Neutral Citation [2012] IEHC 272

THE HIGH COURT

[2012 No. 1258 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN/

F.X.

APPLICANT

AND

CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS (No.2)

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on the 8th day of July, 2012

1. This applicant is currently detained in the Central Mental Hospital pursuant to an order of the Central Criminal Court made on the 26th March, 2012, pursuant to s. 4(5)(c)(i) of the Criminal Law (Insanity) Act 2006 ("the Act of 2006"). He now seeks his release pursuant to Article 40.4.2 of the Constitution and in a judgment delivered on 3rd July, 2012, I held that for the reasons set out in detail in that judgment that the applicant's custody was unlawful. The issue which now arises is whether I can place a stay on any order for release so as to enable either the respondent or the notice party to take steps to regularise the applicant's detention.

2. The substantive application itself raises from tragic circumstances. The applicant was charged with a very serious criminal offence and he was found unfit to plead by Carney J. on 26th March, 2012. As I noted in my first judgment, the medical diagnosis is that the applicant suffers from chronic paranoid schizophrenia which is resistant to treatment. The overwhelming evidence is that the applicant is seriously disturbed and that he presents a very serious threat to himself, identifiable individuals and to the general public were he to be released from custody.

3. As thus presented, the Court is confronted with two choices, neither of which at first blush are terribly appealing, at least judged by reference to the facts of this particular case. The traditional view, of course, was that the Court must immediately direct the release of the successful applicant, at least if fidelity to the language, structure and purpose of Article 40.4.2 is to be maintained. On this view, the Court must adopt a quasi-Olympian air of detachment from the consequences of its order: *fiat justitia, ruat caelum*. This was certainly the view expressed by Finlay C.J. in *The State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550, 568 where he stated that the existence of such a jurisdiction to place a stay "would be inconsistent with the Constitution."

4. Yet this view has its own limitations, not least in the present case. If the applicant were to be released unconditionally, the clear and cogent medical evidence is that he would pose a real and immediate risk to himself, identifiable individuals and to society at large. One can put this in some perspective by noting that the applicant is possibly the most seriously disturbed individual currently detained in civil confinement in the State. In this context, one might have thought that the Constitution's objective of a "true social order" (as reflected in the Preamble), together with the State's express constitutional duty to protect the life and person of citizens (Article 40.3.2) might come into play at this juncture.

5. The alternative approach which is urged on me here by Mr. McEnroy S.C. for the Central Mental Hospital and by Mr. McDermott for the Director of Public Prosecutions also has its own distinct drawbacks, They contend that this Court has a general discretion to stay the order of release so as to enable the authorities to take steps to regularise the legality of the applicant's detention. This is a superficially attractive option which is certainly prompted in the present case by good intentions. But these good intentions might come with a price which, over time, could well be considerable.

6. To be blunt, the existence of such a general discretion, if unchecked, might over time serve to hollow out the core of the Article 40.4.2 remedy by converting it into a form of discretionary order. In due course, this discretion might be broadened further to the point whereby the courts tolerated the widespread illegal detention of persons with unpleasant and unappealing backgrounds simply because they were thought to pose some vague, general threat to public order. For a free society committed to the rule of law, the tolerance of a discretion of this kind might be the first step on a long path to perdition and the ultimate emasculation of the Constitution and the values that it stands for.

7. If, therefore, the courts did enjoy a discretion of this kind, it would have to be operated within confined parameters which reflected the essence of the protections afforded by Article 40.4.2. The first question to be considered, however, is whether the court is obliged in *all* circumstances to order the *immediate* release of an applicant who has been successful in the substantive Article 40 proceedings or whether the giving effect to that order can be stayed in some way.

Whether the courts enjoy a jurisdiction to stay the making of an order for release?

8. In the light of *Trimbole*, the accepted view was that the courts had no jurisdiction to stay the making of an Article 40.4.2 order. This view is also reflected in the judgment of Murray C.J. in *N v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374, 470 (which was an Article 40 application in respect of the custody of an adoptive child) where he said that:-

> "A successful application pursuant to Article 40.4 concerning an unlawful detention would normally lead to an order for release of the person concerned from the unlawful detention with no further order being necessary."

9. The Chief Justice added, however, that:

> "In this case there are special circumstances, namely, the welfare of an infant of tender years, to be taken into account when determining the manner in which effect may be given to the order of this court pursuant to Article 40."

10. Drawing on the Article 40.3 case-law, the Chief Justice went on to say ([2006] 4 I.R. 374, 471) that:

> "In my view the court has jurisdiction, in the circumstances of a case such as this, involving a minor of a very tender age, to make ancillary or interim orders concerning the immediate custody of such [an] infant which are necessary to protect her rights and welfare pending effect being given to the substantive order of the court."

11. In his concurring judgment, Hardiman J. expressly agreed with this approach ([2006] 4 I.R. 374, 534-535):-

> "I regard as wholly disingenuous the submission made on behalf of the respondents that because the proceedings were brought under Article 40.4.2, the powers available to the Court were limited to the stark alternatives of refusing relief altogether, or directing an immediate, unprepared for, transfer of custody. The very starkness of these alternatives, it was argued, was an argument for refusing relief altogether.
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> I agree with the form of order proposed by the learned Chief Justice in this case. I am satisfied, for the reasons which he gives, that there is ample power to make an order in that form. I have no doubt that the power of the Court is not constrained in the extraordinary fashion contended for by the respondents. I am quite satisfied that the welfare of the child, in the long term and in the short term, as well the rights and responsibilities of the parties to this litigation, require that the order proposed should be made."

12. Some of this passages were analysed by Clarke J. in *J.H. v. Russell* [2007] IEHC 7, [2007] 41.R. 242, which was one of the first Article 40 applications concerning a mental health patient decided in the aftermath of N. As Clarke J. observed ([2007] 4 I.R. 242, 263):-

> "The underlying logic of the approach of the Supreme Court in both cases was that the normal rule (*i.e.*, immediate release) might not be appropriate in all circumstances involving persons whose detention was, at least in significant part, designed for their own good. A similar situation arises in the case of involuntary patients."

13. As Clarke J. stressed, a significant consideration here was whether it was clear that the applicant was in need of appropriate treatment or, indeed, whether the objective necessity for the continued detention of the patient was not established. In pursuance of this jurisdiction, Clarke J. placed a short stay of approximately seven hours on the order for release.

14. The approach of Clarke J. in *Re JH* has been consistently followed in the interval. Thus, for example, in one of the first cases to arise in the wake of *JH, JD v. Director of the Central Mental Hospital* [2007] IEHC 100, Finlay Geoghegan J., noting that the patient was "seriously mentally ill" and that the medical evidence showed that the patient was "a risk to other people and, in particular, to women", stayed the making of the release order until 4pm on the following day.

15. It is not in doubt but that this practice has been consistently followed by a line of both reserved judgments and *ex tempore* decisions delivered by this Court in the interval. So much is not disputed by counsel for the applicant, Mr. Fitzgerald S.C. He submits rather that this line of case-law has been overruled by an ex tempore decision of the Supreme Court, *SC v. Clinical Director of the Jonathan Swift Clinic, James Hospital*, 5th December, 2008. Here Birmingham J. had found that the applicant was in unlawful detention in the respondent institution. Following established practice, Birmingham J. then placed a stay on the order for a day so that the respondents could take steps to ensure that the applicant was lawfully detained.

16. An appeal against the making of a stay was heard on the following day by the Supreme Court. In his approved *ex tempore* judgment Hardiman J. noted that there was "no evidence or even suggestion that the applicant is a danger to herself or any other person." He then continued:-

> "We do not consider it necessary, in those circumstances, to decide whether or not there may be ever a stay on an order for release from psychiatric detention. It is sufficient to say, firstly, that the *Trimbole* decision suggests strongly that such release must be immediate and, secondly, that evidence which goes only as far as the medical evidence of which we have been informed could not conceivably form the basis for a continuation of a detention admitted to be unlawful."

17. The Court then lifted the stay and released the applicant. This judgment calls for a number of observations.

18. First, Hardiman J. emphatically stated that the Court did not find it necessary to consider "whether or not there may ever be a stay on the order for release from psychiatric detention." The Court, therefore, did not have to consider what was even by then a formidable body of authority from the decision in *N.* onwards. Second, unlike the present case, the applicant in *SC* presented no risk to herself or anyone else. This was a crucial consideration which serves to distinguish that case from, e.g., the decision of Finlay Geoghegan J. in *JD* and, a *fortiori*, the present case. Third, the judgment in *SC* was delivered *ex tempore* by a three judge panel. It is seems most unlikely that the Supreme Court had intended to depart *sub silentio* from the general authority of post-*N* High Court case-law and still less from what had been said by a Supreme Court consisting of five judges in *N*

19. In the circumstances, and for these reasons, I do not think that *SC* bears the broader interpretation which Mr. Fitzgerald SC so skilfully urged upon me. All that the Court decided was that in that particular case given its facts, it was not appropriate to continue the stay.

20. There are, in any event, other contemporary developments which tend to support the approach in *JH* The scope, range and effectiveness of the remedies available where an unconstitutionality has been established is one, of course, of the Constitution's great strengths. Yet recent experience has shown that, paradoxically, the very fact that these remedies are so potentially powerfully and effective itself contains one latent weakness. This was first hinted by Geoghegan J. in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 where he rejected an absolutist doctrine of pure retrospectivity in the aftermath of a finding of unconstitutionality, saying that:-

> "If such was the devastating effect of a declaration of unconstitutionality in all cases, it would fly in the face of common sense, would be manifestly unjust and would be contrary to any good order in a civilised society."

21. This hints at the nature of the problem. It amounts to this: if a finding of unconstitutionality had these "devastating" consequences for society in general and the legal system in particular which the courts found themselves unable to control, then this would inevitably impact on the practical willingness of the courts to make such a finding of unconstitutionality. This would represent a form of functional asymmetry which, absent a necessary flexibility in the manner in which these remedies are administered, might well have the effect of dissuading the courts from making a finding of unconstitutionality in the first place.

22. Thus, for example, if a court faced with a claim that an applicant prisoner's constitutional rights were infringed by reason of inhumane prison conditions could grant no remedy other than to release the prisoner, then this might have the effect in practice of inhibiting the courts finding for the prisoner on the merits of such a claim. If, however, the relief available can include what amounts to a suspensory declaration of invalidity by giving the authorities one final opportunity to remedy the problem, then the court clearly has a freer hand: *cf* the reasoning in respect of this issue set out briefly in my own judgment in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235.

23. A variant of this problem was also in view in *N* where, as we have already seen, the argument was that if an order was made under Article 40.4.2, it must be immediate so that the adoptive child would be forthwith returned to the natural parents without delay. Since such an immediate transfer was such an unappealing prospect, with potentially significant adverse consequences for the welfare of the child, this in turn was advanced as an argument by counsel for the adoptive parents as to why in the first instance the Supreme Court should not find for the natural parents.

24. The present case also provides an example of this dilemma. The immediate release of the applicant in the present case into the general community within minutes of the delivery of the actual judgment might well have had disastrous consequences. If the Court were faced with the stark binary choice of simply ordering the immediate release of the applicant on the one hand or refusing relief on the other, then the judicial branch would be placed in an appalling dilemma. The temptation in those circumstances to opt for the practical, safe and convenient solution- refusing the grant of relief- would be well nigh irresistible for all but the most detached judges who were prepared to live with their consciences if disaster subsequently ensued. Yet judicial pragmatism of this kind often comes with a heavy price. Result oriented decisions which cannot be rationally supported by reference to earlier authority and established doctrine sap the integrity of the judicial decision-making process and undermine - often with serious consequences -public confidence in the objectivity of that decision-making process.

25. By contrast, a flexible approach in respect of the provision of remedies for constitutional breaches not only permits the courts fearlessly to examine the merits of the claim, but it also serves to promote an important dialogue between the various branches of government which enables all three branches to best work in the public interest. In the context of an application such as the present one, it enables the judicial branch to determine the legality of the detention, while allowing the executive branch a short opportunity to address difficult problems arising from that judicial finding: *cf* again by analogy my own judgment in *Kinsella* and Dr. Carolan's analysis of these issues, "The Relationship between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspensive Declaration of Invalidity" (2011) 46 *Irish Jurist* 235.

26. It follows, accordingly, that for these reasons I intend to follow the general approach articulated by Clarke J. in *JH*. It remains to consider how and in what circumstances the discretion to play a stay on the order for release should be exercised.

In what circumstances should the discretion to place a stay on the order for release be exercised?
27. As Clarke J. noted in *JH*, the option of the suspensory order under Article 40.4.2 only arises in the context of persons detained for their own good, of which involuntary patients are perhaps the most obvious category. To this may be added the comments of Hardiman J. in *SC* to the effect that the question of placing a stay does not arise where the patient poses no threat to himself or others. While not excluding any future development of this stay jurisdiction on an *a priori* basis, the question of the grant of a stay on the making of an order under Article 40.4.2 would only seem to arise where these two conditions have been satisfied, as they are in this case.

28. Of course, the discretion must be exercised in a fashion which respects the fundamental principle that there must be an order for release within a short period of the making of that decision. In the present case, when I first delivered my own judgment on Tuesday, 3rd July, 2012, I indicated that I was prepared to grant a stay in line with the *JH* practice. In the aftermath of the delivery of the oral judgment, Mr. Fitzgerald SC protested that this issue had not been fully argued and that I had erroneously assumed that it had been. In the end, it was agreed by the consent of all parties that the matter would be put in for further argument on the question of a stay in the afternoon of Friday, 6th July, 2012. Following the conclusion of that argument, I indicated that I would give judgment on Sunday evening, 8th July at 7pm.

29. On the hearing on 6th July Mr. McDermott indicated that the Director proposed to have the matter re-listed before the Central Criminal Court tomorrow, 9th July. I should make it clear that the Director is fully entitled to make that application and in making that application no question of any endeavour to set my judgment at naught arises. Any such application will be entirely a matter for the Central Criminal Court.

30. For his part, Mr. McEnroy SC, reserved the right of the Director of the Central Mental Hospital to apply to this Court (although perhaps not necessarily to me) for an order under the inherent jurisdiction of the Court committing the applicant afresh to detention in the Hospital. That, of course, is an entirely a matter for the Hospital and I express no view whatever in respect of this which will be a matter for the judge who hears any such application.

Conclusions
31. In the light of the foregoing, I have decided that the applicant must be released *from his present custody* (*i.e.*, the order of the Central Criminal Court made pursuant to s. 4(5)(c)(i) of the Criminal Law (Insanity) Act 2006 on 26th March, 2012) at 5pm on Tuesday, 10th July, 2012. This further short delay is designed, in line with *JH*, to enable the authorities to take such steps as they think fit in the meantime to ensure in advance of that time and date that the applicant's custody is henceforth a regular and lawful one.