Neutral Citation Number: [2009] IEHC 69

HIGH COURT

2009 91 SS

IN THE MATTER FOR AN APPLICATION FOR AN ENQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND 1937

BETWEEN

E.H.

APPLICANT

AND

THE CLINICAL DIRECTOR OF ST. VINCENT'S HOSPITAL,

DR. AIDEEN FREYNE

AND THE MENTAL HEALTH TRIBUNAL

RESPONDENTS

JUDGMENT of O'Neill J. delivered on the 6th day of February, 2009

On 21st January, 2009, I directed an enquiry pursuant to Article 40.4.2 of the Constitution into the legality of the applicant's detention. This enquiry proceeded before me on Friday 30th January, 2009, and Tuesday 3rd February, 2009.

The applicant is sixty-eight years of age and suffers from a mixed affective state of vascular dementia. The applicant was first admitted to St. Vincent's Hospital as an involuntary patient on 3rd June, 2008, and was released on 19th June, 2008. She was readmitted to the hospital as an involuntary patient on 7th August, 2008. She remained as an involuntary patient in that hospital until 10th December, 2008, when the order detaining her was revoked by the Mental Health Tribunal. The reasons stated for the decision by that Tribunal to revoke the order detaining the applicant are as follows:

> *"A preliminary issue was made by the legal representative regarding the wrong date being in the order. Hence, the Tribunal has no jurisdiction to affirm the order as the documentation is false on the face of it."*

The applicant remained a patient in St. Vincent's Hospital after 10th December, 2008. On 11th December, 2008, the applicant was given a form entitled 'Notification of Change of Status from Involuntary to Voluntary'. Although the question of whether the applicant was in effect, in law a voluntary patient from 10th December, 2008, to 22nd December, 2008, is hotly disputed in this enquiry, the formal basis on which the applicant continued in the hospital and on which she was treated ,was that she was a voluntary patient.

On 22nd December, 2008, in response to an attempt by the applicant to leave the hospital, the first named respondent moved to convert the applicant's status into that of an involuntary patient by invoking s. 23 of the Mental Health Act 2001 [the Act of 2001]. Under this section, the first named respondent, being of opinion that the applicant was suffering from a mental disorder, detained the applicant for a period not exceeding twenty-four hours. This period of twenty-four hours commenced at 13.00 hours on 22nd December, 2008.

Pursuant to the provisions of s. 24 (2) of the Act of 2001, the applicant was, on 22nd December, 2008, at 16.45 hours, examined by another consultant psychiatrist, who certified, pursuant to s. 24(2)(a) that the applicant was suffering from a mental disorder and needed to be detained in the hospital.

Following this, pursuant to s. 24[3] of the Act, and admission order was made by the first named respondent which had the effect of detaining the applicant and to which the provisions of ss. 15-22 of the Act apply.

Pursuant to the provisions of s. 18 of the Act, the applicant's detention on foot of this admission order was reviewed by the second named respondent on 9th January, 2009. The decision of this Tribunal was to affirm the admission order of 23rd December, 2008. Subsequently, on 12th January, 2009, on the expiry of that admission order, a renewal order was made pursuant to s. 15(2) of the Act. That renewal order which is the current legal basis of the applicant's detention, has yet to be reviewed by a Mental Health Tribunal, as required by s. 18 of the Act.

The issue which arises for determination on this enquiry is whether the invoking of s. 23 of the Act on 22nd December, 2008, and the making of the admission of 23rd December, 2008, was invalid, on the ground that the detention of the applicant from 10th December, 2008, to 22nd December, 2008, was illegal because it is claimed on behalf of the applicant that during that period, she was not a voluntary patient. It is submitted that the applicant was not a voluntary patient because she lacked the capacity to become a voluntary patient and at no time during that period was she free to leave the hospital. As said earlier, the first named respondent vigorously disputes that she was incapable of being a voluntary patient or that she was not free to leave.

In the event that the court concludes that the exercise of the powers given under s. 23 of the Act was invalid, a residual issue arises as to whether or not the applicant can assert such a complaint, having regard to the fact that the admission

order had expired on 12th January, 2009, and whether the judgment of this court in the case of W.Q. v. The Mental Health Commission and Ors. [2007] 3 I.R. 755, should be distinguished.

The following provisions of the Act are relevant:

> *"2. - (1) In this Act, save where the context otherwise requires: -*
>
> *. . . .*
>
> *'voluntary patient' means a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order."*

Section 4 :

> *"4. -(1) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made."*

Section 9:

> *"9. - (1) Subject to the sub-sections (4) and (6) and section 12 where it is proposed to have a person (other than a child) involuntarily admitted to an approved centre, an application for a recommendation that the person be so admitted may be made through a registered medical practitioner by any of the following:*
>
> *(a) the spouse or a relative of the person,*
>
> *(b) an authorised officer,*
>
> *(c) a member of the Garda Síochána, or*
>
> *(d) subject to the provisions of sub-section (2), any other person.*
>
> *(2) The following persons shall be disqualified from making an application in respect of person -*
>
> *(a) a person under the age of eighteen years,*
>
> *(b) an authorised officer or member of the Garda Síochána who is a relative of the person or of the spouse of the person,*
>
> *(c) a member of the governing body, or the staff, or the person in charge of the approved centre concerned,*
>
> *(d) any person with an interest in the payments (if any) to be made in respect of the taking care of the person concerned in the approved centre concerned,*
>
> *(e) any registered medical practitioner who provides a regular medical service at the approved centre concerned,*
>
> *(f) the spouse, parent, grandparent, brother, sister, uncle or aunt of any of the persons mentioned in the foregoing paragraphs (b) to (e), whether of the whole blood, of the half blood or by affinity."*

Section 14:

> "14. - (1) Where a recommendation in relation to a person, the subject of an application, is received by the clinical director of an approved centre, a consultant psychiatrist on the staff of the approved centre, shall, as soon as may be, carry out an examination of the person and shall thereupon either -
>
> (a) if he or she is satisfied that the person is suffering from a mental disorder, make an order to be known as an involuntary admission order and referred to in this Act as 'an admission order' in the form specified by the Commission for the reception, detention and treatment of the person and a person to whom an admission order relates is referred to in this Act as 'a patient' or,
>
> (b) if he or she is not so satisfied, refuse to make such an order."
>
> *Section 15:*
>
> *"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 twenty-one days from the date of the making of, and, subject to sub-section (2) and section 18 (4) shall then expire.*
>
> *(2) The period referred to in sub-section (1) may be extended by order (to be known as, and in this Act and referred to as 'a renewal order') by the consultant psychiatrist responsible for the care and treatment of the patient concerned for a further period not exceeding three months.*
>
> *(3 The period referred to in sub-section (1) may be further extended by order made by the consultant psychiatrist concerned for a period not exceeding six months, beginning on the expiration of the renewal order made by the psychiatrist under sub-section (2) and thereafter may be further extended by order made by the psychiatrist for periods, each of which does not exceed twelve months (each of which orders is also referred to in this Act as 'a*

renewal order' . . ."

Section 18:

"18. - (1) Where an admission order or 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."

Section 23:

"23. - (1) Where a person (other than a child) who is being treated in an approved centre as a voluntary patient, indicates at any time that he or she wishes to leave the approved centre, then, if a consultant psychiatrist, registered medical practitioner or registered nurse on the staff of the approved centre is of opinion that the person is suffering from a mental disorder, he or she may detain the person for a period not exceeding twenty-four hours or such shorter period as may be prescribed, beginning at the time of aforesaid . . ."

Section 24:

"24. - (1) Where a person (other than a child) is detained pursuant to section 23, the consultant psychiatrist who is responsible for the care and treatment of the person prior to his or her detention, shall either discharge the person or arrange for him or her to be examined by another consultant psychiatrist who is not a spouse or relative of the person.

(2) If, following such an examination, the second mentioned consultant psychiatrist -

(a) is satisfied that the person is suffering from a mental disorder, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that because of such mental disorder, the person shall be detained in the approved centre or

(b) is not so satisfied, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that the person should not be detained and the person shall thereupon be discharged.

(3) Where a certificate is issued under sub-section (2)(a), the consultant psychiatrist responsible for the care and treatment of the person immediately before his or her detention under section 23, shall make an admission order in a form specified by the Commission for the reception, detention and treatment of the person in the approved centre.

(4) The provisions of sections 15-22 shall apply to a person detained under this section as they apply to a person detained under section 14 with any necessary modifications. . . ."

In the light of the obligation of this court pursuant to s. 2(1) of the European Convention on Human Rights Act 2003, [the Act of 2003], in so far as is possible and subject to the rules of law relating to interpretation and application, to interpret the Act of 2001 in a manner compatible with the State's obligations under the Convention provisions, Article 5 of the European Convention on Human Rights is relevant and it reads as follows:

"Article 5

Right to liberty and security

1. Everyone has a right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) . . . .

(b) . . . .

(c) . . . .

(d) . . . .

(e) the lawful detention of persons for the prevention of spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) . . . ."

The first aspect of the Act of 2001 which requires consideration is the definition of a voluntary patient. It was submitted, for the applicant, that if this provision is to be interpreted, respecting the provisions of the Constitution of Ireland and, specifically, the right to liberty, and also having regard to the State's obligations pursuant to s. 2 of the Act of 2003, it necessarily follows that any inhibition of the voluntariness of the detention, such as, in the first instance, a lack of capacity to be a voluntary patient by virtue of mental disorder such as suffered by the applicant, or any restraint on the exercise of the right to liberty rendering the detention unlawful, must inform an interpretation of the adjective "voluntary" as used in the definition so as to remove from the scope of the definition a person who otherwise, in law, would be considered to be illegally detained.

As is apparent from the definition, it is cast in sufficiently wide terms so as, on the face of it, to encompass a person who otherwise might be illegally detained on the bases suggested by Mr. Rodgers S.C. for the applicant, but who was nonetheless receiving care and treatment but not the subject of an admission order or a renewal order.

The question which arises is, does a constitutional interpretation of this definition and/or a Convention-compatible interpretation require that a person who is receiving care and treatment in an approved centre, but is not the subject of an admission order or renewal order, and whose presence in the approved centre may be characterised as illegal detention, is to be excluded from the scope of the definition.

A surprising feature of the case, and no doubt that which gave rise to the problem on 10th December, 2008, in the first place, is the fact that the renewal order under which the applicant was detained at that point was revoked, apparently on the sole basis of an incorrect date in the order. Faced with that situation, and having regard to the undisputed mental disorder which afflicted the applicant, I have no doubt that the first named respondent chose the option which she felt was in the best interest of the applicant. Perhaps, had s. 23 of the Act been invoked immediately upon the revocation of the previous order on 10th December, 2008, the application to this court for this enquiry might never have arisen.

In the event, the first named respondent opted to treat the applicant as a voluntary patient, being of opinion that she understood her status and was willing to undertake treatment in the hospital on that basis, and only moved to alter her status to an involuntary patient when it became apparent that the applicant was attempting to leave the hospital.

There is no dispute at all but that the applicant has, since June of 2008, suffered from a mental disorder, and from then until 10th December, 2008, required treatment on an involuntary basis in an approved centre. Likewise, there is no dispute but that the applicant continues to suffer from this mental disorder and continues to require treatment as an involuntary patient.

The extent of the dispute between the parties is confined to a difference of psychiatric opinion as to whether or not in the period from 10th December, 2008, to 22nd December, 2008, the applicant was capable of understanding her status as a voluntary patient, and, secondly, whether, in reality during that period, she was free to leave the hospital. The fact that the applicant was, prior to 10th December, 2008, and subsequent to 22nd December, 2008, undoubtedly suffering from a mental disorder which required treatment as an involuntary patient, must inform and influence the manner in which the court resolves the issues that arise in this enquiry. As has been said in several cases in the past dealing with this legislation and the Mental Treatment Act !945, the purposive approach is the correct method of interpretation. Indeed it has been said that a paternalistic approach is also appropriate, which of course is reflected in s.4 of the act of 2001.

I am quite satisfied that the definition of "voluntary patient" in the Act is consistent with the Constitution and, indeed, it was not suggested or submitted otherwise on behalf of the applicant. No provision of the Constitution, in my view, requires that for the purposes of construing this definition in conformity with the Constitution, that, in effect, the definition is to be narrowed to exclude a detention which, apart from the compliance with the express provisions of the definition in the Act, was otherwise illegal in law. It would seem to me that the definition was cast in the wide terms used in order to provide for the variety of circumstances wherein a person is in an approved centre receiving care and treatment, but not subject to an admission order or a renewal order, including, in my view, the type of situation which has indeed arisen in this case, namely, where a detention pursuant to an admission order or a renewal order breaks down, but where the patient is suffering from a mental disorder and receiving care and treatment. I say this, bearing in mind the clear linkage between the definition and sections 23 and 24, which are designed to cater inter alia, for mishaps or unexpected developments which result in there being no admission order or renewal order in respect of a patient which is suffering from a mental disorder which requires treatment as an involuntary patient and who attempts to leave the approved centre.

Whether or not the detention from 10th December, 2008, to 22nd December, 2008, was otherwise, in law, illegal, is, in my view, immaterial, in so far as the application of the definition and the invocation of sections 23 and 24 is concerned. Even if the applicant was illegally detained during that period, in my view, that did not stop that situation being brought to an end by the use of these statutory provisions, where the circumstances of the applicant clearly brought her within the express terms of the definition, thereby leading to the correct invocation of ss. 23 and 24, as was done. As observed earlier, perhaps, this was the appropriate course to have taken on 10th December, 2008.

This is not, of course, to say that, if the detention during that period was not illegal. For the purposes of this enquiry it is not necessary for me to determine whether it was or was not or what remedy would be appropriate if it was illegal. I am satisfied that for the purposes of the correct operation of the provisions of the Act of 2001, the first named respondent was lawfully entitled to invoke ss. 23 and 24 so as to bring to an end the applicant's status as a voluntary patient during that period.

It must next be considered whether or not pursuant to s. 2 of the Act of 2003, it is necessary to interpret the definition so as to exclude persons whose detention might otherwise be illegal, notwithstanding compliance with the express provisions of the definition.

The following passage from the judgment of the European Court of Human Rights in the case of H.L. v. the U.K. ECHR 45508/99, is, in my opinion, of considerable assistance:

"(c) The Adequacy of Safeguards against Arbitrary Detention

The lawfulness of detention requires conformity with the procedural and substantive aspects of domestic law. Given the importance of personal liberty, the relevant national law must also meet the standard of 'lawfulness' set by the Convention, namely, that all law be sufficiently precise to allow the citizen (with appropriate advice) to foresee to a degree that is reasonable in the circumstances the consequences which a given action might entail.

When 'unsoundness of mind' within Article 5.1 (e) is involved, in addition to the three minimum conditions (namely, the detainee must reliably be shown of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of the continued confinement depends upon the persistence of such disorder), it must be established that the detention was in conformity with the essential objective of Article 5.1, namely, to prevent individuals being deprived of their liberty in arbitrary fashion. This objective, and the broader condition that detention be 'in accordance with a procedure prescribed by law' required the existence in domestic law of adequate legal protections and 'fair and proper procedures' . . ."

It is, in my opinion, abundantly clear from the evidence in this case, and I am quite satisfied that for the purposes of Article 5.1(e), that the applicant has been reliably shown to be of unsound mind and that her mental disorder is of a kind or degree warranting compulsory confinement. It is equally clear beyond any doubt but that her detention at all times during her presence in the approved centre could not be characterised as the deprivation of her liberty in an arbitrary fashion.

In the light of the foregoing, I am satisfied that the procedural safeguards, and the fair and proper procedures fairly required for compliance with Article 5.1, were abundantly in place in the provisions of the Act of 2001, and, indeed, the applicant's detention from June of 2008 to the present, in my opinion, was regulated in accordance with these.

Insofar as it may be suggested that during the period of 10th December, 2008, to 22nd December, 2008, the applicant was put in a position where she was denied the benefit of these procedural protections, in my view, it would be unreal to suggest that the applicant was consigned to a status or position where she was removed from the ambit of the protection of the Act of 2001. Clearly, in my opinion, and, indeed, this itself is part and parcel of the complaint made on behalf of the applicant, the first named respondent maintained a very high level of supervision of the applicant's condition and was, at all times, poised to reinstate her status as an involuntary patient, when in her judgment, it was appropriate to do so. Thus, in my opinion, the protection of the procedural requirements of the Act of 2001, if suspended for a short period, was at all times in the contemplation of the first named respondent who was competent to exercise that responsibility and was charged with the duty of ensuring that the protection of the Act was made available to the applicant, when appropriate.

I am satisfied that the definition of voluntary patient as it stands in the Act is compliant with Article 5 of the European Convention on Human Rights.

I have come to the conclusion that the admission order made on the 23/12/08 pursuant to s. 24[3] of the Act of 2001, was in all respects valid. It follows that he that there is no basis for suggesting that the current detention of the applicant pursuant to the renewal order of the 12th of January is illegal.

In light of this conclusion it is unnecessary for me to express any opinion on the issue of whether the case of W.Q. v. The Mental Health Commission and Ors. [2007] 3 I.R. 755, should be distinguished.