Neutral Citation [2016] IEHC 623

THE HIGH COURT

[2015 No. 642JR]

BETWEEN

MS F.

Applicant

– AND –

THE MENTAL HEALTH TRIBUNAL,

THE MENTAL HEALTH COMMISSION,

IRELAND,

THE ATTORNEY GENERAL

Respondents

– AND –

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Key Issues Arising.

1. A woman is detained involuntarily in a mental hospital pursuant to Order A on the ground that she is suffering from a mental disorder. This order is later affirmed by a mental health tribunal. The woman appeals against that affirmation to the Circuit Court. On appeal, the Circuit Court is empowered to affirm or to revoke Order A. By the time the appeal gets to the Circuit Court, Order A has lapsed and the woman, though she has continued throughout to be detained, is now being detained pursuant to Order B. The Circuit Court declines to proceed with hearing the appeal because Order A has lapsed and cannot now be affirmed or revoked. Did the Circuit Court proceed correctly? Are there inherent legal deficiencies in the process whereby such involuntary detentions are effected?

II. Background Facts.

2. Ms F is, unfortunately, a lady with a protracted history of mental ill-health. In the recent past she has been detained involuntarily on a number of occasions. She comes to court claiming that her statutory right of appeal against such involuntary detention has been violated in the past. Mindful that the future may yet involve a further period of such detention, at least if the past is any guide, Ms F is concerned that a further such violation (if violation there has been) might yet arise in the future, and is concerned to ensure that it does not. The steps that have led to the present proceedings are perhaps best outlined by way of the summary timeline that follows. The references to section numbers are to sections of the Mental Health Act 2001.

07/10/15 Admission Order (Order A) made (s.14). Order A good for 21

days.

27/10/15 Mental health tribunal affirms Order A (s.18).

27/10/15 Renewal Order (Order B) made by Ms F's psychiatrist. Order

good to 27/12/15 and is basis for Ms F's continuing detention

(s.15).

28/10/15 Ms F appeals tribunal decision of 27/10/15 (s.19).

10/11/15 Circuit Court declines to hear appeal against lapsed Order A.

16/11/15 Mental health tribunal affirms Order B (s.18).

15/12/15 Circuit Court hears appeal against decision of 16/11/15.

Affirms Order B (s.19).

III. Applicant's Principal Contentions.

3. Arising from the above-described facts, all manner of contentions have been made. These are described hereafter; however, the critical issue arising is did the Circuit Court proceed properly on the 10th November, 2015, or ought it to have proceeded otherwise? The various contentions are as follows. First, the Circuit Court erred on 10th November in placing a restriction on Ms F's right of appeal that is not provided for by the Act of 2001. Second, the Circuit Court failed on 10th November to interpret s.19 in a constitutional manner. Third, the approach adopted by the Circuit Court on 10th November led to a discriminatory result in that it debarred Ms F from her appeal in a manner that would not affect patients wishing to appeal affirmations of renewal orders. Fourth, there was no reason why the Circuit Court could not have made a determination as to whether or not Ms F was suffering from a mental disorder on 10th November. Fifth, to vindicate Ms F's statutory right of appeal, and where a renewal order was in place, it was

open to the Circuit Court to construe the renewal order as nothing more than an extension of the admission order. Sixth, the Mental Health Commission is discharging its functions under the Act of 2001 in such a manner as to deny patients their statutory right of appeal against an admission order, despite the Commission's obligation, under s.33(1) of the Act of 2001, to "*take all reasonable steps to protect the interests of persons detained in approved centres under this Act*". Seventh, the Mental Health Commission is to be criticised for not expediting the pre-appeal portion of the review process so as to ensure Ms F could exercise her right to bring an appeal. Eighth, s.19 is unconstitutional. Ninth, s.19 violates the European Convention on Human Rights. Tenth, a number of further points are made as regards how the court should interpret the statutory right of appeal conferred by s.19, viz. that the legislature does not act in vain, that the court should have regard to the purpose of the Act of 2001 in approaching its interpretation of same, that the court is obliged to vindicate the rights of Ms F, including but not limited to her constitutional right to liberty and her right to equality before the law; and that if the court finds a denial of Ms F's rights to have occurred, it is not limited to granting one or more of the reliefs that she seeks but can fashion its own remedy. The court examines each of these contentions later below.

IV. Reliefs Sought.

4. Ms F seeks a variety of reliefs at this time, including (1) an order of *certiorari* quashing the order of the Circuit Court of 10th November, 2015, (2) a declaration that the Circuit Court erred in law in failing to make a decision on the merits of Ms F's appeal, as contemplated by s.19 of the Act of 2001, (3) a declaration that s.19 of the Act of 2001 is unconstitutional and invalid, and (4) a declaration that s.19 is incompatible with the European Convention on Human Rights.

V. Section 19.

5. Section 19 of the Act of 2001 provides for an onward appeal to the Circuit Court by a patient who is aggrieved by the decision of a mental health tribunal to affirm an admission or renewal order. The sole ground of appeal is that the patient is not in fact suffering from a mental disorder. Thus s.19(1) provides that "*A patient may appeal to the Circuit Court against a decision of a tribunal to affirm an order*[be it an admission order or a renewal order] *made in respect of him or her on the grounds that he or she is not suffering from a mental disorder".* Under s.19(4) of the Act, the burden of proof shifts to the patient, so that "*unless it is shown by the patient to the satisfaction of the Court that he or she is not suffering from a mental disorder*", the Circuit Court must "*affirm the order*". (If it is so shown, the Circuit Court must revoke the order). In the present case, the difficulty that confronted the Circuit Court was that, notwithstanding the continuing detention of Ms F at the date of the appeal hearing, the order of 7th October, 2015, that was being appealed against (lapsed Order A) had been superseded by the consulting psychiatrist's renewal order (extant Order B).

6. The respondents contend, correctly, that the Superior Courts have now repeatedly held that each period of detention, under an admission order and each subsequent renewal order, is a separate period of detention, so that a deficiency, for example, in an initial admission order does not taint the validity of a subsequent renewal order. (See, for example, *W.Q. v. Mental Health Commission* [2007] 3 I.R. 755, *E.H. v. Clinical Director of St Vincent's Hospital* [2009] 3 I.R. 774, and *M. v. Clinical Director of the Department of Psychiatry, University Hospital Limerick* [2016] IEHC 25). In W.Q., O'Neill J. offered a notably patient-focused rationale for this approach, stating at 770:

> *"There is, in the best interests of a person suffering from a mental disorder, a need for good order in the care and treatment of that person and the management of that care and treatment. The rendering invalid of an otherwise valid renewal order by reason of a defect in a prior renewal or admission order is in my view inimical to good order in this process and ultimately not in the best interest of someone suffering from mental disorder".*

7. The respondents contend, in light of the general thrust of the above-mentioned case-law, that where an admission order (Order A) has expired, there is no practical purpose and no legal basis for continuing with a s.19 appeal as events have been undertaken by the new order (Order B). Ms F makes various contrary contentions that have been touched upon above and are considered in more detail hereafter.

VI. Restricting the right of appeal?

8. Ms F contends that the Circuit Court erred on 10th November in placing a restriction on her right of appeal that is not provided for by the Act of 2001. The court does not perceive that any restriction was placed on Ms F's right of appeal. Her appeal was brought and heard and the subject-matter of the appeal was found to have expired. It seems to the court that to suggest that this involves a restriction of the right of appeal is, to borrow from the recent decision of the Supreme Court in *Kershaw v. Ireland and the Attorney General* [2016] IESC 35, para. 37, to confuse "restrictions which directly affect the right at the access point in the first instance, and decisions made thereafter which may affect the conduct of the litigation".

VII. Unconstitutional interpretation of s.19?

9. Ms F contends that the Circuit Court failed on 10th November to interpret s.19 in a constitutional manner. It appears to the court that the Circuit Court's reading of s.19 was correct. Given the court's finding that the reading afforded by the Circuit Court to s.19 is correct, it is a reading that comes clothed with that presumption of constitutionality that has been held to apply to legislation since *Pigs Marketing Board v. Donnelly* [1939] I.R. 413, 417 and in the years since. (See, for example, the decisions of the Supreme Court in *In re the Planning and Development Bill 1999* [2000] 2 I.R. 321, and *JD v. Residential Institutions Redress Review Committee* [2010] 2 I.L.R.M. 181).

VIII. Discrimination?

10. Ms F contends that the approach adopted by the Circuit Court on 10th November led to a discriminatory result in that it debarred Ms F from her appeal in a manner that would not affect patients wishing to appeal affirmations of renewal orders. However, there is no principle that requires there to be an exact identity of procedures open to persons who are not similarly situated. (See *Brohoon v. Ireland* [2011] 2 I.R. 639, and *Markey v. Minister for Justice* [2012] 1 I.R. 62). Nor is there any absolute requirement as to procedural equality. (*Akpekpe v. Medical Council* [2014] 3 I.R. 420).

IX. Determination as to presence/absence of mental disorder?

11. Ms F contends that there was no reason why the Circuit Court could not have made a determination as to whether or not Ms F was suffering from a mental disorder on 10th November, the date on which the hearing was held. The court does not agree. Her appeal against the admission order (Order A) had become moot because that order had been supplanted by the renewal order (Order B). Thus the Circuit Court could neither affirm nor revoke Order A and, as a mental health tribunal had yet to affirm or revoke Order B, it would have been premature for the Circuit Court to make a finding concerning that order. That said, there are practical steps that could be taken (and which the court understands are taken) to avoid wasting time in instances such as those which Ms F seeks now to impugn. These are touched upon later below. It suffices at this point to note that statute does not envision the Circuit Court making a finding as to whether or not a person is suffering from a mental disorder before the admission/renewal order that includes that finding is affirmed by a mental health tribunal. (If it is revoked, there can be no appeal under s.19(1)).

X. Right of appeal as extension of admission order?

12. Ms F contends that it was open to the Circuit Court to construe the renewal order as nothing more than an extension of the admission order. In fact, as this Court noted in M., if one has regard to s.15(2) of the Act of 2001, which provides that "*The* [21-day] *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')"* (emphasis added), it appears that a renewal order ought most properly to be viewed as an extension of a period of detention, not a renewal of a previous order at all. But what it certainly is not, and what it has consistently been held by the courts not to be, is an extension of an admission order: a renewal order supplants the previous order. (See *W.Q., E.H., and M.*, op. cit.).

XI. Mental Health Commission denying right of appeal?

13. Ms F contends that the Mental Health Commission has been discharging its functions under the Act of 2001 in such a manner as to deny patients their statutory right of appeal against an admission order, despite the Commission's obligation, under s.33(1) of the Act of 2001, to "*take all reasonable steps to protect the interests of persons detained in approved centres under this Act*". There is not an iota of evidence to suggest that the Mental Health Commission has impeded or denied the right of appeal under s.19 at any time. There is no requirement in the Act that a s.19 appeal must reach the Circuit Court in a particular timeframe, be it before the expiry of the initial admission order or otherwise. As to the pre-appeal process, with the best will in the world, and there has been no suggestion but that all relevant parties have at all times manifested such will, it takes time for the staff at a mental hospital to determine what ails a patient, for an independent mental health tribunal to be convened, and for an independent consultant psychiatrist to examine a patient and prepare a report for the tribunal. If all of this typically takes to the latter end of the 21-day period within which a tribunal must typically sit, and there is suggestion that it often does, then that may perhaps be slower than it could be – perhaps – but that is the extent of matters and no legal consequence flows therefrom, at least not in the within proceedings.

XII. Expedition of pre-appeal process.

14. Ms F contends that the Mental Health Commission is to be criticised for not expediting the pre-appeal portion of the review process so as to ensure Ms F could exercise her right to bring an appeal. The court has addressed this point above.

XIII. Section 19 is unconstitutional?

15. Ms F contends that s.19 is unconstitutional and invalid, having regard to the Constitution, in particular Articles 34, 38 and 40. The court does not accept that this contention is correct. The Constitution does not confer a right of appeal to the Circuit Court, whether by virtue of Art. 34 or any other provision of the Constitution. As Charleton J. observed in *Han v. President of the Circuit Court* [2011] I.R.504, 518, "*There is nothing in the Constitution which requires all and every, or any, decision of the mental health tribunal to be reviewed by the courts under a statutory scheme."* In short, even if the Act of 2001 did not provide an appeal mechanism in respect of mental health tribunal decisions concerning admission orders, this would not render s.19 invalid. Nor are the afore-mentioned provisions of the Constitution even engaged. And even if they were engaged, s.19 appears to the court to vindicate Ms F's rights. Certainly, as mentioned previously above, Ms F has failed to rebut the presumption of constitutionality that attaches to the Act of 2001, including s.19, by virtue of *Pigs Marketing Board*, op. cit.

XIV. Section 19 breaches the European Convention on Human Rights?

(i) Overview.

16. Though it was initially alleged that s.19 contravenes various provisions of the European Convention on Human Rights, by the time of the hearing this appeared to have shrunk to a contention that Article 5 of the Convention is contravened. Thus, although the court perceives no violation of the Convention to arise, it confines itself here to a consideration of the contention that Article 5 is contravened.

(ii) Article 5 of the Convention.

17. The case-law of the European Court of Human Rights (see, for example, *Lukanov v. Bulgaria*, (App. No. 21915/93, 20th March, 1997), and *McKay v. United Kingdom*[GC] (App. No. 543/03, 3rd October, 2006) identifies that the key purpose of Article 5 of the Convention is to prevent arbitrary or unjustified deprivations of liberty. In order to meet the requirement of lawfulness, the detention must, per Art. 5 be "*in accordance with a procedure prescribed by law*". This means (see, for example, *Del Rio Prada v. Spain*, (App. No. 42750/09, 21st October, 2013) that the process of detention must conform with substantive and procedural rules of national law. The within proceedings are not concerned with the lawfulness of Ms F's detention. Hence Art. 5 of the Convention is not engaged. But even if it were, all of the statutory protections and procedures of the Act of 2001 were made available to, and pursued by, Ms F. The fact that the admission order (Order A) had been supplanted by the renewal order (Order B) by the time her appeal came on for hearing before the Circuit Court does not alter that fact. And it is in this regard that a critical departure arises between the facts of the within proceedings and those in *Nakach v. The Netherlands* (App. No. 5379/02, 30th September, 2005), a case on which some

reliance was placed by Ms F. For in *Nakach* it was a breach of domestic law that was held to yield a breach of Art. 5(1); here no like breach of domestic legislation presents.

18. The court notes: (i) the observation of the Supreme Court in *In re Philip Clark* [1950] I.R. 235 concerning the Mental Treatment Act 1945, the forerunner of the Act of 2001, that the Act of 1945 was "*designed for the protection of the citizen and for the promotion of the common good*"; (ii) the related observation of Charleton J. in Han that "*This purposive interpretation continues into every analysis of the successor of the Mental Treatment Act 1945 namely the Mental Health Act 2001"*; and (iii) the observation of McMahon J. in *CC v. Clinical Director of St Patrick's Hospital and the Mental Health Commission* [2009] IEHC 13, 28, that "[T]*he reading of the Menatla Health Act 2001, in its entirety... clearly establishes a procedure for continuous and regular assessment and supervision of the detention of a person under that legislation in a manner which wholly conforms to the requirements of Article 5(1) of the Convention...".* Here, not only was there compliance with the procedural safeguards set out in the Act of 2001; the Act of 2001 itself is in conformity with the Convention. In short, the court concludes that (a) Ireland has not breached its positive obligation, under Art. 5 of the European Convention, to protect Ms F against interference with her liberty, and (b) the provisions of s.19 are not incompatible with the Convention.

XV. The Oireachtas does not legislate in vain.

19. Ms F urges upon the court that the President of the Circuit Court ought to have heard the appeal on 10th November because, to echo McMenamin J. in *DPP v. J.C.*[2015] IESC 31, at para. 8 of his judgment, "*The Oireachtas does not legislate in vain*". Thus Ms F submits that as the legislative purpose of s.19 was to provide for an appeal to the Circuit Court, the Act must be interpreted to give effect to that purpose. However, the Act does not provide for an unconstrained right of appeal to the Circuit Court. Why would the Oireachtas provide that regardless of whether an admission order (Order A) is supplanted or not, regardless of whether it is extant or not, and despite the fact that no remedy is available to a patient under s.19(4), she must still be given her day in court because she had lodged a notice of appeal? That would be irrational and legislation must be construed so as to give it a rational meaning. The court considers that the interpretation it affords the Act of 2001 in this judgment gives it just such a meaning.

XVI. Purpose of the Act of 2001.

20. Ms F contends that that the court should have regard to the purpose of the Act of 2001 in approaching its interpretation of same. The overriding purpose of the Act of 2001 is to provide a calibrated system whereby persons may be involuntarily admitted to detention, subject to independent review of every such admission. Ms F has pointed to a certain imperfection in the system established by the Act, *viz*. that it is possible for an appeal to arrive in the Circuit Court against a lapsed admission order and during the currency of an extant renewal order. However, no matter how a statutory scheme is constructed it will always be possible to point to a different way in which it could have been structured. It may even be possible to point to a different way that is consistent with the purpose of the Act. But it is not for an unelected court, in purported observation of the purpose of an Act, to devise alternative processes to such lawful processes as are established by our elected lawmakers through the medium of such Act.

XVII. Vindicating the rights to liberty and equality.

21. Given that the renewal order (Order B) was affirmed on 16th November, 2015, by a mental health tribunal (a decision that was itself later affirmed by the Circuit Court on 15th December, 2015, the court does not see how Ms F can claim that her right to liberty was not vindicated. Moreover, if there was some failure in any one instance which saw the right to liberty unlawfully infringed, notwithstanding the various protections for patients that the Act of 2001 seeks to establish, a patient always has a right to bring an application to the High Court under Article 40 of the Constitution, though hopefully the instances in which this drastic solution would be required would be very small in number, if indeed they arose at all. The right to equality has been treated with in the context of the alleged discrimination referred to above.

XVIII. Fashioning reliefs.

22. The issue of fashioning a relief does not arise as all reliefs sought are being declined.

XIX. Conclusion.

23. The court does not see any unlawfulness to present in how the Circuit Court acted in this matter. Insofar as any inefficiency might be perceived to arise in a process which can see an appeal against a lapsed admission order (Order A) arrive in the Circuit Court at a time when an appeal against a later extant renewal order (Order B) is imminent or can be anticipated, it appears to the court that such inefficiency can be, and apparently is in practice, overcome by the parties to the appeal agreeing that a notice of appeal against Order A should be amended so as to make it an appeal against Order B. This only works, of course, if the appeal is heard after the mental health tribunal has already sat and affirmed Order B; otherwise there can be no appeal under s.19(1). However, in the event that the tribunal has not so affirmed by the time the appeal arrives for hearing before the Circuit Court, there is nothing to stop the Circuit Court (a) adjourning the appeal pending the determination of the tribunal, an approach that should limit wasted time in the event of the tribunal affirming the detention, or (b) if and as the Circuit Court deems appropriate, having regard to the circumstances arising, striking out matters with no further order. It may be that the need for such practical 'work-arounds' could be obviated by means of a future amendment to the Act of 2001 which made provision for the instance where an appeal against a lapsed admission order (Order A) arrives before the Circuit Court during the currency of extant renewal order (Order B) but that is a matter well beyond the remit of the court.

XX. Refusal of Reliefs Sought.

24. For the reasons stated above, the court respectfully declines to grant any of the reliefs sought by Ms F. The court will hear the parties on the issue of costs.