Neutral Citation Number [2010] IEHC 378

THE HIGH COURT

JUDICIAL REVIEW

2010 589 JR

BETWEEN

MARIA (E.T.)

APPLICANT

AND

THE CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL AND THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

JUDGMENT of Mr. Justice Charleton delivered the 2nd day of November 2010

1. Maria, the name I will call the applicant, is a patient in St. Brendan's Hospital in Grangegorman. She seeks declaratory relief from the Court that her detention under the provisions of the Mental Health Act 2001 ("the Act of 2001) constitutes torture, or inhuman or degrading treatment pursuant to Article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950. Following on the declaratory relief sought in these proceedings, it is argued on her behalf that appropriate action will be taken by the State to rectify the situation. St. Brendan's Hospital is not a party to these proceedings. In the ordinary course of litigation, this makes it impossible for the Court to make a declaration against them. The reason that the Clinical Director of the Central Mental Hospital in Dundrum is joined instead is that better treatment exists in that institution for Maria than is available in St. Brendan's Hospital. Due to stretched resources, she has now spent eight months waiting for a bed to enable her to go from St. Brendan's Hospital to the Central Mental Hospital. That wait, the availability of better treatment in another place and the circumstances of her current detention make up the elements of the complaint.

Background

2. I will be brief in my descriptions of Maria's background. Both her parents suffered from mental illness. She was reared in a kindly fashion by an order of nuns. When she reached adolescence, serious mental problems began to manifest themselves. After a number of episodes of absconding from her residence, she came to the attention of psychiatric services. The situation is not clear as to whether, from that time on, Maria remained in St. Brendan's Hospital in Grangegorman, but it appears probable that she was at some stage living in hostel accommodation in Dublin City. For a short period in 2002, she was admitted to the Central Mental Hospital and what was then a difficult situation in her illness improved somewhat. She then returned to St. Brendan's Hospital which has been her main place of residence since she was nineteen years of age.

3. One of the background facts that seem to have most disturbed her condition was an especially vicious rape in 1987. This required a blood transfusion in its aftermath. In consequence of this crime, she has symptoms that are consistent with post traumatic stress disorder. To this serious condition are added paranoid delusions and an underlying serious psychiatric illness. This has resulted in her being unable to trust people, incapable of engaging with psychologists on the team in St. Brendan's, and to her feeling deep rooted insecurity and uncertainty, with low self worth and violent impulses. She has attacked patients on occasion, often looks at nursing staff in an aggressive or vacant manner and has been involved in serious assaults. Up to November 2009, Maria was a voluntary patient in St. Brendan's Hospital. Then a grave incident occurred. She attacked a nurse, grabbing her by the hair and throwing her to the floor, where she kicked her viciously and repeatedly. She was described by the nurses who attended the victim as smiling in the aftermath of the attack. The victim lost a number of teeth and suffered other injuries, including profound shock.

4. She was nursed in seclusion following the attack. A security officer had already been engaged by the hospital to shadow her, so as to prevent further damage to the staff. She, however, believes the nursing staff have been rough with her.

5. One of her treating psychiatrists, Dr. Maria Theresa Ramanos, on the 7th December, 2009, recommended that she should be considered for admission to the Central Mental Hospital. At that stage Maria had been managed in seclusion for several weeks.

6. A Mental Health Tribunal met, as the statutory regime requires, and agreed that the applicant should be transferred from St. Brendan's to the Central Mental Hospital for the purposes of treatment.

The Statutory Power

7. It is unnecessary for the purposes of this judgment to detail the statutory powers that have been exercised in detaining Maria. It suffices to say that from a procedural and statutory viewpoint, no difficulty has arisen. Under s. 3 of the Mental Health Act 2001, a person may be detained against their will in a mental hospital, which the Act refers to as an approved centre, where they have a mental disorder, which means a mental illness or severe dementia, or significant intellectual disability and where (i) because of the condition there is a serious likelihood of the person causing harm to themselves or others, or (ii) because of the severity of the condition, a failure to hospitalise would be likely to lead to a deterioration or would prevent the administration of appropriate treatment, and the reception and treatment of the person in a hospital would be likely to benefit or alleviate the condition to a material extent. It is clear, on the basis of the papers, that from the first involuntary admission that both a serious likelihood of harm by Maria to herself, or to other people, and a necessity for hospitalisation in order to alleviate her condition, were present.

8. Under s. 21 of the Mental Health Act 2001, where the Clinical Director of a hospital where a mental patient is detained is of the view that for the purpose of obtaining special treatment, the patient should be transferred somewhere else, that transfer may be arranged with the consent of the receiving hospital. That is the ordinary situation as between two hospitals that may treat people who have a mental illness. In the case of the Central Mental Hospital, however, s. 21(2) provides that if the transfer is to be to the Central Mental Hospital, then the Mental Health Commission must be notified who must refer a proposal to a Mental Health Tribunal, which Tribunal must decide to either refuse to authorise the transfer or to certify that it is in the best interests of the health of the patient. The transfer was authorised, in that regard, as the statutory scheme demands, in respect of Maria. Having been detained in

St. Brendan's Hospital by virtue of an order affirmed by a Mental Health Tribunal on the 22nd December, 2009, a proposal was made on the 14th January, 2010, to transfer her to the Central Mental Hospital. This was accepted by a Mental Health Tribunal on the 27th January, 2010. Subsequent to that renewal, orders in respect of her involuntary detention were made by the Mental Health Tribunal on the 9th of April and the 29th September, 2010.

9. An authorisation of a transfer does not, however, constitute an order that a patient should be transferred from one hospital to another. Nor does it necessarily mean that the treatment being afforded to a patient who is not transferred is inadequate; much less that it constitutes torture or inhuman or degrading treatment. It is argued here, however, that the combination of the availability of better treatment in the Central Mental Hospital, coupled with the conditions of confinement in St. Brendan's, constitute a breach of Article 3 of the Convention.

Conflicting Opinions
10. As may be the case with many other professional disciplines, the psychiatrists involved in this case have different opinions, or have nuanced their views differently. The issues may be easily resolved on the material before the Court. The probable conclusion which the Court must reach on the reports that it has read, is the Maria would be better treated in the Central Mental Hospital than in St. Brendan's Hospital. This is not to imply any disrespect toward the care which she already receives there.

The Central Mental Hospital
11. The Central Mental Hospital is a discretionary referral hospital. No one can be admitted to the hospital directly from the community. Admission can only be made from within the community of those currently receiving psychiatric care in hospitals, in the manner already described in this judgment. In addition, the Central Mental Hospital has a responsibility for those who are detained having been found not guilty by reason of insanity in the context of criminal justice system. The Central Mental Hospital also operates an outreach programme to prisons and, under s. 15 of the Criminal Law (Insanity) Act 2006, in-patient treatment can be given in that hospital, in appropriate cases, by the direction of a Governor of a prison. These clinical demands put a severe strain on the treating staff of the Central Mental Hospital and its accommodation of 93 beds, 8 of which are for women. Most stays by women, as I understand the affidavit evidence of the Director of Central Mental Hospital, Prof. Harry Kennedy, are short-term.

Under Capacity in a Medical System
12. It is clear that the Central Mental Hospital would accept Maria were they able to do so. At present she is on a waiting list, but as to when her admission may occur is very uncertain. How is the Court to say that a patient should be given priority on a waiting list, when to do so would clearly, by the very nature of a waiting list, disenable others? It would only be in circumstances of the most extreme kind, in my view, that the Court should interfere. The circumstances are akin, in my view, to those which are analogous to the abuse of public authority or to decision making conducted so as to fly in the face of fundamental reason and common sense.

13. Absent cases of real urgency, where to fail to act would endanger or cause serious injury to health that is demonstrated to be avoidable and which would not endanger other patients in a similar situation, or where the prioritisation of patients is being conducted in an arbitrary or unreasonable manner, the court should not interfere in favour of a litigant patient so as to put him or her by court order above others on a waiting list.

14. In the course of his judgment *in D.H. (a minor) v. Ireland and the Attorney General* (Unreported, High Court, 23rd May, 2000), Kelly J. had this to say concerning an application to transfer a 12 year old child to the Central Mental Hospital in the context of the absence of a place, at p. 12 of the unreported judgment:-

> "Quite apart from all that however, there are other problems associated with the move to the Central Mental Hospital. It is full. It has room for 85 patients. All beds are occupied there and there is a waiting list for admission. Seven male and two female prisoners are at present in prison when by reason of mental illness they should be in the hospital. If I send D. there it is likely that an existing patient will have to be released or at the very least a patient on the waiting list will be deferred. These are mentally ill people; D. is not. It is not in my view for this Court to assume responsibility for a clinical decision concerning the admission, discharge or deferral of sick people. That is particularly so when I know nothing of these other patients or prospective patients. They may very well be more deserving of the facilities of the Central Mental Hospital than D.
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> For this reason alone this Order ought not to be granted. Even without this I would in any event be slow to make an order in the teeth of Dr. O'Neill's [of the Central Mental Hospital] strong opposition to it. It seems to me that the views of Lord Justice Balcombe as expressed in the English case of Re: J. a minor [1992] 2 F.R. 165, at 175, have much to recommend them. In the course of his Judgment he said this, and I quote:
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> > 'I find it difficult to conceive of a situation where it would be a proper exercise of the jurisdiction to make an Order positively requiring a doctor to adopt a particular course of treatment in relation to a child unless the doctor himself or herself was asking the Court to make such an Order. Usually all the Court is asked or needs to do is to authorize a particular course of treatment where the person or body whose consent is requisite is unable or unwilling to do so.'
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> That is the end of the quotation. Then later in the Judgment he said:
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> > 'The Court is not or certainly should not be in the habit of making Orders unless it is prepared to enforce them. If the Court orders a doctor to treat a child in a manner contrary to his or her clinical judgement it would place a conscientious doctor in an impossible position. To perform the Court's Order could require the doctor to act in a manner which he or she genuinely believed not to be in the patient's best interests. To fail to treat the child as ordered would amount to a contempt of Court. Any Judge would be most reluctant to punish the doctor for such contempt, which seems to me to be a very strong indication that such an Order should not be made. I would also stress the absolute undesirability of the Court making an Order which may have the effect of compelling a doctor or Health Authority to make available scarce resources both human and material to a particular child without knowing whether or not there are other patients to whom those resources might more advantageously be devoted.'
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> There the Judge deals with both of the impediments which exist concerning the possible detention of D. in the Central Mental Hospital. Applying that reasoning and having regard to the findings which I have made in the light of the evidence which has been placed before me, I refuse to make an order directing the Central Mental Hospital to receive and detain D."

15. It may be argued that the unavailability of treatment, for instance a particular operation, is due to the failure to adequately resource medical facilities. To make such a case is to assume a heavy burden and one that requires a court to become convinced that the decisions leading to the complained of situation are amenable to judicial review of administrative action in the sphere of medical treatment. Issues as to the proper priority of resources are ones that should be properly left to the competent authorities that are charged with taking an overall view as to priorities and demands. This is very different to the case by case approach by a court which ill fits with the debate and analysis that is required in the allocation of resources in the provision of health care to a community. In *R. v. North West Lancashire Health Authority ex parte* [2000] 1 W.L.R. 977, the Court of Appeal in England dealt with the issue as to whether a Health Authority should provide funding for operations enabling people to change sex. These operations were not available within the functional area of that Health Authority, because a decision had been made not to fund them. A judicial review challenged thereto was dismissed. In the course of his judgment, Buxton L.J. referred to propositions that had been established in earlier case law on the issue of the proper allocation of resources. At p. 997 of the report he stated:-

> "A number of propositions are clearly established . . . . They are:
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> > 1. A health authority can legitimately, indeed must, make choices between the various claims on its budget when, as it will usually be the case, it does not have sufficient funds to meet all of those claims. 2. In making those decisions the authority can legitimately take into account a wide range of considerations, including the proven success or otherwise of the proposed treatment; the seriousness of the condition that the treatment it intended to relieve; and the cost of that treatment. 3. The court cannot substitute its decision for that of the authority, either in respect of the medical judgments that the authority makes, or in respects of its view of priorities . . . [I]t follows from the foregoing propositions that a health authority can in the course of performing these functions determine that it will provide no treatment at all for a particular condition, even if the condition is medically recognised as an illness requiring intervention that is categorised as medical and curative, rather than merely cosmetic or a matter of convenience or lifestyle . . . [T]he court's only role is to require that such decisions are taken in accordance with the equally well known principles of public law. Those principles include a requirement that the decisions are rationally based upon a proper consideration of the facts. The more important the interest of the citizen that the decision affects, the greater will be the degree of consideration that is required by the decision-maker. A decision that, as is the evidence in this case, seriously affects the citizen's health will require substantial consideration and be subject to careful scrutiny by the court as to its rationality. That will particularly be the case in respect of decisions of the nature referred to in the previous paragraph of this judgment, which involve the refusing of any, or any significant treatment in respect of an identified and substantial medical condition."

Article 3

16. Article 3 of the European Convention on Human Rights provides as follows:-

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

17. It should not be forgotten that the provisions of the European Convention on Human Rights were enacted in the aftermath of genocide, aggressive war and mass murder that characterised the continent of Europe for a period from 1933 to 1945. The Convention establishes a foundation of rights in terms of the entitlements of citizens. The states that are party to the Convention are entitled to provide better or additional rights but are not permitted to sink below the minimal level established by the Convention. What a right is, and what the deprivation of a right consists of, will change to some degree from generation to generation and is dependant to a degree on the community expectations that are established in times that have ameliorated the poverty general at the time when the Convention was drafted. It seems to me that would not be regarded as a deprivation of rights in the context of the economic and social state of Europe in the aftermath of World War 2 might be considered differently in the context of contemporary life. The Convention is a living document and its interpretation may change, certainly to some small degree, from generation to generation.

18. Intention is not definitive as to whether a situation amounts to torture or inhuman or degrading treatment. It is obvious that those who have people within their power, and intend to treat them violently, will also often have the means to carry out that intention. That situation is plain. Wrongs like torture and inhuman or degrading treatment can also proceed from other causes. Ignorance and neglect can, absent intention, also lead to the same result.

19. The words used in Article 3 are deliberately evocative of a repugnant situation from the point of view of human rights. Some people may be particularly vulnerable and may thus, as a matter of ordinary sense, require greater protection under the Convention. This applies both to an intended wrong and to one that comes about consequent on inattention. As people differ in their social capacity, a situation which might not cause difficulty to a healthy fisherman in early middle age might constitute a violation of Article 3 to someone rendered infirm by reason of age. Some guidance is given by a short passage from the judgment of the European Court of Human Rights in *Ireland v. U.K.* [1980] 2 E.H.R.R. 25 at para. 162:-

> ". . . Ill-treatment must attain a minimum level of severity if is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all of the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and the state of health of the victim, etc . . . The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and at Protocols 1 and 4, Article 3 makes no provision for exceptions and, under Article 15(2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation."

20. It is clear that to deprive someone of their liberty within a mental hospital for ulterior or improper purposes, perhaps because of a dislike of their political views, can constitute a violation of Article 3; *Ashingdane v. United Kingdom* [1985] 7 E.H.R.R. 528. Moreover, as the Court pointed out in *Herczegfalvy v Austria* [1993] 15 E.H.R.R. 437 at para. 82, those who are confined in a psychiatric hospital are in reality assigned to a position of inferiority within society and are rendered powerless; thus, national courts are enjoined to be more than usually vigilant in assessing claims of a violation of Article 3 based on psychiatric detention. At that paragraph, the Court went on to state:-

> "While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3… whose requirements permit of no derogation. The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has

been convincingly shown to exist."

21. As Clarke J. stated in *J.H. v. Russell (Mental Health)* [2007] 4 I.R. 242 at paras. 51-52, there can be situations which fall so far short of acceptable as to the conditions of detention and treatment that confinement becomes unlawful. It is also the case that a situation of confinement that would ordinarily be lawful, may be rendered unlawful by reason of a medical condition. This is exemplified by the case of *Aleksanyan v. Russia*, Final Judgment of the European Court of Human Rights delivered on 5th June, 2009. There it was held that to confine a person suffering from AIDS and the weakness and illness consequent on that condition within an ordinary prison, especially where the state had refused to allow a visit from an independent medical commission, can render a detention a breach of Article 3. In that instance a transfer to the Moscow AIDS Clinic would have markedly assisted the applicant within a context where he was a minimal security risk.

22. Those involuntarily confined through mental illness and those serving sentences are under authority of an extreme kind. History has shown that abuses can easily grow up because of the entitlement to control others. National authorities are thus enjoined to take special care in guaranteeing the physical and mental well-being of persons deprived of their liberty; see *Ukhan v. Ukraine,* Final Judgment of the European Court of Human Rights the 18th March, 2009 at para. 72-74.

23. In *Grori v Albania* Final Judgment of the European Court of Human Rights delivered on the 7th October, 2009, the Court at paras. 126-127, characterised the relationship between the conditions of detention, the state of health of the detainee and the obligations of national governments under Article 3 in a most helpful way. This is what was said:-

> "126. In exceptional cases, where the state of a detainee's health is absolutely incompatible with detention, Article 3 may require the release of such a person under certain conditions (see *Papon v. France (no. 1)* (dec.), no. 64666/01, ECHR 2001-VI, and *Priebke v. Italy* (dec.), no. 48799/99, 5th April 2001). There are three particular elements to be considered in relation to the compatibility of the applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention; and (c) the advisability of maintaining the detention measure in view of the state of health of the applicant (see *Mouisel v. France,* no. 67263/01, §§ 40-42, ECHR 2002-IX).

127. However, Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. It rather imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. The Court accepts that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance (see *Kudla v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; see also *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79; and *Kalashnikov v. Russia*, no.47095/99, §§ 95 and 100, ECHR 2002-VI). In *Farbtuhs v. Latvia* (no. 4672/02, § 56, 2 December 2004) the Court noted that if the authorities decided to place and maintain a seriously ill person in detention, they should demonstrate special care in guaranteeing such conditions of detention that corresponded to his special needs resulting from his disability (see also *Paladi v. Moldova,* no. 39806/05, § 81, 10th July 2007)."

Conclusions

24. Having reviewed all of the evidence, and in the light of the relevant legal authorities, I conclude as follows:

(i) there has been no intention by any of the parties to this case, or any other treating hospital or medical professional, to treat Maria in any way that is incompatible with her dignity under the Constitution and her human rights as guaranteed in Article 40 and in the European Convention on Human Rights, particularly Article 3;

(ii) a legitimate difference of opinion has arisen in relation to the proper course of her treatment. Professor Kennedy, in the Central Mental Hospital, is of the view that an increase in some of her medication to a therapeutic dose coupled with treating her with more nursing care would assist her condition. None of this would amount in any way to inhumanly treating her or to degrading her or torturing her. Some improvement has already been manifest under the current approach. In recent months, her isolation has eased as her conduct has improved. The condition of her sleeping quarters, involving as it does a blocked out window, and her being shadowed by security personnel, is regrettable, but it is also understandable in the context of the series of assaults to which medical personnel have been subjected;

(iii) in the context of Maria's state of health, the conditions of treatment and the confinement applied to her are not unreasonable. It is impossible to say that they are not mandated by her condition even though better treatment may be available elsewhere. They do not amount to torture or to inhuman or degrading treatment;

(iv) Maria may receive some benefit through being transferred for a time to the Central Mental Hospital. The Court cannot be expected to order her transfer, in the context of scarce resources, in preference to other patients on that waiting list who would have their necessary treatment put back in consequence;

(v) Maria's right to privacy has been briefly mentioned. That right is certainly infringed by her conditions of confinement, but this is necessary for her proper care and treatment so that harm may be avoided to herself and to those who come in contact with her. This is not a breach of her Convention rights or her right to privacy under the Constitution because it is necessary and is justified by the statutory scheme; and

(vi) Maria's detention is not therefore unlawful. There is no breach of Article 3 of the European Convention on Human Rights. Whereas her constitutional rights have been severely circumscribed, this has been done in accordance with the paternal jurisdiction of the State to care for the severely ill. No steps have been taken beyond those which are reasonably necessary within the context of the condition that has caused it.