Neutral Citation: [2014] IEHC 58

THE HIGH COURT

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

[2014 No. 192 SS]

BETWEEN/

P.D.

APPLICANT

AND

CLINICAL DIRECTOR, DEPARTMENT OF PSYCHIATRY, CONNOLLY HOSPITAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 10th day of February, 2014

1. The applicant in these Article 40 proceedings, Ms. D., is a 27 year old with a long history of mental illness who is currently detained by the respondent by virtue of a renewal order made on 13th January 2014. Although outwardly the applicant often presents as pleasant and cheerful, she has been presently diagnosed with schizoaffective disorder. She is a vulnerable person who has no real insight into the nature of her condition. Having regard to the circumstances of her medical condition I accordingly made an order pursuant to s. 27(1) of the Civil Law (Miscellaneous Provisions) Act 2008 which prohibited the publication of any details which might identify her.

2. Ms. D. was admitted as an involuntary patient to the Department of Psychiatry, Connolly Hospital on 26th October 2013. A renewal order was made on 13th November 2013. A Mental Health Tribunal then affirmed the admission order and the renewal order on 27th November 2013.

3. A further renewal order was then made on 13th January, 2014, by a consultant psychiatrist. It is not in dispute but that two errors were made in the course of completing this renewal form. First, the wrong part of the form was completed. The consultant filled out the reference to s. 15(2) of the Mental Health Act 2001 ("the 2001 Act") rather than to s. 15(3). Second, the wrong date was inserted, since it refers to (either) 13th or 14th April 2013. Having inspected the original on a number of occasions, I confess that it is hard to say whether the reference is to either 13 or 14. While the figure "4" seems to have been written over the figure "3", both are clearly visible. The reference to "2013" is obviously wrong, since it should be to "2014". The consultant immediately noticed these errors and wrote a brief memorandum to the effect that she hoped that this would not have implications for the subsequent Tribunal hearing.

4. These are entirely pardonable mistakes: which of us through force of habit have not, for example, mistakenly referred in correspondence to the old year having momentarily forgotten that we are now in a new year? Nevertheless, as it is this renewal order which forms the basis of the applicant's current detention, there is no escaping the fact that this order contains these errors in relation to the document which forms the current legal basis of the applicant's detention.

5. The Mental Health Tribunal nevertheless affirmed the applicant's detention pursuant to s. 18(1) of the 2001 Act. It heard evidence from the consultant physician who clarified that she had intended to refer to 14th April, 2014. The Tribunal summarised its reasoning thus:

> "In essence, the Tribunal is of the view that these errors on the face of the document do not affect the substance of the order, in particular given the benefit of the receiving consultant physician's evidence relating to these errors….The Tribunal also formed the view that these errors did not cause an injustice. It is the view of the Tribunal that these errors were mere technical defects which could be cured by the Tribunal: see *EH v. Clinical Director of St. Vincent's Hospital [*2009] IESC 46, [2009] 3 I.R. 771."

6. I fear that I cannot agree with the Tribunal's conclusion. First, the critical point is that by virtue of the structure of s. 18(1) the 2001 Act the Tribunal's task is simply to review the earlier admission or renewal order. Even where the Tribunal affirms such an order, the decision of the Tribunal does not actually *supplant or replace* the earlier order. Thus, for example, on the return to the present Article 40.4.2 inquiry, the certified ground justifying the detention was that the respondent held the applicant pursuant to a renewal order made under s. 15 of the 2001 made on the 13th January 2014. It follows, therefore, that the renewal order itself remains the basis for the detention.

7. Second, nor is this case where the provisions of s. 18(1)(a)(ii) come into play at all. These provisions permit the Tribunal to affirm the renewal order even where there has been a failure to comply with the requirements of ss. 9, 10, 12, 14, 15 or 16 if it is satisfied that "the failure does not affect the substance of the order and does not cause an injustice." Section 18(1)(a)(ii) accordingly enables the Tribunal under certain circumstances to disregard any infirmities which might attach to the renewal order by reason of earlier non-compliance with certain key procedural requirements prescribed by the 2001 Act.

8. This, however, is not quite what has happened here. It is not suggested that there has, in fact, been some *prior non-compliance* with statutory formalities such as might render invalid a renewal order which is *otherwise good on its face*. It is rather a question of whether the order – in this case, the renewal order of 13th January 2014 – is, in fact, good on its face and whether it recites an appropriate legal basis for the applicant's detention.

9. The test for documentary error was recently re-stated by the Supreme Court in *GE v. Governor of Cloverhill Prison* [2011] IESC 41. In this case the issue was whether a notice given to the applicant non-national refusing him leave to land in the State for the purposes of s. 5(2) of the Immigration Act 2003 was valid on its face such as would justify his detention pending his removal from the State.

10. The Supreme Court held that the document was invalid *on its face*, thus rendering the detention unlawful. Denham C.J. re-stated the relevant principle in the following terms:

> "30. The appellant has invoked his right under the Constitution to *habeas corpus*. In enquiring under the Constitution as to his custody the Court must examine the validity of the document of the 2nd August, 2011.
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> 31. A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the Governor of the Prison, or any other, who is holding a person in custody; and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution.
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> 32. In this case the document of 2nd August refers only to s.5(2)(a) of the Immigration Act, 2003…That is insufficient to show jurisdiction. The document is defective because it does not state on its face the reason for the arrest and detention of the appellant. Section 5(2) confers on an officer or member of the Garda Síochána a power of arrest and detention of "a person to whom this section applies". Thus it is necessary to see what, if any, provision of s. 5(1) applied to the appellant. Detective Garda McGovern, in his affidavit, swore that the appellant was "refused leave to land". He thus invoked paragraph (f) of s. 5(1), which was inserted by s. 16(8) of the Immigration Act, 2004. As a result of that amendment, s. 5(1) applies to a non-national who has been refused a permission under s. 4(3) of the Act of 2004, provided that the Garda had the additional suspicion, mentioned in s. 5(1) of the Act of 2003, that the appellant had been unlawfully in the State for a continuous period of three months. Section 4 of the Act of 2004 made new provisions for application for permission to land or to be in the State. Section 4(3) lists, at paragraphs (a) to (k) reasons why a person may be refused such permission. Detective Garda McGovern appears to have relied on three of them: (e) not having a valid Irish visa; (g) not being in possession of a valid passport; (h) having the intention to travel to Great Britain of Northern Ireland. However, it was the fact of having refused permission to land or be in the State, for whatever reason, which triggered the power pursuant to s. 5(2) of the Act of 2003 to arrest and detain. The Detention Order of the 2nd August 2011 should have recited the fact of that refusal by Detective Garda McGovern and that, with reasonable cause, he suspected that the appellant had been unlawfully in the State for a continuous period of less than three months. It was not necessary to state the reasons for that refusal. The appellant had been given those reasons in writing, as was required by s. 4(4) of the Act of 2004. They were open to challenge by judicial review, if there were grounds. However, the defect in the Detention Order was the failure to state that the appellant had been refused permission to land and, as required by s. 5(1) of the Act of 2003, that Detective Garda McGovern had "with reasonable cause suspecte[d]" that the appellant had been "unlawfully in the State for a continuous period of less than three months".
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> 33. As these facts were not on the document of the 2nd August, 2011, this Court released the appellant on the 26th August, 2011."

11. Judged by the standards articulated in *GE*, I find myself coerced to hold that the errors on the face of the document are too significant to admit of any conclusion other than that the renewal order is bad on its face. As the Supreme Court made clear in *GE*, it is of vital importance that any order which provides the legal basis for any form of custody or detention should clearly recite the basis for this on its face. In that case the administrative notice reciting that the applicant had been refused leave to land and providing for his detention pending removal from the State failed to contain certain key recitals required by statute.

12. A similar view had previously been taken by Finlay Geoghegan J. in *JD v. Director of the Central Mental Hospital* [2007] IEHC 100, a case which concerned the validity of a reception order made under the Mental Treatment Act 1945 ("the 1945 Act") immediately prior to the commencement of the 2001 Act. The endorsement in that case extended the applicant's detention "by a further period not exceeding six months", but, as Finlay Geoghegan J. noted, it did not "specify any period for which the order is to be extended." She held that the order was bad on its face, noting that the principles governing whether such an order is bad on its face apply "strictly" where the patient is detained involuntarily under the provisions of legislation such as the either the earlier 1945 Act or the present 2001 Act

13. In the present case not only did the form contain the wrong date, but the incorrect part of the form was filled in. The scheme of s. 15 is that an admission order remains in force for an initial period of 21 days. Section 15(2) provides that a consultant psychiatrist can extend that period of detention for a further three months. However, s. 15(3) enables the consultant psychiatrist to extend that period of detention for a further six months and may be further extended again for further periods not exceeding 12 months. Every such renewal order must, of course, be reviewed by a Mental Health Tribunal under s. 18(1).

14. The recital in the present case is to the wrong sub-section. This, in itself, can have serious legal consequences, because the time periods governing the further renewal of any detention under the 2001 Act (were it to occur) are different depending on whether the renewal order is made under s. 15(2) as distinct from s. 15(3).

Conclusions

15. Given that the renewal order fails *on its face* to recite clearly either the proper legal basis for the detention or the correct date on which the renewal order will expire, I feel bound by the decision in *GE* to hold that the respondent has not clearly established the lawful basis for the detention in the manner required by Article 40.4.2.

16. This conclusion is, in many ways, an unfortunate one since it is the result of the type of routine clerical error to which all of us are prone. It may be that the Oireachtas might well consider amending the 2001 Act to enable obvious clerical errors of this kind to be corrected by means of a form of slip rule procedure, along, of course, with safeguards and external supervision of any changes to an admissions order or renewal order.

17. Nevertheless, as Peart J. noted in *AM v. Kennedy* [2007] IEHC 136, [2007] 4 I.R. 667, 677 "mistakes have legal consequences and cannot simply be erased for the sake of convenience." In that case, as a result of what appears to have been an administrative miscalculation a renewal order expired the day before the order could be considered by a Mental Health Commission. Peart J. held that the purported review of that order by a Mental Health Commission on that following day was ineffective in law, so that the applicant's further detention was held to be unlawful. While that case did not, as such, concern an order which was bad on its face, it shows a judicial approach to the construction of documents required by statute which have implications for personal liberty.

18. In these circumstances, I feel that there is no alternative but to hold that the applicant's detention under the 2001 Act is not in accordance with law since the document which forms the basis for that detention is not good on its face.

Postscript

19. I should record that in the immediate aftermath of the delivery of this judgment the respondent did not seek to argue that the release of the applicant should be delayed. In these circumstances it was not necessary to consider the implications of the Supreme Court's decision in *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 1 regarding the question of the possible delayed release of an applicant in such circumstances. I accordingly directed the immediate release of the applicant in accordance with Article 40.4.2 of the Constitution.