THE COURT OF APPEAL

CIVIL

NO REDACTION NEEDED **UNAPPROVED**

Neutral Citation Number [2021] IECA 309

[2021 No. 180]

The President

Kennedy J.

Ní Raifeartaigh J.

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

BETWEEN

RGF

APPLICANT

AND

THE CLINICAL DIRECTOR, DEPARTMENT OF PSYCHIATRY, MIDLAND REGIONAL HOSPITAL, PORTLAOISE

RESPONDENT

JUDGMENT of the President delivered (electronically) on the 19th day of November 2021 by Birmingham P.

1. On 30th July 2021, on foot of an appeal from a decision of the High Court (Hyland J.) of 19th July 2021, this Court refused to order the release of the applicant pursuant to Article 40 of the Constitution, and dismissed the appeal. We stated then that we would deliver a written judgment outlining the reasons for our decision and this we now do.

Background Events

2. The applicant was detained on 21st May 2021 in the Drogheda Department of Psychiatry on foot of an admission order. The order had been made pursuant to s. 24 of the Mental Health Act 2001 ("the 2001 Act") on the ground that the applicant was suffering from a mental disorder.

3. On 25th May 2021, he was transferred to the Department of Psychiatry in Midland Regional Hospital, Portlaoise. The admission order was affirmed by a Mental Health Tribunal on 10th June 2021, and a renewal order of the same date, made pursuant to s. 15(2) of the 2001 Act, extended the detention of the applicant for a further period of three months.

4. The appeal focuses on events that occurred on 30th June 2021. On that day, a Mental Health Tribunal ("the Tribunal") convened and revoked the renewal order, pursuant to s. 18(1)(b) of the 2001 Act, on the ground that there were defects in the statutory procedures; the applicant's name and date of birth, as they appeared in the documentation, were incorrect.

5. The applicant was notified of the decision of the Tribunal when it was read to him in full at 2.10pm that day. The staff of the department were informed by the applicant's solicitor of their client's intention to leave after a conversation with him at 2.16pm.

6. At 3.20pm, while waiting for his wife to collect him, the applicant was detained by a consultant psychiatrist (his treating psychiatrist). The consultant psychiatrist certified that he had examined the applicant at 3.30pm, and at 3.35pm, certified that he was suffering from a mental disorder within the meaning of s. 3(1)(b)(i) and (ii) of the 2001 Act. Five minutes later, at 3.40pm, a second consultant psychiatrist certified to the same effect. The proceedings before the High Court and before this Court centre on the period of approximately 70 minutes which elapsed between the applicant being notified of the decision of the Tribunal that it had revoked the renewal order, and of his further detention, purportedly pursuant to s. 23(1) of the 2001 Act.

7. On 1st July 2021, an inquiry pursuant to the provisions of Article 40.4.2° was directed by the High Court (Meenan J.) and made returnable for the morning of 2nd July 2021. On that date and with the agreement of all parties, the High Court (Hyland J.) listed the hearing of the inquiry for 8th July 2021, with a view to providing an opportunity for written submissions to be filed. In a written judgment delivered on 19th July 2021, the High Court found that the applicant's detention was in accordance with law and it refused to direct his release.

8. The particular statutory provision in issue is s. 23(1) of the Mental Health Act 2001 (as amended). It provides as follows:

> "Power to prevent voluntary patient from leaving approved centre.
>
> 23.—(1) Where a person (other than a child) who is being treated in an approved centre as a voluntary patient indicates at any time that he or she wishes to leave the approved centre, then, if a consultant psychiatrist, registered medical practitioner or registered nurse on the staff of the approved centre is of opinion that the person is suffering from a mental disorder, he or she may detain the person for a period not exceeding 24 hours or such shorter period as may be prescribed, beginning at the time aforesaid."

9. Section 24 of the 2001 Act is also of relevance:

> "(1) Where a person (other than a child) is detained pursuant to section 23, the consultant psychiatrist responsible for the care and treatment of the person prior to his or her detention shall either discharge the person or arrange for him or her to be examined by another consultant psychiatrist who is not a spouse, civil partner or relative of the person.
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> (2) If, following such an examination, the second-mentioned consultant psychiatrist—
>
> (a) is satisfied that the person is suffering from a mental disorder, he or she shall issue a certificate in writing in a form specified by the Commission

stating that he or she is of opinion that because of such mental disorder the person should be detained in the approved centre, or

(b) is not so satisfied, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that the person should not be detained and the person shall thereupon be discharged.

(3) Where a certificate is issued under subsection (2)(a), the consultant psychiatrist responsible for the care and treatment of the person immediately before his or her detention under section 23 shall make an admission order in a form specified by the Commission for the reception, detention and treatment of the person in the approved centre.

[…]"

10. Section 2 of the 2001 Act sets out the relevant interpretations and two of the definitions that appear there are of particular significance:

"'Voluntary patient' means a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order…

'Treatment', in relation to a patient, includes the administration of physical, psychological and other remedies relating to the care and rehabilitation of a patient under medical supervision, intended for the purposes of ameliorating a mental disorder."

Discussion

11. At first blush, one's reaction to a suggestion that the applicant might be regarded as a voluntary patient would likely be to dismiss the suggestion by making the point that he certainly was not a voluntary patient in the ordinary sense, since he was showing every desire to leave the premises and there was no question of him wanting to be there. However, the

statutory definition of voluntary patient provided makes clear that any such approach would be erroneous. It would also involve ignoring the fact that the whole *raison d'être* for s. 23 of the 2001 Act is to provide a basis for preventing voluntary patients who wish to leave from leaving an approved centre.

12. The operation of s. 23 of the 2001 Act and the concept of a voluntary patient has been considered by the superior courts on a number of occasions, the first of which was in the case of *EH v. Clinical Director of St. Vincent's Hospital* [2009] 2 IR 774. In that instance, the applicant had been an involuntary patient, but the renewal order was subsequently revoked. The applicant then remained as a voluntary patient for twelve days until she sought to leave, and, at that point, was detained pursuant to ss. 23 and 24 of the 2001 Act. An argument was advanced that the patient did not have the capacity to decide to stay in the centre as a voluntary patient, and that therefore, s. 23 could have no application as it only applied to voluntary patients. Kearns J. (as he then was), in the Supreme Court, observed that the 2001 Act was designed with "the best interests of persons with mental disorder in mind". He proceeded to quote from O'Neill J., the judge who had dealt with the matter in the High Court, who had said that, in considering whether the applicant was capable of understanding her status as a voluntary patient, the fact that she was suffering from a mental disorder requiring treatment had to "inform and influence" the manner in which the Court resolved the issues arising in the inquiry.

13. In the decision of the High Court (*EH v. Clinical Director of St. Vincent's Hospital* [2009] IEHC 69), O'Neill J., in a passage which was quoted with approval by Kearns J. in the Supreme Court, said of the definition of voluntary patient:

> "70. … It would seem to me that the definition was cast in the wide terms used in order to provide for the variety of circumstances wherein a person is in an approved centre receiving care and treatment, but not subject to an admission order or a renewal

order, including, in my view, the type of situation which has indeed arisen in this case, namely, where a detention pursuant to an admission order or a renewal order breaks down, but where the patient is suffering from a mental disorder and receiving care and treatment. I say this, bearing in mind the clear linkage between the definition and sections 23 and 24, which are designed to cater *inter alia*, for mishaps or unexpected developments which result in there being no admission order or renewal order in respect of a patient which is suffering from a mental disorder which requires treatment as an involuntary patient and who attempts to leave the approved centre."

14. These observations of O'Neill J., approved on appeal by Kearns J., have an obvious significance in the context of the present case. In the course of his own judgment, Kearns J. said the following in relation to "a voluntary patient":

"[41] … It does not describe such a person as one who freely and voluntarily gives consent to an admission order. Instead the express statutory language defines a 'voluntary patient' as a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order. This definition cannot be given an interpretation which is *contra legem* …

[42] Any interpretation of the term in the Act must be informed by the overall scheme and paternalistic intent of the legislation as exemplified in particular by the provisions of ss. 4 and 29 of the Act. Such an approach to interpretation in this context was approved by this court in the course of a judgment delivered by McGuinness J. in *Gooden v. St. Otteran's Hospital (2001)*[2005] 3 IR 617 when, in relation to s. 194 of the Mental Treatment Act 1945, she emphasised that a purposive construction of the section was appropriate …"

15. The second of the trio of cases is that of *KC v. The Clinical Director of St. Loman's Hospital* [2013] 1 IR 772. The situation under consideration there was that the patient had

been treated on a voluntary basis in St. Loman's Hospital from 24th April to 7th June 2013 before an application was made under s. 9 of the Mental Health Act 2001, which was followed by an admission of the applicant on an involuntary basis pursuant to s. 14 of the Act. This approach was taken in circumstances where the applicant was not seeking to leave, but would not consent to any treatment, and because she had given no indication of wanting to leave the centre, s. 23 could not be invoked. The relevance of s. 23 is that it was argued that the s. 14 procedure could not be used in respect of a voluntary patient because s. 23 was the only way that a voluntary patient in a hospital could be the subject of an involuntary admission. In the course of his judgment, Hogan J. referred to certain aspects of s. 23 and the concept of a "voluntary patient". He noted that Part 2 of the Mental Health Act 2001 draws a distinction between involuntary and voluntary admissions to an approved centre. He described the purpose of ss. 23 and 24 as follows:

> "[19] … The sub-section rather endeavours to cater for the special case of where the voluntary patient who requires on-going treatment may seek to leave the hospital, possibly in an unplanned and abrupt manner. If, therefore, a voluntary patient could leave at a moment's notice, it could mean that a person who might well be in need of urgent treatment could re-enter the community before the approved centre could put in place the necessary procedures enabling the patient to be admitted on an involuntary basis.
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> [20] The Oireachtas has thereby sought to cater for this special case by allowing for the temporary detention of the patient in those circumstances. One cannot, however, infer from this special provision dealing with a particular set of circumstances that an application for the involuntary admission of a patient currently staying voluntarily in the approved centre and who has not expressed a wish to leave is thereby excluded."

16. The final case is that of *PL v. The Clinical Director of St. Patrick's University Hospital* [2019] 2 IR 266. Both parties to this appeal place reliance on it and both draw comfort from it. The background to this case is that the applicant was initially admitted to the hospital without reference to the statutory regime available under the Acts. He was an inpatient from 26th August to 13th September 2011, when he attempted to leave the hospital. At that point, the provisions of s. 23 of the Mental Health Act 2001 were invoked. On 14th September 2011, an admission order was signed and that order was renewed on 27th September 2011, and confirmed for a three-month period. On 12th October 2011, having examined the applicant and expressed the view that he was no longer suffering from a "mental disorder" as defined in the Act, a consultant psychiatrist revoked the renewal order pursuant to s. 28(1). However, the applicant was not discharged in the ordinary sense of the term at that point; he was not invited or allowed to leave the hospital, and instead remained in a locked ward, not free to leave. When his solicitor attended on him in hospital, the applicant could not leave the locked ward without permission, and when permission was sought, it was refused until a risk assessment had been conducted by another psychiatrist.

17. It seems that the applicant's condition worsened on 21st November 2011, and he attempted to leave the hospital by jumping over the garden wall on a number of occasions. At that point, a decision was made, during the afternoon of 22nd November 2011, to invoke the provisions of section 23. However, the question with which the Court of Appeal was concerned was whether there was a legal basis to restrain the applicant from leaving the hospital on 21st November 2011, in circumstances where, at that point, s. 23 of the Act had not been invoked. Referring to this case in her judgment in the present matter, Hyland J. made the point that it was important to understand that the decision to invoke s. 23 the following day (22nd November 2011) was not the subject of the challenge. Rather, s. 23 was discussed by the Court of Appeal because it had been argued by the hospital that it was

implicit in s. 23 that hospital personnel could refuse to permit a voluntary patient to leave in order to persuade them to stay, or to obtain an initial assessment, and that this could be done without having to invoke the provisions of section 23.

18. In the course of her judgment in the High Court, Hyland J. pointed out that Hogan J. had gone on to note that sections 23 and 24 of the 2001 Act gave the hospital's medical and nursing personnel the power to effect a short-term detention of a voluntary patient who expressed a desire to leave the hospital for a period not exceeding 24 hours. However, he pointed out that s. 23 did not contain a provision for the interim detention of a patient pending examination as to whether he/she was suffering from a mental disorder. He noted that the language of s. 23 was deliberately broader and more extensive than that of s. 24, being designed to deal with short-term exigency, and may be exercised by a broader range of medical and nursing personnel and without the need for prior examination of the voluntary patient's mental health status. He concluded that absent the exercise of the s. 23 power, he could not agree that the decision to restrain the applicant from leaving the hospital on 21st November 2011 was a lawful one, as any other conclusion would empty s. 23 of all real meaning and undermine a careful and vital safeguard designed to protect the personal liberty of the voluntary patient.

19. In what Hyland J. felt was an important passage for the purpose of this case, Hogan J. had noted at paragraph 57 of his judgment in *PL*:

> ". . .It must be recalled that voluntarism remains a cornerstone of our system . . .
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> 58. There are, of course, exceptions provided for by statute and, indeed, the 2001 Act is itself one of the principal exceptions to that rule. But the legislative quid pro quo is always that compulsory medical treatment and detention is attended by appropriate safeguards."

Ultimately, Hogan J. declared the detention unlawful on the basis that any other conclusion would "not only be entirely at odds with the rule of law based-democracy envisaged by Article 5 of the Constitution, it would also contradict the fundamental constitutional premise of Article 40.4.1 of the Constitution, namely, that the deprivation of personal liberty must be 'in accordance with law.'"

20. Overall, it seems clear to me, having reviewed these authorities, that the fact that on the afternoon of 30th June 2021, the applicant did not want to be in Portlaoise Hospital and was expressing the desire to leave, did not preclude him from being considered a "voluntary patient".

21. In those circumstances, it seems to me that the live question in this case is whether, during the period between the making and notification of the order of the Tribunal and the re-detention, the applicant was being treated. It is important to stress that what requires consideration is whether the applicant was being treated, and not whether the applicant required, or was in need of, or would benefit from treatment.

22. It is therefore necessary to consider what information we have as to what was occurring during the critical period, *i.e.* the period after the applicant was informed of the decision of the Tribunal. The matter is dealt with in the course of an affidavit sworn by the applicant on 5th July 2021. The applicant's account is as follows (at para. 3):

> "On 30 June 2021, following the revocation of the Renewal Order by the Mental Health Tribunal I spoke with my Solicitor by telephone at 2.16 pm approximately. He informed the nursing staff of my intention to leave the hospital following the Tribunal decision and, following the call, I informed the staff nurse of my intention to leave the department. I was asked to speak with my consultant psychiatrist before I left and, having packed my bags, I did so a few minutes later. Over the course of an approximately 20-minute meeting with him, in the presence of a staff nurse, I was

> asked several times to stay in the hospital as a voluntary patient; each time I informed him that I did not want to stay, I would not stay and that I was leaving. I told him I would not stay in the department and that I wanted to go, the Tribunal had lifted the order and as far as I was concerned I could go and I was leaving. At the meeting, my consultant psychiatrist agreed that I could go. He asked me if I would take medication if I was to leave and I told him I would as I knew the hospital would require this and it would help me stay out of hospital."

Later in the course of the affidavit, he comments (at para. 6):

> "At no time during the period between the Tribunal decision and being told that I was being detained was I given or did I take any treatment. At no time did I agree to remain in the hospital as a voluntary patient. At all times I was clear that I did not want to stay, I would not stay and that I was leaving."

23. The respondent contends that the applicant was receiving treatment during the relevant period.

24. In my view, what seems to have been sustained efforts by the consultant psychiatrist, in the presence of the staff nurse, to persuade the applicant to remain in the hospital, together with exploring the issue of whether he was prepared to take his medication outside a hospital setting, was of considerable medical significance, and, in my view, met the threshold of the administration of treatment. Let us suppose that the situation had been handled differently, and that once the applicant had expressed a wish to leave, there had been no further engagement with him and he had been left alone in the reception or public area of the unit to await the arrival of his wife to collect him. Suppose then, having left the hospital, that he acted out in a way that was feared, what would the reaction be? Would the authorities in Portlaoise and the medical professionals there not be subject to justified criticism for failing to try to persuade the applicant to remain in hospital when the strong view of the medical

professionals was that hospitalisation was required? If no efforts were made to explore whether his intentions were to continue to take medication and to impress upon him the importance of doing so, would those who had failed in this regard not be the subject of justified criticism? Would the view not be that those who, in this scenario, had failed to utilise the time available to import professional advice and to urge the applicant to act in accordance with the advice, had acted in dereliction of their professional responsibilities?

25. Had the situation been that in the period of time between the decision of the Tribunal and the arrival of the applicant's wife to collect him, there had been no engagement with him and he had simply been left alone to await the arrival of his wife, my decision would be different. However, in the circumstances, I am satisfied that what happened during this period saw the applicant being provided with important professional advice. In my view, the giving of that advice, alongside the urging of the applicant to follow that advice, meant that during this relevant period he was receiving patient treatment; he was doing so as a voluntary patient within the meaning of the Mental Health Act 2001; and he was present in the approved centre at a time when he was not the subject of an admission order or a renewal order.

26. In these circumstances, I would uphold the decision of the High Court and dismiss the appeal.

Kennedy J:

I have had the opportunity to read the judgment delivered by the President and I agree with the conclusions reached therein.

Ní Raifeartaigh J:

I have also read the judgment of the President and I agree with the decision.