

## THE HIGH COURT

Record Number: 2007 No.1413 SS

BETWEEN

PMCG

APPLICANT

AND

THE MEDICAL DIRECTOR OF THE MATER MISERICORDIA HOSPITAL  
IN THE CITY OF DUBLIN

RESPONDENT

AND

THE CLINICAL DIRECTOR OF ST. ALOYSIUS WARD PSYCHIATRIC UNIT  
OF THE MATER MISERICORDIA HOSPITAL IN THE CITY OF DUBLIN

AND

THE HEALTH SERVICE EXECUTIVE

AND, BY ORDER

THE MENTAL HEALTH TRIBUNAL

NOTICE PARTIES

**Judgment of Mr Justice Michael Peart delivered on the 29th day of November 2007:**

1. This matter came before the Court on the 3rd October 2007 by way of an application for the release of the applicant pursuant to Article 40.4 of the Constitution. Having heard the evidence and the submissions of all parties represented before me I concluded that while there had been a failure to comply with the requirements of s. 22 of the Mental Health Act, 2001 when a decision was taken to move the applicant from St Aloysius Ward, an approved centre for the purposes of the Act in the respondent's hospital, to a medical ward therein, namely St. Teresa's Ward so that he could receive medical treatment as opposed to psychiatric treatment, since his transfer was not arranged by the clinical director of an approved centre as required by the section, this failure was not such as to render his detention unlawful to the extent that the order sought should be made. I gave my reasons in an ex tempore ruling at the conclusion of submissions on the 3rd October 2007, and indicated that I would deliver a written judgment in due course in case it was of assistance in any future application.

2. I will first set out a brief history of relevant facts and events as are disclosed in the affidavit sworn to ground the application by Ms. Niamh Moran, the solicitor assigned by the Mental Health Commission to represent the interests of the applicant pursuant to the provisions of s. 17(1)(b) of the Act, and the documents exhibited therein. It would be useful at this point also to set out the provisions of s. 22 which are at the heart of the present application. They are:

"22. – (1) *A clinical director of an approved centre may arrange for the transfer of a patient detained in that centre for treatment to a hospital or other place and for his detention there for that purpose.*

(2) *A patient removed under this section to a hospital or other place may be kept there so long as is necessary for the purpose of his or her treatment and shall then be taken back to the approved centre from which he or she was transferred.*

(3) *The detention of a patient in a hospital or other place under this section shall be deemed for the purpose of this Act to be detention in the centre from which he or she was transferred."* (my emphasis)

3. Ms. Moran represented the applicant at the review hearing in respect of a Renewal Order dated 5th September 2007 held on the 25th September 2007 pursuant to the provisions of s. 18 of the Act. Evidence given at that review hearing included evidence from John Sheehan, Consultant Psychiatrist and according to Ms. Moran he gave evidence as to the applicant's 'medical cum psychiatric condition'. It appears that the applicant had become medically unwell and that in order to address his medical condition he was moved from St Aloysius's Ward, which is a psychiatric unit within the Mater Hospital and an approved centre for the purpose of the Act, to St. Teresa's Ward, which is in the medical part of the same hospital but which is not an approved centre for the purpose of the Act. It would appear that on the 20th September 2007 those personnel in charge of the applicant had become of the view that his medical condition had deteriorated significantly and that he need to be moved to St. Teresa's Ward so that investigations could be carried out to determine the cause of the deterioration and any necessary treatment for his physical ailments could be treated appropriately.

4. Ms. Moran had the opportunity at the review hearing to question Dr Sheehan, and he confirmed to her that St. Teresa's ward was not an approved centre for the purpose of the Act. According to her affidavit she asked him also to confirm that the transfer of the applicant from the approved centre in the Mater Hospital to St. Teresa's Ward had been approved by the clinical director as required by s. 22 of the Act. He himself is not the clinical director. That person in fact is based at St. Vincent's Hospital, Dublin and, according to Dr Sheehan in answer to Ms. Moran, he had not given the 'approval' referred to, although he had placed on the applicant's medical records a note requesting that the applicant be transferred to a medical ward. He confirmed that he had not spoken to the clinical director about the matter.

5. Ms. Moran submitted to the Mental health Tribunal that in these circumstances it could not affirm the Renewal Order given that the applicant's detention in St. Teresa's Ward was not in accordance with the provisions of s. 22 of the Act. Nevertheless the Tribunal affirmed the applicant's detention under the Renewal Order. The record of the proceedings before the Tribunal as exhibited by Ms. Moran shows that the submission made by her was considered and that in spite of same the Tribunal, while expressing some reservations about the matter raised, considered that the provisions of s. 22 of the Act were outside its remit since that section is not one of the sections referred to in s.18 (1)(a)(i) of the Act, and affirmed the detention of the applicant under Renewal Order since all necessary requirements for doing so were met. The final paragraph of the Tribunal's decision states as follows:

"While we are affirming the order, conscious of our duty under s. 4 of the Act, acting in the best interests of the patient, this Tribunal is concerned that the patient is being treated in St. Teresa's Ward which is outside the centre, without the clinical director's express authorisation".

6. I have set out sufficient detail to make clear the rather nett issue which the court must decide.

7. Mr Adrian Mannering SC for the applicant has accepted immediately that the applicant is a person who is suffering from a mental disorder within the meaning of s. 3 of the Act. In addition he agrees that the applicant is in need of medical treatment which requires his detention for that purpose in the medical ward where he was transferred to from the approved centre at the Mater Hospital. He

also readily accepts that all those under whose care the applicant is both in relation to his psychiatric needs and his medical needs are concerned with the best interests of the applicant as mandated by the provisions of s. 4(1) of the Act. In this respect he refers to what has been referred to as the paternalistic nature of the legislation, but submits that the purpose of the legislation is to put in place measures which protect the rights of the applicant not to be in detention which is not in accordance with the provisions contained in the Act. He submits, correctly in my view, that the fact that everybody concerned in the care and treatment of the applicant is well motivated and concerned to act in the best interests of the patient does not remove or indeed dilute in any way their obligation to adhere strictly to the very specific procedures laid down by the Act, and that where there has been a breach of procedures put in place, that has the effect in the present case of rendering his detention to be not in accordance with law, and that accordingly his release should be ordered. In this regard he has referred to the judgment of Ms. Justice Finlay Geoghegan in *JD v. Director of the Central Mental Hospital*, unreported, High Court, 20th March 2007, and a judgment of my own on *AM v. Kennedy*, unreported, High Court, 24th April 2007.

8. Mr Mannering has placed a great deal of emphasis on the absolute right of a person not to be detained against his will other than in accordance with law. In the present case he points to the uncontroverted evidence that the transfer of the applicant from the approved centre in St. Aloysius's Ward to a hospital ward which is not an approved centre was not, as he states, 'authorised' by the clinical director of the approved centre. I place emphasis on the word 'authorised' because, as I shall make reference to later on, what the section requires is not that the transfer be 'authorised', but rather that the transfer may be 'arranged' by the clinical director. By way of emphasis on the importance of the requirement contained in s. 22(1) of the Act which is in play in the present case, Mr Mannering has referred to the fact that the Oireachtas has gone further in this Act than simply laying down the requirement that the clinical director be part of the decision to transfer the patient from any approved centre, and has provided specifically in s. 67 that no person shall be detained in any place other than an approved centre, and that where there is a contravention of that requirement, *the person carrying on that centre* shall be guilty of an offence, the penalties for which range from a fine not exceeding £1500 or imprisonment not exceeding 12 months on summary conviction, or on indictment to a fine not exceeding £50,000 or to imprisonment for a term not exceeding 2 years or to both. In such circumstances he submits that this Court cannot lightly overlook the fact that the detention of the applicant at the time when this application was made was in a place other than an approved centre, giving rise to an offence under that section, as well as being other than in accordance with the requirement in s. 22 of the Act.

9. Donal McGuinness BL appearing for the Mental Health Tribunal which was by order substituted as a Notice Party to this application in place of the Mental Health Commission has submitted that it is important to note that there is no question arising as to the legality of the Renewal Order under which the detention of the applicant was affirmed following the review by the Mental Health Tribunal, and that the procedures which were invoked to detain the applicant have been correctly observed, and in that respect the applicant has been accorded all the rights to which he is entitled for the protection of his best interests under the Act. He emphasises that it is that order under which he is detained under the Act. He submits that the fact that there has been a failure to comply with s. 22 does not have the effect of rendering that detention unlawful, and submits that s.22 should be viewed as a section which simply enables a person to be transferred to a hospital for medical treatment if that is what is required for the patient. He submits that what is contained in s. 22(3) of the Act serves to validate the applicant's detention in the non-approved centre.

10. Mr McGuinness makes the point also that s. 18(1)(a) of the Act makes no reference to s. 22 when it provides that the Tribunal on reviewing a patient's detention must be satisfied that various sections have been complied with before it affirms an admission order or renewal order. In that regard only sections 9, 10, 12, 14, 15 and 16 are specified, and he submits that the Oireachtas can be seen therefore as not regarding s. 22 as going to the legality of detention. This is a matter to which the Tribunal which sat on the 25th September 2007 to review the applicant's detention has drawn attention to as I have set forth earlier.

11. Paul McGinn BL appeared and made submissions on behalf of the Clinical Director of the Mater Hospital. Submissions were also made on behalf of the Health Service Executive by Carmel Stewart BL. These supported the submissions made by Mr McGuinness.

## Conclusions

12. The first thing to be stated is that there is no doubt whatsoever that all medical personnel looking after the mental and physical health of the applicant are concerned that he is very sick both physically and mentally and that he needs to be detained wherever necessary so that he can be treated appropriately. No suggestion to the contrary is made on his behalf on this application. Nobody doubts that he needs to be detained in his own best interests.

13. Neither is there any suggestion made which seeks to impugn the admission order or the renewal of that order, and neither is it suggested that, the s. 22 point apart, the Tribunal was not correct to affirm the renewal order following its review of that order on the 25th September 2007. In my view the Tribunal was correct in its view that any lack of compliance with s. 22 of the Act by the time the detention of the applicant came before the Tribunal for review on that date was not something which was within its jurisdiction to examine and make findings in relation to. Section 18(1)(a)(i) of the Act is quite clear and specific as to what the Tribunal must be satisfied about before it affirms the order. Section 22 is not mentioned within the sections with which the Tribunal must concern itself. Nevertheless the Tribunal had concerns about the failure to adhere to that section in this case and correctly made a note of that concern in its decision.

14. In the circumstances of this case it was in my view appropriate for the applicant's solicitor to form the view that as the provisions of s. 22 of the Act had clearly not been complied with, the High Court should be asked to enquire into the legality of the applicant's detention. It is not for the solicitor appointed to represent the interests of the patient to ignore the failure to observe the provisions of s. 22 on the basis that she may not have believed that this Court was likely to order his release. That is a matter within the jurisdiction of this Court to decide. To fail to bring the matter to Court for such an inquiry on such a basis would lead to a risk that in some case or cases a patient might remain in unlawful detention without redress, given in particular the vulnerability of many such patients who may not be in a position to themselves instruct their appointed legal representative to apply for an order releasing him or her from detention. Such a situation would tend also to encourage a slack approach to the observance of the requirements of this legislation and this would be an undesirable situation to arise in relation to legislation whose very purpose is to put in place a regime of statutory procedures for the protection of vulnerable persons against involuntary unlawful detention. The protections put in place are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in which the Act is operated. That is not to say that there could never be a case which the High Court would consider ought never to have been made. The Court must always retain the discretion to consider that the defect alleged is of such a trivial and insubstantial nature as to have always been bound to fail.

15. It cannot have been the intention of the Oireachtas when it enacted this piece of legislation that its provisions would have to be acted upon in such a literal way that the best interests of the patient would take second place to those best interests. The Act lays down procedures which protect the patient's fundamental rights, and it is essential that those protections are afforded in all cases. But there may be situations where some deviation from the provisions of the Act will not undermine those protections. To take an

example in the context of s. 22 of the Act, since that is the section under scrutiny in the present application, one could well envisage a case in which a patient has been properly detained under an admission order or renewal order in an approved centre, and suddenly and without any forewarning suffers an acute illness or sustains a serious injury while detained which requires his immediate transfer to a hospital which is not itself an approved centre. In such a circumstance, it would be entirely inappropriate for the personnel in charge of the patient to delay the transfer to hospital on the basis that the clinical director of the approved centre in question was unavailable to 'arrange' for the transfer to that hospital as is the requirement under s. 22. It cannot have been the intention of the legislature when enacting that section that the health of a patient should be potentially jeopardised in this way by his transfer having to await the availability of the clinical director to make arrangements for transfer to hospital. That would be manifestly absurd and contrary to the whole spirit and intention of the Act. Such an example makes it abundantly clear that the purpose of the section is to vest in the clinical director a power to take a necessary step in the interests of the patient. It is helpful also to emphasise the use of the word 'arrange' in the section, and to note that the section does not use the word 'authorise'.

16. In my view, in the present case the transfer of the applicant to St. Teresa's Ward, a step deemed essential by those looking after the applicant, has not rendered his continued detention there for treatment purposes to be unlawful, in spite of the fact that it was not the clinical director of the approved centre who arranged it. The circumstances in which this occurred are completely bona fide. In this case there has been no suggestion that the clinical director was not available to make the arrangements for that transfer, and clearly in those circumstances it would have been better practice if that person made the arrangements, or was at least aware that this was being done. It may well have been simply an oversight in this case. If there had been any evidence that the transfer had not been required for medical reasons, and was done for some other reason such as lack of space in St. Aloysius's Ward, then the Court's view would have to be entirely different since such a transfer would have implications for the fundamental right of the applicant to be detained only in an approved centre. But I am satisfied that in this case that was not the case, and that the transfer to St. Teresa's Ward was properly considered to be required in the best interests of the applicant.

17. In those circumstances I am satisfied that his detention in St. Teresa's Ward remains in accordance with law, and I refuse the order sought.