THE HIGH COURT

[2021] IEHC 447

[Record No. 2020/9 JR]

BETWEEN

ADRIAN SWEETMAN

APPLICANT

AND

THE CLINICAL DIRECTOR OF ST. MICHAEL'S PSYCHIATRIC UNIT AND THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 2nd day of July, 2021

Introduction

1. This is a contested leave application, in which the applicant, who is representing himself in these proceedings, seeks leave to challenge an order made by a doctor in the first respondent's hospital to detain him in the psychiatric unit of the hospital on 26th September, 2019; which order was made pursuant to s.23 of the Mental Health Act 2001 (as amended).

2. The applicant had been admitted to the psychiatric unit in the hospital as a voluntary patient, at approximately 14:30 hours on 26th September, 2019. The order detaining him in the unit as an involuntary patient was made at approximately 03:00 hours on 27th September, 2019.

3. The applicant was reviewed by a consultant psychiatrist at approximately 10:30 hours on the morning of 27th September, 2019, as required by s.24 of the 2001 Act. That doctor reached the diagnosis that he was suffering from an emotional unstable personality disorder, but that he did not require to be detained in the hospital. The applicant was discharged home at approximately 11:00 hours.

Background

4. The facts in this case are not greatly in dispute between the parties. The applicant had had previous inpatient treatment in the psychiatric unit in 2012, due to mental health difficulties connected with substance abuse. He stated that following that period of treatment, he did not have any further mental health difficulties up to 2019.

5. The applicant stated that on 12th March, 2019, he was involved in a road traffic accident in which he suffered a serious injury to the femur of his left leg. He was in very severe pain as a result of that injury. He was required to take strong pain killing medication. He was not able to work. He developed psychiatric difficulties in the form of very low mood as a result of his ongoing pain and disablement.

6. On 26th September, 2019, a referral was made by Dr. Sinéad O'Brien for the voluntary admission of the applicant to the psychiatric unit in the first respondent's hospital. In the referral note, Dr. O'Brien noted that the applicant had reported that his mood had been low since the RTA on 12th March, 2019. She noted that he reported having suicidal thoughts and had reported that he had been checking the internet to determine how to successfully end his life. She noted a previous history of cutting his arm and of taking an overdose. He described himself as impulsive. She noted that he had "*ideas of harm to*

others" though it is not clear what that meant. The doctor noted that the applicant had suicidal ideation in the mornings; that he had traits of being emotionally unstable; her impression was that he was likely to have a personality disorder. She requested further evaluation to out rule a mood disorder. She requested a brief crisis admission to an acute unit. She recommended that he not be allowed to leave the ward.

7. The applicant accepted that he was voluntarily admitted to the psychiatric unit in the hospital at approximately 21:30 hours on 26th September, 2019. During the remainder of the afternoon, he was reviewed by various medical personnel within the hospital. He stated that he was permitted to have cigarette breaks just outside the front door of the hospital on a number of occasions during the afternoon.

8. The applicant stated that he retired to bed at approximately 21:30 hours/22:00 hours. He awoke at approximately 02:00 hours on 27th September, 2019. He stated that as he was unable to get back to sleep, he got out of bed and requested that he be allowed outside for another cigarette break. He was told that he was in a secure unit and that it was not possible for him to go outside for a cigarette at that time. The applicant stated that he then requested some tea and toast. This too was refused. He was told that he would have to go back to bed, as it was the middle of the night.

9. The applicant stated that when he was refused a cigarette, or tea and toast, he told the staff that he was going to leave the hospital. They told him that he was in a secure unit and that he could not leave. They further informed him that if he insisted in trying to leave the hospital, an order would be made pursuant to s.23 of the Mental Health Act 2001 (as amended), detaining him as an involuntary patient in the hospital.

10. The applicant stated that he became very distressed at that stage. He made a number of calls to the gardaí, who apparently told him that, as he was in the hospital on a voluntary basis, he was entitled to leave at any time that he wished. The applicant stated that he also phoned his wife a number of times, asking her to come and collect him.

11. The applicant stated that at one stage as many as five staff restrained him and removed his mobile phone from him. He stated that he was very upset by this, because he could not contact his wife, who had been his great support since the road traffic accident.

12. The applicant stated that after his mobile phone was taken from him, he sat in a chair crying for approximately twenty minutes. He stated that he was not aggressive or threatening to any of the staff at any stage.

13. The applicant stated that during this time, the staff on the ward called one of the hospital doctors, Dr. Ndukwe to come and examine him. He stated that the doctor who came, wanted to speak to him. The applicant requested that the interview should take place in a quiet room and that was done. The applicant stated that Dr. Ndukwe then proceeded to make an order detaining him pursuant to s.23 of the Act.

14. When the order had been made, the applicant returned to his room and spent the rest of the night there.

15. On the following morning, the applicant was assessed by a Consultant Psychiatrist Dr. Siobhán Barry at approximately 10:35/10:45 hours. She made the diagnosis already referred to, but was not satisfied that he required to be detained as an involuntary patient. He was discharged and left the hospital at approximately 11:00 hours. Earlier that morning, his family had been contacted. His father, sister and wife had attended at the hospital at approximately 10:30 hours.

The Statutory Provisions

16. For the purposes of these proceedings, the relevant provisions are ss. 23 (1) and 24 (1) and (2) of the Mental Health Act, 2001 (as amended):-

"s. 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.

[…]

s.24 (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 or relative of the person.

(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.

The Applicant's Submissions

17. The applicant is a very courteous and articulate man. He submitted that as he had been admitted to the hospital on a voluntary basis, his constitutional right to liberty had not been curtailed by his admission to hospital. It was submitted that he was entitled to leave the hospital at any time that he chose. He had attempted to exercise that right at approximately 02:30 hours, but had not been allowed to leave.

18. The applicant submitted that there was no basis on which the s.23 order could validly have been made. He stated that he had not engaged in any aggressive or threatening behaviour towards any of the staff at any stage. All he had done was to make a reasonable request to either be allowed the opportunity to have a cigarette, or to have some tea and toast. When that had been refused, he had elected to leave the hospital, which he submitted was not an unreasonable stance to have taken.

19. The applicant accepted that he had become somewhat agitated, but said that that had only been done when he had been refused the tea and toast and after he had been told that he could not leave the hospital and after his mobile phone was taken from him. He stated that the doctor had not *bona fide* reached the opinion that he was suffering from a mental disorder, as was required by s.23, because he had purported to reach that opinion by reference to the applicant's previous admission to hospital in 2012. He stated that that was inappropriate, because it ignored the fact that he had had no psychiatric difficulties in the years after 2012, until subsequent to his RTA in March of 2019.

20. The applicant submitted that having regard to the medical notes in relation to his presentation in the hospital at that time, there was no basis on which Dr. Ndukwe could reasonably have formed the requisite opinion to enable him to make an order pursuant to s.23 of the Act.

21. The applicant submitted that his stated distress and agitation was largely contributed to by the fact that the hospital staff had removed his mobile phone from him and therefore he could not contact his wife, who was a great support to him. He stated that he did not feel that it was right, that because he had expressed his feelings of low mood and some suicidal ideation, that that was used as a means of forcibly detaining him in the psychiatric unit.

22. Insofar as it was alleged on behalf of the respondents that regard should be had to the fact that his request to leave the hospital was made in the middle of the night, that was irrelevant. He stated that because he was a voluntary patient in the hospital, he retained his constitutional right to liberty and was entitled to discharge himself from the hospital whenever he wished, whether that be during the day, or at night.

23. The applicant submitted that in all the circumstances, he had raised an arguable case that he was entitled to the reliefs which he sought in his statement of grounds and therefore the court should grant him leave to proceed by way of judicial review.

Submissions on behalf of the Respondents

24. On behalf of the respondents, Ms. Hill BL submitted that s.23 of the 2001 Act, concerned the power to prevent a voluntary patient from leaving an approved centre. The section was wide in its terms. It provided that a detention order could be made for a limited period of time, not exceeding 24 hours. The order could be made by a consultant psychiatrist, a registered medical practitioner, or a registered nurse on the staff of the approved centre, if they were of the opinion that the person was suffering from a mental disorder.

25. That section had to be read in conjunction with s.24, which provided that within the 24-hour period after which the initial order had been made pursuant to s.23, the patient who had been involuntarily detained in the hospital, had to be assessed by a consultant psychiatrist. It was only if the consultant psychiatrist was satisfied that the patient was suffering from a mental disorder, that he or she could issue a certificate providing for the further detention of the patient in the hospital on an involuntary basis. Thus, it was submitted that the test under the two sections was different. It was only necessary under s.23, for the person making the order to be "of the opinion" that the patient was suffering from a mental disorder; whereas under s.24, the consultant psychiatrist had to be "satisfied" that he or she was suffering from a mental disorder.

26. Counsel submitted that from the medical records that had been exhibited by the applicant and from the affidavits that had been sworn on behalf of the respondents by Dr. Ndukwe and Dr. Collins, it was clear that the statutory procedure provided for under s.23 had been complied with. In particular, it was pointed out that before Dr. Ndukwe made the order, he had carried out an assessment of the applicant's mental state, by interviewing him in a room; he had reviewed the relevant hospital records and had had a telephone conversation with the consultant on call.

27. It was submitted that having regard to the content of the medical records, and the admissions made by the applicant in the course of the hearing, to the effect that he had suffered from low mood and had indicated that he had suicidal ideation, all of which had been recorded in the notes, there was a sound basis in both law and fact for the opinion that was reached by Dr. Ndukwe on the night.

28. Insofar as the applicant had alleged that the doctor had not reached the stated opinion on a *bona fide* basis, because he had had regard to the notes in relation to the 2012 admission, there was no evidence to support that assertion. In addition, it was submitted that having regard to the fact that the respondent's hospital was very close to the River Lee, the doctor concerned had acted prudently in making the order, having regard to the stated suicidal ideation on the part of the applicant and the proximity to the river.

29. Counsel referred to the decision of the Court of Appeal in *PL v. Clinical Director of St. Patrick's University Hospital* [2019] 2 IR 266. She submitted that on the facts of this case, there was ample evidence for Dr. Ndukwe to form the opinion that the applicant was suffering from a mental disorder in the early hours of 27th June, 2019. In those circumstances it was submitted that the respondents had complied with the test set down by the Court of Appeal in the *PL* case for the lawful operation of s.23.

30. It was submitted that the notes which had been made by Dr. Ndukwe, which appeared at p.465/466 of the notes, showed that the applicant was behaving in an agitated and restless way at the time; his speech was incoherent; he was irritable and was speaking loudly on his mobile phone. All of that had to be seen in light of the recorded risk of deliberate self-harm as recorded in the notes, which had been reviewed by the doctor. It was submitted that in these circumstances there was no basis for arguing that the doctor

had acted *mala fide* in reaching the opinion that he had and in making the order pursuant to s.23.

31. It was submitted that in the circumstances, the applicant had not disclosed an arguable case that the respondents, or their servants or agents, had acted unlawfully in making the order pursuant to s.23 in the early hours of 27th September, 2019.

Conclusions

32. Notwithstanding that this is a contested leave application, the threshold which the applicant must cross in order to be granted leave to proceed by way of judicial review, remains the same as in an *ex parte* application. The only difference is that in assessing whether the applicant has crossed the necessary threshold to be granted leave to proceed, the court takes into account the evidence and submissions made by the respondent.

33. The test which must be applied when considering whether an applicant should be granted leave to proceed by way of judicial review was set down by the Supreme Court in G v. The DPP [1994] 1 IR 374, at p.377/378:-

> *"An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters: -*
>
> *(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).*
>
> *(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*
>
> *(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.*
>
> *(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O.84, r. 21(1), or that the court is satisfied that there is a good reason for extending the time limit... (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."*

34. In determining whether the applicant has made a *prima facie* case on the facts that he has an arguable case for the reliefs he seeks, it is not necessary that the court should form the opinion that he is likely to win at the ultimate hearing; it is only necessary that the court is satisfied, having regard to all the evidence that was put before it at the leave

hearing, that the applicant has raised an arguable case for the reliefs sought in his statement of grounds.

35. As noted earlier in this judgment, the essential facts in the case are not in dispute. The applicant accepts the accuracy and veracity of the medical records. Indeed, he referred to these in some detail during the course of his submissions to the court.

36. In looking at the legality of the decision that was reached by Dr. Ndukwe at approximately 03.00 hours on the morning of 27th September, 2019, to make an order pursuant to s.23 of the 2001 Act, the court has to have regard to the requirements of that section.

37. The provisions of ss. 23 and 24 of the 2001 Act, were considered by the Court of Appeal in *PL v. Clinical Director of St. Patrick's University Hospital* [2019] 2 IR 266. Delivering the judgment of the court, Hogan J reviewed the provisions of the sections at para. 31 *et seq*. He pointed out that the statutory predicate for the exercise of the power under s.23 and s.24 was different in each case. In the case of s.23 the psychiatrist or general practitioner or nurse (as the case may be), was only required to be "of opinion" that the voluntary patient was suffering from a mental disorder, whereas in the case of s.24 the relevant consultant psychiatrist must be "satisfied" following such an examination that the patient is suffering from a mental disorder. In relation to that distinction he stated as follows at paras. 37 and 40:-

> *"[37] In this context one must assume that in distinguishing between the use of the phrase being of "of opinion" in s. 23 and being "satisfied" in s. 24, the Oireachtas chose its words with some care. Any opinion formed pursuant to the exercise of a statutory power must be "bona fide held and factually sustainable and not unreasonable" and this phrase connotes "a laxer and more arbitrary level of … assessment" as compared with a statutory test which requires the decision maker to be "satisfied": see The State (Lynch) v. Cooney [1982] I.R. 337, at pp. 361 and 378 per O'Higgins C.J. and Henchy J. respectively.*
>
> *[…]*
>
> *[40] The language of s. 23, moreover, is deliberately broader and more extensive than that of s. 24. It is designed to deal with a short term exigency and it is striking that in contrast to s. 24 the power of detention may be exercised by a broader range of medical and nursing personnel and without the need for a prior examination of the voluntary patient's mental health status. It is sufficient that members of the medical and nursing staff form the "opinion" that the voluntary patient "is suffering from a mental disorder". Provided that the opinion is formed bona fide, is not unreasonable and is factually sustainable, then the power of detention under s. 23 will have been lawfully exercised."*

38. The definition of what constitutes a mental disorder is provided in s.3 of the 2001 Act, which provides as follows at s.3(1):-

"(1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where—

(a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or

(b)(i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and

(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."

39. It was undoubtedly a very distressing experience for the applicant to find himself becoming the subject of a s.23 order in the middle of the night. However, the court is satisfied that when one looks at all the circumstances that pertained in the early hours of 27th September, 2019, there is no arguable case that can be made that the opinion formed by Dr. Ndukwe, or the order that he made pursuant to s.23 of the 2001 Act having formed the requisite opinion, were unlawful.

40. Dr. Ndukwe carried out an appropriate mental state examination of the applicant by conducting an interview with him in a private room; he observed the signs of agitated behaviour that were being exhibited by the applicant at that time; he reviewed the referral note and the multidisciplinary team records from the time of the admission of the applicant to the hospital at approximately 14.30 hours on the previous afternoon. In those notes there was reference to the applicant admitting that he had been feeling low for some considerable period and there were references to suicidal ideation on his part; the doctor also consulted with the consultant on call, Dr. Corkery. Having regard to these matters, the court cannot find that there is any arguable basis on which it could be submitted that Dr. Ndukwe did not form the requisite opinion that the applicant was suffering from a mental disorder as defined in the 2001 Act.

41. While the applicant has submitted that the doctor did not act in a *bona fide* manner in reaching that opinion, because the applicant believes that he reached it on the basis of the admission notes relating to the 2012 admission to the hospital, there is no evidence that the doctor relied on those notes to form the opinion. Indeed, all the evidence tendered, indicates that his opinion was reached on the basis of the matters referred to above, all of which pertained to his admission to hospital in 2019.

42. At the hearing, the applicant made the case that had he been supplied with tea and toast as he had requested, he would probably have calmed down and returned to his room. While that may well be true, that is not the test that has to be applied. The test is whether the doctor who made the order pursuant to s.23, had reached the requisite

opinion and had done so on a reasonable and rational basis. Having regard to the behaviours that were being exhibited by the applicant at the relevant time, as recorded in the medical notes, which are not disputed, the court is satisfied that the opinion reached by doctor Ndukwe on the morning of 27th September, 2019, cannot realistically be challenged.

43. The fact that the consultant psychiatrist, Dr. Barry, reached a different opinion when she examined the applicant on the following morning, does not affect the validity of the opinion held by the doctor who made the order pursuant to s.23 earlier that day. As pointed out in the *PL* case, the tests are different. Under s.23 the doctor or other person making the detention order pursuant to that section, need only be "of the opinion" that the patient is suffering from a mental disorder. Whereas, under s.24, the consultant psychiatrist must be "satisfied" that the person is suffering from a mental disorder, which warrants their continued detention in the approved centre. Thus, the fact that Dr. Barry reached a different decision to that reached by Dr. Ndukwe, does not provide an arguable basis for arguing that the earlier decision was unlawfully made.

44. While it was submitted by the applicant that the time at which the detention order was made, was irrelevant, as he had a right to leave the hospital at any time; the court does not agree with that submission. It is true that a voluntary patient is entitled to leave a hospital at any time that he or she chooses. However, in reaching the decision to make an order pursuant to s.23, it was reasonable and appropriate for Dr. Ndukwe to have had regard to the fact that it was the middle of the night. He was also entitled to have regard to the fact that the hospital was located very close to the River Lee and the applicant had admitted to having suicidal ideation. Indeed, that was the primary reason for the referral to the hospital on the previous day by Dr. O'Brien. In these circumstances, Dr. Ndukwe owed the applicant a duty of care not to discharge him in the middle of the night from a location where he could easily commit suicide by throwing himself into the nearby river. Had that happened, the respondents would undoubtedly have been on the receiving end of a claim for damages for fatal injuries, brought by the applicant's next of kin. Thus, the court is satisfied that the decision reached by Dr. Ndukwe was not only justified on the materials before him in the early hours of 27th September, 2019, it was also consonant with his duty of care towards the applicant as a patient in the psychiatric unit.

45. In his written submissions the applicant made a somewhat oblique reference to the provisions of s.23 being repugnant to the Constitution. However, that argument was not pursued by the applicant at the hearing of his leave application. It focused solely on the issue of the lawfulness of the order made by Dr. Ndukwe. Accordingly, the constitutional issue does not arise for determination on this application.

Decision

46. For the reasons set out herein, the court refuses the applicant leave to proceed by way of judicial review to seek an order of *certiorari* quashing the decision of the first named respondent to detain him pursuant to s.23 of the 2001 Act, on the morning of 27th September, 2019.

47. In his statement of grounds, the applicant also sought a probation order restraining the respondent from "acting *ultra vires* the 2001 Act and an order preventing the respondent hospital acting in breach of fair procedures and/or natural justice and to restrain the respondent from acting" with bias and/or actual bias. That is an application for a relief that would apply in futuro. It is not appropriate to grant a prohibition order in the terms sought by the applicant. The court refuses this relief.

48. The applicant also seeks damages for "personal liberty restriction, damaged personal property and assault". The court is not satisfied that any of these claims arise on the within judicial review proceedings. Accordingly, this relief is also refused.

49. Finally, the applicant sought an order for costs against the respondent hospital in respect of "consequential loss and legal costs". It is not appropriate for the court to make any order as to costs at this stage. The court will await written submissions on the issue of costs.

50. As this decision is being delivered electronically, the parties will have a period of two weeks within which to furnish brief written submissions in relation to the terms of the final order and on costs and on any other matters that may arise.