Neutral Citation: [2015] IEHC 34

THE HIGH COURT

[Record No: 2015/63 SS]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN/

L.B.

Applicant

AND

THE CLINICAL DIRECTOR OF NAAS GENERAL HOSPITAL

Respondent

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 27th January, 2015

Introduction

1. The central issue in this case concerns the adequacy of an examination of the applicant carried out by her general practitioner prior to the making of a recommendation for her involuntary admission to hospital under the provisions of the Mental Health Act, 2001. The applicant says that the doctor had already formed a view of her mental state to the extent that she had prejudged the issue, and that the purported examination was so inadequate as to amount to a fundamental failure to comply with the statutory requirements.

2. Section 9 of the Act provides for an application to be made by, *inter alia*, a relative of the person concerned to a registered medical practitioner for a recommendation that the person be made the subject of an involuntary admission. The application may not be made unless the applicant has observed the person within the previous 48 hours.

3. Section 10 of the Act reads, in relevant part, as follows:

> *(1) 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.*
>
> *(2) An examination of the person the subject of the application shall be carried out within 24 hours of the receipt of the application and the registered medical practitioner concerned shall inform the person of the purpose of the examination unless in his or her view the provision of such information might be prejudicial to the person's mental health, well-being or emotional condition."*

4. An "examination", for the purposes of a recommendation, is defined in s.2 (1) as meaning

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

Background facts

5. It appears that the practitioner in question, Dr. K., has known the applicant and her family for several years. The applicant suffers from Graves' disease and attended Dr. K. on a number of occasions during 2014 with various symptoms. Dr. K. has said that her view is that the applicant commenced showing signs of mental illness from about May of 2014.

First involuntary admission

6. On the 16th November, 2014 the applicant was the subject of an involuntary admission. She believes that her mother and her stepfather brought this about because she had had a "major falling out" with her mother and as a result was "very stressed and upset". Dr. K. had signed the recommendation on that occasion also and the mode of examination was challenged at a hearing before the Mental Health tribunal on the 4th December, 2014. Briefly, the doctor had gone to the applicant's home in the company of the applicant's mother and uncle. The applicant declined to admit her but spoke to her through an intercom.

7. Dr. K's recommendation for involuntary admission was based on her view that the applicant was

> *"Aggressive, making false claims, locking herself in her home away from her family. She is paranoid."*

8. The consultant who signed the admission order recorded the following:

> *"She has persecutory beliefs about mother and family. She is without insight into her illness and does not wish to stay in hospital and is suspicious about treatment."*

9. At the Tribunal hearing, the applicant's solicitor submitted that Dr. K. had not, in the circumstances, carried out a medical examination. In ruling on the matter, the Tribunal said that it was satisfied from the applicant's own evidence that she had a sufficient conversation with the doctor so as to enable the latter to reach a decision as to making a recommendation. However, the admission order was revoked. The treating psychiatrist gave evidence that she was considering her discharge as of that day, and the tribunal concluded that the applicant had recovered in the intervening period to such an extent that, while she had a mental disorder, it did not meet the severity criteria set out in the Act. It was noted that the applicant was agreeable to taking prescribed medication and attending day hospital.

The second admission
10. On the 23rd December, 2014 the applicant's mother contacted the Gardaí expressing concern about her daughter. The Gardaí in turn contacted Dr. K., who requested them to assist her in carrying out an assessment. It appears from the Garda account of events that an arrangement was made to meet the applicant at her home. They attended there with Dr. K., who had arranged for an ambulance to be on standby. However, the applicant was not there. Contact was made with her and it transpired that she was in a local town with her boyfriend. The Gardaí and Dr. K. then went to the town. Dr. K. met with the applicant and her stepfather in circumstances considered in detail below.

Evidence relating to Dr. K's examination
11. According to the affidavits sworn by the applicant and her boyfriend, they were sitting in a car when the Gardaí approached them. The applicant says that she was asked for identification, which she provided. She complains that the Gardaí searched her car, and her boyfriend's person, without justification. She says that the Gardaí then asked her to come with them to the Garda Station as she was "very unwell". She says that nothing had happened during the interaction with the Gardai to give them that impression. However, because she wanted to get out of the public view and because there were five Gardaí present, she went to the station. She says that she did not feel free to do otherwise.

12. The Gardaí say that the applicant was informed in the street that her mother had expressed concern about her health. She was asked would she consent to an assessment by Dr. K. and she said she would. As the weather was very bad, she was invited to have the assessment carried out in the Garda station.

13. It is stressed by the Gardaí that the applicant was not arrested or detained. They say that their involvement was solely to prevent a breach of the peace.

14. The applicant arrived at the Garda station at about 3 o'clock.

15. At the station, the applicant says that she was sitting in a room when her stepfather and Dr. K appeared and stood in the doorway. Her stepfather

> *"…simply said 'the texts L., the texts' and Dr. K. then simply said to me 'you're very unwell L., you're very sick L. ah come on L., ah come on."*

16. The applicant deposes that prior to this she had not seen her stepfather since the 9th November, 2014 and had not seen Dr. K. since the events of the 15th November, 2014.

17. In oral evidence, Dr. K said that she had been contacted by the Gardaí, who told her that there was a concern about the applicant threatening her mother. Dr. K said that she too was concerned as the applicant was not taking her medication and had only once attended the out-patient department since her previous certification. Dr. K. said that she was aware that the applicant had transferred €40,000 from her grand-uncle's bank account to her own without his consent and had also taken out €2,000 in cash.

18. Describing the meeting at the Garda station, Dr. K. said that the applicant did not make eye-contact. The doctor told her that she felt that she was not well and that she should go back to the hospital. The applicant did not pass comment other than to say "Right I'll go." She did not otherwise engage.

19. When asked whether she was in a position to observe the applicant's mental state and mood, Dr. K. said that she was, and that she thought the applicant knew that she was not well and that she did need care. She felt that the applicant was manic.

20. In cross-examination, Dr. K. agreed that she stood in the doorway of the room, with the applicant's stepfather and a Garda, during the conversation. She also agreed that it was not private, but then said that she would like to add that she was "terrified" of the applicant and that so were the members of the applicant's family. The applicant has made threats to her, because of the previous involuntary admission, and she continues to be terrified of her.

21. Dr. K. said that she had observed the applicant interact with the Gardaí for five to ten minutes on the street. She agreed that the applicant had not caused a scene.

22. Dr. K. also agreed that there had not been a lengthy conversation. She said that while some people can be engaged in conversation, the applicant is quite an abrasive person at the best of times.

23. Despite these comments, it should be noted that Dr. K. spoke about the applicant with evident sincerity, describing her as "a beautiful girl", who is "so unwell" and "needs help".

24. Asked what had led her to the conclusion, set out in the form, that the applicant was "unreasonable", Dr. K. said that it was because the applicant was not saying that she was going to change and did not refute the suggestion that she was unwell. However, she went on to say that her view had been based on the applicant's history and what she had been told by the family; the threats to the applicant's mother and the threats to herself.

25. It was put to Dr. K. that the whole premise upon which she had signed the recommendation was based on matters that had occurred prior to the meeting in the Garda Station and that she had pre-determined the issue. Her reply was that this was not quite fair, that the decision of the 23rd could not be taken in isolation from previous events. The family were worried and wondering what might happen over Christmas and whether they would be able to get help quickly enough if she attacked someone.

26. Asked if she had made up her mind before arriving in the Garda Station, Dr. K. said that the ambulance was on standby, but that if the applicant had said different things she would have changed her mind. As it happened, the applicant did not dispute being unwell.

27. At 3.15 pm the stepfather signed an application for a recommendation for involuntary admission, giving as his reason:

> *"L. is not reasonable, making false accusations, threatening family and friends for no reason. Spending money inappropriately. Making unwise personal decisions."*

28. At 3.23 pm Dr. K. signed a recommendation in which she set out the grounds for her opinion as follows:

"Unreasonable. Not in touch with reality. Spending money inappropriately. Threaten her mother with death. Making unwise personal decisions. Making serious significant accusations and threats."

29. It appears that the applicant then went voluntarily in the ambulance to Naas General Hospital.

Admission to hospital
30. Where a recommendation under the Act is received by the clinical director of an approved centre, it is necessary (under s. 14) that the person concerned be examined by a consultant psychiatrist on the staff of the centre as soon as may be. If the psychiatrist is satisfied that the person is suffering from a mental disorder, he or she is to make an admission order.

31. The consultant who signed the admission order in this case examined the applicant on the morning of the 24th December, 2014. She described the applicant's mental condition in the following terms:

"Paranoid psychosis regarding her mother. No insight into her mental illness. Non compliant with medication in community. Threats of harming mother."

32. On the 30th December, 2014 the applicant was examined by an independent consultant psychiatrist who reported in detail what the applicant had told him in relation to a number of issues, her history and the views of a treating psychiatrist. His diagnosis was that she was suffering from

"Bipolar disorder current episode manic".

33. It was his opinion that the applicant required involuntary inpatient treatment for her mental disorder and to prevent further deterioration in her mental state. He considered that future compliance with medication would be doubtful. He formed the view that she presented as a risk to herself by overactivity, disinhibition, spending money foolishly and the formation of inappropriate relationships. He described the overall picture as on highly, if not unequivocally, indicative of major mental disorder.

The Mental Health Tribunal
34. The Tribunal hearing took place on the 9th January, 2015. The applicant was represented by her solicitor, who has made a number of criticisms of the way the hearing was conducted. For present purposes, the significant issue is his assertion that he was precluded from exploring the nature and extent of Dr. K.'s examination. He says that the reason given for this was that the form signed by Dr. K. complied with the requirements of the Act and in particular complied with the definition of examination set out in s.2(1) thereof. The solicitor submitted that there was case-law dealing with the question of the adequacy of a s.10 examination but, he says, the tribunal took the view that in such cases the doctor had been given an opportunity to file an affidavit, but that Dr. K. was not available to give evidence.

35. The Tribunal concluded on this occasion that the applicant was suffering from paranoid psychosis and needed to be treated on an involuntary basis. It therefore decided to renew the admission order.

The evidence of the respondent
36. The Clinical Director of Mental Health Services in the unit where the applicant was admitted, Dr. Donal O'Hanlon, has sworn an affidavit in which he stands over the admission of the applicant.

37. Dr. O'Hanlon refers to the criticisms made of Dr. K.'s examination and makes the following comments:

"I say and believe that although I was not present on this particular examination I would underline that it is not uncommon for examinations like this to be conducted using methods such as observation. Due to a patient's presentation it is not always possible to have a direct interview with them for the purpose of forming a clinical opinion or making a recommendation. In such cases, the medical practitioner involved would rely on their observation of the patient's behaviour and presentation and any collateral information available in forming their opinion.

In this case Dr. K. appears to have been in close contact with the Applicant in the Garda Station and would have been in a position as a medical practitioner to hear and observe her. Indeed some of the exchanges between Dr. K. and the Applicant are described. I believe that Dr. K. would have had sufficient opportunity to examine the mental presentation as well as the mood and behaviour of her patient the Applicant, with whom she was already familiar. Again Dr. K. was of the medical opinion that [the Applicant] was a person suffering from a mental disorder pursuant to the provisions of the 2001 Act. This opinion was based on the fact that [she] was unreasonable and not in touch with reality. [She] was also making unwise personal decisions and making serious accusations and threats including death threats against her mother."

38. Dr. O'Hanlon examined the applicant for the purpose of providing a report to the court in these proceedings. His opinion is that she remains psychotic with marked paranoid delusions concerning her mother and an elated mood that primarily presents as irritability. He considers that she will not stay in hospital as a voluntary patient and would be unlikely to continue with her treatment if allowed to leave. On the other hand, the continued detention and treatment of the applicant is likely to benefit or alleviate her condition to a material extent. His diagnosis is

"Bipolar Disorder Manic with Psychosis (Steroid induced)."

39. It may be necessary to point out here that the applicant had been treated with steroids for her Graves' disease.

The applicant's case
40. On behalf of the applicant, Ms. Sarah Phelan SC submits that there was no valid s.10 examination and that, based on the authority of *S.O. v Clinical Director of the Adelaide and Meath Hospital of Tallaght* [2013] IEHC 132, this was a fundamental flaw that could not be cured by the subsequent admission order. It is submitted that the degree of pre-judgment on the part of the doctor can be gauged from the fact that she had not seen the applicant since the previous month, but nonetheless had an ambulance on standby when she went to see her. When they met, the extent of the doctor's engagement with the applicant was to tell her that she was unwell. Ms. Phelan also adopted to some extent a concern expressed by the court that Dr. K.'s professional judgment may have been affected by the fact that she herself was "terrified" of the applicant as a result of threats made to her.

41. It is also submitted that the circumstances surrounding the arrival of the applicant at the Garda Station amounted to a *de facto* and unlawful arrest.

General principles
42. The following propositions, relevant to this case, are clearly established by the authorities.

43. Where a person detained pursuant to the provisions of the Mental Health Act, 2001 makes a complaint to the High Court that he or she is unlawfully detained, the court should have regard to the overall scheme and paternalistic intent of the Act and to the potential impact on the applicant of release – the Supreme Court (per Kearns J.) in *E.H. v. Clinical Director of St. Vincent's Hospital* [2009] 3 I.R. 774, at pp. 788-790. "Mere technical defects", without more, should not form the basis for an application.

44. The inquiry conducted by the court should not apply the same sort as reasoning that would be applied to a criminal detention – *C. v. Clinical Director of St. Brigid's Hospital* (Supreme Court, 13th March, 2009).

45. However, it is important to bear in mind that the scheme set out in the Act is intended to protect the rights of the individual – *R.L. v. Clinical Director of St. Brendan's Hospital* (Supreme Court *ex tempore* judgment of 15th February, 2008). The best interests of a person suffering from a mental disorder are secured by compliance with the statutory safeguards set out in the Act. Non-compliance with a provision of the Act may be excused where the defect is of an insubstantial nature and does not cause injustice, but a flaw which undermines or disregards the statutory basis for lawful detention under the Act cannot be overlooked. (O'Neill J. in *W.Q. v Mental Health Commission* [2007] 3 I.R. 755).

The requirements of a valid examination under s. 10
46. A recommendation by a registered medical practitioner is an essential part of the process and no person may be involuntarily detained in a psychiatric hospital without such a recommendation. In turn, the recommendation cannot be made unless the practitioner has carried out an examination.

47. No statutory procedure is laid down for the carrying out of the examination, apart from the definition quoted above.

48. In *M.Z. v. Khattak* [2008] IEHC 262, the doctor had, in the first instance, spoken with the applicant's brother, who told him that the applicant suffered from bipolar affective disorder, had not been taking his medication and that the hospital had a bed for him. He then held a conversation with the applicant at the rear of a Garda station, lasting about for about ten minutes while each of them smoked a cigarette. The doctor confirmed in evidence that he had not carried out a mental state examination as such and said that, not being a psychiatrist, he was not aware of what such an examination might entail. He was satisfied that the applicant was elated, was not taking his medication, was suffering from paranoia and needed to go to hospital. He also appears to have been unaware of the statutory definition relating to the examination that he did undertake. He said that he was satisfied to rely on the psychiatrist in the hospital taking in the applicant if he considered that he should do so.

49. The doctor in this case was not in general practice and was not familiar with the applicant.

50. Peart J. expressed disquiet at the informality of the procedure adopted by the doctor, and by the lack of knowledge of the requirements specified in the Act. It appeared that the doctor had relied largely on his experience and "gut instinct". However, Peart J. observed that the examination required by s.10 is not to be equated with the later examination to be carried out by the consultant psychiatrist.

> *"It must, I would have thought, be an examination which is less detailed and thorough, and therefore of shorter duration than one carried out by a consultant psychiatrist following admission, in particular since there is no requirement under the Act that the registered medical practitioner have any particular psychiatric qualification or other expertise."*

51. In the circumstances of the case Peart J. felt that he could not doubt the basis upon which the doctor made his recommendation.

52. In *X.Y. v Clinical Director of St. Patrick's* [2012] 2 I.R. 355, the doctor said that he had been treating as the applicant as her general practitioner for something under a year at the relevant time. After a discussion with members of her family, he attended at a car-park where he knew she would arrive. He did not speak to her but "*examined her through observations*", as a result of which he remained of the view, already held by him, that she had a major mental illness which required hospital treatment.

53. Dealing with the issue as to whether this amounted to an examination within the meaning of the Act, Hogan J. said that the question was "finely balanced". However, having regard to the fact that the Act permits the doctor to dispense with informing the patient that an examination is being carried out in some circumstances, he considered that it followed that observation from a distance could at least in some circumstances constitute a personal examination. This was particularly the case where the practitioner was very familiar with the patient's clinical presentation.

54. Crucially, Hogan J. went on to say:

> *"Beyond expressing sympathy in respect of the enormously difficult situation in which Dr. B. found himself, I think it unnecessary to decide this difficult question. Even if it were to be accepted that Dr. B.'s observations of the applicant on the 20th May, 2012, did not constitute an "examination" in this sense, it is clear that such a failure does not invalidate a subsequent detention under s.14 if this detention is otherwise valid: see the judgment of Feeney J. in the High Court in R.L. v. Clinical Director of St. Brendan's Hospital [2008] IEHC 11, [2008] 3 I.R. 296 and that of Hardiman J. for the Supreme Court in that case (Unreported, Supreme Court, 15th February, 2008)."*

55. The issue in R*.L*. concerned the method by which the applicant in the case had been brought to hospital. Both the High Court and the Supreme Court considered that the alleged breaches of the Act, even if established, could not affect the validity of the admission order made at the hospital. In *X.Y*., Hogan J. held that that reasoning clearly applied to an alleged breach of s.10.

> *"If – as I have held – a valid admission order was made [at the hospital] following an examination of the applicant 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." (Emphasis in the original.)*

56. In a case on the other side of the line, *S.O. v. Clinical Director of the Adelaide and Meath Hospital of Tallaght* [2013] IEHC 132, Hogan J. granted an order under Article 40.4 where the general practitioner, who knew the applicant well, made a conscious decision to sign the recommendation without attempting an examination because of a fear that the applicant would abscond if he saw him. Hogan J., without doubting the doctor's awareness of the facts of the patient's case, held that there had been

*"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."*

57. Hogan J. distinguished his own and Peart J.'s earlier decisions on this basis.

Discussion and conclusions
58. Applying both the general principles outlined above and the authorities relating to the requirements of s.10, I consider that this application must fail.

59. Dealing with the alleged wrongful detention of the applicant by the Gardaí in the first instance, it is quite apparent that the applicant does not allege that they told her that she was obliged to accompany them. The fact that she felt that she did not have a choice does not mean, as a matter of law, that she was under arrest. In my view the likelihood is that she was aware from her previous experience what might be about to happen and, as she said herself, she wanted to get out of the public street.

60. I believe that the argument about pre-judgment on the part of Dr. K. is misconceived. There is no requirement that doctors asked for a recommendation under the Act should leave aside such personal knowledge as they may have of a patient's case, or such information obtained from family members or other parties as they consider to be reliable. To do so would be to leave aside the kind of information that doctors must often take into account in making a clinical finding. They are not to be equated with persons making quasi-judicial decisions – they are medical practitioners being asked to give an opinion on a medical state of affairs.

61. The interaction between the applicant and Dr. K. was indeed short. However, having regard to the doctor's existing knowledge of her medical history; the recent information from her family; the evidence of Dr. O'Hanlon referred to above; and the authorities on the issue, the examination cannot be described as inadequate for the purposes of the section.

62. Although I was concerned, during the hearing, about the potential impact on Dr. K's professional judgment of her own fear of the applicant, I have come to the conclusion that this must be seen as part of the applicant's clinical picture, and the recent history of her illness. The precipitating factor behind the application on the 23rd December, 2014, was the fear on the part of the applicant's family arising from the fact that she had been threatening her mother. (It is noteworthy in this regard that the applicant has not, in her affidavit, made any comment on her stepfather's reference to her text messages.) In the circumstances it is clear that the doctor believed this information and found it consistent with her own experience of the applicant. Having regard to the role played by her in the statutory scheme, I do not believe that this personal experience disqualified her from acting on her views and making the recommendation.

63. Finally, if I am wrong about the foregoing, the authorities make it abundantly clear that, while it is an essential prerequisite to the making of an admission order, the recommendation of the registered medical practitioner is just that – a recommendation, made by a person who may not have psychiatric expertise. Provided that the practitioner carries out an examination of some sort, even if short and informal, the validity of any subsequent detention will fall to be considered by reference to the admission order made by the consultant psychiatrist in the hospital. No issue has been raised in that respect in this case.

64. I therefore refuse the relief sought.