Neutral Citation Number: [2007] IEHC 184

THE HIGH COURT

Record Number: 2007 No. 636 SS

IN THE MATTER OF AN INQUIRY PURUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND, AND IN THE MATTER OF THE MENTAL HEALTH ACT, 2001

BETWEEN

R.W.

APPLICANT

AND

CLINICAL DIRECTOR OF ST. JOHN OF GOD'S HOSPITAL, STILLORGAN, COUNTY DUBLIN, HEALTH SERVICE EXECUTIVE

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 22nd day of May 2007

1. This is an application brought on the applicant's behalf for an order that he be released from detention of the first named respondent on the basis that his detention there has not been in accordance with law since the 17th April 2007.

2. I should say at the outset that at the commencement of this application before me yesterday, an application was made to strike out this application as against the second named respondent, the Health Service Executive on the basis that the applicant is not detained by that body, but rather by the first named respondent only. An affidavit filed on behalf of the Health Service Executive has stated that it provides funding only for the first named respondent and has no role in the management thereof, or in any administrative or clinical decisions made therein. I acceded to this application and have made an order striking out the application against the second named respondent. Hereafter I shall refer to the first named respondent as "the respondent".

3. At the hearing of this application before me yesterday, the respondent has certified that the basis of his detention is a renewal order pursuant to Section 15 of the Mental Health Act 2001 ("the 2001 Act") dated 23rd April 2007, which detention was affirmed upon review thereof by a decision of the Mental Health Tribunal dated the 10th May 2007.

4. Ms. Bronagh O'Hanlon SC on the applicant's behalf submits, however, that the said renewal order made on the 23rd April 2007 was of no effect since in her submission the previous order under which he was held lapsed on the 17th April 2007, and nothing which occurred before the Tribunal on the 10th May 2007 served to lawfully detain him between the 17th April 2007 and the 10th May 2007. She submits that the so-called transitional provisions contained in s. 72 of the 2001 Act were not properly complied with.

5. Bernadette Kirby BL for the respondent, and Cian Ferriter BL who has appeared and made submissions on behalf of the Mental Health Tribunal and the Mental Health Commission have urged to the contrary, and that all the relevant provisions have been fully complied with and that the applicant's detention is in accordance with law.

Background

6. The applicant was first detained by the respondent pursuant to an order made on the 25th October 2005 pursuant to the provisions of s. 184 of the Mental Treatment Act, 1945. On that date an application was made under that section by a sister of the applicant to have the applicant received as a temporary patient and as a chargeable patient. Section 184 of the 1945 Act provided as follows:

> "184.—(1) Where it is desired to have a person received and detained as a temporary patient and as a chargeable patient in an approved institution maintained by the mental hospital authority for the mental hospital district in which such person ordinarily resides or an approved institution in which temporary patients of such authority may, in pursuance of an arrangement made under section 102 of this Act , be received, application may be made in the prescribed form to the person in charge of such institution for an order (in this Act referred to as a temporary chargeable patient reception order) to have such person received and detained as a temporary patient and as a chargeable patient in such institution."

7. On that application two registered medical practitioners examined the applicant and certified that he was suffering from a mental illness and that he required for his recovery not more than six months suitable treatment and that on account of that illness was unfit for treatment as a voluntary patient. An order was made that he be "received and detained in [the respondent hospital] as a temporary patient and as a chargeable patient". On the 25th April 2006 that detention was extended for a further period of six months as permitted under that Act, and on the 25th October 2006, yet another six month period of detention was authorised. That period of detention would naturally expire on the 25th April 2007.

8. In the meantime, Part II of the 2001 Act came into operation on the 1st November 2006. In order to continue the lawfulness of his detention into the regime established under the 2001 Act, it was necessary for the respondent to comply with the transitional provisions contained in s. 72 of the 2001 Act for this purpose. The provisions of s.72 relevant to the present application provide as follows:

> 72.—(1) Subject to the provisions of this section, where immediately before the commencement of Part 2, a person stood detained under section 171, 178, 184 or 185 of the Act of 1945*, he or she shall be regarded for the purposes of this Act as having been involuntarily admitted under that Part to the institution in which he or she was so detained.*
>
> (2) In the case of a person who immediately before such commencement stood detained under section 184 or 185 of the Act of 1945, his or her treatment and *detention shall be regarded as authorised by virtue of this Act until the expiration of the period during which he or she may be detained pursuant to the said section 184 or 185 as may be appropriate.*
>
> (3) In the case of a person detained under section 171 or 178 of the Act of 1945, his or her treatment and detention shall be regarded as authorised by virtue of this Act for a period not exceeding 6 months after the commencement of this section.
>
> (4) *The detention of a person referred to in subsection (2) or (3) shall be referred to a tribunal by the Commission before the expiration of the period referred to in subsection (2)* or (3), as may be appropriate, and the *tribunal shall review the detention as if it had been authorised by a renewal order under section 15 (2).*
>
> (5) As soon as may be after the commencement of this section, the clinical director of the institution concerned shall furnish the Commission with particulars of the persons detained in the institution under the provisions of the Act of 1945."

(my emphasis)

9. What happened in the present case is that following the commencement of Part II of the 2001 Act on the 1st November 2006, and in accordance with s. 72 (5) of the Act, the clinical director of the respondent hospital completed a Form 24 containing particulars of the applicant's detention and furnished same to the Mental Health Tribunal. This is what was required to be done under that section. That form indicated that the applicant's detention commenced on the 25th October 2005 and that the detention order under which he was being held was due to expire on the 25th April 2007. As is evident from the provisions of s. 72(2) of the Act that detention is "regarded as authorised by virtue of this Act until the expiration of the period during which he or she may be detained".

10. The next event which occurred was that on the 27th March 2007 the Mental Health Tribunal sat and reviewed the applicant's detention, and, following that review, affirmed the order detaining the applicant. It will be seen from s. 72(4) of the 2001 Act that the detention of a person in the position of the applicant, coming within s. 72(2) of the 2001 Act, and whose detention under s. 184 of the 1945 Act is therefore "regarded as authorised" under the new Act, must be referred by the Mental Health Commission to a Mental Health Tribunal before the expiration of that detention (i.e. in the present case the 25th April 2007), and that tribunal must review the detention "as if it had been authorised by a renewal order made under s.15(2) [of the 2001 Act]".

11. In other words the detention is, for the purpose of the transition arrangements, *to be regarded as* being on foot of an admission order under s. 14 of the new Act and whose period has been extended under s. 15(2) of the new Act. In such a case, the provisions of s. 17 apply which require the Commission to refer the admission order or the renewal order to a Mental Health Tribunal for review, and take certain other steps such as appoint a legal representative to represent the patient, and direct an examination of the patient as set forth in that section.

12. At any rate the Tribunal sat on the 27th March 2007, being a date before the expiration of the order detaining the applicant *which was due to expire on the 25th April 2007*, and, in compliance with s. 18 (1) of the 2001 Act, having satisfied itself that the applicant was suffering from a mental disorder, that the provisions of sections 9, 10, 12, 14, 15 and 16, where applicable, were been complied with, or if there had been a failure to comply with any such provision, that the failure did not affect the substance of the order and caused no injustice, affirmed the order.

13. Since the order detaining the applicant was due to expire on the 25th April 2007, a renewal order was made pursuant to the provisions of s. 15 of the 2001 Act on the 23rd April 2007. That renewal order survives for a period of 21 days only pursuant to the provisions of s. 15(2) of the Act, unless a review of same is completed before the expiration of that 21 day period. Such renewal shall be for not more than three months, unless that period is in turn, and as provided for in s. 15(3) of the Act, further extended. In the case of the applicant, the renewal order under the new Act was made on the 23rd April 2007, and therefore had to be reviewed not later than the 14th May 2007. In fact it was reviewed on the 10th May 2007.

14. In all of these circumstances the respondent submits that it has complied with all the requirements of the transitional provisions contained in s. 72 of the 2001 Act, that the applicant has been afforded all the rights to which he is entitled where his detention under the old Act is to be regarded as being one under s. 15 of the new Act, and that since the renewal order was made well before the expiration of the previous order, and was reviewed on the 10th May 2007, again well before the expiration of the twenty one day period, his detention is in accordance with law.

15. Ms.O'Hanlon on behalf of the applicant seeks to urge a different interpretation of the transitional provisions. The point made by her is that when the Tribunal on the 27th March 2007 made the order affirming the detention of the applicant, the procedures to be followed are those set forth in sections 15, 16, 17 and 18 of the 2001 Act since the applicant's original detention under s. 184 of the 1945 Act is to be regarded as detention under s. 15(2) of the 2001 Act. In those circumstances she submits that when the Tribunal made its order on the 27th March 2007, that order had a shelf-life of only 21 days from that date as provided by s. 15(2) of the Act. In those circumstances, following the making of that order, a review under s. 18 of the 2001 Act ought to have taken place on or before the 17th April 2007, and since it did not the detention of the applicant became unlawful thereafter, and was not cured by the review which tool place on the 10th May 2007.

16. In my view, the applicant's submissions are based upon a misunderstanding of the meaning to be given to the phrase "regarded as" contained in s. 72 (2) of the 2001 Act, and therefore the nature of the order for detention made by the Tribunal on the 27th March 2007. It would appear to me that the applicant is submitting that the order made on the 27th March 2007 is itself an admission order or a renewal of an admission order and therefore one lasting only for 21 days thereafter unless renewed following review as provided.

17. Forgetting for a moment the necessity for and relevance of the transitional provisions in s. 72 of the 2001 Act, an admission order is provided for in s. 14 of the Act. That occurs where following examination by a consultant psychiatrist an order is made to detain the patient. That is an admission order. In s. 2 of the Act, an admission order shall be construed in accordance with section 14 of the Act. Such an order may be renewed under s. 15 (2) and (3) of the Act.

18. Once such an admission order is made, the provisions of sections 15, 16, 17 and 18 must be followed, and this includes the requirement under s. 18(2) that the admission order (or renewal order made under s. 15) must be reviewed and decision made by a Mental Health Tribunal not later than twenty one days after it is made.

19. Section 14 and the sections thereafter which contain procedures which must be followed, must be seen first of all as making provision for new admissions following the 1st November 2007. Clearly the applicant is not a person who was not detained for the first time under an admission order made under section 14 or any renewal thereof. He has been detained since 25th October 2005 under s. 184 of the 1945 Act. Section 72 of the 2001 Act must be seen as making specific provision for such a case where it was necessary to carry over the detention ordered under s. 184 into the new scheme without the necessity to bring his detention temporarily to an end and re-commence the process of detaining him under the 2001 Act. That is why these so-called "transitional provisions" were included in the new Act. In my view they must be seen as operating in a sense independently of any order actually made under section 14 (or s. 15 in the case of a renewal thereof), even though some of the provisions of sections 15 et seq. will be applied.

20. As I have stated already, it is provided by s. 72(1) that a person detained under s. 184 of the old Act "shall be regarded for the purposes of this Act as having been involuntarily admitted under [Part II]". Section 72(2) goes on to state absolutely clearly that such detention "shall be regarded as authorised …… until the expiration of the period during which he or she may be detained pursuant to the said section 184…". That must mean that the applicant's detention was authorised until the 25th April 2007, unless steps were taken to continue it thereafter.

21. The fact that the section states that the applicant's detention under s. 184 of the old Act "shall be regarded" as an involuntary

admission under Part II of the new Act, does not mean that he has been admitted under the provisions of section 14 and his detention has been renewed under section 15. This is clear in my view because of the provisions of s. 72(2) of the 2001 Act which clearly states that his detention is regarded as authorised until the expiration of the period allowed under the s. 184 detention order. That period has not been substituted in any way by anything which might be provided for in sections 14, 15, 16, 17 or 18. The use of the phrase "shall be regarded" is a convenient way of ensuring that as provided for in s. 72(4) of the 2001 Act, the patient's detention under the old Act can nevertheless be made the subject of the safeguards built into the new Act by means of the review provisions.

22. In the present case the applicant's detention under s. 184 of the old Act endured by virtue of the provisions of s. 72(2) of the new Act until the 23rd April 2007. There is no ambiguity or lack of clarity about that section. It is absolutely clearly stated that this is so. Subsection (4) thereof then states what is to occur. What was to occur in the case of the applicant was that his detention had to be referred by the Commission to the Tribunal not later than the 25th April 2007, so that the Tribunal could review that detention "as if it had been authorised by a renewal order under section 15(2). That does not mean that it was such a renewal order. It means what it says, namely that the Tribunal must conduct its review in the same manner as if it was such a renewal. In other words it must afford the applicant the same rights, and conduct itself in the same way, as it would in the case of a renewal order made under section 15(2). There is no doubt that this is what occurred in the present case. The only way in which the Commission can refer the matter on to the Tribunal in accordance with its obligations under s. 72 (4) is under the procedure set forth in s. 17 of the Act. But the invocation of the procedures of section 15 et seq. does not convert the order detaining the applicant into an admission order made on the 27th March 2007, requiring to be reviewed not later than twenty one days thereafter. That would fly in the face of section 72 (2).

23. By simply *regarding* the s. 184 detention as being a detention under s. 15 (2), the Commission becomes empowered to refer the matter to the Tribunal for the purpose of a section 18 review. In this way the transitional provisions ensure that a person detained previously under the old Act receives all the benefits under the new Act that a person being detained under the new Act for the first time will receive.

24. I am satisfied that the relevant provisions have been complied with, and that the detention of the applicant is in accordance with law.