SOLICITORS SUPREME COURTS LIBRARY EDIN 1965

OPINION OF LORD MacLEAN

in Petition of

[redacted]

for

JUDICIAL REVIEW OF A RECOMMENDATION BY DR ALISTAIR HAY UNDER SECTION 24 OF THE MENTAL HEALTH ACT 1984 AND A REPORT BY PROFESSOR EVE JOHNSTON UNDER SECTION 26 OF SAID ACT

Respondents:

---

27 November 1992

The petitioner, [redacted], whose date of birth is [redacted], was in June 1990 detained as a patient in the Royal Edinburgh Hospital. On 26 June 1990 she brought the present petition for Judicial Review of an emergency recommendation in terms of section 24(1) of the Mental Health (Scotland) Act 1984 and a Report in terms of section 26 of the same Act, to which I shall refer in this judgment as "The Act", by force of which she was detained in the hospital. The petitioner sought declarator that her continued detention was unlawful, liberation from detention, liberation ad interim and damages. The petition came before Lord Coulsfield on 27 June 1990 on a motion for an order for intimation and service, and for interim liberation. On 28 June 1990 Lord Coulsfield granted interim liberation to the petitioner, and also, inter alia granted leave to the respondents to reclaim. The respondents duly reclaimed. While the cause was awaiting a hearing on the summar roll Mr Stephen

Woolman, Advocate, was appointed curator ad litem to the petitioner. On 21 November 1991 on the unopposed motion of the respondents and reclaimers the First Division of the Inner House refused the reclaiming motion and remitted the cause to the Lord Ordinary to proceed as accords. The petition, to which no answers have yet been lodged, came before me on 21 October for its first Hearing when Mr Clancy appeared for the petitioner and Mr Keen for the respondents.

In his judgment of 28 June 1990 Lord Coulsfield set out the circumstances which gave rise to the petition which do not appear to be in dispute. He said:

> "The petitioner has a long history of mental disturbance and has been treated since 1981 for a schizophrenic illness. On 3 May 1990, she was admitted to the Royal Edinburgh Hospital as a voluntary patient, after attending an outpatient clinic. On 10 May, after some investigations had been carried out, she decided to leave the hospital and on that date she was made the subject of an emergency recommendation under section 24(1) of the Mental Health (Scotland) Act 1984. An order under that section authorises detention of the patient for a period of 72 hours. On 13 May a report was made under section 26 of the Act of 1984 and in consequence, in terms of that section, she became liable to be detained for a period of 28 days from

the expiry of the initial period of 72 hours detention. She remained in the hospital during the 28 day period. It is understood that the petitioner would remain in the hospital as a voluntary patient after the expiry of the 28 day period. However, on 11 June, the petitioner apparently decided to leave the hospital. As she was doing so, at about 1.45 pm, she met the first respondent who had a discussion with her and thereafter decided to detain her again, purportedly under section 24 of the Act. On 14 June the second named respondent issued a further report under section 26 of the Act purporting to authorise the detention of the petitioner for a further period of 28 days."

Having heard counsel, who coincidentally were the same counsel as appeared before me, Lord Coulsfield was of opinion for the reasons he gave on pages 6-7 of his judgment that on behalf of the petitioner there had been made out a reasonably strong prima facie case that, in a case in which the first period of detention expired upon one day and the second was ordered on the subsequent day, the one followed immediately upon the other; and so he granted the petitioner interim liberation.

Before me, Mr Clancy for the petitioner made clear that the averments in Article 6 of the petition ("she was stopped... back to the said ward") were not well founded. Nor was the averment that the first named

petitioner on 11 June 1990 had not personally examined the petitioner. For that reason it was not possible for him to argue what was contained in Article 7(b) of the petition. A similar concession had been made before Lord Coulsfield as appears from pages 2-3 of his judgment. The only additional material made available to me that was not before Lord Coulsfield was an Affidavit dated 4 December 1991 from the first respondent (No 17/1 of process) and a further report from Dr Masterton dated 8 September 1992 (No 18/1 of process). In the Affidavit the first respondent states that when the petitioner was admitted to the hospital she was displaying psychotic symptoms. On 10 May 1990 when the result of an electro-encephalogram revealed an abnormality consistent with a diagnosis of epilepsy, the petitioner coincidentally decided to discharge herself from hospital. As, in the opinion of the first respondent, she was still psychotic, he detained her in terms of section 25 of the Act. The petitioner resisted detention and attempted to leave the hospital but was returned from the car park of the hospital to the ward. On 13 May 1990 at 1400 hours she was further detained under section 26 of the Act because the medical staff wished to attempt treatment with anti-psychotic and anti-epileptic medication in the light of the findings of the electro-encephalogram. As a result of continuing treatment, progress seemed to have been made, and about two weeks before the expiry of the section 26 period the

petitioner indicated that she would be willing to remain in the hospital voluntarily as an informal patient and to receive treatment after the expiry of that period. The view taken then was that a section 18 application for her detention was unnecessary. In the first respondent's view the detention period under the section 26 order expired at 1400 hours on 10 June 1990. At that time the petitioner expressed no desire to leave the hospital. (I interject here the report of Dr Masterton who examined the petitioner on 18 June 1990. He recorded that the petitioner thought at different times during the interview he had with her, that she thought she had been an informal patient for three days and one and a half days. He thought that indicated her disorder of thought and judgment). The first respondent at the time believed that the petitioner was aware of the expiry of the 28 day period and of her right to leave. When he met her outside the door of his office at 1345 hours on 11 June 1990, she had her coat on, her bags were packed, and she said that she was going to discharge herself from hospital. In his office to which he invited her, she said: "I want to leave. I am not under section. You can't detain me." The first respondent then proceeded to examine her, as he records in his Affidavit in paragraph 5. He states:

> "In view of the fact that [redacted] was in the midst of treatment for her psychotic state and we had this new electro-encephalogram abnormality, it

was decided by myself to detain [redacted] once more under section 25 of the Act in full knowledge that section 26 had expired 24 hours previously and that we had not proceeded to section 18 as [redacted] had previously agreed to stay in hospital and accept our treatment. At the time I did not feel 24 hours constituted 'immediately after the expiry of the period of detention'".

The question is whether the first respondent was correct in his belief because section 26(7) of the Act provides that a patient who has been detained in hospital under section 26

> "shall not be further detained under this section nor detained under section 24 of this Act immediately after the expiry of the period of detention under this section."

For the petitioner Mr Clancy submitted first that the petitioner's lawful detention ended at midnight on 10 June, notwithstanding the averment in Article 6 of the petition to the effect that "the 28 day period expired on 10 June 1990 at or about 2 pm." The petitioner therefore attended voluntarily as an informal patient from then ie. midnight on 10 June until about 1.45 pm on 11 June. The period of her detention was to be calculated de die in diem (civilis computatio) rather than de momento in momentum (naturalis computatio). For this purpose the first day of the petitioner's detention (13 May 1990) fell to be excluded entirely.

In support of his submission he referred to the case of Frew v Morris 1897 24 R (J) 50. In that case the statutory period under consideration was a period not exceeding 28 days "from the time of the purchase" in a case in which milk was purchased about 9 am on 4 November and the summons relating to that purchase was served on the seller respondent about 7.30 pm on 2 December. Lord Justice Clerk Macdonald said at page 51:

> "I think that in the ordinary sense of our criminal law the word 'time' means the day on which the fact or offence occurred, and the rule of law applies, that in computing a period from the time or day of the occurrence of any event, the day of that occurrence is not to be counted. The running of the time is to be counted as from midnight of that day. Therefore any proceedings raised before midnight of the day when the statutory period expires are timeously instituted."

The Lord Justice Clerk's observations were considered recently by the Lord Justice General in Keenan v Carmichael 1991 SCCR 681. In that case the question was at what time an offence had been committed where it was provided that penalty points in respect of an offence committed more than three years before another offence were not to be added in respect of that other offence. After pointing out that it was not the practice to record in the endorsement on a driving licence the

precise time of day when an offence had been committed, the Lord Justice General went on (at page 682E):

> "In any event naturalis computatio is used in only exceptional circumstances, such as where the statute in question makes it clear that time is to run from a particular hour in the day to some other similar point of time. The normal rule is that time is computed de die in diem leaving out of account fractions of days and calculating the period in question to the midnight following or preceding the last day of the specified term."

Mr Clancy also referred me to the article on "Time" in volume 22 of the Stair Memorial Enclyclopaedia of the Laws of Scotland, and in particular to paragraphs 820 and 823, which was also drawn to the Court's attention in Keenan. I note that in paragraph 819 the author of the article says generally this:

> "Except where statute has placed the matter beyond doubt, it is essential to look at each time limit independently, and ascertain the computation principles applicable thereto from an examination of the decided cases or by analogy from similar situations."

The correct approach, in my view, it to examine the provisions of the statute with care in the light of practical considerations and basic principles. That, broadly, was the approach urged upon me by Mr Keen for the respondents. In the first place, he said, the key

provisions of the Act provide the necessary timetable. Section 26(3) of the Act provided for the commencement of the 28 day period from the expiry of the period of 72 hours being the maximum period for which a patient can be detained under an emergency recommendation under section 24(3). The starting point, it should be noted, was measured according to the hour, because the patient under such an emergency recommendation could not be detained according to section 24(3) "for a period exceeding 72 hours from the time of his admission". In the normal case the 28 day period could be expected to begin on the expiry of the 72nd hour. It was possible therefore to calculate to the precise hour when the 28 days in fact expired. In this case the patient was made the subject of an emergency recommendation at 1400 hours on 10 May 1990, and her renewed detention in hospital under section 26 commenced at 1400 hours on 13 May 1990. It followed that it expired, as the petitioner averred, at 1400 hours on 10 June. In any event, as a general principle, that construction was to be favoured which preserved and ensured the liberty of the subject. The presumption was for freedom. If Mr Clancy's submission was correct the petitioner would be detained for longer than than the statute allowed. If, in any case, Mr Clancy was well founded in saying, as he did, that the period to midnight on the first day of detention in terms of section 26 was to be ignored, it would follow that the petitioner had been wrongfully

detained on that day. There was, said Mr Keen, no halfway house. Both the cases of Frew and Keenan were concerned with the application of penal statutes in which no similar provisions with regard to precise timing were made as in the 1984 Act.

In my opinion, for all the reasons he advanced, Mr Keen was well founded. The Act sets its own precise time limits to the hour. This is, therefore, the less common case of the application of naturalis computatio. In practical hospital terms exact times of admission and detention are noted. In any event the general presumption is in favour of freedom of the individual and that may quite properly be used as an aid to construction where necessary. No-one should be detained for a moment longer than is justified by the warrant to detain and such a warrant should be construed strictly. I therefore hold that the petitioner's period of detention expired at 1400 hours on 10 June 1990. Thereafter, she attended voluntarily as an informal patient for almost 24 hours.

Mr Clancy's second submission was that the detention in terms of section 25 of the Act at 1345 hours on 10 June 1990 followed immediately after the expiry of the detention in terms of section 26, and so was unlawful. Before a further order for detention could be lawful some material interval of time would have to elapse, and he referred to the obiter observations of the Lord Justice Clerk, Lord Ross, in

this connection in B v Forsey 1987 SLT 681 at page 690L. What was a material interval of time depended on all the circumstances of the particular case. He, for his part, would consider detention two days later to be in contravention of section 26(7). The circumstances of the case might include the fact whether the patient de facto had left the hospital at any stage; the reasons the hospital authority had for obtaining the hospital order or orders; the reasons for not invoking the section 18 procedure while the patient was lawfully detained; and the question whether the patient had genuinely been afforded an opportunity to leave after she had, it appeared, remained in the hospital voluntarily on an informal basis. He referred me to the report of Dr Masterton (No 10 of process) dated 18 June 1990. In that report Dr Masterton had called into question whether those who had charge of the petitioner should properly have relied upon the petitioner's apparent willingness to undergo voluntary drug treatment in the hospital in view of her past history as a patient. He also referred to her disorder of thought and judgment which was reflected in her uncertainty about the period during which she had been an informal patient which varied, according to her recollection between 1½ and 3 days. This does however make it clear and confirms the first respondent's statement that the petitioner knew that she was for a period an informal patient at the hospital. It was unsatisfactory, said

Mr Clancy, for the hospital authorities to say that the second period of detention was lawful merely because the patient herself had assumed the stance of being an informal patient but chose not to leave immediately. If they wished to continue the petitioner's treatment in the hospital, they ought to have invoked the section 18 procedure. That, as it seems to me, is a matter of medical judgment and there may be sound medical reasons why psychiatrists would prefer to treat patients in hospitals without their formal detention there.

Finally, Mr Clancy drew my attention to Lord Coulsfield's judgment in which his Lordship expressed the opinion that there was a reasonably strong prima facie case that, in a case in which the first period of detention expired upon one day and the second was ordered on the subsequent day, the one followed immediately upon the other. His Lordship went on:

> "It seems to me that from a practical and common sense point of view detention authorised on the day following the day in which the period expires is detention 'immediately after the expiry' of that period, particularly if the patient has not left the hospital. It is true that in this case the patient's legal status altered for a period of about 24 hours, during which she was a voluntary patient, but that does not in my view necessarily take away the force of the petitioner's argument."

The question, as I think, is what is comprehended

by the adverb "immediately" in section 26(7). Mr Keen accepted that it was not possible to lay down a construction of the sub-section that applied in every case. The phrase "material interval" was not a substitute for the word "immediately" which imported the meaning of "without any delay" or "forthwith". In The Queen v Justices of Berkshire 1879 4 QBD 469 Cockburn CJ at page 471 said that the word implied

> "prompt, vigorous action, without any delay and whether there has been such action is a question of fact, having regard to the circumstances of the particular case".

It was very difficult to say what period of time could elapse without breaching this provision. One had to look at the circumstances of each case, said Mr Keen, and determine whether it had been or not. In point of actual time in this case, there had been no breach, but that was not determinative of the question. He figured the case where the period of detention expired at midnight when the patient was asleep. A doctor, discovering this on coming on duty at 9 am, then issued a section 25 detention order. That would breach the terms of section 26(7). I agree with that submission.

Some assistance can be obtained from a consideration of the mischief which section 26(7) was enacted to remove. That is succinctly set out in the speech of Lord Keith of Kinkel in B v Forsey 1988 SLT 572 at page 576 where his Lordship said:

"Section 31 of the Mental Health (Scotland) Act 1960 authorised the detention in hospital of a mentally disordered person upon an emergency recommendation made by a medical practitioner. The authorised period of detention was seven days, and a recommendation might be made in respect of a person who was already a patient in hospital. There was nothing to prevent successive emergency recommendations being made, each leading to seven days detention, and this became a not uncommon practice. Section 12 of the Mental Health (Amendment) (Scotland) Act 1983 put a stop to the practice by introducing into section 31 of the Act of 1960 a subsection in the terms now found in section 24(6) of the Act of 1984. At the same time the period of emergency detention was reduced to 72 hours, and provision was made for short term detention by enacting a new section 32A. That section is now what appears as section 26 of the Act of 1984. So it appears that Parliament specifically set out to outlaw successive periods of emergency detention, and it also forbade successive periods of short term detention."

The very difficult professional problem which the doctors faced in B v Forsey has now been resolved with the enactment in July 1991 of the Mental Health (Detention) (Scotland) Act 1991 which makes special provision where late in a period of detention under

section 26 there is a change in the condition of the patient that makes it necessary in the interests of his own health or safety or with a view to the protection of other persons that the patient should continue to be detained after the expiry of a period of 28 days and it is not reasonably practicable to submit a section 18 application to the Sheriff before the expiry of the 28 day period. That, of course, has no application to this case.

It must, I consider, be a matter of impression in each case whether it can truly be said that the patient has been *further* detained immediately after the expiry of a period of detention under section 26. What impresses me in this case is that the petitioner knew that the period had expired; that she knew then that she could leave but preferred to remain voluntarily as an informal patient so that her treatment could be continued; that those who had care of her in the hospital had reason to believe for some time before the period expired that they had her co-operation; and nearly 24 hours elapsed between the expiry of the 28 day period and her further detention. In these circumstances I find it impossible to affirm that the further detention was effected immediately after the expiry of the 28 day period of detention in contravention of section 26(7) of the Act. Since no Answers have ever been lodged to the petition, I will simply find that the averments in the petition disclose

no relevant ground of action, and I will therefore refuse the prayer of the petition.

OPINION OF LORD MacLEAN

in Petition of

[redacted]

for

JUDICIAL REVIEW OF A RECOMMENDATION BY DR ALISTAIR HAY UNDER SECTION 24 OF THE MENTAL HEALTH ACT 1984 AND A REPORT BY PROFESSOR EVE JOHNSTON UNDER SECTION 26 OF SAID ACT

Respondents:

Act: Clancy
Macbeth Currie & Co

Alt: Keen
R F MacDonald, WS
Solicitor for
Respondents

27 November 1992