In The Supreme Court of Bermuda

CIVIL JURISDICTION
2007: No. 79

AND IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT 1985

AND IN THE MATTER OF LORENZO PRINCE ROBINSON

AND IN THE MATTER OF A NOTICE ISSUED BY THE MINISTER OF HEALTH AND FAMILY SERVICES DATED 6 JUNE 2005

AND IN THE MATTER OF AN ORDER OF THE GOVERNOR OF BERMUDA DATED 24 JUNE 2005

BETWEEN:

LORENZO PRINCE ROBINSON

Applicant

- and -

MINISTER OF HEALTH AND FAMILY SERVICES

First Respondent

and

THE GOVERNOR OF BERMUDA

Second Respondent

Dates of Hearing: 23 & 25 January 2008
Date of Judgment: 7 March 2008

Narinder Dosanjh, of Christopher Francis Forrest, for the Applicant;
Martin Johnson, of the Attorney General's Chambers for the Respondents.

JUDGMENT

INTRODUCTION

1. These proceedings have been bought by Mr. Lorenzo Prince Robinson ('the Applicant') to challenge the legality of his continuing detention at the Westgate Correctional Facility ('Westgate') in a designated 'hospital cell'. The Applicant contends that the designated 'hospital cells' at Westgate are not true hospitals and that the circumstances of his detention breach his rights under section 3 of the Constitution.

FACTUAL BACKGROUND

2. In October 2004 the Applicant was tried in the Supreme Court on charges of –

(i) attempted murder contrary to s. 289 of the Criminal Code 1907;

(ii) robbery contrary to s. 344 of the Criminal Code; and

(iii) stealing contrary to s. 341 of the Criminal Code.

The attempted murder charge arose from the fact that he had attacked and stabbed a complete stranger on Front Street in broad daylight without reason or provocation. The facts were not contested, but he entered a plea of not guilty by reasons of insanity. This plea was tried before a judge and jury, and was not seriously contested by the prosecution. On 20 October 2004 the jury returned a unanimous verdict of not guilty on account of insanity pursuant to s. 546(1) of the Criminal Code.

3. The verdict triggered the application s. 546(2) of the Criminal Code which provides:

> 'In any such case the Governor, acting after consultation with the Committee [*i.e. the Advisory Committee on the Prerogative of Mercy*], shall give such order as he thinks fit for the removal to, and safe custody of such person in a hospital.'

4. After the verdict was announced, and pursuant to s. 546 (1) Criminal Code, the Applicant was sent to the Maximum Security Unit at Westgate until the Governor gave the necessary order. In order to assist the Governor the trial Judge ordered that a transcript of the proceedings be prepared and provided to him, and that was conveyed by letter of 15 November 2004, together with copies of two psychiatric reports of Dr. Paul Harlow dated 3 October 2003 and 18 September 2004 and the psychiatric report of Dr. Frank Kelly dated 18 October 2004. The reports and evidence indicated that the applicant suffered from chronic paranoid schizophrenia co-morbid with recurrent depressive episodes and poly-substance abuse, as a result of which he was highly dangerous and required long-term detention and treatment in a secure psychiatric facility.

5. At this point the Governor was faced with a problem. It is, I think, common ground that there is no secure psychiatric facility in Bermuda capable of housing the applicant on a long term basis. That is, in any event, verified by the evidence of Mr. Kevin Monkman[1], the then Permanent Secretary in the Ministry of Health:

> "8. There is currently, as well as at that time on the 20th day of October, 2004, no secure forensic unit in Bermuda to house, in strict custody, a patient such as Mr. Robinson."

That was also confirmed by Dr. Saratchandra, the head of psychiatry at the Mid-Atlantic Wellness Institute ('MAWI'), when he gave evidence In particular, MAWI, the country's primary psychiatric facility, does not a secure long-term unit. It does have Somers Annexe, which is reasonably secure, in the sense that it is locked and has round the clock medical supervision. But Dr. Saratchandra's evidence was that it was essentially a 'psychiatric ICU', intended for the short term assessment and treatment of acute cases, and not suitable for the long-term detention of a high risk patient.

[1] See his affidavit of 7th August 2007, paragraph 8 [143]. References in square brackets are to the page numbers in the Pleadings File.

6. It had been the applicant's case at trial that he should be housed and treated abroad, possibly in the United Kingdom. There is nothing in the evidence to show whether that was considered, and, if so, why it was rejected.

7. In December 2004 the then Governor, Sir John Vereker, met with the Applicant in the Applicant's maximum security prison cell at Westgate, together with the Permanent Secretary, Mr. Monkman; the then Minister for Safety and Public Affairs, Mr. Randolph Horton; the Principal Officer at Westgate, Mr. Kenneth Cane; the Chief of Psychiatry at Westgate, Dr. Paul Stein; and the Chief Nurse Officer at Westgate, Mr. Russ Ford. The Applicant had been notified of the meeting the night before it took place and as a result of such short notice he had no legal representation at the meeting. Mr. Robinson deposes[2] that the Governor asked him whether he would rather stay in Bermuda or go abroad, to which Mr. Robinson replied he would rather go abroad as he felt there was more opportunity out there for him. The Governor is then said to have replied that he would do what was in Mr. Robinson's best interests, and the meeting ended.

8. On 10 February 2005 the Governor wrote to the Acting Minister of Health and Family Services, inviting him to consider designating the appropriate part of Westgate Correctional Facility in order for the Governor to be able to recommend that Lorenzo Robinson be detained there[3]. On 6 June 2005 the Minister of Health and Family Services made the Mental Health (Designation of Hospital) Notice 2005 ('the Designation Notice') which designated seven cells at Westgate as 'hospitals' for the purposes of the Mental Health Act 1968 ('the MHA') . Two of those cells are in the Maximum Security Unit, one of which was already being occupied by the Applicant and within which the December 2004 meeting was held. The remaining five are scattered around the Echo Unit One and Echo Unit Two (Echo Units house the 'general population' of prisoners). None of the 'hospitals' are in the Segregation Unit.

[2] See his first affidavit of 9th March 2007, at paragraph 11 [6].
[3] That letter is not in the evidence, but it is referred to in the Governor's letter of 24 June 2005 [30].

9. Once that designation was made, the Governor, by letter of 24 June 2005 [30] addressed to the Minister of Health and Family Services, gave the following direction:

> 'I am therefore now able to make my pleasure known that pursuant to Section 546 of the Criminal Code Act 1907, and acting after consultation with the Advisory Committee on the Prerogative of Mercy, I think it fit, and hereby order, that Lorenzo Robinson be removed to, and kept in safe custody in, one of the units at Westgate so designated as a hospital under the 1968 Act.'

It was not specified which of the seven 'hospitals' the Applicant would be detained in.

RELIEF SOUGHT

10. Against that background, it is the applicant's case that the designation of the Westgate cells as hospitals, and his continued detention in one of them, was inappropriate and he seeks –

(i) An Order of Certiorari in respect of the decision of the Minister of Health and Family Services to designate the seven cells at Westgate as hospitals.

(ii) A Declaration that the Mental Health (Designation of Hospital) Notice 2005 is unlawful.

(iii) An Order of Certiorari in respect of the Order of the Governor of Bermuda dated 24 June 2005 that the Applicant be kept in custody in one of the cells so designated as a hospital.

(iv) An Order of Mandamus requiring that the Minister of Health and Family Services designate an appropriate hospital for the purposes intended by s.546(2) of the Criminal Code.

(v) An Order of Mandamus directing the Governor of Bermuda to properly and lawfully discharge his duties pursuant to s.546(2) of the Criminal Code.

(vi) Damages.

11. The Applicant recognizes that damages may only be awarded in judicial review proceedings if the Court is satisfied that, if the claim had been bought in a private law action begun at the time of making his application, he could or would have been awarded

damages: see RSC Ord. 53, r. 7. He therefore asks that, if successful on his application for prerogative orders, the Court give him leave to continue with his claim for damages by way of writ.

GROUNDS OF CHALLENGE

12. Although the original application contained eight grounds of challenge, for the purposes of argument at trial the applicant condensed these to three main grounds, as follows:

1. The Minister's decision to classify certain cells at Westgate as hospitals was unreasonable, frustrated legislative purpose and is *ultra vires* the Constitution;

2. The Designation Notice is *ultra vires* the MHA and the Constitution.

3. The Governor's order dated 24 June 2005 detaining the Applicant in a 'hospital' cell at Westgate was unreasonable and *ultra vires* the Constitution

THE EVIDENCE

13. The evidence was given on affidavit, but Dr. Saratchandra, the Chief of Psychiatry at MAWI, was tendered by the respondents and cross-examined.

14. The applicant deposed as to his current situation. He says that he has spent most of his time in the designated maximum security cell, although he has also spent time in one or other of the designated cells in the E unit. However, he has also spent a considerable amount of time in a segregation cell and that is in the punishment block and is not a designated hospital cell.

15. The applicant says that the maximum security cell is approximately 8 ft x 6 ft, with a barred window and solid door with a small window. There is a steel toilet and sink, which does not have hot water. The bed is metal with a thin canvas mattress. He gets clean

bedding on washing days, which are two or three times a week. He says that he eats all meals in the cell and gets two breaks outside a day, on one of which he can exercise. The evening break can be spent in the communal area, which includes access to the one television in the unit. Otherwise he is locked in his cell for 22 hours per day. There is little real dispute over the detail of these conditions.

16. The applicant says that he has been twice attacked by other inmates, and they also sometimes encourage him to misbehave. On one occasion he stabbed a prison officer with a knife he had sharpened, and he asserts that he did this because the officer held him down to force him to take medication. He has also tested positive for cannabis use, which he admits, although he recognizes that it interferes with his treatment. He complains that the food in the prison is not suitable for his needs as he suffers from acid reflux disease.

17. As to medical treatment he says that he sees a visiting psychiatrist for 10 - 15 minutes every six weeks. It seems that there is little continuity in the people who see him, so that there is difficulty with establishing a rapport between doctor and patient. Otherwise there is a medical unit in the prison which is only open from 7 am to 7 pm on weekdays, and 8 am to 12 noon on weekends. The unit is staffed by a medical officer, three psychiatric nurses and two other nurses, who work shifts. However, he has no access to these personnel outside of clinic opening hours. Again there is little dispute over all of this, although Dr. Saratchandra says he sees a psychiatrist once a month, rather than every six weeks.

18. The respondents also rely upon an affidavit from the Assistant Commissioner, Corrections[4], which says, inter alia –

> "These cells are supervised by trained Correctional officers, including Specialist officers (Nursing officers) of the Health Services Department of the Westgate facility. The Medical staff is also assisted by Prison officers in the event that assistance is needed and they (Prison officers) also provide security at nights when staff of the Health Services Department are off duty."

[4] See the affidavit of Keeva Joell-Benjamin of 7th August 2007, at paragraph 5 [127 at 128]

19. I think that it is accepted that the applicant is receiving appropriate drug treatment for his condition, and that it is adequately managed in that respect. However, it is the applicant's case that he is denied the other benefits of being in a therapeutic hospital environment, including proper management of his episodic flare-ups, as well as socialization and occupational therapy.

20. Perhaps the most disturbing aspect of the applicant's management at the prison is the use of segregation facilities. The applicant deposes[5] –

> "8. The segregation cell I live in when I am on punishment is in the B unit and is not designated as a hospital. Since my detention at Westgate I believe I have been in segregation some ten to twenty times. The longest period was four months as punishment for stabbing a Correctional Officer who had held me down in order to force me to take medication. The segregation cell is slightly bigger than a regular cell. It has a metal toilet and sink with cold running water. It has a cold water fountain for drinking. It does not have a bed. The cell walls and floor are made of concrete and there is a concrete platform upon which the mattress goes. If I am on suicide watch then I can only wear a smock and do not have a mattress and so I sleep on the concrete floor with a blanket. If I am not on suicide watch then I can have a mattress and regular prison clothes.
>
> 9. As stated in my previous Affidavit the lights are on in the segregation cell twenty four hours a day and I get thirty minutes out of the cell per day. In terms of when I am sent to segregation and when I am allowed to leave segregation this decision is made by either the Correctional Officers or by the Medical Officer depending upon the reason I have been sent to segregation. If I am sent for disciplinary or punishment reasons then I believe it is the Correctional Officers who decide when I go in and when I come out. On the other hand if the Medical Officer considers that I have become a danger to myself or if I threaten to commit suicide then he can decide when to put me in and when to let me out. I do not believe that they liaise with each other in terms of this decision making. For example the Correctional Officers could send me to segregation on punishment without the knowledge of the medical unit and keep me there for so long as they see fit. When I am in segregation I have no access to television services or to exercise facilities. I am allowed out for thirty minutes per day."

21. There is no evidence from the respondents to contest that. Dr. Saratchandra, who was the respondents' witness, agreed that such a regime would be inappropriate for the applicant and his condition. He said that in a therapeutic setting segregation would only

[5] See his second affidavit of 17th September 2007 [157].

be used for very short periods – a matter of hours, rather than days – and that it would be closely monitored both mechanically and by nurses, to ensure the health and safety of the patient.

22. As to how the designation of the cells came about, this is addressed in Mr. Monkman's affidavit[6] –

> "6. I have met with various people including, Mrs. Patrice Dill, the Director of St. Brendan's Hospital (now known as the Mid Atlantic Wellness Institute ("MAWI") and Dr. Stein, Psychiatrist at MAWI, to find out how Mr. Robinson's welfare would be best dealt with given the prevailing circumstances in Bermuda, especially in relation to how he could be kept in strict custody while still receiving psychiatric care.
>
> 7. It was recognized by all persons including all the experts and the Court that Mr. Robinson was a very dangerous man, and that he was required to be held in strict custody at the Governor's pleasure for his own protection as well as the protection of the public.
>
> 8. There is currently, as well as the that time on the 20th day of October, 2004, no secure forensic unit in Bermuda to house, in strict custody, a patient such as Mr. Robinson.
>
> 9. The Minister of Health and Family Services exercised her powers under section 2 (2) of the Mental Health Act 1968 to designate certain cells at Westgate Correctional Facility as hospitals for the purposes of holding a person suffering from mental disorder in strict custody. Mr. Robinson was held in one of those designated cells (Mental Health (Designation of Hospital) Notice 2005) ("the 2005 Notice").
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> 10. The 2005 Notice was delegated legislation which was debated and passed by both houses of the Bermuda Legislature. The Governor was then informed and the Minister of Health and Family Services signed and publish the Notice into law ("the affirmative resolution"). All persons in Bermuda had a chance to make representations through their Member of Parliament and through the Senators during the debate of the 2005 Notice.
>
> 11. It is my understanding that Mr. Robinson is receiving help from psychologists, psychiatrists, medical practitioners and Nurses trained in the field of psychiatry at the designated hospital cell in Westgate Facility."

[6] [143] at [144]

23. That is supplemented by an affidavit from the respondents' counsel, Mr. Martin Johnson[7], although he explained that he was simply quoting verbatim his e-mail instructions from the Governor. That affidavit says –

> "(c) The Advisory Committee on the Prerogative of Mercy advised his Excellency, in February 2005, that Mr. Robinson be treated and housed at Westgate Facility, with clinical treatment being provided at St. Brendan's, pending a suitable secure unit being established at Westgate with appropriate psychiatric long term treatment. The Committee recommended that His Excellency take this recommendation forward to the Government of Bermuda.
>
> (d) His Excellency having regard to this advice, and to the safety of the public, and having considered the safety, treatment and well being of the Applicant, and having been advised that the security at St. Brendan's Hospital was insufficient for this purpose, invited the Minister of Health to designate the appropriate part of Westgate Correctional Facility as a hospital pursuant to s2 (2) of the mental Health Act 1968."

24. One important question which the respondents' evidence does not address is whether Mr. Robinson could be sent overseas for his treatment. In particular, Mr. Monkman's affidavit is silent on this, although the transcript of the proceedings before the Supreme Court, which the Judge had ordered to be prepared to assist the Governor in reaching his decision, clearly shows that the medical evidence was that it would be difficult to treat the applicant adequately in an ordinary prison (p. 98 [106], l. 24); that segregation would be positively detrimental to his health (p. 104 [107], l. 20); and that he required a specialist psychiatric facility that had good security and where his care could be delivered by suitably qualified psychiatrists and mental health nurses (p. 105 [108], l. 14). Moreover, the possibility of treatment in England was floated by defence counsel both before the jury (p. 48 [98], l. 22; and p. 107 [110], l. 21) and to the Judge (p. 131 [111] , l. 17).

25. Against that background, the applicant relies upon the reports of Dr. Francis Kelly, a distinguished British psychiatrist. He gave evidence at the original trial, and prepared further reports in support of this application. He had met and interviewed the applicant,

[7] [147] at [148]

and also conducted a lengthy and thorough review of the applicant's history and the circumstances of his detention. I have no reason to question Dr. Kelly's reports, and there is nothing in the various reports tendered on behalf of the respondents, nor in the evidence of Saratchandra, which contradicts it in any substantive way. I therefore accept it, and can do no better than quote his conclusion[8], which I also accept:

> "I have only one major recommendation and from this one recommendation will flow a number of other consequences. I am of the strong opinion that Mr. Robinson's needs are only minimally met by his detention in the Westgate Correctional Facility. I believe the only appropriate place for meeting his needs would be in a forensic unit with appropriate security to manage his ongoing risks while at the same time addressing his multitude of psychological, physical and social needs. I believe this is the spirit and intention behind the original verdict in October 2004. The designation of several cells in Westgate as hospitals is spurious. While one can understand the resource/financial and/or political expediency for such disposal I cannot imagine or countenance any appropriately qualified and experienced clinician or Mental Health Service Organizer agreeing the designation of the several cells at Westgate even approximating to a hospital. Furthermore definitions of hospitals which in the case of *Customs and Revenue Commissioners v Fenwood Development Limited [2005]* at the Chancery Division in the UK in which there was a need to define a hospital, quoted definitions from various dictionaries including the shorter Oxford English Dictionary to mean a hospital as "an institution for the care of the sick and wounded or those who require medical treatment". In the Collins English dictionary it is "an institution for the medical surgical obstetric psychiatric care or treatment of patients". Chamber 21st Century dictionary defines the word as "an institution, staffed by doctors and nurses for the treatment and care of people who are sick or injured". 'The common element in all of these definitions is the provision of medical treatment and care'. Clearly from the evidence given in my report, Westgate Correctional Facility or indeed the designation of several cells as hospitals would fall considerably short of these definitions."

THE LAW

26. The respondents say that I should not interfere with the hospital designation because it is delegated legislation, which has been laid before the legislature and approved by affirmative resolution after debate, or at least the opportunity for debate. In this case a statement from the Chief Parliamentary Counsel was put before me to confirm that.

[8] Report of Dr. Francis John Kelly MBBS MRCPsych, 29th August 2007, at p. 35 [202]

However, that does mean that the notice is immune from judicial review. I take the law to be accurately set out in Halsbury's Law, 4th ed. (2001 re-issue), paragraph 64:

> ". . . delegated legislation and byelaws may be attacked either directly or collaterally . . . It may also be alleged that the discretion involved in making the relevant statutory instrument or byelaw was abused, for example because the authority allowed its discretion to be fettered, or on grounds of unreasonableness. But the fact that delegated legislation has been approved by parliament means that the court will be reluctant to strike it down on this ground."

27. For an amplification of this by Mustill LJ, see R v Secretary of State for the Environment, ex parte The Greater London Council, QBDC (3rd April 1985), CO/237/85. CO/252/85 at p. 13:

> "The debate in the House on affirmative resolution and the investigation by the court of a Wednesbury complaint . . . are of a quite different character and are directed towards different ends; the two are complimentary. Having stated this answer in point of theory, we continue at once to say that in practice the grant of judicial review on the grounds of unreasonableness is likely to be rare, and probably very rare, when the decision is subject to affirmative resolution, . . . Nevertheless we do not find it possible to say that every application for such relief must be dismissed out of hand for want of jurisdiction. "

28. Based on that, I consider that the designation order is amenable to judicial review. The position of the Governor's order in respect of Mr. Robinson is more straightforward. I think that it is now trite law that purely administrative decisions made by a Governor are amenable to judicial review in the ordinary way. I consider that an order under section 546(2) of the Criminal Code is purely administrative, and while it obviously commands respect, it is not in the same position as delegated legislation which has been approved by the legislature.

29. The Minister's designation order was made under the MHA. That act establishes a scheme for the detention and treatment of people with mental health problems. Section 2(1) of the MHA provides that "a person suffering from mental disorder may be lawfully detained and may be given therapeutic or psychiatric treatment in any hospital." Section 2(2) provides that, for these purposes, the Minister responsible for Health may declare any building or premises or any part thereof to be a hospital (which was the power used

in this case). However, hospitals are not limited to buildings so designated by the Minister, because the definition of a hospital in section 1 of the MHA is broader than that. That definition provides that –

> ""hospital" means –
>
> (a) a hospital under the control of the Board and includes the buildings or the premises and the precincts thereof; and
>
> (b) any building or premises or part thereof declared to be a hospital under section 2(2);"

30. "Board" in this context means the Bermuda Hospitals Board established under the Bermuda Hospitals Board Act 1970 ('the BHBA'). Under that Act a hospital means the King Edward VII Memorial Hospital ('KEMH'); any "hospital as defined in section 2 of the Mental Health Act 1968"; and "includes any establishment for the care or relief of the sick or infirm that may be placed under the control of the Board". All this is a bit circular but the upshot is that for the purposes of the MHA a hospital can either be:

> (i) KEMH;
>
> (ii) any other establishment for the care or relief of the sick which is under the control of the Hospital Board; or
>
> (iii) a place declared to be a hospital by the Minister.

31. There is, however, one further wrinkle on all of this. By virtue of section 3 of the MHA, the Hospitals Board is given general charge for the administration of a hospital designated as such by the Minister under section 2, and is required to administer such hospital in accordance with the provisions of the MHA and the BHBA.

32. The scheme of the MHA is set out in section 6, which lists the processes by which a person can be committed or detained in a hospital, and these include –

> (a) by voluntary admission at the request of the patient; or

(b) by informal admission at the request of a relative of the patient in any case where the patient raises no objection to such admission; or

(c) by compulsory admission for observation; or

(d) by compulsory admission for treatment; or

(e) by order of a court made under the MHA.

33. Part III of the MHA concerns the admission of patients concerned in criminal proceedings, and permits a court to make a 'hospital order' which authorizes the admission of a *convicted* person to, and his detention in, a hospital[9]. Before it can make a hospital order a court must be satisfied on the evidence of two doctors that the offender is suffering from a mental disorder which is of a nature or degree which warrants his detention in a hospital for medical treatment. Such orders may contain provisions restricting such a person's release, and the MHA contains elaborate mechanisms dealing with such restrictions.

34. However, none of these provisions are directly in issue in this case, because the applicant is not a convicted person and he was not committed to hospital under any of the provisions of the MHA, which has, therefore, no immediate bearing on the applicant's detention. The definition of hospital in the MHA is not, therefore, decisive of whether the prison cell in which the applicant is detained is in fact a hospital for the purposes of 546(2) of the Criminal Code. The question comes down to what the word "hospital" is to be taken to mean in that section of the Criminal Code. The problem is that there is no definition in the Code for these purposes[10]. The choice really is between the meaning assigned to the word in the MHA and the BHBA (which are essentially the same) on the one hand, and some broader, purposive meaning on the other, which might exclude inappropriate premises, notwithstanding their designation, and include overseas institutions, notwithstanding that they are obviously beyond the control of the Hospitals Board.

[9] MHA section 33

[10] There is a definition of the word for the purposes of the provisions of sections 196 A – D, which concern the medical termination of pregnancies, but that definition is limited to those sections.

CONCLUSIONS

35. I first want to clear out of the way some issues which are not relevant. I think it important to make the point that the questions of the length of Mr. Robinson's committal and the constitutional propriety of the Governor's discretion as to how long he should be held, were not before me. Some of the reports indicate that the applicant wants a fixed term. That is not permissible under the legislation, and may not be a good idea – he should only be released when the weight of clinical opinion considers him safe. The only question which may require further consideration is whether the final decision on that should lie with the court or the Governor, but, as I say, that was not an issue before me.

36. I do not think that the Governor's visit to Mr. Robinson in his cell is material. It was one of the original grounds of this application that that interview breached the rules of natural justice at it was held on short notice and without an attorney being present. But the law does not require a person in Mr. Robinson's situation to be given an opportunity to be heard on the question of where he is to be held. Nor does he have a right to be heard on the question of the designation of a hospital under the MHA, which I consider to be plainly a legislative rather than an administrative act[11].

37. The real issue is whether his place of detention is a hospital within the meaning of section 546(2) of the Criminal Code. On that, it is hard to escape from Dr. Kelly's conclusion that the designation of the various cells in the prison is spurious, and was really a ruse to deal with the problem posed by the lack of a long-term secure psychiatric unit. The pressing need for such a unit is well illustrated by this case, but it is also well known to the courts because of the difficulties encountered in respect of Hospital Orders made in respect of convicted persons with mental illnesses. In those cases persons committed by the courts are often quickly released simply because of the absence of appropriate long-term secure facilities. In Mr. Robinson's case, however, it is accepted by all that he is potentially very dangerous and needs to be kept in a secure facility for the foreseeable future.

[11] See Bates v Lord Hailsham [1972] 3 All ER 1019;

38. This court faces the same dilemma that the Governor did: there is no appropriate long-term facility in Bermuda to house Mr. Robinson. The allocation of resources is a matter for the political will of the Government of the day, and courts will not trespass into such policy areas. The Court cannot, therefore, order government to build and maintain a secure psychiatric facility. Nor can it substitute its own judgment for that of the executive. It cannot, therefore, properly order that Mr. Robinson be sent to a secure facility overseas, even if the other potential difficulties with such a course of action could be satisfactorily resolved. The most the court can do is review the legality of the designation of the prison cells as a hospital and the legality of the Governor's decision to send the applicant to those cells.

39. Turning then to the legality of the designation of Westgate cells as hospitals, it seems to me plain on the facts that the current arrangement is incompatible with the Bermuda Hospitals Board Act 1970. That Act requires the Board to have the general charge and management of all hospitals as defined in the Act, and that includes hospitals declared to be such under section 2 of the MHA. Not only is that what the Act says in clear terms, but it is also what section 3 of the MHA says –

> **Administration**
> 3 The Board shall have the general charge for administration of a hospital referred to in section 2 and, for the purposes of this Act, shall administer such hospital in accordance with the provisions of this Act and, in so far as they are not in conflict therewith, in accordance with the provisions of the Bermuda Hospital Boards Act 1970 [*title 11 item 26*].

40. The BHBA mandates the Board to "administer the hospitals generally in an efficient manner and in such a way as to promote the welfare of the patients of the hospitals". There is no evidence that that is being done in respect of the Westgate cells at all. Indeed, the evidence of the Assistant Commissioner (*supra*) suggests the contrary, namely that the designated cells remain wholly under the management of the Department of Corrections. Of course, that is what one would expect in a prison – having some outside authority come in and manage a couple of the cells would, no doubt, pose significant practical and jurisdictional problems. However, on the evidence of Mr.

Monkman, the Minister does not seem to have considered any of this before making the designation, which seems to have been made solely to resolve the dilemma over Mr. Robinson.

41. On the other hand, the designation order is delegated legislation, and, as Mr. Monkman says in his affidavit, it has been affirmed by the legislature. The Courts will accord considerable deference in such circumstances, although (as explained above) that does not entirely rule out their intervening on the grounds of Wednesbury unreasonableness. In this case I decline to quash the designation order or to declare that it is bad. It may be that the Hospitals Board can be given sufficient, effective control over the cells in question, and while I consider the present regime wholly unsuitable for this applicant, it may well be that other persons with other conditions could properly be held in these cells for short periods of time.

42. That does not, however, resolve all the issues. As pointed out above, the designation of the cells for the purposes of the MHA did not make them hospitals, either in fact or law, for the purposes of section 546(2) of the Criminal Code, because the meaning of 'hospital' as it is used in that subsection is not linked to the MHA in any way. Nor is it contingent on the premises being a hospital under the management of the Board. As used in section 546(2) of the Code, the word 'hospital' simply means a real hospital – in other words an institution for the treatment of the sick which is properly managed and staffed in accordance with current accepted standards. Moreover, because the Governor is required to act reasonably in making his choice of where to send Mr. Robinson, it has to be an appropriate hospital, in the sense that it is appropriate for his treatment needs and appropriate for keeping him confined and secure.

43. While Westgate obviously meets the need to keep Mr. Robinson confined and secure, it is not in any sense a real hospital and the regime that it provides is not appropriate for his treatment needs. In particular, it provides nothing in the way of rehabilitation; it forces Mr. Robinson to associate with inappropriate people; it does not have the level of round-the-clock medical surveillance that is required by a person of his level of

disturbance; and the segregation regime is wholly unacceptable. I did not understand Dr. Saratchandra to dispute any of that. It is, therefore, as it stands at the moment, an inappropriate place to which to commit Mr. Robinson.

44. It seems to me, therefore – and I say this with great respect – that the former Governor's decision making process was faulty. The cells at Westgate were not a hospital within the meaning of the section, and he was misled by the MHA designation into thinking that they were. I therefore grant an order of certiorari to quash the Governor's order committing Mr. Robinson to Westgate.

45. This means that everyone will have to reconsider. In doing so they should consider overseas treatment. It may be that that proves impossible for any number of reasons, but those making the decision should be able to demonstrate that they have considered it and have rejected it on reasonable grounds.

46. I decline to make an order of mandamus directing the Governor to properly and lawfully discharge his duties. There is nothing to show that the respondents will not now consider the problem afresh, and there is no need for me to order them to do so.

47. In the meantime I order that Mr. Robinson remain in custody at Westgate under the original order of the trial Judge, pending His Excellency the Governor's further consideration of the matter. I will hear the parties on any consequential matters, and on costs.

Dated the 7th day of March 2008.

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Richard Ground
Chief Justice