

Case Name:

 **Orru v. Penetanguishene Mental Health Centre**

Between

Alessandro Orru, applicant, and
Administrator, Mental Health Centre-Penetanguishene,
Persons in Charge, Royal Ottawa Health Care Group
(Brockville Psychiatric Division), Ontario Review Board,
Her Majesty the Queen, respondents

[2004] O.J. No. 5203

Court File No. 04-6997

**Ontario Superior Court of Justice
Glass J.**

Heard: December 20, 2004.

Judgment: December 22, 2004.

(30 paras.)

Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Life, liberty and security of the person — Wills, estates and trusts law — Mental incompetency — Committal — Involuntary — Patients' rights — Habeas corpus.

This was an application by Orru for a declaratory judgment by way of a writ of habeas corpus ad subjiciendum with certiorari in aid. In 1998, Orru was found not criminally responsible for prowling by night and criminal harassment, and was detained at the Mental Health Centre, Penetanguishene, a maximum-security institution. In July 2004, the Ontario Review Board ordered Orru transferred to the Royal Ottawa Health Care Group - Brockville, a medium-security facility. While Penetanguishene is a lockdown centre, Brockville has its doors unlocked during the day, most persons are able to travel on the grounds unsupervised and there are privileges to go unsupervised in the community. Brockville also permits greater access to family, community facilities and outward-looking programming. Penetanguishene was ready to transfer Orru, but Brockville would not accept the transfer due to lack of space. Orru argued that his continued detention at Penetanguishene violated his s. 7 Charter rights.

HELD: Application allowed. Pursuant to s. 24(1), there was a declaratory order that Orru has been in detention at Penetanguishene in violation of his s. 7 Charter rights, and that he is to be transferred to Brockville within 15 days. Part XX.1 of the Criminal Code does not allow a facility to delay a transfer order. When the transfer does not take place, it is appropriate to ask a court by way of habeas corpus with certiorari in aid to order that the transfer be completed with a time limitation. The continued holding of Orru at Penetanguishene and the denial to him of the treatment available at Brockville

deprived him of liberty and security of his person in breach of s. 7. Facilities are required to abide by the procedure established under the Criminal Code, and the Province has a legal obligation to provide sufficient space to meet its legal obligations to persons found not criminally responsible. The breach of Orru's s. 7 rights was not saved by s. 1 of the Charter. Administrative convenience cannot override the need to adhere to the principles of fundamental justice.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 7, 24(1).

Criminal Code, s. 672.54, 672.54(c).

Counsel:

C. Anik Morrow, for the Applicant

Beth G. Beattie, for the Administrator, Mental Health Centre-Penetanguishene

Joseph Wright for Ontario Review Board

Kathryn Hall for the Crown

GLASS J.:—

Introduction

¶ 1 Alessandro Orru is detained at the Mental Health Centre, Penetanguishene following being found not criminally responsible (NCR) at a trial on February 27, 1998 on charges of prowling by night and criminal harassment. Since then, he has had annual reviews with the Ontario Review Board.

¶ 2 On July 26, 2004, the Ontario Review Board ordered that Mr. Orru be transferred to a medium security facility. To date, he remains at the Health Centre in Penetanguishene because the Royal Ottawa Health Care Group in Brockville will not receive him due to a lack of space.

¶ 3 The Applicant seeks a declaratory judgment by way of a writ of habeas corpus ad subjiciendum with certiorari in aid. Such judgment would find a s. 7 Charter infringement not overcome by s. 1 of the Charter. The court is asked to order that the Applicant be transferred within 15 days to the Royal Ottawa Health Care Group in Brockville.

¶ 4 The Applicant seeks costs against the Respondent, Royal Ottawa Health Care Group which did not attend or file any documentation on this application.

Issues

¶ 5 When a person is institutionalized at a centre such as the Mental Health Centre in Penetanguishene, does a continuation of detaining him there after the Ontario Review Board orders his transfer from a maximum-security institution to a medium security facility amount to a breach of s. 7 of the Charter of Rights and Freedoms?

¶ 6 If there is a Charter breach, does s. 1 of the Charter save the day as a reasonable course of action?

¶ 7 Can habeas corpus with certiorari in aid thereof be used or should the remedy be sought by way of appeal to the Court of Appeal?

¶ 8 If there is a s. 7 Charter violation without relief by way of s. 1 of the Charter, can this court order that Royal Ottawa Health Care Group receive Mr. Orru and within what time period?

The Facts

¶ 9 On January 7, 1998, the Defendant was arrested after attending at the house of a neighbour, ringing the doorbell at night and hiding in bushes, making sexually explicit telephone calls that frightened the female neighbour who called the police.

¶ 10 The trial court found that Mr. Orru was not criminally responsible.

¶ 11 He was sent to the Mental Health Centre in Penetanguishene. This is a maximum-security facility. It is more of a jail setting with extensive lockdown times. There is no opportunity to be in the community.

¶ 12 Mr. Orru has been examined and found to be only in need of being in a medium security institution. The Ontario Review Board made a ruling in July 2004 that the appropriate way to look after Mr. Orru is to transfer him to such a facility in Brockville. As per the Criminal Code of Canada, the Board looked at the twin goals of the least onerous and least restrictive disposition for the accused person. Part XX.1 of the Code sets out the governing procedures. At the same time, the protection of the public, Mr. Orru's mental condition and his other needs have been addressed. There is no suggestion otherwise by anyone in this proceeding.

¶ 13 The hospital in Penetanguishene is ready to transfer Mr. Orru as soon as the facility in Brockville says that they can receive the Applicant. To date, Brockville has not given the approval to transfer Mr. Orru.

¶ 14 The Royal Ottawa Health Care Group in Brockville has not filed any documentation in this proceeding. There is a letter from Mr. Kelly who acts for that facility, but the letter makes it clear that he is not retained to participate in this application, but he provided some indication of a space problem for Brockville. The letter indicates that Dr. Bradford asked Mr. Kelly to advise that Mr. Orru is on a waiting list.

Analysis

¶ 15 *R. v. Hussein* [2004] O.J. No. 4594 is a decision of the Superior Court of Justice involving the Royal Ottawa Health Care Group. Desmarais J. notes that Dr. Bradford indicates a bed shortage at the Brockville facility. There, the court found that a declaratory order should issue to address the breach of the constitutional rights of in that case persons waiting to be assessed.

¶ 16 I am prepared to accept that the Royal Ottawa Health Care Group has a bed space problem in servicing the needs of NCR persons and that it appears that Mr. Orru is being moved down the priority list or not moved up the list. The doctor that the Ontario Review Board focused on Mr. Orru seeing upon being transferred is the same Dr. Bradford in *R. v. Hussein*, supra.

¶ 17 Part XX.1 of the Criminal Code of Canada is a layout of the way to handle the special needs of accused persons found to be not criminally responsible along with the needs and protection of society in general.

¶ 18 When a person is found to be not criminally responsible, the Ontario Review Board must conduct an annual review of the person so long as the person remains at a mental health institution. The old method of placing a person in a facility at the pleasure of the government of the Province was ruled out years ago. Part XX.1 provides a new regime to handle the circumstances of NCR persons now. The procedure used now got away from the previous stereotypes about mentally ill offenders by going to an alternative of assessment to determine whether the person poses a continuing threat to society coupled with an emphasis on providing opportunities to receive appropriate treatment. See *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31 at paragraph 21.

¶ 19 Can failure to send the person to the facility ordered by the Ontario Review Board be handled by this procedure or does the matter have to go to the Court of Appeal to appeal the Board's ruling? I am satisfied that an appeal is not necessary. No party has filed an appeal to the Board's order from July 2004. The only issue for appeal would be to strike from the order the words "until such time" with respect to keeping Mr. Orru at Penetanguishene until he is transferred. I read the wording of the order of the Board to mean that Mr. Orru is to be transferred forthwith to Brockville. Part XX.1 of the Criminal Code does not allow the facility in Penetanguishene to delay the transfer beyond a matter of days required to move the person from one institution to another. When the transfer does not take place, it is appropriate to ask a court by way of habeas corpus with certiorari in aid to order that the transfer be completed with a time limitation for doing so. One might anticipate it taking a few days but not almost 5 months to transfer Mr. Orru.

¶ 20 The continuation of holding Mr. Orru at Penetanguishene is a breach of s. 7 Charter by depriving Mr. Orru of the liberty and security of his person. Even though he is a person held within an institution, the continuation of holding at a maximum security facility when the Ontario Review Board has ordered transfer to a medium security institution amounts to infringing on the liberty of his person because he is in a lockdown centre rather than a greater treatment facility. If he were in Brockville, the doors are unlocked during the day and most persons there are able to travel unsupervised on the grounds and have privileges to go unsupervised within the community. This medium security facility assists in a gradual reintegration into the community to the extent that the twin goals of public safety and treatment permit. It also permits greater access to family, community facilities and outward looking programming along with their therapeutic effect. To continue holding Mr. Orru in Penetanguishene, the Respondent deprives him of an enlarged circumstance in Brockville. See *Dumas v. Leclerc Institut*, [1986] 2 S.C.R. 459, [1986] S.C.J. No. 61 (S.C.C.).

¶ 21 In *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* (the accused person's name was Tulikorpi), [2004] 1 S.C.R. 498, [2003] S.C.J. No. 67 the Supreme Court at paragraph 24 referred to the least restrictive regime as including not only the place or mode of detention but also the conditions governing it. The liberty interest of the NCR accused person there was not exhausted by the simple choice among absolute discharge, conditional discharge or hospital detention on conditions. The Court noted a variation in the conditions of a conditional discharge or the conditions under which an NCR person is detained in a mental hospital can also have serious ramifications for his or her liberty interest. At paragraph 31, the Court observed that after the Review Board made its disposition to "a hospital" under s. 672.54(c) of the Criminal Code, the choice of the type of hospital and the level of security and conditions of detention have a major impact on the liberty interest of the detained person. Confinement to a cell-like room at the Mental Health Centre in Penetanguishene is very far removed from a life of liberal access to the community at the Royal Ottawa Health Care Group in Brockville. I note that the same facilities were involved in Tulikorpi as with Mr. Orru. At paragraph 45, Binnie J. emphasized that the Review Board is to consider every step of s. 672.54. That includes the least onerous and least restrictive considerations as well as protection of the public from dangerous persons, the mental condition of the accused person, the reintegration of the person into society and the other needs of the accused individual. In other words, there is no reason to isolate the governing principle of s. 672.54, i.e. the least onerous and least restrictive, from the whole consideration. In paragraph 51, Binnie J. referred to McLachlin J. in *Winko*, (supra) at paragraph 71 with respect to a s. 7 Charter challenge where the scheme of s. 672.54 "ensures that the NCR accused's liberty will be trammelled no more than is necessary to protect public safety."

¶ 22 The procedure established in s. 672.54 of the Criminal Code meets the needs of the public and the accused person. It is a deliberate move by the Parliament of Canada to advance to a more humane method of handling persons who experience mental health problems. That requires a follow through by public facilities to make the system work. It is not good enough to rely on a lack of space. That may require a greater expenditure of funds by government, but that is expected for the benefit of society as a whole and the NCR person. Failing to do so does infringe on the s. 7 Charter rights of Mr. Orru. I accept Ms. Morrow's submission that the delay in transferring Mr. Orru to the Health Centre in Brockville has a

psychological impact upon the Applicant as he is denied treatment that is available to him there. Withholding treatment strikes at the fabric of s. 7.

¶ 23 Does s. 1 of the Charter answer any shortfall of how Mr. Orru has been handled since the order of the Ontario Review Board on July 26, 2004? The answer is no. The Supreme Court in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 did not accept that administratively convenient procedures can be sufficient to invoke s. 1 of the Charter so as to ignore the principles of fundamental justice. Wilson J. at pp. 218-219 pointed out that the principles of fundamental justice and procedural fairness have been supported by the courts and that the constitutional entrenchment of the principles of fundamental justice in s. 7 recognize that administrative convenience will not override the need to adhere to such principles. With Mr. Orru, I have noted above that I accept that there are shortfalls in bed space. That is not good enough to leave Mr. Orru in a maximum-security mental health facility when the Ontario Review Board has ordered that he go to a medium security institution. The Province has a legal obligation to provide sufficient space to meet its legal obligations for NCR persons.

¶ 24 Pursuant to s. 24(1) of the Charter, the order of the Ontario Review Board dated July 26, 2004 is interpreted as an order for the transfer of Mr. Orru from the institution in Penetanguishene to the facility in Brockville, and that means right away.

Conclusion

¶ 25 There is a s. 7 Charter breach.

¶ 26 S. 1 of the Charter does not save the situation.

¶ 27 Habeas corpus with certiorari in aid thereof can issue for the transfer of Mr. Orru.

¶ 28 A declaratory order can issue with such findings.

¶ 29 Therefore, since s. 1 of the Charter does not override the s. 7 infringement, there will be a declaratory order pursuant to s. 24(1) of the Charter that Mr. Orru has continued to be in further detention at Penetanguishene thereby violating his s. 7 Charter rights. Mr. Orru is to be transferred to Brockville to the Royal Ottawa Health Care Group within 15 days of December 22, 2004 and the Royal Ottawa Health Care Group in Brockville will receive Mr. Orru pursuant to the order of the Ontario Review Board of July 26, 2004 as an NCR accused person under Part XX.1 of the Criminal Code. Further, the Mental Health Centre, Penetanguishene and the Royal Ottawa Health Care Group will file with the court affidavits confirming that Mr. Orru has been transferred. The affidavits shall be filed by January 10, 2005.

¶ 30 The issue of costs may be presented.

GLASS J.

QL UPDATE: 20050107

cp/e/ln/qw/qlgkw/qlkjg