Neutral Citation [2013] IEHC 617

THE HIGH COURT

[2013 No. 100 CA]

CIRCUIT APPEAL

[002741/13]

DUBLIN CIRCUIT COUNTY OF DUBLIN

BETWEEN

EOIN GALLAGHER

APPELLANT

AND

THE MENTAL HEALTH TRIBUNAL

RESPONDENT

AND

DR. SALLY LINEHAN

NOTICE PARTY

AND

THE CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

NOTICE PARTY

JUDGMENT of O'Neill J. delivered on the 20th day of December 2013

1. This is an appeal under s. 19(16) of the Mental Health Act 2001, against the order of the Circuit Court made on 29th April 2013, whereby the Circuit Court (Deery J.) made the following order:

> *"THE COURT DOTH ORDER that the decision of the Mental Health Tribunal dated 10th April 2013 in respect of the appellant herein be affirmed and amended in relation to sections 3(1)A and B."*

2. The order of the Circuit Court was in an appeal pursuant to s. 19(1) of the Act from a decision of a Mental Health Tribunal of 10th April 2013.

3. In its decision, the Mental Health Tribunal affirmed, pursuant to s. 18 of the Act, a renewal of Detention Order signed by the first notice party, Dr. Sally Linehan, as the responsible consultant psychiatrist. This renewal order was made on 28th March 2013, and was for a period of one year. On the same day, Dr. Linehan certified, pursuant to s. 15(4) of the Act, that the appellant continued to suffer from a mental disorder as described in both sub-sections 3(1)(a) and (b).

4. In the reasons for its decision, the Mental Health Tribunal, whilst affirming the renewal of Detention Order, it did so for reasons which did not correspond with the terms of the certification of Dr. Linehan pursuant to s. 15(4) of the Act, insofar as it concluded that the continuing mental disorder of the appellant was as described in sub-section 3(1)(b) rather than 3(1)(a). The relevant portion of the reasons for the decision of the Mental Health Tribunal is as follows:

> *"The Tribunal is satisfied that Mr. Gallagher needs ongoing treatment including access to a step down facility to allow proper discharge planning to progress. We are satisfied on the evidence, however, that detention in an approved centre is necessary to allow for the ongoing administration of appropriate treatment and that such detention continues to be likely to benefit Mr. Gallagher and alleviate his condition. It is a matter of significant concern to the individual members of the Tribunal that Mr. Gallagher should remain detained at the Central Mental Hospital when a less secure approved centre would better meet his current therapeutic needs, but following careful deliberation, we remain satisfied that the requirement of s. 3(1)(b)(i) and (ii) are met on the evidence available to the Tribunal and it is not within our powers to revoke an order merely because we may believe that he would be better placed in another approved centre.*
>
> *We are not satisfied on the basis of the evidence presented to affirm the order on the basis of s. 3(1)(a) as the evidence of risk of harm to self and others offered, although very significant, was historic. Nonetheless, evidence of this historic risk remains a factor in the need to ensure appropriate treatment is available to Mr. Gallagher during his detention under s. 3(1)(b)(i) and (ii)."*

5. The appellant, as said, appealed the decision of the Mental Health Tribunal and when the matter came on before Deery J. in the Circuit Court, and he having heard evidence from Dr. Bownes, a consultant psychiatrist for the appellant, Dr. Linehan and from Professor Harry Kennedy, the second named notice party, the learned judge concluded that it was of most benefit to the appellant to continue in his present course of treatment and that it was appropriate to affirm the renewal order.

6. An application was made under s. 19(5) of the Act, to make a consequential order in relation to the provision of a step down facility. Deery J. declined to give such a direction.

7. It would appear that a discussion ensued as to whether or not the renewal order was being affirmed on the basis of s. 3(1)(b) or on the basis of 3(1)(a) or both.

8. Deery J. affirmed the renewal order on the basis of s. 3(1)(a) and s. 3(1)(b), and although this is not clear, he may have considered that s. 19(5) of the Act allowed him to do this in circumstances where the Mental Health Tribunal had found in its decision, that the relevant mental disorder afflicting the appellant when the matter was before them was as provided for in s. 3(1)(b) only.

9. The appellant is aggrieved with the decision of the Circuit Court, but only insofar as the order of the Circuit Court purports to amend the decision of the Mental Health Tribunal by re-introducing s. 3(1)(a) as a basis for the renewal order.

10. The appeal from the decision of the Circuit Court to this court is provided for in s. 19(16) of the Act, and it reads as follows:

> *"(16) No appeal shall lie against an order of the Circuit Court under this section other than an appeal on a point of law to the High Court."*

11. As the notice of appeal from the Circuit Court to the High Court, as provided for under the Rules of the Superior Courts, does not envisage the statement of grounds of appeal or issues to be dealt with on appeal, the parties, in correspondence, have formulated the point of law to be determined on this appeal as follows:

> *"1. Whether the Circuit Court had jurisdiction under s. 19(5) or otherwise of the Mental Health Act 2001 to make an order amending the decision of the Mental Health Tribunal of April 10th 2013, to the effect that the appellant was required to be detained by the second named notice party in accordance with the provisions of the Mental Health Act 2001 on the grounds that the judge of the Circuit Court had formed the view that the appellant satisfied the criteria for detention provided at s. 3(1)(a) of the Mental Health Act, in circumstances where the respondent had determined that he did not require to be detained on the basis of the said provisions and in circumstances where no right of appeal lay at the behest of the second named notice party herein or any party (save the appellant herein) against the said determination."*

12. The appellant submits that the learned Circuit Court judge fell into error, and indeed an excess of jurisdiction, in purporting to amend the determination of the Mental Health Tribunal, whereas under s. 19(4) of the Act, the only jurisdiction given to the Circuit Court was to either affirm the order or revoke it.

13. It was further submitted that as the decision of the Mental Health Tribunal expressly rejected s. 3(1)(a) as a basis for affirming the renewal order, and where no appeal was taken in respect of that by any other relevant parties because, of course, they could not, because only a "*patient*" has a right of appeal under s. 19, it was not open to the Circuit Court to revive s. 3(1)(a) as a basis for affirming the renewal order, and in so doing without notice to the appellant, he (the appellant) was thereby subject to an unfair procedure contrary to Article 6 of the European Convention on Human Rights. This unfairness, it was submitted, was exacerbated by the fact that under s. 19(4)(a) of the Act, the onus is shifted onto the patient to show to the satisfaction of the court that he or she is not suffering from a mental disorder, so that not only is the appellant confronted with an issue which was not raised in the appeal, that appeal being confined to an appeal against the decision of the Mental Health Tribunal to affirm the renewal order on the basis of s. 3(1)(b), but additionally, has the onus cast on him of establishing a proposition that did not form part of the appeal in the first place, namely, that he was afflicted by a mental disorder as described in s. 3(1)(a) of the Act.

14. In order to deal with the case of the appellant, it is necessary, in a summary way, to consider a variety of the provisions of the Act. Section 3 defines mental disorder in the following terms:

> *"3.—(1) In this Act 'mental disorder' means mental illness, severe dementia or significant intellectual disability where—*
>
> *(a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or*
>
> *(b)(i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and*
>
> *(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."*

15. Apropos s. 3, this court, in *M.R. v. Byrne* [2007] 3 I.R. 211, at para. 26, held:

> *"I am quite satisfied that these two bases are not alternative to each other and indeed it would be probable in my view that in a great many cases of severe mental illness there would be a substantial overlap between the two. Thus it would be very likely in my opinion that in a great many cases in which a person could be considered to fall within the categorisation in s. 3(1)(a) that they would also be likely to fall within s. 3(1)(b). To a much lesser extent, it is probable that persons who are primarily to be considered as falling within s. 3(1) (b), would also be likely to have s. 3(1)(a) applied to them . . . "*

16. It might also be usefully observed, that as occurred in this case, whilst a patient might comfortably fall within both categorisations, depending upon the success of treatment, the patient might no longer be considered to be within the ambit of s. 3(1)(a) but still have a mental disorder which was covered by s. 3(1)(b). It is clear that these are not static situations and can fluctuate even over relatively short periods of time so that a patient's mental disorder can move in and out of the two described categories.

17. Section 15 is relevant to these proceedings and is in the following terms:

> *"15.—(1) An admission order shall authorise the reception, detention and treatment of the patient concerned and shall remain in force for a period of 21 days from the date of the making of the order and, subject to subsection (2) and section 18 (4), shall then expire.*
>
> *(2) The period referred to in subsection (1) may be extended by order (to be known as and in this Act referred to as 'a renewal order') made by the consultant psychiatrist responsible for the care and treatment of the patient concerned for a further period not exceeding 3 months.*

(3) The period referred to in subsection (1) may be further extended by order made by the consultant psychiatrist concerned for a period not exceeding 6 months beginning on the expiration of the renewal order made by the psychiatrist under subsection (2) and thereafter may be further extended by order made by the psychiatrist for periods each of which does not exceed 12 months (each of which orders is also referred to in this Act as 'a renewal order').

(4) The period referred to in subsection (1) shall not be extended under subsection (2) or (3) unless the consultant psychiatrist concerned has not more than one week before the making of the order concerned examined the patient concerned and certified in a form specified by the Commission that the patient continues to suffer from a mental disorder."

18. Thus, pursuant to s. 15(4), on 28th March 2013, Dr. Linehan, as the responsible consultant psychiatrist, certified that the appellant was continuing to suffer from a mental disorder, as described in sections 3(1)(a) and 3(1)(b) and on the same day, made a further renewal order for a period of one year to expire on 1st April 2014.

19. Pursuant to s. 17, the Commission, on receipt of a copy of this renewal order, referred this matter to the Mental Health Tribunal and there is no dispute but that all of the provisions of s. 17 were complied with.

20. When the matter came before the Mental Health Tribunal on 10th April 2013, it made its decision as it was required to, in accordance with the provisions of s. 18 of the Act, and that decision was to affirm the renewal order pursuant to section 18. Section 18(1) is relevant to this appeal and is in the following terms:

"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—

(a) if satisfied that the patient is suffering from a mental disorder, and

(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."

21. In *M.R. v. Byrne*, this court, at para. 14, held that a renewal order could be validly affirmed by a Mental Health Tribunal on a different categorisation of mental disorder to that certified by the consultant psychiatrist as follows:

"It was submitted on behalf of the applicant that the conclusion or finding of Dr. O'Neill in making this renewal order ran counter to the findings that the Mental Health Tribunal made on the 20th December, 2006, to the effect that the applicant's 'mental disorder' was to be characterised as falling under s. 3(1)(b) of the Act of 2001, and hence unsustainable and invalid. I disagree with this contention. Dr. O'Neill as the consultant psychiatrist responsible for the care of the applicant had a specific function to discharge under the Act of 2001, namely on the day of the making of the renewal order he had to form a view as to whether or not the condition of the applicant was such as to give rise to a finding or conclusion that the applicant was at that time suffering from 'mental disorder' on either of the bases set out in s. 3(1) of the Act of 2001. It necessarily follows in my view that his discretion in that regard could not be fettered by any decision made either by himself on a previous occasion or by a Mental Health Tribunal on a previous occasion, as to the mental health status of the applicant. This must necessarily be so because the condition of this applicant or any other applicant, perhaps in response to treatment, could change. Hence an essential feature of a decision to make a renewal order is that it is independent of previous decisions and has to be made in a contemporaneous context, that is to say contemporaneous with the condition of an applicant and because of this there is the requirement set out in s. 15(4) for an examination by the consultant psychiatrist not more than one week before the making of a renewal order, which was done in this case . . ."

22. Section 18(5) requires that notice in writing of the decision of the Mental Health Tribunal under s. 18, sub-section (1) and the reasons for the decision has to be given by the parties set out in sub-section (5), namely, the Commission, the consultant psychiatrist responsible, the patient and his or her legal representative and any other person who, in the opinion of the Tribunal, to whom such notice should be given.

23. In the statutory scheme, this leads on to the appeal to the Circuit Court as provided for in s. 19, the relevant parts of which are as follows:

"19.—(1) A patient may appeal to the Circuit Court against a decision of a tribunal to affirm an order made in respect of him or her on the grounds that he or she is not suffering from a mental disorder.

. . .

(4) On appeal to it under subsection (1), the Circuit Court shall—

(a) unless it is shown by the patient to the satisfaction of the Court that he or she is not suffering from a mental disorder, by order affirm the order, or

(b) if it is so shown as aforesaid, by order revoke the order.

(5) An order under subsection (4) may contain such consequential or supplementary provisions as the Circuit Court considers appropriate. . ."

24. As is readily apparent, the appellate jurisdiction exercised by the Circuit Court under s. 19 is markedly different to the reviewing jurisdiction exercised by a Mental Health Tribunal under section 18. Where an admission order or a renewal order has been made, s. 17 places upon the Commission the mandatory obligation to refer the matter to a Tribunal and to do the various other things set out in section 17. Under s. 18(1), the Tribunal is obliged to review the detention of the patient, and for that purpose, it must be satisfied

that the patient is suffering from a mental disorder and that the various procedural safeguards set out in sections 9, 10, 12, 14, 15 and 16 have been complied with, or where there has been a failure to comply with any of these provisions, that this failure does not affect the substance of the order and does not cause an injustice. If the Mental Health Tribunal is satisfied of these foregoing requirements, it must affirm the renewal order, or otherwise if not so satisfied, it must revoke the order and direct that the patient be discharged from the approved centre.

25. It is clear that in this review procedure before the Mental Health Tribunal, there is no onus or burden of proof on the patient to establish the necessary ingredients for the validity or otherwise of the renewal order. The procedure envisaged in sections 17 and 18 for the review of the detention of a patient is more of an inquisitorial-type proceeding rather than adversarial, the obligation resting upon the Commission under s. 17(1) to arrange representation for the patient; to make arrangements for the independent consultant psychiatrist to examine the patient; to consult the relevant records and consult the consultant psychiatrist responsible for the care of the patient. Next, there rests upon the Mental Health Tribunal under s. 18, an obligation to review the detention in light of the material brought in to existence pursuant to s. 17 and thereby to be satisfied of the matters set out in s. 18(1) and act accordingly.

26. In the appeal under s. 19(1), and in particular 19(4), the onus clearly rests on the patient to show to the satisfaction of the court that he or she is not suffering from a mental disorder. Thus, the procedure on the appeal to the Circuit Court reverts to the more traditional adversarial type. Another obvious difference in this appeal, as compared to the review before the Mental Health Tribunal, is that the court can only take cognisance of one issue and one issue only, and that is whether or not the patient is or is not suffering from a mental disorder. No appeal lies to the Circuit Court under s. 19 in respect of compliance with or the failure of compliance with sections 9, 10, 12, 14, 15 and 16 or whether or not any such failure of compliance affects the substance of the order or causes injustice.

27. As is apparent from s. 19(4), the only outcome of the appeal provided for, is an affirming of the order where the patient fails to demonstrate that he is not suffering from a mental disorder or a revocation of the order if he does succeed in showing that he is not suffering from a mental disorder.

28. Where the sub-section refers to "*affirm the order*" or "*revoke the order*", the order here referred to is the renewal order and not the decision of the Mental Health Tribunal.

29. There is one constant theme running through the review of detention by a Mental Health Tribunal under s. 18 and the appeal to the Circuit Court under s. 19, and that is that the primary test (in the Circuit Court the only test) is whether or not the patient is suffering from a mental disorder. In both sections, the existence of mental disorder is expressed in the present tense as indicated by the use of the verb "*is*" in both sections.

30. In my opinion, this requires that the ascertainment of whether or not the patient is suffering from a mental disorder must be contemporaneous as of the time that each procedure takes place. A necessary consequence of this is that a Mental Health Tribunal, as discussed in *M.R. v. Byrne*, because of fluctuation in the condition of the patient may well conclude that notwithstanding the grounds upon which the responsible consultant psychiatrist has certified the existence of mental disorder, the Mental Health Tribunal may conclude that a patient is suffering from a mental disorder on the different basis as provided in s. 3(1) and may affirm the renewal order on that different basis.

31. Likewise, when the matter comes before the Circuit Court on appeal under s. 19, that court, too, must consider whether the plaintiff is suffering from a mental disorder at the time of the appeal hearing and is not confined by or to conclusions in that regard reached by the Mental Health Tribunal in its review of the detention of the patient, nor the certification of the responsible consultant psychiatrist.

32. The critical finding which is essential for a valid renewal order is the existence of a mental disorder on either of the two bases set out in s. 3(1) or both of them. If either the Mental Health Tribunal or the Circuit Court appealed to under s. 19 find on the evidence that the patient is suffering from a mental disorder, it may validly affirm the renewal order, even though either the Mental Health Tribunal or the Circuit Court concludes that the categorisation of that mental disorder is, at the time of its hearing, different from the earlier proceeding or certification.

33. In this case, the renewal order was for a period of one year to expire on 1st April 2014. Thus, that renewal order is still in existence and is the basis of the appellant's current detention. There is no provision in the Act of 2001 for the existence of concurrent or more than one detention order at the same time. Thus, whilst that detention order remains in force, there can be no question of the procedural machinery set out in the Act being activated leading to another admission order or renewal order. Because the Act makes provision in s. 15 for renewal orders with a duration of up to one year, it necessarily follows that when an appeal is taken under s. 19 (which can only be done against a renewal order still in force), the Act necessarily contemplates that the Circuit Court can reach conclusions different from the Mental Health Tribunal, even though an appellant might perceive these conclusions as having been decided in his favour by the Mental Health Tribunal, such as the conclusion in this case that the type of mental disorder involved, was as provided for in s. 3(1)(b). Thus, I would reject the appellant's submission which was to the effect that the Circuit Court, in reaching a conclusion to the effect that the mental disorder could be considered to be within both categories provided for in s. 3(1), that this was a new or fresh finding of mental disorder which he had no opportunity to have challenged through the procedures set out in the Act for bringing conclusions of this type which are the basis of an admission order or renewal order to a review of detention before a Mental Health Tribunal, and thus was subjected to an inherently unfair procedure.

34. In my opinion, because of the continuity of the renewal order in force and because of the obligation resting on the Circuit Court to ascertain whether a patient is suffering from a mental disorder contemporaneously with its hearing, it necessarily follows that where an appeal is taken under s. 19, the consideration of whether the plaintiff is suffering from a mental disorder is not a historic one, frozen in time as of the date of the hearing before the Mental Health Tribunal, but remains a live issue subject to fluctuation depending upon the fluctuations in the condition of the patient at the time of appeal, and so it remains until the final effluxion by time of the renewal order.

35. In *Han v. The President of the Circuit Court & Ors*. [2011] 1 I.R. 504, Charleton J. decided that the Circuit Court had no statutory jurisdiction to hear an appeal under s. 19 of the Act of 2001, where the applicant had been released from detention under the Act. The ratio for his decision in this regard was a conclusion that the jurisdiction exercised by the Circuit Court on such an appeal was not to engage in historical analysis, the Act limiting the powers of the Circuit Court on appeal from the Mental Health Tribunal to a single narrow issue on the current state of health of a detained patient. At para. 19, he said the following:

> *"[19] The legislative purpose behind s. 19 of the Mental Health Act 2001, is to allow those patients who are still detained, following on a hearing before the mental health tribunal, to have the condition of their mental health reviewed before a*

judge of the Circuit Court. It is not to engage in a historical analysis. Whether there would or would not be a point, to such an historical analysis is irrelevant given the express wording of the section. I am obliged to give grammatical and ordinary sense to the use of the present tense in s.19, and to the choice given to the Circuit Court of either affirming an admission or renewal order or revoking it . . .”

36. I would respectfully agree with the conclusion of s. 19 of Charleton J. in this case.

37. This brings me to the order made by the Circuit Court. As said earlier, the Circuit Court was obliged under s. 19 to consider whether or not a patient had a mental disorder contemporaneously and was entitled to conclude, in the first instance, whether or not there was a mental disorder, and secondly, which of the two types of disorder, as mentioned in s. 3(1), was involved, regardless of what conclusions had been reached earlier, either in the certification process by the responsible consultant psychiatrist, or the Mental Health Tribunal. Having done this, the court then had to either affirm or revoke, not the decision of the Mental Health Tribunal, but the renewal order which was the subject matter of the review of the Mental Health Tribunal and the appeal to the Circuit Court under section 19.

38. Thus, a legally effective order of the Circuit Court on an appeal under s. 19 needs only to record the affirming of the renewal order or the revocation of it. Anything beyond that, provided it is not contradictory, is merely surplusage and does not impinge upon the legal effectiveness of the order.

39. In this case, it is clear the court was affirming, and whilst there is reference is to the decision of the Mental Health Tribunal dated 10th April 2013, I am quite satisfied that what was clearly intended by the court was to affirm the renewal order made on 28th March 2013. The added reference to amending the Mental Health Tribunal decision on the basis of sections 3(1)(a) and (b) merely indicates the entirely legitimate conclusion of the court that the mental disorder in question was of both types. It was entirely unnecessary for this to be recorded in the order but its inclusion does not impinge upon the legal effectiveness of the order, being merely surplusage.

40. It is plainly obvious from the note of the proceedings before the Circuit Court put in evidence in this appeal, that at all times the court was only considering affirming the renewal order and no question arose as to affirming or amending the decision of the Mental Health Tribunal. That being so, one would have so say that there is an artificiality in the specific question posed as the point of law in issue in this case in the letter dated 28th October 2013, from Felton McKnight, Solicitors, to Arthur Cox & Company, Solicitors, insofar as it fastened on to the words in the court order which appear to state that the decision of the Mental Health Tribunal is affirmed and amended. These words in the order do not accurately reflect what the court actually did which was, as one would have expected, to have affirmed the renewal order on the basis of a conclusion that s. 3(1)(a) and (b) applied. As said earlier, the addition of these words in the order beyond the core affirmation of what was clearly intended to be the affirmation of the renewal order, is mere surplusage and does not affect the legal effectiveness of the order as affirming the renewal order made on 28th March 2013.

41. It is quite clear that the Circuit Court did not exceed its jurisdiction nor err within same, in deciding to affirm the renewal order or in finding that the appellant was suffering from a mental disorder which fell within the two categories specified in section 3(1).

42. In my opinion, for the purposes of deciding the issue under s. 19(4) and affirming the renewal order, there was no need at all for the Circuit Court to have recourse to s. 19(5) to achieve that core purpose. Section 19(5), as its terms state, is there for ordering supplementary or ancillary relief and it could not supply the legal power to affirm or revoke a renewal order, that power being expressly provided in section 19(4).