Neutral Citation [2013] IEHC 132

THE HIGH COURT

[2013 No. 495 S.S.]

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN/

S.O.

APPLICANT

AND

CLINICAL DIRECTOR OF THE ADELAIDE AND MEATH HOSPITAL OF TALLAGHT

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 25th March, 2013

1. The case-law which has followed the enactment of the Mental Health Act 2001 ("the Act of 2001") has endeavoured to strike a balance between the need to protect rights to personal liberty, due process and the rule of law on the one hand and the effective protection of the mentally ill, medical professionals and the patients' family and friends on the other. It is not an easy balance to strike. If the courts veer in the direction of the paternalistic protection of the patient, important safeguards might suffer erosion over time to the point whereby the effective protection of the rule of law might be compromised. Yet, if on the other hand, the courts maintain an ultra-zealous attitude to questions of legality and insist on punctilious adherence to every statutory formality, the might lead to the annulment of otherwise perfectly sound admission decisions, sometimes perhaps years after the original decision has been taken.

2. The present case may be thought to provide a paradigm example of this dilemma. There is no doubt at all but that the applicant, Mr. O., suffers from psychiatric illness and is in urgent need of psychiatric care. Yet the manner in which he came to be involuntarily detained in the early evening of 8th March, 2013, raises significant questions regarding the operation of the 2001 Act.

3. Mr. O. has been a patient of Dr. C., a registered medical practitioner since June, 2009. During that time it is clear that he has required on-going psychiatric assessment and monitoring, for much of the time he has suffered obsessive delusions regarding the conduct of a former employer.

4. Matters came to a head, however, on the 8th March, 2013. On that day Dr. C met with Mr. O's brother and mother at his surgery. They both recounted how Mr. O's behaviour had markedly deteriorated in recent days. He had begun to sleep with his head wrapped in tinfoil and lately kept a hammer beside his side or under the bed. Other family members feared for their safety and all expressed concern regarding the paranoid delusional thinking which was dominating Mr. O.'s chain of thought. Mr. O.'s brother then replayed to Dr. C. a tape recording of a conversation he had with him the previous day. This tape recording served to corroborate the fears which had already been expressed by these family members.

5. In a very considered letter which Dr. C. sent to Mr. O.'s solicitors on 12th March, 2013, at their request, he explained what had happened next:

> "Based on all of the above and out of concern for the possibility that [Mr. O.] may potentially abscond should he see me and given my long standing and extensive knowledge of [Mr. O.'s] history, I proceeded to sign the Form 5 recommending [his] involuntary admission to an approved psychiatric unit."

6. Mr. O. was later removed to the respondent hospital later that day. He was received into the hospital just before 7pm and was examined on the following morning. The admission order describes his mental condition as:-

> "Persecutory delusions. Aggressive and homicidal. In the context of same, no insight. Wishes to leave hospital."

7. No issue has been raised as such concerning his examination or subsequent treatment in hospital. What is instead at issue is whether the applicant's admission is lawful by reason of the fact that no actual examination was conducted by Dr. C. prior to the making of a recommendation for his admission.

8. The entire premise of s. 14 of the 2001 Act is that no person may be involuntarily detained in psychiatric hospital without a prior "recommendation" from a registered medical practitioner. Section 10(1) of the 2001 Act further re-inforces this by providing that:-

> "Where a registered medical practitioner is satisfied following an examination of the person the subject of the application that the person is suffering from a mental disorder, he or she shall make a recommendation (in this Act referred to as "a recommendation") in a form specified by the Commission that the person be involuntarily admitted to an approved centre (other than the Central Mental Hospital) specified by him or her in the recommendation."

9. Section 1(1) provides that the word "recommendation" shall be construed in accordance with section 10. But the medical practitioner cannot be "satisfied" to make a recommendation unless there has been a prior examination of the patient. Section 10(2) further stipulates that the examination must be carried out within 24 hours of the receipt of the application.

10. Section 1(1) of the Act of 2001 defines "examination" as meaning in relation to a "recommendation, admission order or a renewal order" a:-

> "personal examination carried out by a registered medical practitioner or a consultant psychiatrist of the process and content of thought, the mood and the behaviour of the person concerned".

11. It is plain that no such examination was conducted of Mr. O. by Dr. C. within the 24 hour period prior to the making of a recommendation. In making this observation, I would also add that Dr. C. deserves only great personal praise for the kindly, careful and considerate way in which he handled this very difficult situation. I am nonetheless driven to the conclusion that the failure to conduct an examination rendered the subsequent involuntary detention of the applicant unlawful.

12. The Oireachtas clearly envisaged that no person should be involuntarily admitted to a mental hospital save on the recommendation of a registered medical practitioner. That recommendation in turn had to be preceded by an "examination" of the patient within the 24 hour period. These were deemed to be vital essential safeguards for the patient.

13. Further evidence of this is provided by s. 12 itself. This section provides for an arrest of person who a member of An Garda Siochána has "reasonable grounds" for believing that the person is suffering from a mental disorder and that there is a "serious likelihood" of the persons concerned causing immediate and serious harm to himself or others. Where this occurs, the member must forthwith apply to a registered medical practitioner for a recommendation. If, however, no such recommendation is made, the person concerned must then be released immediately: see s. 12(4). If, however, a patient was to be arrested under s. 12 by a member of An Garda Síochána and conveyed directly to a psychiatric hospital without any such recommendation from a registered medical practitioner, could it be suggested that any subsequent admissions order was nonetheless valid?

14. It is true that the recent case-law indicates that non-compliance with *some* of the protections contained in the 2001 Act will not render invalid a subsequent valid order, such as an admissions order: see the judgment of Feeney J. in *L. v. Clincial Director of St. Brendan's Hospital* [2008] IEHC 11 and that of Hardiman J. for the Supreme Court in *L.*, delivered on 15th February, 2008.

15. In *L.* the suggestion was made that the initial arrest of the patient under s.13 was invalid, but it was held by both this Court and the Supreme Court that even if that were so, this did not affect the validity of the admission order under s. 14. As Feeney J. observed:-

> "Section 14 is not dependent upon how a person arrived at an approved centre, the word used in the section is the word 'received'…An admissions order is a separate and stand-alone matter….The facts herein demonstrate the very limited nature of the alleged wrong. There is no evidence before the Court that the suggested breaches in relation to s.13 were made other than in good faith. In this instance any wrong which might potentially have been done to this applicant is cured by the complete and proper implementation of the provisions in relation to the admissions order…"

16. The Supreme Court took a similar view on appeal, with Hardiman J. observing that even "assuming the breaches of s. 13 to have occurred, we see no reason to believe that it would invalidate the making of an admission order under s. 14." Section 13 deals, however, simply with the method whereby patients in respect of whom a recommendation has been *already made* may be removed to the approved centre. While an important safeguard, it could not be said that s. 13 is as vital and critical to the orderly operation of the admissions procedure as is the necessity for a prior recommendation by a registered medical practitioner based on an actual examination of the patient.

17. The approach taken in *L.* is also evident in the approach taken by Kearns J. in *EH v. Clinical Director of St. Vincent's Hospital* [2009] IESC 46, [2009] 3 I.R. 771. In that case a patient who was not involuntarily detained was so detained when she sought to leave the psychiatric unit. An otherwise valid admission order was subsequently made. The Supreme Court held that even if the initial detention was invalid, this was cured by the subsequent admissions order. Kearns J. went on to say ([2009] 3 I.R. 771, 792):-

> "These proceedings were initiated and maintained on purely technical and unmeritorious grounds. It is difficult to see in what way they advanced the interests of the applicant who patently is in need of psychiatric care. The fact that s. 17 (1) (b) of the Act of 2001 provides for the assignment by the Commission of a legal representative for a patient following the making of an admission order or a renewal order should not give rise to an assumption that a legal challenge to that patient's detention is warranted unless the best interests of the patient so demand. Mere technical defects, without more, in a patient's detention should not give rise to a rush to court, notably where any such defect can or has been cured – as in the present case. Only in cases where there had been a gross abuse of power or default of fundamental requirements would a defect in an earlier period of detention justify release from a later one."

18. These words have given me pause for thought. The applicant here is certainly in need of psychiatric care and all the evidence is that the medical professionals and his family have striven to care for him under exceedingly difficult circumstances. Yet I find myself obliged to conclude that there was a default of fundamental requirements in that the applicant was not examined *at all* in the manner required by s. 10 by the registered medical practitioner in the twenty-four hour period prior to the making of the recommendation.

19. In this respect, the present case is different from both *MZ v. Khattak* [2008] IEHC 262, [2009] 1 I.R. 417 and *XY v. Clinical Director of St. Patrick's University Hospital* [2012] IEHC 224. In *MZ* Peart J. held – albeit with understandable reluctance and unease - that an informal conversation between a registered medical practitioner of some experience and a patient at the rear of a Garda station constituted an "examination" of the patient for the purposes of s. 10. One might say that this was a case where the detention order was not invalid because the examination requirements had, at least, been substantially complied with, even if the manner and nature of the examination had been somewhat unconventional.

20. In *XY* I did not find it necessary to reach a concluded view on the question of whether the observation of the patient from a short distance by a medical practitioner in a car park constituted an "examination" in this sense, because even if there had not been such an examination in the statutory sense of that term, any invalidity had been cured by the subsequent admissions order:-

> "The reasoning in *L.* clearly applies by analogy to the present case. If - as I have held - a valid admission order was made by Dr. O'Ceallaigh following an examination of Ms. Y. under s.14, then it is immaterial *so far as the continued validity of the detention under that admission order* is concerned that the requirements of s. 10 were not perfectly complied with by the registered medical practitioner concerned."

21. The true *ratio* of *XY*, accordingly, is that an incidental invalidity in the examination process will not render invalid an otherwise valid admissions order which was subsequently made thereafter. In other words, the mere fact that the medical practitioner had not "perfectly" complied with the requirements of s. 10 will not suffice to render the detention invalid. It was clear in that case that at least such had been attempted and it was essentially for those reasons that I concluded that the detention was not invalid. In those circumstances it was therefore unnecessary to determine whether there had been full or perfect compliance with the requirements of s. 10 so that what had occurred could properly be described as an "examination" of the patient.

22. The essential point of difference, therefore, between this case and *XY* is that in the latter case the medical practitioner at least

endeavoured – again under exceedingly difficult circumstances – to examine the patient, whereas (for perfectly understandable reasons) this was not attempted here. It is rather the *complete failure* to comply with the requirement of s. 10 that there be a prior examination which renders invalid the subsequent admissions order. There is accordingly here a default of fundamental requirements in the sense canvassed by Kearns J. in *EH*. If it were otherwise, it would mean that a patient could be validly admitted on an involuntary basis without the necessity for an examination within the previous 24 hour period or even, perhaps, without a recommendation at all. If this were so, it would entirely set at naught the safeguards deemed to be fundamental by the Oireachtas.

23. In so far as any dicta of mine *XY* suggested that *any* defect whatever attaching to the s. 10(1) examination procedure could subsequently be automatically cured by a valid admissions order, I think that these should stand qualified in the light of the present case.

24. One cannot again but sympathise with the position of Dr. C. and members of Mr. O.'s family. Perhaps the solution is very difficult cases of this kind is that the patient might first be arrested by a member of An Garda Síochána in accordance with s. 12 of the 2001 Act and then examined by the registered medical practitioner prior to the making of a recommendation: see s. 12(2) and s. 12(3) of the 2001 Act.

Conclusions

25. In the event, therefore, I find myself coerced to the conclusion that the validity of the admissions order was tainted by the fundamental failure to comply with the procedural obligations in relation to an examination contained in s.10. It follows, therefore, that the present detention of the applicant is not in accordance with law. I will hear counsel on what further steps should now be taken.