REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

C.V. 00513 of 2008

BETWEEN

FELIX JAMES

Claimant

AND

THE ATTORNEY GENERAL

Defendant

Before The Honourable Madam Justice Dean-Armorer

Appearances

Mr. Ramdeen instructed by Mr. Murphy for the Claimant
Mr. Young instructed by Ms. Kelshall for the Defendant

JUDGMENT

Introduction

1. This was an application for judicial review. The Claimant challenges the exercise of the decision-making power of the Attorney-General. The source of the Attorney-General's decision-making power for the purpose of these proceedings was the Order of Justice Ibrahim requiring the Defendant to consider and decide whether the Claimant was fit and proper to be released from detention.

Procedural History

1. The Claimant sought and obtained leave to apply for judicial review in February, 2007.

2. By his application, the Claimant challenged the decision of the Respondent Attorney-General, to advise His Excellency the President that the Claimant was not a fit and proper person to be released from Prison.

3. The Claimant challenges the Respondent's decision on the following grounds:

    (i) that the decision was so unreasonable that no reasonable person could have come to such a determination;

    (ii) that the decision amounts to an abuse of power;

    (iii) that the decision amounts to an improper and irregular exercise of the discretion vested in him;

    (iv) that the decision is based on irrelevant considerations.

4. The evidence before the Court was by way of affidavits only. The Claimant relied on his own affidavits filed on 13th February, 2007 and 21st February, 2007 as well as the affidavit of Mark Seepersad filed on 15th February, 2007 and the affidavit of Lemuel Murphy filed 11th June, 2007. The Respondent relied on the affidavit of Neil Byam filed on 25th July, 2007.

Facts:

1. In or around 1975, the Claimant had been charged and tried for murder. The jury returned a verdict of guilty but insane. He was detained at Her Majesty's pleasure and was incarcerated at the Carrera Island Prison for over thirty years.

2. In 2003, the Claimant commenced proceedings under s. 14 of ***the Constitution***. Before the hearing or determination of the Applicant's Constitutional Motion, similar matters were determined by Justice Stollmeyer in constitutional motions: ***Funrose v. The Attorney General***[1] and ***Noriega v. The Attorney General***[2]. In his decision Justice Stollmeyer embarked on an in-depth analysis of the history and philosophy of the verdict of guilty but insane as prescribed by s. 67 ***Criminal Procedure Act*** Ch. 12:02. It is accepted, in the instant claim that it was in the wake of Justice Stollmeyer's decision that the Respondent Attorney General agreed to enter an order without objection before the Honourable Justice Ibrahim *(the Ibrahim Order)* in respect of the Claimant's Constitutional Motion. The salient aspects of the Ibrahim Order, which was dated 2nd October, 2006 are:

> *"1. That the case be remitted by the Minister of National Security to determine whether the Applicant is a fit and proper person to be released from custody such determination to be made within ten days from receipt of this order …*
>
> *2. The determination to be made … only on the basis of medical reports forwarded in these proceedings …*
>
> *3. The Minister shall convey his opinion to His Excellency … within four days from his determination*

[1] HCA No. 1816 of 2003
[2] HCA No. 2474 of 2003

4. The Applicant's attorneys to be kept informed."

3. Subsequent to the order without objection, Mr. Neil Byam, who had been the instructing attorney for the Attorney General in the Constitutional Motion, discovered a Cabinet Minute which recorded Cabinet's decision in respect of the review of persons who were detained at her Majesty's pleasure as guilty but insane[3]. By the Cabinet Minute, the Attorney General and not the Minister of National Security was responsible for advising his Excellency on reviews of such detainees.

4. It was on this basis that the attorneys for the Attorney General returned to Ibrahim J. to have the first order varied, by replacing reference to the Minister of National Security by reference to the Attorney General. The first variation of the Ibrahim Order was made on 17th October, 2006. Although the Order was amended to replace reference to the Minister of National Security by reference to the Attorney-General, the Order otherwise made no reference to the Cabinet Minute.

The Cabinet Minute

1. The Cabinet Minute was dated the 5th January, 2006. Cabinet recognised that sections 64 to 66 of the ***Criminal Procedure Act***[4] identified three categories of accused persons found to be insane. The third category were those persons in respect of whom the jury returned a verdict of *"guilty but insane ..."*

2. Cabinet agreed further, with respect to the release of persons detained at the President's pleasure by reason of insanity that:

[3] Affidavit of Neil Byam filed on 25th July 2009 at paragraph 11.
[4] Criminal Procedure Act Ch. 12:02

"(a) the Attorney General acting under the general direction and control of the Cabinet be responsible for advising the President on the release of Category 3 Cases …

(b) the Minister of Health to be responsible for the assessment and review of Category One, Two and Three Cases, the final responsibility to advise the President … to rest with the Attorney General …"

3. Cabinet Minute No. 6 of January 5th, 2006 also recorded Cabinet's agreement to the procedure to be followed for persons detained as guilty but insane. The applicable procedure is set out at Appendix II of the Cabinet Minute.

4. Paragraph 6 of Appendix II provides for an initial assessment of a person detained within fourteen days of his detention pursuant to s. 68 of the ***Criminal Procedure Act***[5]. If the detainees release is not recommended, Appendix II provides for further reviews at six month intervals. Paragraph 6 of Appendix II provides details for the further review of the detainee:

"Such further review or reviews … shall be carried out by a Board or Tribunal … appointed by the President and composed in the same or similar manner as the Hospital Psychiatric Tribunal ..."

Paragraph 11 prescribes:

"The decision or report of the tribunal shall be forwarded directly to the President and copied to the Attorney General within fourteen days of it being made or issued."

[5] Ch. 12:02

Appendix II therefore establishes a tribunal, whose written report is sent directly to His Excellency. Appendix II is substantially different from the Order of Justice Ibrahim.

5. In my view, it is fair to infer that the amended Order of Ibrahim J. superceded the Cabinet Minute as the source of the Attorney General's decision-making power in this matter.

6. The Order of Ibrahim J. was further varied by consent on 18th December, 2006. The varied Order directed that the following reports be forwarded to the Attorney General:

   a. Social Workers Report dated 5th March, 2004 of Rajpaul Sinanansingh.

   b. Minutes of the Psychiatric Hospital meeting.

   c. Ministry of Health letter dated 3rd May, 2004.

   d. Letter of Dr. Ghany dated 14th October, 2004.

7. The decision of the Defendant Attorney General was forwarded to learned attorneys-at-law for the Applicant in two letters of the Attorney General's, the first dated 9th November, 2006 and 10th January, 2007.

8. In his letter of 9th November, 2006, the Attorney-General referred to the Order of Justice Ibrahim. The Attorney-General referred to four reports which had been forwarded to him by the Order of Ibrahim J. The four reports referred to in his November, 2006 letter were:

   - Report of John Neehall …. 3rd February, 1975

- Report of Dr. Chen …. 19th April, 1994
- Report of Dr. Ghany …. undated – second Report of Dr. Ghany – 2004

9. The Honourable Attorney-General wrote:

> *"In obedience to the order, I have duly considered these reports and nothing else and have decided that I cannot recommend to His Excellency … that the Applicant be released based on what is contained in any of them or on what is contained in all of them when taken together."*
>
> *"I believe that for me to make such a recommendation I must be fully satisfied in my own mind that the Applicant would not pose a threat to the citizens of this country if he were to be released, which means that I must be convinced by the reports that the applicant would not be such a threat and not merely take the word or adopt the opinions of the persons who made the report on the issue."*

10. The Attorney-General then examined each of the reports and stated why he found them unconvincing.

11. Following the Attorney General's November, 2006 letter, four more reports were sent to the Attorney-General:

- Report of Social Worker … 5th March, 2004
- Report of the Psychiatric Hospital Tribunal … 8th November, 2004
- Report of Dr. Doon … 3rd May, 2004
- Letter of Dr. Ghany … 13th October, 2004

12. Further reports were sent to him and on 10th January, 2007, the Attorney-General referred to the reports and stated:

"These documents when taken individually and together are conspicuously lacking in sufficient information as to the applicant's afflictions and as to the basis for the conclusions reached by the tribunal for his fitness to be released."

13. Of the eight documents, which the Attorney-General was required to consider, six recommended the Claimant's release. The other two were the report of the Social Worker, Rajpaul Sinanansingh who did not express an opinion as to the Claimant's fitness, but reported that suitable accommodation was available to the Claimant upon his release. The second report which expressed a reservation was the report of Dr. Doon to Senator Martin Joseph. This report dated 3rd May, 2004 recommended that the Claimant be sent to St. Ann's for a brief assessment. Dr. Doon did not recommend the continued detention of the Claimant.

Submissions and Law

1. Learned Attorneys-at-Law relied on written submissions which, in the case of the Defendant, were supplemented by brief oral submissions.

2. In their written submissions, learned Attorneys-at-Law for the Defendant contended that the Defendant *"had made no reviewable error in finding that he was not satisfied that the Claimant was a fit and proper person to be released."*

3. Learned Attorneys-at-Law argued that the Defendant was correct in approaching his task on the basis that he had to be satisfied by the reports tendered to him.

4. They argued that if the reports proved unsatisfactory, the Respondent would have, *"acted outside of his remit by looking elsewhere or making further enquiries …"*

5. Learned Attorneys argued that the nature of the Claimant's detention raised a presumption that he was not a fit and proper person for release until otherwise was established. They argued further:

> *"The question for the Respondent was whether the reports which he was required to consider discharged that burden …"*

6. Learned Attorneys relied on numerous cases which support the well-established principle that a decision-maker ought not to abdicate his decision-making authority by deferring to the view of another person.

7. At paragraph 19, of their submissions learned attorneys submitted:

> *"The reports are conspicuously deficient in their failure to provide reasons."*

This raised the issue as to whether the opinion of an expert is valueless if it fails to provide the grounds for the opinion.

8. Learned Senior Counsel, Mr. Mendes supplemented the Defendant's written submissions by oral submissions. Citing the case of ***Attorney General's Reference*** [1999] 3 All ER 40 at 43 J, learned Senior told the Court that it was not in dispute that the Claimant's detention was derived from s. 68 ***Criminal Procedure Act*** and that the Court had ordered the detention of the Claimant at His Majesty's pleasure. Learned Senior also indicated the agreement of the Defendant that it fell to His Excellency the President to determine whether the Claimant was a fit and proper person to be released.

9. Learned Senior then echoed his written submission in arguing that in so far as the Claimant killed someone there existed a presumption that the Claimant constituted a danger to society.

10. Senior reiterated the well-established principle that a decision-maker ought not to abdicate his discretion in decision making to anyone else including the Medical Authorities whose reports had been sent to him.

11. Learned Senior alluded to the view of the Defendant that the reports failed to provide adequate analysis and argued that this case raised the question as to how the Court should deal with medical reports.

12. Learned Senior Counsel cited the decision of Lord Cooper ***Davie v. Magistrate of Edinburgh***[6] a decision which was followed by the local Court of Appeal in ***Rampersad Ramdial v. State***[7]**.**

Submissions for the Claimant

13. At p. 16 of their written submissions, learned attorneys-at-law for the Claimant argued that it is well settled by decisions of the House of Lords and the Privy Council that the detention of a person as guilty but insane *"is the same as that of a person subject to a life sentence."* They submit:

> *"The executive can only detain such a person where it can be objectively proved that the further detention of the person is necessary for the protection of the public."*

14. Learned attorneys argued further on the authority of ***Stafford v. UK***[8] that the risk posed must be a real and not a perceived risk.

15. Relying on the judgment of Stollmeyer J. in ***Funrose and Noriega***[9], learned Counsel for the Claimant argued that the policy of the ***Criminal Procedure Act***

[6] [1953] SC 34
[7] Cr. A 97 of 1992
[8] [2002] EHRR 32
[9] HCA 2474 of 2003; HCA 1816 of 2003

required the Defendant to justify further detention of the Claimant. They quoted a large portion of Stollmeyer's judgment including:

> *"While each person must be assessed according to the individual facts and circumstances of his or her case, the fundamental position remains that they are entitled to their liberty and must not be deprived of it without good cause."*

No authorities were advanced by the Defendant to counteract the effect of the judgment of Stollmeyer J. in ***Funrose and Noriega.***

Law

1. The ***Criminal Procedure Act*** Ch. 12:02 at sections 66, 67 and 68 provide as follows:

> *"66. Where, in an indictment, any act is charged against any person as an offence, and … it is given in evidence … that [the accused] … was insane, so as not to be responsible according to law for this actions at the time when the act was done, then if it appears to the jury … that he did the act charged, but was insane … at the time when he did the same, the jury shall return a special verdict to the effect that the accused person was guilty of the act charged against him, but was insane … when he did the act.*
>
> *67. Where a person … has a special verdict found against him under section 66, the Court shall direct the finding of the jury to be recorded, and thereupon the Court may order such person to be detained in safe custody, in such place and in such manner as the Court thinks fit until the President's pleasure is known.*

68. The Court shall as soon as practicable, report the finding of the jury and the detention of the person to the President who shall order the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he may think necessary."

2. These provisions were given in depth and extensive consideration by the Honourable Justice Stollmeyer in ***Funrose and Noriega v. The Attorney General*** HCA No. 2474 of 2003. At the end of his admirably erudite judgment, which appears not to have been appealed, the learned Judge sets out what may be regarded as recommendations for the treatment of persons detained as guilty but insane. At page 34 of his judgment, Stollmeyer J states:

> *"In arriving at its findings … when reviewing the case of a person subject to a Section 68 Order, the tribunal should bear in mind, that … the person is entitled to his liberty unless there is good reason to deprive him of it …"*[10]

3. In the case of ***Rampersad Ramdial v. the State*** Cr. A 97 of 1992, a panel of five Justices of Appeal considered the contention that *"there is an inflexible rule that the opinion of an expert is valueless … unless facts on which it is based are stated in the evidence by the expert giving it"*.[11]

At p. 13 of 16 of his judgment CJ de la Bastide concluded:

> *"I venture to put forward as a general guide … the failure of the expert to provide such an exposition does not render his evidence inadmissible or valueless …"*[12]

[10] HCA No. 1816 of 2003; HCA No. 2474 of 2003
[11] See Page 3 of 16
[12] See page 13 of 16

Reasoning and Decision

1. Learned Attorneys-at-Law for the Claimant contend inter alia that the decision of the Defendant was irrational, or unreasonable. They contend further that the Defendant took into account irrelevant considerations, that the decision constituted an abuse of power and that the decision conflicted with the policy of the ***Criminal Procedure Act***.

Irrationality

2. The definition of the unreasonable decision continues to be the classic ***Wednesbury*** definition that an unreasonable decision is one which no reasonable decision-maker would make.

3. Lord Diplock in ***CCSU v Minister for the Civil Service***[13] defined an irrational decision to be one which was so *"outrageous in its defiance of logic"* and accepted moral standards that no sensible person who had applied his mind to it could have arrived at it. The ***CCSU*** test has been applied in recent cases of high authority[14] and is therefore, the appropriate test to be applied in considering the ground of irrationality.

4. The Court notes further, that irrationality as a ground has been notoriously difficult to establish. The decision must amount to one which is perverse or that the decision-maker, in making the irrational decision took leave of his senses.

5. In the instant matter the source of the Defendant's decision-making power was quite unusually, a Court Order, that is to say, the varied Order of Ibrahim J. in a constitutional Motion brought by the Claimant in 2003.

6. The Court Order described itself as having been made without objection. The Court Order was made in the wake of Justice Stollmeyer's historic judgement in

[13] [1985] 1 AC 374
[14] See: ***NH International v UDECOTT and or.*** CA 95 of 2005; ***HMB Holdings LTD. v Cabinet of Antigua and Barbuda*** P.C. 18 of 2006.

October 2004, in ***Funrose and Noriega v. Attorney-General***[15] where Justice Stollmeyer underscored the constitutional necessity for periodic reviews of prisoner detained as guilty but insane, at the President's pleasure.

7. The Court order was also made in the historical context of a Cabinet decision in January 2006[16], where Cabinet agreed on a procedure for the periodic review of persons detained as guilty but insane.

8. No reasons are offered in this case for Government's failure to follow the procedure in the Cabinet Minute. However, compliance or non-compliance with procedure in the Cabinet Minute has not been raised as an issue for my consideration and it is therefore out of the scope of this decision to make any order or comment thereon. It is also out of the scope of this decision to comment on the Order without objection. However, in my view, the crafting of the Order was unfortunate for many reasons, not the least of which was its failure altogether to recognise the existence of the Cabinet Minute.

9. In this matter, the impugned decision which was made pursuant to the Order of Justice Ibrahim was communicated to learned Attorneys for the Claimant by way of the Attorney-General's letter of 10th January, 2007. It is to this decision that the Court must apply the learning in relation to irrationality and abuse of power.

10. The letter which communicated the Attorney-General's final decision, had been preceded by earlier letter of the 9th November, 2006, which was remarkably more substantial than the later letter.

By his first letter the then Attorney-General acting pursuant to the Order of the Honourable Justice Ibrahim carefully considered four reports which had been forwarded to him pursuant to the Court order.

[15] HCA No. 1816 of 2003
[16] Cabinet Minute No. 6 of 5th January 2006. See Affidavit of Neil Byam filed 25th July 2007

The four reports were:

- The report of Dr. John Nehall dated 3rd February, 1975
- The report of Dr. G. Chen dated 19th April, 1994
- A report of Dr. Ghany (date uncertain)
- A second report dated 11th March, 2004 by Dr. Ghany

The Attorney-General carefully considered the reports and came to the conclusion that they were insufficient to persuade him that he should *"… in the exercise of his duties for the public good, advise His Excellency to release him …"*

In my view the decision which the Defendant communicated in the letter of the 9th November, 2006 might have been reviewable in so far as the Defendant held and applied the view that there was a presumption that the Claimant was not fit to re-enter society, because he had killed someone.

The Defendant had no basis in law for applying this presumption, which is contrary to the clear findings of Stollmeyer J in ***Funrose and Noriega*** that *"the detained person is entitled to his liberty unless there is good reason and deprive him of it …"*

11. Following this letter, on 18th December, 2006, the Order of Justice Ibrahim was varied a second time. By the varied Order, Justice Ibrahim directed that four further reports be sent to the Defendant. The reports were:

- Report of the Social Worker, Rajpaul Sinanansingh
- Minutes of the Psychiatric Hospital Meeting
- Ministry of Health letter dated 3rd May, 2004
- Letter of Dr. Ghany dated 13th October, 2004

It is not clear from the evidence why the order was varied. However the varied order had the effect of remitting the matter to the Defendant. The effect of the varied Order, was to require the Defendant to re-consider his November, 2006 decision, having regard to additional reports.

12. The Defendant complied with the varied order in his letter dated 10th January, 2007. In the second letter, which provided evidence of the impugned decision, the Defendant simply referred to the additional reports and concluded that the documents provided no assistance to him *"in arriving at a determination as to the fitness of the applicant for release."*

13. The Defendant was required to consider a total of eight reports, two of which were the reports of medical practitioners, that is to say Dr. Chen and Dr. Doon, Chief Medical Officer and one of which was the report of a social worker. The remaining six reports emanated from psychiatric experts being Dr. Ghany, Dr. Neehal and the Psychiatric Hospital Tribunal. The overwhelming majority of six out of the eight reports recommended the Claimant's release. Of the remaining two, one was the report of a social worker which did not address the Claimant's fitness for release, but provided information as to the availability of accommodation for the Claimant, in the event of his release. The single report which did not positively recommend his release was the report of Dr. Doon by letter dated 3rd May, 2004.

Dr. Doon did not recommend the Claimant's further detention, but recommended further assessment. The Claimant was in fact assessed in October, 2004 by the Hospital Psychiatric Tribunal and recommended for release.

14. I agree with the submissions of learned Senior Counsel for the Defendant that the Defendant's decision would have been flawed had he simply rubber stamped the views of the medical experts. Had the Defendant done so, his decision would have been reviewable on the ground that he had abdicated his decision-making power.

15. It seems to me, however, that the overwhelming expert view (medical and psychiatric) that the Claimant ought to have been released should have given pause to the defendant as decision-maker. In my view, in such event, no reasonable decision-maker would have perfunctorily cast the expert views away with a summary refusal to recommend the Claimant's release, without even recommending that further information be obtained. In my view, such was the action of the Defendants in his letter of the 10th January, 2007.

16. No rational decision maker would have lost sight of the fact that he had no expertise to contradict the recommendations of the psychiatric and medical practitioners.

No reasonable decision-maker would have ignored the factor present in the reports that the Claimant had been incarcerated since 1971. No rational decision-maker would have overlooked the fact that the separate independent reports recommended the Claimant's release. In the context of these two considerations, in my view, it would have been callous for a decision-maker summarily to refuse to recommend the Claimant's release, as the Defendant did in his letter of 10th January, 2007. In my view, it was this callousness which rendered the 10th January decision outrageous in its defiance of logic and of accepted moral standards and therefore irrational.

Even if the Defendant were dissatisfied with the contents of the reports, it was open to him to return to Court, as indeed he had done through his attorneys on two earlier occasions. In this way, the Defendant could have alerted the Court that further information was needed. However, the effect of the impugned decision was to resentence of the Claimant without any indication as to whether or when his detention would be reviewed. In my view, the effect of the impugned decision was to place the Claimant in virtual limbo where he could have no recourse to either the Cabinet Minute or the Constitutional Motion, which had

been determined without objections in his favour. In my view, in this careless disregard for the Claimant's position, places the Defendant in the ***CCSU*** definition of irrationality.

Accordingly, it is my view that the Defendant acted as no reasonable decision-maker would have acted. The decision is hereby quashed on the ground that it was irrational. The decision is remitted for re-consideration to the Attorney-General.

In my view the remaining grounds that the decision constituted an abuse of power have not been supported by the evidence. At highest the Defendant may be accused of careless disregard. I find no basis to hold that he abused his power or acted in mala fides.

Order

1. The decision of the Honourable Attorney-General made on the 10th day of January, 2007 was irrational, null and void.

It is ordered that:

1. An order or certiorari remitting the decision to the Honourable Attorney-General for consideration.

2. The Defendant to pay the Claimant's costs fit for Advocate Attorney-at-Law to be quantified in default of agreement.

3. There be a stay of execution of forty-two days pending appeal.

Dated the 30th day of January, 2009.

……..
Mira Dean-Armorer
Judge