Neutral Citation Number: [2007] IEHC 65

THE HIGH COURT

Record Number 2007 No. 118 SS

BETWEEN

AMC

APPLICANT

AND

ST. LUKE'S HOSPITAL, CLONMEL

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 28th February 2007

1. The applicant has a long history of psychiatric illness since he was diagnosed as suffering with paranoid schizophrenia in 1994. Since that time he has had several admissions to the respondent hospital. He has been an inpatient at St. Luke's Hospital, Clonmel ("St. Luke's") on a continuous basis since the 25th April 2002 when he was admitted pursuant to the provisions of the Mental Treatment Act, 1945. That admission was at first on a voluntary basis but on the 2nd June 2002 his status was changed to that of a temporary involuntary patient under the provisions of s. 184 of that Act. He remained detained on that basis until the 2nd June 2004, that being the maximum period allowed for detention on that basis, including any extensions permitted.

2. After the 2nd June 2004, he remained detained as a voluntary patient. It is clear from the evidence adduced that he remained ill during all of these periods. However on the 2nd June 2006 it was agreed following an assessment and discussion with nursing staff that he should be permitted to go on a holiday to Ardmore, albeit supervised by nursing staff from the respondent hospital. However while he was on holiday it was noticed that he experienced an acute exacerbation of his schizophrenic illness which included threatening violence to others. He was returned under nursing escort to hospital on the 2nd June 2006, where on the following day he was interviewed and assessed, and was reverted to the status of an involuntary patient. That order pursuant to s. 184 of the 1945 Act was made on the 9th June 2006. That order would in the ordinary course of events have expired six months later at midnight on the 8th December 2006.

3. Since no issue arises on this application as to the lawfulness of the applicant's detention up to that date, it is unnecessary to set out in any more detail the history of his detention and the medical reasons for it. The issue arising relates to how the transitional provisions of the Mental Health Act, 2001 ("the 2001 Act") were operated, and it is submitted that an error has occurred which has rendered his present detention unlawful, albeit with no suggestion of *mala fides* on the part of hospital personnel, and an acceptance that everything which has been done has been done in the best interests of the applicant. It is beyond doubt in my view that the evidence is clear that the applicant requires to be detained both in his own best interests and for the protection of others. Nevertheless, the Court must order the release of the applicant if it is not satisfied that his detention is not in accordance with law.

4. As stated already, certain relevant provisions of the Mental Health Act, 2001 came into force on the 1st November 2006, including certain transitional provisions intended to permit a seamless transition and continuation of detentions already in being under the 1945 Act, to detention under the 2001 Act. These provisions were designed to facilitate this transition in the interests of the patients concerned.

Section 72 of the 2001 Act – transitional provisions

5. Under these new provisions contained in s. 72, sub-s.(1) of the 2001 Act, a person such as the applicant who was in involuntary detention under s. 184 of the1945 Act, is to be "regarded as having been involuntarily admitted" to the same hospital under Part II of the 2001 Act, and, as provided by s. 72, sub-s. (2) his treatment and detention shall be regarded as authorised until the expiration of the period during which he may be detained pursuant to the detention order made under s. 184 of the 1945 Act. In the case of the applicant, as already stated, this detention and treatment was thereby regarded as authorised until midnight on the 8th December 2006.

6. If an order renewing the detention of the applicant had been made on the 9th December 2006, following the expiration of the previous detention on the 8th December 2006, no difficulty would be seen to exist in this case since the review on the 29th December 2006 would have been within 21 days from the making of that renewal order.

7. However, what occurred was that on the 4th December 2006, the "Responsible Consultant Psychiatrist" having examined the applicant at 14.15pm on the 4th December 2006, expressed her opinion that he "should continue to be detained for a period not exceeding three months", gave her reasons, and made an order renewing the applicant's detention for a period of three months. The applicant was notified in writing.

8. It is provided by s. 72, sub-s.(4) of the 2001 Act that the applicant's detention shall be referred to a tribunal by the Mental Health Commission before the expiration of the period of detention under s. 184 of the 1945 Act, and it is further provided that the tribunal "shall review the detention as if it had been authorised by a renewal order under s. 15, sub-s.(2) of the 2001 Act.

Section 15 of the 2001 Act:

9. Subsection (1) provides that an admission order (which includes an order made under the transitional provisions in s. 72) shall remain in force of a period of 21 days from "*the date of the making of the order*" – not the date from which the order takes effect. In this case the date of the making of the order is the 4th December 2006, even though the previous order remained in force until midnight on the 8th December 2006.

10. By s. 16 of the 2001 Act, it is provided that where such an order is made, as in this case, the consultant psychiatrist making the renewal order shall "not later than 24 hours thereafter, (a) send a copy of the order to the Mental Health Commission, and (b) give notice in writing of the making of the order to the patient.

11. In accordance with these provisions in so far as (b) is concerned, the Consultant Psychiatrist in the present case complied with this requirement by giving the applicant on the 4th December 2006 a form entitled "Patient Notification of the making of an admission order or a renewal order". That form, *inter alia*, tells the patient the nature of the order made, and of his rights to legal representation, that he will have his detention reviewed by a Mental Health Tribunal in accordance with the provisions of s. 18 of the 2001 Act, that he is entitled to appeal against the decision of the Mental Health Tribunal to the Circuit Court, and that he may be admitted as a voluntary patient should he indicate a wish to be so admitted.

12. In so far as (a) is concerned, a copy of the order was sent by the consultant psychiatrist to the Mental Health Commission. The Commission in due course referred the matter to the Mental Health Tribunal in accordance with s. 17 of the Act, assigned a solicitor,

James J. Hally to act for the applicant, and directed a consultant psychiatrist to examine the applicant, interview the consultant psychiatrist responsible for the care and treatment of the applicant, review the records so as to determine whether he was suffering from a mental disorder and to report thereon in writing within 14 days to the Tribunal, and to provide a copy thereof to the applicant's solicitor.

13. Section 18 provides that following the making of a renewal order such as was made in the present case, the Tribunal shall review the detention of the patient concerned, and shall either affirm or revoke the order, but it is provided by s.18, sub-s.(2) that a decision in this regard must be made as soon as may be *but not later than 21 days after the making of, in this case, the renewal order*. That order was made, as stated already, on the 4th December 2006, even though the order it was renewing remained effective and did not require renewal until midnight on the 8th December 2006. Clearly the intention was that the renewal would take effect upon the expiry of the earlier order, rather than ahead of that expiry. Nonetheless the section says what it says.

14. The period of 21 days referred to for the review of the order made on the 4th December 2006 would have expired on the 25th December 2006. What in fact occurred was that the review was listed for the 29th December 2006, and took place on that date, on which occasion the applicant was represented by Mr Hally. The decision was made to "affirm the order" made on the 4th December 2006. But it should be stated also that at the outset of the review hearing, Mr Hally made a submission to the effect that the 21 day period for review must run from the 4th December 2006 and not from the expiry of the earlier order on the 8th December 2006. The written record of the review hearing notes:

> "We are satisfied that we have jurisdiction on the basis of legal advice contained in an e-mail dated 18th December 2006 received from the MHC which states 'the Commission has taken the view, endorsed by its legal advisers, that the period of detention in the admission order must expire before the "further" period of detention in the renewal order commences'. In this instance, based on this advice, the 6 month temporary order expired at midnight on the 8/12/06. Therefore the 21 day period expires at midnight on 29/12/06, today."

15. As I have stated, the order was affirmed. There is a curiosity about the manner in which Form 8, being that which records the decision to affirm, has been completed. There are a number of boxes to be ticked in order to indicate what was done. Three out of four boxes in the relevant part of the form have been ticked by the Tribunal. The paragraph states:

> "The Mental Health Tribunal has reviewed the detention of the patient concerned and has concluded that:
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> · It is satisfied that the patient is suffering from a mental disorder, and
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> · The provisions of Sections 9,10,12,14,15 and 16 where applicable have been complied with, OR
>
> · If there has been a failure to comply with any such provisions, that the failure does not affect the substance of the order and does not cause an injustice, AFFIRM THE ORDER
>
> · If not so satisfied, REVOKE THE ORDER and direct that the patient be discharged from the approved centre concerned."

16. There are four boxes, one opposite each of these bullet paragraphs. The Tribunal has ticked the first three boxes, even though boxes two and three are worded in the alternative. The fourth box remains unticked naturally. The fact that box three was ticked is open to the interpretation that the Tribunal felt that perhaps there was a failure to strictly adhere to the time limit for the review, while at the same time being of the view that it did not amount to any injustice to the applicant.

17. This Form 8 is in accordance with the requirements of s. 18 sub-s.(1) of the Act which provides:

> (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 –
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> (a) if is 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
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> (ii) if there has been a failure to comply with any such provisions, that the failure does not affect the substance of the order and does not cause an injustice,
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> affirm the order, or
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> (b) if not so satisfied, revoke the order and direct that the patient be discharged from the approved centre concerned."

18. Referring to the provisions of s.18, sub-s. (1)(a)(ii) above, it is worth noting that one of the provisions referred to in the previous paragraph (a) is that in s. 15 (1) which provides that "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."

19. I surmise that the Tribunal, by ticking the third box referred to above may have been of opinion that s.18(1)(a)(ii) enabled it to overlook the fact that a period greater than 21 days from the making of the order had passed, thereby enabling it to have jurisdiction to make the order affirming the order since in its view no injustice arose. However, given the very specific provision that upon the expiration of 21 days the order "shall expire", such latitude as is suggested in s.18(1)(a)(ii) could not, I think, extend so far as to enable it to embrace that difficulty. However, in any event, the Tribunal relied upon its legal advice that the order made on the 9th June 2006 endured until midnight on the 8th December 2006, and that this was unaffected by the fact that the renewal order was made four days ahead of time. It is also the case that Counsel for the respondent has not sought to address the applicant's case by reference to s.18(1)(a)(ii) of the Act.

20. Michael Counihan SC for the respondent has submitted that the clear intention of the transitional provisions of s. 72 is that the order under which a person was detained under s. 184 of the 1945 Act will endure until it would have expired in the normal way, i.e. in the present case at midnight on the 8th December 2006. He refers to s. 72(1) and (2) in this regard. He submits that although under subsection (1) the applicant's detention is to be regarded as having been involuntarily admitted under Part II of the 2001 Act, it is stated clearly in subsection (2) that "his treatment shall be regarded as authorised until the expiration of the period of the order made

under s. 184 of the 1945 Act. He submits that this is a free-standing provision in relation to a case coming under these transitional provisions, and that while the applicant is to be regarded as having been involuntarily admitted under Part II of the new Act, that is not to be seen as a new admission under the provisions of s.15 of the 2001 Act, bringing into play all the requirements and protections to be afforded to a person being admitted under the new provisions of s. 15. He submits that in the latter case such a person, being admitted under the new provisions is detained under an admission order which shall remain in force "for a period of 21 days *from the making of the order*" (my emphasis), and the provisions of s. 16, 17 and 18 apply thereafter. But he submits that there is nothing in s. 72 (transitional provisions) which mandate the application of those provisions to the applicant. Instead, the provisions of s. 72(4) apply, namely that "the detention ……shall be referred to a tribunal by the Commission before the expiration of the period referred to in subsection (2)…". That in his submission is exactly what has been done in this case and the fact that it occurred more than 21 days from the making of the order on the 4th December 2006 is irrelevant to the jurisdiction of the Tribunal.

21. He points also to the fact that s. 72 is silent as to the need for a renewal order in this case at all. In other words it is submitted that at any time up to the 8th December 2006, the existing detention of the applicant, albeit to be regarded as being one under Part II, had to be referred under s. 72(4) of the Act to the tribunal by the Commission, and that it does not require a renewal of that detention prior to so doing. When read in that way, it is submitted that the unnecessary step of making a renewal order on the 4th December 2006 could not have the effect of shortening the life span of the order made on the 9th June 2006. Accordingly the Tribunal was entitled to affirm the detention on the 29th December 2006.

22. Mr Counihan further submits that even if there has been some technical flaw in the manner in which things were done, it is purely a want of form and not such as to cause any injustice to the applicant who, in the considered opinion of all concerned, is in need of being detained on account of the seriousness of his mental health condition, and that the best interests of the patient must override any undesirable consequence from an error, if it be such, in the manner in which things were done, and that the Court should not order the release of the applicant, but should rather in the event of the detention being found to be irregular, make an appropriate order, as is done in such cases, which would facilitate the regularisation of the applicant's detention in his own best interests.

23. He submits also that if there is any ambiguity of lack of clarity about the statutory provisions in question, the Court should have regard to s. 5 of the Interpretation Act, 2005 which provides that in the case of obscurity or ambiguity, or in a case where a literal interpretation would give an absurd result or fail to reflect the plain intention of the Oireachtas, the Court should give the provisions in question "a construction that reflects the plain intention of the Oireachtas……..where that intention can be ascertained from the Act as a whole."

24. David Kennedy SC for the applicant on the other hand points to the fact that on the 4th December 2006 the applicant was assessed and an order renewing his detention was made one way or the other under s. 15 of the Act, and the applicant was notified in writing of this fact as is evidenced by the Patient Notification Form already referred to. In the circumstance where that order was clearly made, it follows, in his submission that all the requirements of s. 15 must apply, including that which provides that such an order lasts only for 21 days from the making of the order i.e. until the 25th December 2006. He refers also to the Form 8 completed by the Tribunal wherein it affirmed the order made on the 4th December 2006. That form itself refers at the top thereof to it being a form for the purpose of sections 18, 21 and 58 of the 2001 Act, the last two sections being of no relevance to the present application or the applicant.

25. Mr Kennedy submits that the statutory scheme now in place has very specific provisions for the protection of vulnerable persons such as the applicant, including a specific time limit within which the detention must be reviewed, after which, if not reviewed, the order "shall expire". He submits that there is absolutely nothing to suggest that the order can remain valid after that period of twenty one days in the event that the period under the order dated 9th June 2006 had not yet passed. He accepts of course that there is no question of any *mala fides* or deliberate flouting of the provisions of the Act by any of the personnel concerned, and that they at all times have acted in what they see as the patient's best interests.

Conclusions

26. There is at first glance an attraction to the argument made by Mr Counihan that under s. 72 there was no obligation under s. 72 of the Act on the respondent to have made the renewal order which it made on the 4th December 2006 before the matter was reviewed by the Tribunal, and that as required by s. 72(4) of the Act, the Tribunal carried out the review required of it "as if it had been authorised by a renewal order under section 15(2)". Such an argument may well be capable of being made in respect of some other case in the future where no renewal order was in fact made, and the Tribunal carried out its review after the expiration of the order made under the old Act, but within 21 days of the expiry. That is not this case however. It must be said also in that regard that while s. 72 of the 2001 Act does state that the person detention is to be regarded as one made under s. 15 and that the detention shall be referred to "a tribunal by the Commission" it is silent as to how the matter is to reach the Commission. That step occurs only by reference to s. 16 of the Act following the making of an order or renewal order under s. 15 of the Act. It would seem to follow that a consequence of s. 72 stating that the detention under the old Act is to be "regarded as" detention under s. 15 of the new Act, is that the procedures applicable to a new s. 15 application must be followed under the transitional arrangements as well, as otherwise there is nothing to impose a requirement on the consultant psychiatrist to refer the matter to the Commission, so that it in turn can refer the matter for review to the Tribunal. This is why an order of renewal was made on the 4th December 2006. This I feel adds strength to Mr Kennedy's submission that the provisions of s. 15, 16 and 18 apply to the present case. I am satisfied that he is correct in this regard.

27. That being so, it seems to me that the Act is clear and unambiguous as to when the period of time runs for the purpose of considering when that order must lapse. The fact is that the renewal order made on the 4th December 2006 need not have been made on that date. It could have been made at the expiration of the order of the 9th June 2006. However, there was no obstacle to the renewal order being made when it was. There could be particular reasons why it was made when it was. I do not know. But one could foresee a situation where some vital person would be on holidays or unavailable at the point at which the order was to expire and it could be necessary for the order to be made in advance of the actual expiration of the order. That eventuality is provided for by the provision which in effect requires the review to take place not later than twenty one days from the date of the making of the renewal order, rather than 21 days from the expiry of the order. There is nothing absurd in my view in arriving at such a conclusion, and the Court is obliged to ascertain the intention of the legislature from the plain and ordinary meaning of the words used in the section. By so doing, I am in no doubt that the effect of making the order of renewal on the 4th December 2006 was to require that any review by the Tribunal would occur not later than the 25th December 2006. The fact that the final day for such a review fell on Christmas day is not sufficient of itself to get over the clear meaning of the words of the section. I appreciate that it is a time of year in most walks of life which makes it very difficult to meet deadlines which expire at or near that holiday period, but the Act is unforgiving in that respect, and the Court cannot invent a means of forgiveness from without the terms of the Act. I have the greatest sympathy for the hardworking personnel in hospitals of this kind, and I have little doubt that the present applicant was not the only person to whom the transitional provisions of the Act were applicable, and it may be that great pressure of work emanated at this difficult period by reason of the need to ensure in the interests of patients that their detention was not cast in doubt over the

period. But the fact remains in my view that the effect of renewing the order on the 4th December 2006 was that unless a review was completed by the 25th December 2006, it expired by virtue of the provisions of s. 15(1) of the Act. Thereafter the applicant was not held in detention by virtue of any extant order, and the review and the affirmation of the expired order on the 29th December 2006 was of no effect in reviving it.

28. As to the form of order which should be made in the light of my conclusions, I am satisfied that the Court has the jurisdiction to make an ancillary type of order which will facilitate the putting into place of arrangements so that a process can be invoked so that a valid detention order is put in place in respect of the applicant. It has been most helpful to have been referred in this respect to the recent judgment of Clarke J. in H v. Russell, unreported, High court, 6th February 2007 wherein the learned judge examined the basis for such a jurisdiction and concluded that such a jurisdiction existed. I respectfully agree completely with his conclusions and adopt them, without embarking afresh on an examination of the question. It is beyond any doubt, based on the evidence of Dr Tully that the applicant is very ill and in need of treatment and care which can be given only in the context of detention. This is in his own interests, as well as those who may be endangered in the event of his release being ordered.

29. I am satisfied that the detention of the applicant is not in accordance with law, but I will not immediately make any order in that regard, so that I can be addressed as to an appropriate form of order to meet the situation which arises. I have no doubt, and certainly express the hope that, since the Court has concluded as it has, an agreed form of order will be forthcoming which the Court will then make which will ensure that the best interests of the applicant continue to be safeguarded appropriately.