[2024] IEHC 169

RECORD No. HSS 252/2024

THE HIGH COURT

IN THE MATTER OF AN ENQUIRY PURSUANT TO ARTICLE 40.4 OF BUNREACHT NA hÉIREANN

BETWEEN/

Y. Z (also known as N.Z)

APPLICANT

AND

THE CLINICAL DIRECTOR OF THE DEPARTMENT OF PSYCHIATRY XY HOSPITAL [LOCATION REDACTED] and HEALTH SERVICE EXECUTIVE

RESPONDENTS

EX TEMPORE JUDGMENT of Ms. Justice Nuala Jackson delivered on the 27th February 2024.

1. By Order of this Court (Hyland J.) of the 22nd February 2024, an inquiry was directed in accordance with Article 40.4 of Bunreacht na hÉireann into the grounds of the detention of the Applicant and it was furthermore ordered that the Respondents certify the grounds of such detention in writing. An Order was also made on that date pursuant to section 27(1) of the Civil Law (Miscellaneous Provisions) Act, 2008 that publication or broadcast of any matter relating to the proceedings which would or would be likely to identify the Applicant and their condition be and is prohibited. I have continued that Order in being.

2. The matter was heard before me on the 26th February 2024, a Certificate of Detention having been filed by the first named Respondent. The said Certificate indicated that the

Applicant was detained consequent upon an Admission Order dated the 25th January 2024 pursuant to section 14(1)(a) and section 15(1) of the Mental Health Act, 2001 to 2018 ('the Acts') which said Admission Order had been extended by a Renewal Order made under section 15(2) of the Acts dated the 9th February 2024.

FACTUAL BACKGROUND

(a) The Applicant was admitted to an Approved Centre within the meaning of the Acts on the 24th January 2024. An Admission Order was made on that date by Dr. E. No issue arises in relation to the validity or lawfulness of this Admission Order.

(b) Pursuant to section 15(1) of the Acts, the Admission Order remained in force for a period of 21 days from the date of its making, being the 14th February 2024.

(c) Dr. E. examined the Applicant on the 9th February 2024 at approximately 9 am and was of the opinion that the Applicant continued to suffer from a mental disorder.

(d) Dr. E. commenced the filling out of a Form 7 in the context of activating a Renewal Order on that same date at approximately 12.30 pm. In error, Part 10 of the Form 7 was not completed by the doctor, Part 10, importantly, being the expiry date of the Renewal Order and, in consequence, indicating the end of the detention period being activated by the Renewal Order. The Form 7 was otherwise completed and was signed, dated and timed by the doctor.

(e) A Patient Notification Form was completed by Dr. E. on the 9th February 2024, which Patient Notification Form is signed, dated and timed, indicating that it was completed within minutes of the incomplete Form 7. The Patient Notification Form indicated that the Renewal Order would come into effect on the 15th February 2024 and would end on the 9th May 2024. The Patient Notification Form was notified to the Applicant shortly after its completion.

(f) The first named Respondent attempted to send the Renewal Notice to the Mental Health Commission ('the MHC') thereafter (it was accepted that this attempt was likely made within the 24 hour period required by section 16(1) of the Acts) using the online portal provided by the Commission but was not accepted due to the error therein being the absence of a detention expiry date in Part 10 thereof.

(g) On the 12th February 2024, Dr. E. inserted the expiry date into Part 10 of Form 7. The Form was not resigned on that date and the date thereof remained the 9th February 2024.

On the 12th February 2024, with this insertion having been made a further attempt was made to send the form to the MHC, which attempt was successful, resulting in the sending of the altered Form 7 to the MHC.

(h) Dr. E. in a report to me dated the 24th February 2024 which was exhibited in the Affidavit of the first named Respondent confirms that, following an examination of the Applicant on that date, continued detention an involuntary patient is required, that there is no less restrictive option to ensure the Applicant receives required treatment and that the Applicant continues to suffer from a mental disorder within the meaning of the Acts. The Applicant was not in a position to adduce evidence to contradict this report.

ISSUES ARISING

(a) Was the Renewal Order made on the 9th February 2024 a valid Order?
(b) Was the said Renewal Order capable of amendment?
(c) Is the detention of the Applicant on the authority of the Renewal Order aforementioned unlawful due to the failure to notify the Applicant thereof?
(d) If the Applicant is being unlawfully detained, what is the appropriate order to be made by this Court having regard to his current psychiatric condition?

LEGAL PRINCIPLES APPLICABLE

3. The important protections created by the Acts and the importance of such protections being created has been recognised in many decisions. In **I.F. v Mental Health Tribunal** [2019] IESC 44, [202] 1 IR 604, Dunne J. stated:

> *"It is important to emphasise that the thrust of the 2001 Act is the creation of significant protection for a patient who may be the subject of an involuntary detention. It has always been a hallmark of a constitutional democracy such as outs that the deprivation of the liberty of an individual is not to be lightly undertaken. This is so whether one is concerned with the situation of a person convicted of a criminal offence or a situation such as this where a person may be the subject of an involuntary detention by reason of the state of their mental health. It is not therefore surprising that the structure of the 2001 Act is predicated on the need to ensure that no one is deprived of their liberty without*

appropriate safeguards being in place which allow them to challenge the basis of their detention."

4. In this regard, it is important to recognise the whole scheme of the Acts which provide for a range of protections including the formation of professional opinions, the limitation of periods of detention, the completion of forms which include necessary information, the conveying of information concerning the statutory provisions invoked and the legal entitlements arising to the patient and review by an independent tribunal. The Acts comprise a suite of protections appropriate and necessary having regard to the nature of the individual rights being intruded upon. Over and above these statutory protections, is the protection afforded by the Constitution and, in particular, by the invocation of Article 40.4 in applications such as the present.

ARTICLE 40.4.2 RELIEF

5. The circumstances in which relief pursuant to Article 40.4 of Bunreacht na hÉireann is appropriate in the context of mental health cases have been considered in **A.B. v. Clinical Director of St. Loman's Hospital** [2018] 3 IR 710. Hogan J. states at Paragraph 99:

   "It is accordingly clear that the High Court could direct the release of an involuntary patient by way of an Article 40.4.2 application not only where the order in question was good on its face, but also where there had been a fundamental breach of constitutional rights or the existence of some other material defect in the process leading to the making of the detention order in question."

6. The Supreme Court has held in **I.F. v Mental Health Tribunal** [2019] IESC 44, [2020] 1 IR 604, a valid Renewal Order operates to extend the period of operation of an Admission Order. Therefore, if there was a valid Renewal Order herein it would operate to extend the Admission Order (which was to terminate on the 14th February 2024) from immediately after that date to the 9th May 2024 which would be in accordance with the statutory three month time limit for the extension of detention pursuant to a Renewal Order. However, the importance of the Renewal Order in the chain of events is clearly

indicated by Hogan J. in **P.D. v Clinical Director, Department of Psychiatry, Connolly Hospital** [2014] IEHC 58 where he states:

> *"..., 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 errors in relation to the document which forms the current legal basis of the applicant's detention."*

7. The Renewal Order in the present case as prepared and signed off by Dr. E. on the 9th February 2024 undoubtedly contained a very serious error. In the context of the lawful deprivation of liberty, it cannot be doubted that the duration of such deprivation is a fundamental matter. The legislature has made this very clear by imposing very strict limitations on the duration of various periods of detention envisaged in the legislation. In the circumstances under discussion, the maximum duration permitted for detention pursuant to this Renewal Notice was three months. The Renewal Notice prepared omitted any date for the termination of the detention period. This was an error on the face of the document. Errors and omissions from such notices have received previous judicial consideration. In **P.D. v Clinical Director, Department of Psychiatry, Connolly Hospital** [2014] IEHC 58, Hogan J. considered two such errors, one of which related to the detention cessation date. I entirely agree with the dictum of Hogan J. at Paragraph 11 of his judgment:

> *"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."*

8. The present case is similar to that considered by Finlay Geoghegan J. in **JD v. Director of the Central Mental Hospital** [2007] IEHC 100. In that case, the reception order under the Mental Treatment Act, 1945 which was under consideration extended the detention "by a further period not exceeding six months". Finlay Geoghegan J.,

referencing that the endorsement did not "specify any period for which the order is to be extended", held that the order was bad on its face. In the present case, the Renewal Order purportedly made on the 9th February 2024 likewise did not specify any such extension period.

9. I endorse the conclusions of Hogan J. at Paragraphs 15 to 17 of the **P.D**. decision:

> *'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.'*

I therefore find that the Renewal Order made on the 9th February 2024 was not a valid order.

10. It has been argued by the Respondent herein that the error or omission in the original document should be viewed as having been cured either (a) by reading it together with the Patient Notification Form which did have a detention end date or (b) due to the

subsequent amendment of the Renewal Form by Dr. E. some three days later when the original form had been rejected by the MHC. I do not find in favour of either of these arguments. In relation to the first of these, it was argued that this was supported by the decision of Baker J. in **Miller v. The Governor of the Midlands Prison** [2014] IEHC 176. In that case, a short form warrant, taken alone, was found not to provide sufficient information concerning the reasons for detention. However, the Court in that instance, referencing a jurisdiction to hear evidence which can explain the facts in the warrant, was in a position to embark upon a joinder of documents by reference to the Circuit Court orders themselves, which orders were referenced in the warrant. I was referred to Paragraph 27 of the judgment where Baker J. states:

> *"27. These judgments clearly point to the court having a jurisdiction to hear evidence which can explain the facts in the warrant and are authority for that proposition. The jurisdiction of the court, however, is discretionary and in McMahon v. Leahy [1984] 1 I.R. 525, McCarthy J., at p. 547, was not prepared to "overlook the careless approach and lack of attention to detail" which he found in what was, in that case, an extradition warrant. The court indicated that one might overlook "patent errors in a printed document" but that there were circumstances when this would not be exercised in favour of the respondent. I am not satisfied that there exists any unusual or special circumstances that might require me to exercise my discretion in this case not to admit the additional evidence, especially as I can do so without any oral or extrinsic evidence or any explanation which cannot be gleaned from the face of the documents offered by the respondent."*

11. In the present case, it is argued by the Respondent that I should consider by way of joinder the Renewal Order and the Patient Notification Form and, in so doing, correct the absence of a detention expiry date. However, in the **Miller** case, the documents which were to be read together, did not conflict but rather merged to provide a complete and consistent explanation. As Paragraph 28 makes clear, it was possible:

> *"... without hearing any extrinsic evidence or making any extrapolation of fact to directly link the short form warrant, which contained express individual signifiers, to the Circuit Court orders themselves as certified by the County*

Registrar, and these orders contain the same records numbers as appear on the face of the short form warrant."

12. I do not consider this to be the situation in the present case. Considering these two documents together serves to provide two documents which are contradictory, one with no date and one with a date specified. They require a significant extrapolation, namely that one is correct and the other incorrect.

13. The Respondent further argued that the error on the face of the Renewal Notice as signed could be cured by amendment and had been so cured when the date was inserted by Dr. E. on the 12th February 2023. I do not believe that it is necessary for me to determine whether amendment can ever occur in respect of Orders such as that presently under consideration. I share the reservations in this regard expressed by Hyland J. in **Ms. K v. Clinical Director of Drogheda Department of Psychiatry** [2022] IEHC 248 at Paragraph 53 and I agree with the dictum of the Court in that case in relation to the importance of accuracy in forms required to be completed under the legislation. At Paragraph 39, Hyland J. states:

"The necessity for completing this Form fully and accurately derives from its statutory basis and from the need for transparency and absolute accuracy in relation to the steps being taken by a person to detail another person."

14. It is clear that, while the legislature saw fit to permit the Tribunal, assembled consequent upon the making of a Renewal Order, to affirm the order where errors had occurred in certain limited circumstances, no provision was made for amendment. Section 18 of the Acts permits the affirming of the order if there has been a failure to comply with stated statutory provisions, provided the failure "does not affect the substance of the order and does not cause an injustice." In addition, the judgment of Hogan J. in **P.D. v. Clinical Director, Department of Psychiatry, Connolly Hospital** [2014] IEHC 58, again considering errors in statutory forms, stated:

"It may be that the Oireachtas might well consider amending the 2001 Act to enable obvious clerical errors of this king 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."

15. The Oireachtas has not so amended the legislation and it is clear that Hogan J. did not envisage such amendment as being possible under the extant legislative regime. It is also to be noted with concern that the purported amendment of the Renewal Order in this instance was done without openness and transparency. There is nothing on the face of the Order itself which indicates that it was amended in any way (which was concerning given that a minor contemporaneous writing clarification made at the time the original Form 7 was completed was initialled). The insertion was simply made and the form resubmitted to the MHC on the 12th February 2024, retaining the Renewal Order date of the 9th February 2024 (which was also the date upon the Certificate of Detention provided to me) notwithstanding that this clearly resulted in a failure to comply with the statutory time limit for notifying the MHC as provided for in section 16 of the Acts.

16. I was furthermore referred by the Respondent to the decision of the Supreme Court in **P.O.I. v. The Governor of Cloverhill Prison** [2018] 3 IR 602 as being permissive of amendment of the Renewal Order. The circumstances of that case were very different to the present, there being a two stage process whereby the warrant under consideration was giving effect to a court order. Dunne J. stated:

"[47] Where there is an underlying valid order of a court committing an individual to prison, it may be possible to amend the warrant. However, as has been accepted by the respondent in the written submissions, where the warrant cannot be corrected, because the ambiguity on the face of the warrant reflects a more deep-seated confusion in the proceedings such as where the true state of affairs is not reliably ascertainable from any source, this cannot be done. To put it another way, in circumstances where a warrant is defective in that it does not reflect the court order actually made, it may be possible to go back to court to amend the warrant to reflect the court order. That is assuming that there is a

valid court order in the first place. If the underlying basis of the detention is invalid then the individual detained is entitled to be released. A trivial error or slip in the completion of the warrant will not be fatal to its validity. There could be no reason not to amend in such circumstances."

17. In the present case, I find that there was no trivial error or slip but rather the date to indicate the duration of the detention was omitted from the document. This is a serious and fundamental situation and clearly distinguishable from the **POI** situation.

18. Undoubtedly, there are statutory review mechanisms incorporated into the Acts and not all mistakes or errors will be such as justify Article 40.4 relief. In this regard, I would make reference to **AB v. Clinical Director of St. Loman's Hospital** [2018] 3 IR 747, paragraph 104:

> *"... the jurisdiction of the High Court in Article 40 applications is confined to ensuring that the admission or renewal order is valid on its face and that there was no violation of constitutional rights or other serious legal error in the making of the order."*

I find that the error in this instance was such that it comes within the jurisdiction outlined in the above *dictum*.

19. The Applicant additionally argued that the detention of the Applicant was unlawful due to the failure of the Respondent to comply with Section 16(1)(b) of the Acts in that the "amended" Renewal Notice, with the expiry date inserted, was never served upon the Applicant. The patient, it is argued, was not given notice of the making of the order but rather was given notice of the making of an invalid order. It is clear that a Patient Notification Form was served upon the Applicant on the 9th February 2024. It is clear that this Form contained all of the necessary information including a detention expiry date. Importantly, this Form did include the important information required to be included pursuant to section 16(2) of the Acts. It is my view that the kernel of this matter relates to the validity of the Renewal Order and that it is in this regard that Article

40.4 is engaged. In so far as issues may arise in relation to patient notification, the Patient Notification Form which was served would come squarely within the ambit of section 18(1)(a)(ii) of the Acts in that any such issues do not affect the substance of the order and do not cause an injustice.

20. In consequence of the foregoing and subject to Paragraph 21, I direct the release of the Applicant pursuant to Article 40.4 of the Constitution as I am not satisfied that he is detained in accordance with law.

21. Having regard to the report of Dr. E., which was exhibited in an Affidavit before me, which report was not contradicted in any manner, the Respondent entirely appropriately submitted that in the event that the application was successful, the release of the applicant should be delayed as envisaged in the **FX v. Clinical Director of the Central Mental Hospital** [2014] IESC 1. I will order such delayed release and I will rule on the terms thereof upon hearing the submissions of the parties in this regard.