Neutral Citation Number: [2008] IEHC 450

THE HIGH COURT

2008 1791 SS

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION AND IN THE MATTER OF THE MENTAL HEALTH ACTS 2001 AND 2008

BETWEEN

P.G.

APPLICANT

AND
MICHELLE BRANIGAN

RESPONDENT

AND
THE HEALTH SERVICE EXECUTIVE AND THE MENTAL HEALTH COMMISSION

NOTICE PARTIES

Judgment delivered by Mr. Justice McCarthy on the 12th day of December, 2008

1. This is an inquiry pursuant to the provisions of Article 40.4 of the Constitution as to the lawfulness of the detention of the applicant at St. Michael's Unit, South Tipperary General Hospital, in the custody of either Dr. Branigan or Dr. Zubaidah O'Leary, each Consultant Psychiatrists and the former Clinical Director of that Unit (which is a psychiatric unit in the hospital). The inquiry was substantively heard on the 27th November.

2. The relevant facts are straightforward and are not in dispute although there are a number of affidavits before me. The grounding affidavit in respect of the application is that of the applicant's solicitor, Finbarr Phelan. This is brief but it exhibits certain documents relevant to the proceedings to which I shall refer below. There is a certificate justifying the detention executed by Dr. Zubaidah O'Leary dated the 23rd November, 2008, and an affidavit by her of the 24th November, 2008, and also of Dr. Michelle Branigan. Much of the latter affidavits pertain to the mental health of the applicant in a substantive way, something which does not arise for immediate consideration. It is noteworthy that at para. 5 of Dr. Branigan's affidavit she agrees with what I might shortly term the chronology of events which may be seen from Mr. Phelan's affidavit, with special reference to the series of orders made pertaining to the applicant's detention, under the Mental Health Act, 2001, as amended by the Mental Health Act, 2008.

3. The sequence of events (and relevant documents) are as follows:-

> (1) On the 27th July, 2008 the applicant was made the subject of an admission order whereby she became an involuntary patient in the hospital. This detention was from 15.15 on 26th July, 2008 pursuant to s. 23(1) of the 2008 Act and the actual admission order was made the following day at 10.30 a.m. It might be said in passing (because it is not further relevant to this case) that under s. 24(1) of the 2001 Act, there is power to detain what might, up to that time, have been voluntary patients (as was the applicant) and for up to twenty-four hours.
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> (2) Subsequent to the admission order of 27th July, 2008, and after an examination by an independent consultant psychiatrist as contemplated by s. 17(1)(c) of the 2001 Act, a Mental Health Tribunal on 15th August, 2008 affirmed the admission order made on the previous 27th July, pursuant to s. 18(1) of the 2001 Act.
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> (3) In as much as the admission order merely permitted the applicant to be detained for up to twenty-one days, that order was spent on 15th August, 2008 and a renewal order was made providing for the applicant's detention for "a period not exceeding" three months.
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> (4) On 4th September, 2008, a Mental Health Tribunal affirmed that renewal order pursuant to provisions of s.18 (1)(a) of the Act of 2001, and *prima facie* that renewal order would have been spent on 14th November, 2008.
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> (5) Before the order of the 15th August, 2008 was spent, and on 30th October, 2008, the Mental Health Act, 2008 was passed and this gave rise to the issue of a replacement renewal order pursuant to s. 4 thereof, being in all respects equated to a renewal order, in replacement for that made on 15th August, 2008 and for the unexpired balance of the latter. This has been described as being for a period of ten days.
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> (6) In any event on the 14th November, 2008 a further renewal order was made, after which an independent medical examination took place and the earlier order was affirmed on 18th November, 2008. It is for a period of six months ending on 13th May, 2009.

4. I turn now to the Acts. Under s. 14(1)(a) of the Act of 2001, a consultant psychiatrist may make "an involuntary admission order" ("an admission order") and s. 15(1) of the Act provides that an admission order "shall authorise the reception, detention and treatment of the patient concerned and shall remain in force for a period of twenty-one days from the date of the making of the order and, subject to subsection (2) and 18(4) shall then expire". Subsection (2) contemplates a renewal order and subsection 18(4) contemplates certain extensions for up to two periods of fourteen days in circumstances not relevant to these proceedings. Copies of any admission order or renewal order must be sent to the Mental Health Commission and "as soon as possible" must refer the matter to "a Mental Health Tribunal", pursuant to the provisions of s. 17(1)(a) of the 2001 Act, must thereafter assign a legal representative to represent the patient, (s. 17(1)(b)), directing in writing the consultant psychiatrist to examine the patient, interview the psychiatrist responsible for the care and treatment of the patient and review the records in relation to her (pursuant to s. 17(1)(c) again of the 2001 Act). By the same subsection, the psychiatrist appointed must report in writing to the tribunal within fourteen days. Section 18, especially subs. (1) and (2) thereof are of particular significance in the present context and those provisions are as follows:-

> "18(1) Where an admission order or a renewal order has been referred to a tribunal under section 17 , the tribunal shall review the detention of the patient concerned and shall either
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> (a) if satisfied that the patient is suffering from a mental disorder, and
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> (i) that the provisions of sections 9, 10, 12, 14, 15 and 16, where applicable, have been complied with, or

(ii) if there has been a failure to comply with any such provision, that the failure does not affect the substance of the order and does not cause an injustice, affirm the order, or

(b) if not so satisfied, revoke the order and direct that the patient be discharged from the approved centre concerned.

(2) A decision under subsection (1) shall be made as soon as may be but not later than 21 days after the making of the admission order concerned or, as the case may be, the renewal order concerned."

5. For reasons which need not concern us here on 30th October, 2008, the Mental Health Act of this year was enacted and it contemplates "replacement renewal orders". By s. 4(1) where a patient is the subject of an unexpired renewal order, and the consultant psychiatrist responsible for her care and treatment carries out an examination before the expiry of five working days from the entry into the force of the Act, may *inter alia* make an order replacing:-

"… the unexpired renewal order in respect of the patient for a specified period not exceeding the period remaining unexpired, as at the date of the making of the order of this paragraph…".

And by s. 4(2):

"… a replacement renewal order shall be in substitution for, and not in addition to, the unexpired renewal order which it replaces…".

6. As to the engagement of a Mental Health Tribunal's in the case of replacement renewal orders, subs. (5) is relevant –

"5. Where an unexpired renewal order has been replaced by replacement renewal order and, before that replacement, a Tribunal has completed its review under s. 18 of the Act of 2001, of the detention of the patient concerned arising from the making of the unexpired renewal order, then, notwithstanding the completion of such review, Section 16 to 19 of the Act of 2001 shall apply to the making of the replacement renewal order in the same manner as they apply to the making of a renewal order"

By this provision, accordingly, a Mental Health Tribunal is called upon to review a replacement renewal order, even if the original renewal order itself was the subject of a concluded review. Such review had been concluded in the present case and the Mental Health Tribunal had affirmed the renewal of the 15th August, 2008 on 4th September, 2008 as aforesaid.

7. It will be seen, accordingly, that notwithstanding the fact that a decision of the tribunal must be made "as soon as may be, but not later than twenty-one days… (after the replacement renewal order), the replacement renewal order might, in a given case, expire and in the present case did expire, before any review was commenced. Nonetheless, it has had the consequence, that, in the first instance, there was no review prior to its expiry or, to put the matter in another way, the applicant was deprived of the benefit of a review of that replacement renewal order because of the fact that, on one view and properly in accordance with the procedure prescribed as to time, no review had taken place within that period. It is accepted by the parties that one may have a renewal only of a valid or existing order, (as one might suppose from the very term), which, of course, includes a proceeding renewal order.

8. One must therefore ask oneself whether or not a review can take place of detention after that detention has ceased (i.e. in this case, whether or not a review could have taken place after the expiry of the replacement renewal order). It seems to me that what the tribunal is called upon to do is to affirm an order or revoke it and "direct that the patient be discharged". It may take the first of those steps if (amongst other things) it is "satisfied that the person is suffering from a mental disorder" i.e. at the time when the review is being conducted since the present tense is used ("is"). Obviously the tribunal is not thereby called upon to decide whether or not, at some time in the past, a person was suffering from a mental disorder and, indeed, it has no power to do so. If the tribunal, on undertaking its review, is concerned with the then existing state of health of a patient, it must surely presuppose that what is in issue, is whether or not by reason of a mental disorder, a detention should be continued and the order of the psychiatrist affirmed. If what is said by the respondents is correct a tribunal conducting a review after the expiry of a relevant period of detention, would be required to consider whether or not, in the past a patient had been suffering (historically) from such mental disorder. It would not be called upon to satisfy itself whether or not, as in the present, the patient was suffering from a mental disorder, notwithstanding the fact that its only jurisdiction is to decide on the existing state of the patient.

9. Further, an alternative to the affirmation of an order is it's revocation with a direction that the patient be discharged. I do not think that discharged can mean anything in the context other than released, so one would have thought that its obligation is to make such an order if it is not satisfied *inter alia* that the patient is suffering from a mental disorder, and this presupposes that the patient is actually detained pursuant to the order, the subject of the review and not otherwise. The alternative proposition must be that the provisions of 18(1)(b) do not mean what they say: there is an obligation ("shall") on the tribunal "if not so satisfied to revoke the order and direct that the patient be discharged…". It does not appear to have any jurisdiction to do anything other than make an order of that class and if the respondents are correct, what the Oireachtas has done is impose an obligation upon it, to make an order in vain in some circumstances, something which I do not believe the Oireachtas would do. I am therefore of the view that the only jurisdiction conferred upon a Mental Health Tribunal to conduct a review of detention is during the currency of the detention contemplated by the order, so far as reviews pursuant to s. 18 are concerned.

10. I quite accept that a different position pertains under s. 28(5) of the 2001 Act. That provision, to put the matter shortly, permits the commencement of, or continuation of, reviews, even after discharge of a patient, at that patient's option. It seems to me that the view I have taken is supported by the fact of this provision: it permits the commencement or continuation of a review after the end of the period of detention and then only at the option of the patient. That seems to presuppose that without the exercise of such option by such patient, a review would either not be held or discontinued by virtue of discharge.

11. If I am right in my conclusion that there is no power to conduct a review, after a concluded detention, the purported review must be a nullity. Of course, in any event, a review after the order in question was spent would be an illusion so the respondents are, in truth contending for more: the scheme of the Act is not merely to have an *ex post facto* review as a matter of public policy (advanced by Mr. McDermott) or, to facilitate a further renewal and, incidentally, the latter proposition would leave a patient in a limbo, subject to a conditional renewal order until the preceding order has been upheld – surely a state of uncertainty condemned by McMahon J. in *S.M. v. Mental Health Commission and Ors*. (Unreported, 31st October, 2008). Surely, such a state of uncertainty cannot be in a patient's interest?

12. A number of further arguments have been advanced against the conclusion which I have reached and I will attempt to address

each in turn.

13. It was pointed out that under the provisions of s. 18(2) a period of up to twenty-one days is afforded to a tribunal within which to decide or not to uphold an order detaining a patient, that a tribunal must have regard to the report of an independent consultant psychiatrist of the kind which the Mental Health Commission must commission after an admission or renewal order is made and that such consultant psychiatrist is afforded fourteen days within which to make a report, after a direction in that regard from the commission.

14. In the latter context it was pointed out that delays may arise beyond the fact that a consultant psychiatrist who is to report to a tribunal is afforded a period of fourteen days within which to do so, when one considers the provisions of s. 17. That section is as follows:

> "17(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
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> (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,
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> (c) direct in writing (referred to in this section as "a direction") a member of the panel of consultant psychiatrists established under section 33 (3)(b) to
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> (i) examine the patient concerned,
>
> (ii) interview the consultant psychiatrist responsible for the care and treatment of the patient, and
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> (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.
>
> (2) Where the Commission gives a direction under this section, the consultant psychiatrist concerned shall, on presentation by him or her of the direction at the approved centre concerned, be admitted to the centre and allowed to
>
> (a) examine the patient and the records relating to the patient, and
>
> (b) interview the consultant psychiatrist responsible for the care and treatment of the patient.
>
> (3) If the consultant psychiatrist to whom a direction has been given under this section is unable to examine the patient concerned, he or she shall so notify the Commission in writing and the Commission shall give a direction under subsection (1) to another member of the panel of consultant psychiatrists.
>
> (4) A person who obstructs or interferes or fails to co-operate with a consultant psychiatrist in the performance of his or her functions under this section shall be guilty of an offence."

In particular, it would seem that even though the commission is obliged to act "as soon as possible" (that, accordingly, must surely mean within a very few days at most) in referring the matter to a tribunal, assigning a legal representative to a patient, giving a direction to a consultant psychiatrist, (who must inter alia examine the patient) and, if what I might term the first consultant psychiatrist cannot undertake the task, appointing another, one can readily see, as submitted by Mr. McDermott, that the discharge of these steps might take some time and, in any event, there does not appear to be any qualification to the period afforded to the doctor to furnish a report ("within fourteen days")(note "not later than"). He says that the consequence of this is that it might well be that even if each party discharged her obligations to the letter that could still leave a situation where a period of detention had expired, when the decision was made – so that one is driven to the conclusion that *ex post facto* decisions are possible and that, accordingly, notwithstanding what might be said for the proposition that 18(1), when taken alone, contemplates only a review of a current detention this could not be so because a review might, in a given case, take longer then the period of detention, even if the full twenty-one day period was not availed of.

15. It does not appear that the fact that the tribunal is afforded a period of up to twenty-one days (with the subsidiary points pertaining to the time afforded to the doctor and otherwise), is in any sense irreconcilable with the meaning I have attributed to s. 18(1). It seems to me that the respondents arguments amount to this: in cases where the detention period is less than twenty-one days, it may not be possible to conduct a review, so that the Act could only have been intended to create and did create, a review procedure capable of taking place, (whether as to conclusion or otherwise) after the expiry of the period of detention.

16. Accordingly, there may well be cases where the application of the foregoing principles will not permit of a review within the period prescribed by the relevant order. What then, is the position where, even on application of these principles, there is insufficient time, to afford a review? I cannot see that that must inevitably, or at all, lead to the conclusion that an *ex post facto* review can take place, in violation of the natural and ordinary meaning of the section. In truth, it seems to me that there is no conflict internally in s. 18: a review must take place of a current detention but, having regard to the provisions of s. 17 and 18 if a review is impossible, I think that it must constitute an exception to the general rule that a review must take place. To put the matter in another way, if it simply cannot be done, applying the provisions of the Act, in particular because of s. 18(1), it cannot mean, or so it seems to me, that the Act could have intended that the order would lapse or be avoided with the consequence that the detention would be unlawful.

17. Mr. McDermott has emphasized practicalities. He has conceded that they may be circumstances in which, notwithstanding what one might think on a *prima facie* basis, one might be deprived of a review. The tenor of the Act is to ensure periodic reviews. There is no violence to the scheme for review or Part II generally in respect of patients merely because what would be extremely short periods of detention could not be made subject to the review or if the statutory scheme as to how reviews are conducted was incapable of being followed. The choice is not between, on the one hand, imposition of impossible terms for a conduct of the review, and on the

other, the conduct of *ex post facto* reviews.

18. It seems to me that the view I take is consistent with the obligation imposed to conduct a review in the case of replacement renewal orders. The view I have taken, of course, is in accordance with that advanced directly by Mr. McDermott and, supported by Mr. Murphy, at least by implication (he did not wish, quite properly, to explicitly repeat what Mr. McDermott had said) that any review contemplated by s. 4 of the 2006 Act is a review in accordance with the scheme of the Act and not otherwise. What then is the position with the ten day replacement renewal order here? This brief period presumably is very rare as matters stand and it seems unlikely, to be anything other than wholly exceptional in respect of what one might term an ordinary renewal order under the Act, as interpreted by McMahon J. in S. M. This contemplates the making of replacement orders in respect of fixed periods not exceeding three months, six months, and so on. It seems very likely, accordingly that in the vast majority of cases, the special difficulties as to time encountered in a class such as the present will not occur.

21. In the present case a period of five working days (seven in all) was afforded from 30th October, 2008 in which to act in terms of making a replacement renewal order – the previous renewal order, by the Act, being continued for that period. It is lawful, as we know, by virtue of the decision of Peart J. in *M.N.B. v. Clinical Director of St. Brendan's Hospital and Another,* (Unreported, 24th May, 2007) as approved by the Supreme Court (per Hardiman J.) on 27th July, 2007, (a decision also unreported), to make a renewal order prior to the expiry of a given order, the same, of course, to operate only from the expiry of the latter; the making of such an order would presuppose the examination of a patient by two consultant psychiatrists.

22. The period of detention was accordingly of such brevity as to exclude the requirement for review of the replacement renewal order and the renewals thereafter are lawful.