# THE COURT OF APPEAL

# CIVIL

**UNAPPROVED** **NO REDACTION NEEDED**

**Neutral Citation Number: [2021] IECA 102**

**[2021 No. 16]**

**The President**

**McCarthy J**

**Kennedy J**

**BETWEEN**

**S.M.**

**APPLICANT**

**AND**

**THE GOVERNOR OF CLOVERHILL PRISON**

**RESPONDENT**

**AND**

**THE DIRECTOR OF THE CENTRAL MENTAL HOSPITAL**

**NOTICE PARTY**

**JUDGMENT of Birmingham P. delivered (*via* remote hearing) on the 1st day of April 2021**

**1.** On the morning of 13th August 2020 at a stepdown facility linked to St. Vincent's Psychiatric Hospital, Fairview, on St. Lawrence Road in Clontarf, Mr. O, a resident of the facility, was stabbed to death. At least for the purposes of the present proceedings, it is not in dispute that the late Mr. O was stabbed by the applicant who was a fellow resident of the facility. Following the incident, the applicant made his way on foot to the nearby Clontarf

Garda station where he reported what he had done. In due course, he was arrested, detained, charged and brought before the District Court where he was remanded in custody. Following his remand by the District Court to Cloverhill Prison on 14th August 2020, he was seen by a nurse on arrival at the prison and placed on the D2 wing, an area of the prison reserved for potentially vulnerable prisoners. He remains on that wing to this day. There, he is supported by the prison medical team and what is described as the 'in-reach' service provided by the Forensic Mental Health Services. He is seen regularly by mental health professionals, including consultant psychiatrists and specialist mental health nurses.

**2.** On 19th November 2020, lawyers acting on behalf of the applicant sought an order, pursuant to Article 40 of the Constitution. The High Court (Hyland J.), by way of a reserved judgment, declined the relief sought. From that refusal, the applicant has appealed to this Court. In the course of the appeal hearing, the point has been made on a number of occasions that the applicant was a reluctant litigant, and an even more reluctant appellant.

**3.** The proceedings are unusual, in that while the case is cast in the form of Article 40 proceedings, it is clear that the desired outcome is that the applicant would be transferred to the Central Mental Hospital (hereinafter "CMH") in Dundrum. Reflecting this, the Director of the CMH has been named as a notice party, and indeed, he has participated fully in the proceedings, both before the High Court and before this Court.

**4.** Insofar as the applicant would wish to be transferred to the CMH, that is a wish that is shared by the respondent Governor of Cloverhill Prison and the Director of the CMH, the notice party. The difficulty is that the CMH is full to capacity and at present, there is no bed available for the applicant. This case, therefore, is what is sometimes described as a 'resources case', requiring consideration of the circumstances in which an otherwise lawful detention can be rendered unlawful by a failure to provide appropriate medical treatment so as to entitle the applicant to an order for his release under Article 40. In the High Court,

counsel for the applicant raised the possibility of an order being made, but then being stayed for a period.

**5.** The sense I have is that there is little underlying disagreement between the parties as to the facts of this case, or indeed, between them as to the relevant legal principles. However, where there is fundamental disagreement is as to what the outcome is if the relevant legal principles are applied to the facts. The applicant says that the proper application of the principles to the facts will see an order under Article 40 being granted. He also says that this was a perfectly appropriate case for the invocation of Article 40, and indeed, that it is the only appropriate and available remedy.

**6.** While the facts are very fully set out in the course of what was a very careful and comprehensive judgment in the High Court, for ease of reference, I will recap them briefly.

**Background Facts**

**7.** The applicant is 25 years of age and is originally from County Wicklow. He studied electrical engineering at college. Of note is that he experienced some mental health issues while at secondary school and in college. In 2018, his difficulties worsened and he spent some time in a psychiatric hospital in Newcastle, County Wicklow. Following his discharge, he became homeless. Then, in June 2019, he was brought by Gardaí to St. Vincent's Psychiatric Hospital in Fairview. He spent some time there, both as an involuntary patient and, at a later stage, as a voluntary patient before being discharged to the stepdown facility in Clontarf.

**8.** Following his detention in Cloverhill Prison, the applicant has been seen on a number of occasions by Dr. Conor O'Neill, consultant forensic psychiatrist of the prison in-reach and court liaison service in Cloverhill.

**9.** By reference to the reports of Dr. O'Neill and of his colleague, Professor Harry Kennedy, Director of the CMH, Hyland J. summarised the situation as follows:

- "that the applicant remains actively psychotic,
- that he has been on the waiting list for the CMH for an extended period,
- that he requires appropriate inpatient psychiatric care and treatment which cannot be provided at this time in a prison setting,
- that he would benefit from treatment with antipsychotic medication and assessment with a neurologist to exclude an organic component to his presentation and
- that the risk of him causing harm including fatal harm to others is of such immediacy and severity that he could not be appropriately managed in a community setting or inpatient setting of a level of security less than the CMH."

**10.** The judge then summarised the applicant's regime in Cloverhill as follows:

- "He has his own cell.
- He is receiving specialist psychiatric treatment from the forensic in-reach services.
- He is seen twice a day by nursing staff.
- He has been prescribed epilim for his epilepsy and is taking same.
- He has been prescribed olanzapine and sertraline, *inter alia*, for his psychosis.
- He is at times taking this medication and at times refusing it due to his concerns about side effects (weight gain and sedation) and because he feels it is not effective for his OCD symptoms [the latest information available indicates that he is not at present taking his medication].

- He has been offered a three-monthly intramuscular injection depot of paliperidone, an antipsychotic, [and] is considering whether to take it but at present does not wish to.
- The waiting list and the placement of patients on it for the CMH is reviewed every week and the position of each person awaiting admission is reviewed afresh each week, meaning that if their condition either improves or deteriorates, that will potentially impact upon their place on the list [the latest information is that at present, he is fourth on the list, having been number seven at one stage]."

**11.** Having summarised the situation, the High Court judge went on to comment that the evidence suggested that the applicant was in a better position insofar as access to the CMH is concerned than he would be in if he was not in prison, since in that situation, he could only access the CMH if he was already in an approved centre, and the evidence was that no approved centre would take him due to the risk that he posed.

**12.** The judge was of the view that he was also receiving more consistent medical treatment and greater access to psychiatric services than he would receive in the community as the evidence strongly suggested that if released, he would not engage with services in the community. The judge went on to indicate that she would take into account the level of care that the applicant would receive in the community in considering whether his current situation constituted an egregious or fundamental breach of his rights.

**13.** The applicant is very critical of the High Court judge for having regard to what the situation would be in the community. It is said this is impermissible and that the sole focus should be on the regime to which he is subject and the question as to whether that regime meets his needs and affords him his rights. The answer to that question, it is asserted, is an emphatic and unconditional, no.

**14.** For my part, I am in absolutely no doubt about the fact that it is an entirely legitimate exercise to benchmark the applicant's regime against the community alternative.

**15.** As the question of the capacity of the CMH and the inability to offer the applicant a bed is central to the present proceedings, it may be of assistance to say something about that facility. It is a tertiary or referral hospital. The hospital generally operates at full capacity. A medical triage system is in place for those whose admission to the hospital is sought. An admissions panel meeting is held at the hospital every Friday and a bed management meeting every Monday. On Monday 23rd November 2020, when the matter was before the High Court, the applicant was placed seventh on a list of fifteen. At that stage, of the six people ahead of him, four had been remanded in Cloverhill for a longer period. On 22nd March 2021, he was fourth on a list of twelve. Of the three patients ahead of him, two had been remanded in custody in Cloverhill for a period longer than the applicant. It is also the case that there are persons lower down on the waiting list who have been waiting longer for admission to the CMH than he has. Ordinarily, the CMH has a bed capacity of 102 patients. However, because of Covid-19, an isolation unit of ten beds is maintained. The effect of this is that the capacity of the hospital during the current health emergency has been reduced to 92 beds.

**16.** It is not in dispute that not every illegality would justify an order for release pursuant to Article 40. Indeed, on the contrary, the case law makes clear that it would take egregious breaches of the fundamental rights of an individual to render otherwise lawful detentions unlawful.

**17.** In the course of her judgment, Hyland J. reviewed many of the authorities in this area, beginning with the case of *The State (C) v. Frawley* [1976] IR 365, a case involving a very disturbed prisoner who engaged in constant efforts to escape through climbing feats, as well as swallowing metal objects, necessitating surgery, which gave rise to a very restrictive prison regime. The judge dealt also with the case of *State (Richardson) v. Governor of*

*Mountjoy Prison* [1980] I.L.R.M. 82, a slopping-out case from the women's prison in Mountjoy. In that case, Barrington J. was of the view that the State had failed in its duty under the Constitution and prison rules to protect the health of Ms. Richardson and to provide her with appropriate facilities to maintain proper standards of hygiene and cleanliness. However, the judge was not satisfied that those matters could not be put right, or that the threat to her health was so grave or immediate so as to require an order for her release.

**18.** In *Kinsella v. Governor of Mountjoy Prison* [2012] 1 IR 467, the High Court (Hogan J.), was required to consider an application for *habeas corpus* arising from the conditions in which the prisoner was being held. Concerns for his safety, coupled with a shortage of single cells in the prison, resulted in the applicant being detained in a small padded observation cell without access to facilities for 23 hours per day. Hogan J. felt that the conditions under which the applicant had been detained constituted a violation of his constitutional rights. He went on to consider whether the breach of his rights would entitle the applicant to an immediate and unconditional release, but was of the view that he could not presently say that the continuing detention had been rendered entirely unlawful. In those circumstances, he dealt with the matter by upholding the claim that there had been a violation of constitutional rights, but he sought to give the authorities an opportunity to remedy the situation before proceeding to grant an order under Article 40.4.2 of the Constitution, while observing that the opportunity for remedying matters could only be measured in terms of days.

**19.** In the case of *JH v Clinical Director of Cavan General Hospital* [2007] 4 IR 242, the situation of a patient detained under the Mental Treatment Act 1945 (as amended) was in issue. The applicant complained that he was being unlawfully detained and, in that regard, Clarke J. (as he then was) concluded that the applicant's detention had been unlawful as the statutory regime had not been followed. He went on to consider an alternative ground which had been advanced, *i.e*. that the detention of the applicant was invalid by reason of the failure

to afford him appropriate treatment. Referring to the *Richardson* case, Clarke J. felt that by a parity of reasoning with the jurisprudence of the courts in respect of persons detained within the criminal justice system, that:

> "…it does not seem to me that anything other than a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful…".

**20.** Clarke J. was of the view that unless it was the situation that a complete failure existed, other legal remedies ought to be pursued, and that in many cases, the issues might well centre around the availability of resources for more appropriate treatment. He characterised such cases as complex and requiring the court to consider the legal entitlement of persons in the context of a lack of resources available to provide more appropriate treatment, commenting:

> "It does not seem to me that such cases are properly determined in the context of an application under Article 40.4 of the Constitution, which is concerned with the narrow question of the validity or otherwise of the detention of the person concerned. In my view, counsel for the respondent was correct when he argued that cases involving resources issues are not ones that can properly be dealt with within the narrow parameters of an Article 40.4 inquiry.
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> In those circumstances, I was not satisfied that the undoubted questions which arise as to the appropriateness or otherwise of the treatment of the applicant are ones which, even from the high watermark of his case, could conceivably result in a conclusion that his detention was, on that ground alone, unlawful … If (and I express no concluded view on the issue) there is any merit to his contention that his treatment falls short of that to which the law entitles him, then his entitlements should be determined in appropriate proceedings designed to obtain appropriate declarations or

orders concerning the nature of the treatment to which he is entitled rather than in proceedings which question the validity of his detention."

**21.** In the present case, the High Court judge was of the view that the treatment that the applicant was receiving was admittedly not fulfilling his medical needs which could be fulfilled only in the CMH, but neither was it the situation that the applicant was receiving no treatment. He was subject to a treatment regime that ensured he was under the care of a psychiatrist from the CMH and was being offered the same medication as would be available to him in the hospital. The judge took the view that she had uncontradicted evidence to the effect that the applicant's immediate needs can be catered for in the D2 wing of Cloverhill, and indeed, that he was likely to be more safely cared for, from a medical and psychiatric point of view, in Cloverhill than in the community. She felt there was no evidence that the current treatment regime was making the applicant's mental state worse than it was when he entered Cloverhill, or that any deterioration was irreversible, or would make the condition more difficult to treat when he enters the CMH.

**22.** She said that in summary, she was not persuaded that, to the extent the applicant's right of bodily integrity was breached by the failure to admit him to the CMH, that such a breach was sufficiently egregious or exceptional or fundamental so as to render unlawful his detention. She said that in so deciding, she had had regard to the following factors:

- "the nature of his existing treatment as identified above, including the supervision by psychiatrists from the CMH;
- the absence of any deliberate or intentional breach by the governor;
- the fact that his position from a treatment point of view would be worse if he was released into the community;
- the fact that he would find it more difficult to access the CMH if he was released from detention;

- the fact that his condition was neither being caused, nor being actively worsened, either on a temporary or permanent basis, by the current failure to admit him to the CMH;
- the fact that he is being actively considered for admission to the CMH on an updated basis from week to week."

**23.** I find myself in complete agreement with the High Court judge. I do not believe that the evidence in the case goes anywhere near what would be required to justify the making of an order under Article 40. All are agreed that the applicant's needs are best met, and indeed can only be met, in the context of an admission to the CMH. However, pending that, his immediate needs are being met in the D2 wing of Cloverhill Prison where he has access to mental health professionals and, where appropriate, medication can be and has been prescribed.

**24.** In the course of the appeal hearing, there has been resort to language such as that the applicant is 'languishing in prison'. I do not think such language is justified. It is not a situation where nothing is being done for the applicant; on the contrary, everything is being done for him that can be done, other than admitting him to the CMH where there is no bed available for him. It is not even the case that the State is content with providing facilities that are obviously inadequate. The CMH will soon be moving to a new site in Portrane where a new facility is currently under construction. The new facility, it is understood, can provide care for up to 170 patients. As the Portrane facility will have beds reserved for females, as well as a forensic child and adolescent mental health service and an intensive care rehabilitation unit, direct comparisons with Dundrum are not easy, but it seems there will be seven additional beds to meet the needs of people in the applicant's situation.

**25.** I am in no doubt that the application for relief under Article 40 should be and must be refused. In those circumstances, I do not propose to comment further on what the situation

might be if other forms of proceedings, whether by way of judicial relief or declaratory relief, had been pursued. I also wish to refrain from expressing a view about whether, if a different conclusion had been arrived at in relation to the extent of the infringements of the applicant's rights, that it might have been possible to place a stay on the order.

**26.** Very difficult issues of principle arise and they are best left for determination in a case where resolution of that issue is strictly necessary.

**27.** I would confine myself for dismissing the appeal.