SUMMARY OF JUDGMENTS DELIVERED BY THE SUPERIOR COURTS ON THE INTERPRETATION OF THE MENTAL HEALTH ACTS 2001 – 2018 (AS AMENDED)

This paper is provided as an overview and a brief guide to the key issues in the judgments delivered to date. This paper should not be relied on as a legal interpretation of the mental health legislation. It is not intended to be a complete or authoritative statement of the law and is not intended as legal advice or advice of any type.

October 2022

Introduction

Part 2 of the Mental Health Act 2001 (the 2001 Act) was commenced on 1 November 2006. It introduced a process for the review of involuntary admission by a Mental Health Tribunal (MHT).

This paper is a summary of case law relating to the 2001 Act including:-

- Article 40 (Article 40.4 Constitution of Ireland) Applications
- Judicial Reviews
- Section 73 Applications under the 2001 Act

Please find below, by way of assistance, legislation of note:-

- Mental Health Act 2001
- SI 550 of 2006 (Authorised Officer)Regulations
- SI 551 of 2016 (Approved Centre) Regulations
- Mental Health Act 2008
- Section 63 of the Health (Miscellaneous Provisions) Act 2009
- Mental Health (Amendment) Act 2015
- Section 98 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
- Mental Health (Amendment) Act 2018
- Mental Health (Renewal Orders) Act 2018
- Assisted Decision Making Capacity Act 2015
- S.I. No. 515/2016 - Assisted Decision-Making Act 2015 (Capacity) (Commencement of Certain Provisions) Order 2016
- S.I. No. 517/2016 - Assisted Decision-Making (Capacity) Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2016
- SI No.527/2018 - Assisted Decision-Making (Capacity) Act 2015 (Commencement of Certain Provisions) Order 2018

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1. Q v St Patrick's Hospital (Respondent) and MHT, MHC (Notice Parties)

Ex-tempore decision of Mr Justice O'Higgins on 21 December 2006. (Not approved by the judge)

The Facts

Ms Q was a voluntary patient in St Patrick's Hospital. She was made the subject of an involuntary admission order under Section 24 of the 2001 Act. However Section 23 was not invoked, which requires a person to indicate an intention to leave the approved centre before their status can be changed from voluntary to involuntary. The Responsible Consultant Psychiatrist (RCP) accepted he did not invoke Section 23 as the patient had not indicated an intention to leave.

Findings

Detention found to be unlawful. The Court found that in order to invoke Section 24 that Section 23 had also to be invoked.

Mr Justice O'Higgins held that "... *it seems to me that that is not merely a procedural defect that is a sine qua non for the exercise of the jurisdiction in Section 24 because it says „where a person is detained pursuant to Section 23" and that did not apply*."
The MHT tried to get round that difficulty by reference to
Section 18(1) but the court found that while a purposive approach was to be adopted in interpreting the Act one could not do violence to the section and held that Section 18(1) could be not used in these circumstances.

Form of Order

Immediate release.

2. H v Clinical Director Cavan General Hospital, (Respondent), and HSE, MHC (Notice Parties)

Written Judgment of Mr Justice Clarke delivered 6 February 2007

The Facts

Mr H was detained on one of what had been a series of Section 184 temporary orders under the Mental Health Act 1945 as at 1 November 2006. His detention had been notified to the MHC under the transitional arrangements and a MHT had been organised.

The Findings

Found to be in unlawful detention.

A Section 184 Order could have been made for a period of six months on the basis that there was a reasonable chance of the person's recovery in that period. On the basis of the clinical evidence in the case there was no such prospect. It was accepted that a Section 184 Order could be renewed 3 times for a maximum of 24 months. In this case the patient had been in care for well in excess of 24 months and the question was raised as to whether the period of detention between the Sectionl84 orders could have been deemed to be voluntary. The Court held that the detention of foot of the Section 184 was invalid because there was no prospect of recovery within a six- month period and the patient had in reality been involuntarily detained for a period in excess of 24 months. The Section 184 order was therefore invalid. The Court also decided that if there was no valid Section 184 Order then Section 72 of the 2001 Act could not "kick" in and that the Tribunal did not have jurisdiction to cure an invalid order under the 1945 Act.

Form of Order

The Court relied upon to two Supreme Court Judgments in relation to the issue of whether the applicants should be immediately released. It was agreed by all the parties that the patient was a vulnerable person so immediate release would not be appropriate. It was considered that a "staggered" or "delayed" release would be more appropriate and this would facilitate procedures to be put in place to re-detain him under the 2001 Act. It was directed that Mr H be released at a stated time/date and be readmitted on an involuntary admission order under the 2001 Act shortly thereafter.

Other key issues commented on in the judgment

Appropriateness of Treatment - The Court stated that nothing other than a complete failure to provide appropriate treatment or care could render unlawful what would otherwise be a lawful detention.

3. AMC v St Luke's Hospital Clonmel (Respondent)

Written Judgment of Mr Justice Peart delivered 28 February 2007

The Facts

AMC had been a patient in the hospital since April 2002 during which time he had been both involuntary and voluntary The period of detention challenged was based on a Section 184 temporary admission order which commenced on 9 June 2006 and was due to expire at midnight on 8 December 2006. On the 4 December 2006 the Responsible Consultant Psychiatrist (RCP) signed a 3 month renewal order. The MHC had arranged an MHT to review this order on 29/12/2006, i.e. within 21 days of the renewal order coming into effect on the 9 December.

Findings

Found to be in unlawful detention. The Court found that a review by a MHT should have occurred within 21 days of the "making" of the renewal order, and not the date it came into effect, as per Section 18(2) of the 2001 Act. The Court said that the wording of the section was plain and unambiguous.

Form of Order

The Court followed the decision of Mr J Clarke in the H case with regard to the staggered or delayed release of the patient to facilitate procedures to be put in place to invoke the process under the 2001 Act.

4. MR v Cathy Byrne & Others, Sligo Mental Health Services (Respondent) and Mental Health Tribunal (Notice Party)

Written Judgment of Mr Justice O'Neill delivered 2 March 2007

The Facts

The approved centre certified that the ground upon which the patient was detained was a 3 month renewal order made pursuant to SI5(2) of the Mental Health Act 2001 made on 21st December 2006 and affirmed by a MHT on the 9 January 2007.

The lawfulness of the detention was challenged on the following grounds:

Renewal order of 21 December invalid as no proper basis for certification (based on 3(1)(a))

The ruling by the Tribunal of 9 January 2007 was unlawful as it failed to satisfy itself, as required under Section 18, that the provisions of Section 15 had been complied with and that if there had been a such a failure there was an obligation on the Tribunal to decide whether such failure affected the substance of the order or caused an injustice (Tribunal had affirmed on the basis of 3(l)(b)).

The reasons given by the MHT for its decision could not support a decision that the patient continued to suffer from a mental disorder.

The Findings

Found to be in lawful detention. The judge stated that a purposive approach was appropriate in interpreting this type of legislation, (Gooden V St Otteran's, 2005). The 2001 Act may be regarded "… .... *as of a paternal character, clearly intended for the care and custody of persons suffering from mental disorder."*

The definition of mental disorder within Section 3(1), was commented on in particular in relation to the (a) and (b) components. The Court stated; *"I am quite satisfied that these two bases are not alternative to each other and indeed it would be probable in my view that in a great many cases of severe mental illness there would be a substantial overlap between the two. Thus it would be very likely in my opinion that in a great many cases in which a person could be considered to fall within the categorisation in S3(l)(a) that they would also be likely to fall within S3(l)(b)."*

The Court analysed the definition of mental disorder and in doing so stated that in relation to 3(l)(a) that the threshold for detention is of a standard of proof of a high level of probability between the civil and the criminal standard. The Court also looked at various terms within that subsection. It went on then to consider the three elements of Section 3(l)(b). It noted that this was a legal analysis of the framework of the operation of the statutory procedure and that it was not intended to interfere with the scope of clinical judgment.
The Court also set out the basis upon which a decision of the Tribunal should be reviewed,

"In approaching an assessment of the decision of the Tribunal as revealed by the record of it, both as to substance and form, in my view, it is not appropriate to subject the record to intensive dissection, analysis and construction, as would be the case when dealing with legally binding documents such as statutes, statutory instruments and contracts. The appropriate approach is to look at the record as a whole and take from it the sense and meaning that is revealed from the entirety of the record. This must be done also in the

appropriate context; namely the record must be seen as the result of a hearing which has taken place immediately before the creation of the record, and it must be read in the context of the evidence both oral and written which has just been presented to the Tribunal. The record is not to be seen as, or treated as a discursive judgment, but simply as the record of a decision made contemporaneously, on specific evidence or material, within a specific statutory framework i.e. the relevant sections of the Act of 2001 as set out above."

Form of Order

Found to be in lawful detention.

Other key issues commented on in the judgment

Each Renewal order is independent of previous decision.

The Tribunal should look at the dominant evidence before it.

The Court also recommended that the Form 7 be amended so that one can decide mental disorder on the grounds of 3(l)(a), or 3(l)(b) or 3(l)(a) and (b). The Form 7 was subsequently edited to address this issue.

5.JD v. Central Mental Hospital

Ex tempore judgment of Ms Justice Finlay Geoghegan delivered 20 March 2007.

The Facts

The patient was subject to involuntary admission pursuant to Section 184 made on th 19 April 2006 and extended on 14 October 2006.

The issue before the court was whether or not the order made on 14 October 2006 was valid in accordance with the provisions of Section 189 of the 1945 Act. The form of endorsement on the temporary order was *"temp.order extended 14/10/06. "* The extension of the temporary order did not specify the period of the extension as required by Section 189 of the 1945 Act.

Findings

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Found to be in unlawful detention. The extension of the temporary order on the 14 October 2006 should have stated the period for which it was extended. The Court relied on the plain and ordinary meaning of Section 189 of the 1945 Act in coming to that conclusion. The Court further noted that the plain and ordinary meaning could not be relied on if (1) it leads to an absurd result, and (2) if it would be contrary to the intention of the legislature. Neither argument was made in this case.

Form of Order

The Court followed the decision of Mr J Clarke in the H case with regard to the staggered or delayed release of this patient, to facilitate procedures to be put in place to invoke the process under the 2001 Act.

6. AM V Central Mental Hospital (Respondent) and HSE, MHC, MHT (Notice Parties)

Written Judgment of Mr. Justice Peart delivered 24 April 2007.

The Facts

The detention of the patient commenced at Our Lady's Hospital, Navan by a Section 184 Order made on the 24 August 2005 and extended for a further period of six months on 24 February 2006. The extension order would have endured until the 24 August 2006.

On the 18 August a further extension order was made on which it was stated *"extended for a further period of six months from 18/8/06."* There was ambiguity as to when that order ended, i.e. 6 months from the 18 or from the 24, and this affected the timing of the subsequent renewal order and the timing of the MHT under the 2001 Act. The patient had been transferred to the Central Mental Hospital during the period of his involuntary detention and was there as at 1 November 2006. The MHC was informed by the Central Mental Hospital by way of a Form 24 that the Section 184 expired on 24 February 2007 and the MHC proceeded on that basis.

The Findings

Found to be in unlawful detention. The Court was asked to consider Sections 184 and 189 of the 1945 Act, various authorities on statutory interpretation and Section 18 of the 2001 Act. The Court stated that no statutory interpretation was required and all it had to do was look at the plain and ordinary meaning of the words written on the endorsement. The Court noted that it was important that a patient knew for what period he was being detained and took the view that the patient was entitled to think that his detention was authorised until the 18 February 2007. A review by a MHT should have taken place on or before 18 February pursuant to Section 72 of the 2001 Act. A renewal order should have been made prior to the expiry of the Section 184 on 18 February which would also have been the subject of a review by another MHT.

Form of Order

All medical opinion available to the Court was of the view that the further detention of the applicant was needed for his own safety and the safety of others.

The Court did not specifically apply Mr J Clarke's decision in the H case on staggered or delayed release but the patient was re-detained under the 2001 Act.

7. T.O'D V Central Mental Hospital, HSE (Respondent) and MHC (Notice Party)

Written Judgment of Mr Justice Charleton delivered 25 April 2007.

The Facts

The detention of the patient commenced under the 1945 Act. At the 1 November 2006 he was detained on a Section 184 Temporary Order that was dated 6 June 2006 and would expire on 6 December 2006. A Renewal Order was not made in time. This was noted on 11 December 2006. The patient became a voluntary patient. He then expressed an intention to leave and was involuntarily detained pursuant to Sections 23/24 and that detention was reviewed and affirmed by a Tribunal. It was then noted that a renewal order had not been made within time. The patient became voluntary again. The patient again indicated a wish to leave and once again Sections 23/24 were invoked. This was on 17 January 2007 but the admission order was not signed until 24 January 2007. The MHT reviewed the Order, taking the date as 24 January2007 and not 17 January 2007, and affirmed the Order.

The Findings

Found to be in lawful detention. The Court referred to Mr Justice O'Neill's judgment in the MR case and followed it in respect of (1) the fact that a purposive approach should be adopted in interpreting the legislation and (2) the analysis of Section 3. The Court in rejecting the applicant's argument took the view that a Tribunal could take Section 4 (Best Interests) into account and that Section 4 infuses the entire legislation. The Court went on to say that if the Tribunal had not taken Section 4 into consideration then that would be grounds for intervening by way of judicial review. The Court then went on to look at the remit of Section 18(1) and took the view that in referring to the other sections (9, 10, 12, 14, 15 & 16) that Section 18(1) refers to the entirety of them and not simply to mere minor matters such as typographical errors. The Tribunal looks at the substance of the Order. This means that it is concerned with whether the Order made is technically valid in terms of the statutory scheme set up by the Act, or if it is not, whether the substance of the Order is sufficiently well justified by the detention of the Plaintiff. It held that the purpose of Section 18(1) is to enable the Tribunal to affirm the lawfulness of a detention which has become flawed due to a failure to comply with the relevant time limits.

Form of Order Found to be in lawful detention.

Other issues commented on in the judgment

Review of the meaning of "forthwith" in the context of Article 40 cases.

Limit of the High Court in Article 40 cases. Remit of Tribunal being wider than the Circuit or High Court.

8.JB V Central Mental Hospital (Respondent)

Written Judgment of Mr Justice McGovern delivered 4 May 2007

The Facts

It was contended on behalf of the patient that his detention was unlawful because, in effect, he was detained under the provisions of Section 184 of the 1945 Act from 28 October 2004 until 16 April 2007. It was contended that this in effect frustrated the purpose of Section 184 and it was argued that while Section 184 can be used in appropriate circumstances if it does not achieve its purpose because the patient's illness becomes intractable then one cannot use Section 184 again. Instead the patient had to be declared of unsound mind.

The Findings

Found to be in lawful detention. The court found that the 1945 Act did not permit a fourth extension (of six months) of a section 184 order and is quite explicit in that regard. But if a fresh Sectionl84 application is brought in circumstances which do not make it a fiction, or a contrived means of getting around the intention or the provisions in the 1945 Act with regard to temporary orders, the Court did not see that resort to a second Section 184 application as making the detention of the applicant or any such patient unlawful. The Court emphasised that its decision was very much based on the facts of the case.

Form of Order

Found to be in lawful detention.

9.WQ v MHC, Central Mental Hospital, MHT (Respondents)

Written Judgment of Mr Justice O'Neill delivered 15 May 2007.

The Facts

The patient suffered from serious mental illness for many years. He had been a patient at the CMH from 1986 pursuant to Section 207 of the 1945 Act. He was transferred to St Luke's Hospital Clonmel (South Tipperary Mental Health Services) on 3 July 2006 and his detention was of foot of a Section 184 Order. He was transferred back to the CMH on 5 July 2006. On 1 November 2006 the detention of the applicant fell under the provisions of the Mental Health Act 2001 and was due to expire on the 2 January 2007.

On 2 January 2007 the Clinical Director of South Tipperary Mental Health Services attended at the CMH and completed a Form 7 renewing the detention for 3 months from that date. The MHC arranged a MHT to review this order on 22January 2007 and the MHT affirmed the Order. Prior to the end of the 3-month renewal period a consultant psychiatrist at the CMH reviewed the patient and on 28March 2007 he made a further renewal Order for a period of 6 months. The MHC arranged a MHT to review the order on 16 April 2007 and the MHC affirmed this order. During the course of this review hearing the legal representative for the patient made a number of submissions, one of which was that the applicants detention was unlawful because no MHT had been convened to review the detention prior to the renewal order of 2 January as required by Section72(4) of the 2001 Act. The MHT of the 16 April 2007 rejected this on the basis that it was there to review the subsequent order and not the initial order to which the argument related and affirmed the order before it on the basis that the patient suffered from mental disorder as defined in the 2001 Act. No submissions had been made by the legal representative in relation to the unlawfulness of the detention at the previous MHT hearings.

The Findings

Patient found to be in lawful detention. Justice O'Neill was satisfied that there were 3 fundamental flaws in the legal regime detaining the patient as of 2 January 2007;

> the order made under Section 184 of the 1945 Act on the 3 July 2006 was invalid *ab initio* as there was no clinical basis to have thought the patient would recover within six months which is a condition for making a Section 184 Order, no MHT had been convened to review the detention prior to the renewal order of the 2 January as required by Section 72(4) of the 2001 Act, (this fact was conceded by the MHC at the outset of the High Court hearing), and the renewal order of the 2 January 2007 was made by a consultant psychiatrist ("CP") not entitled to make that order.

In relation to the who can be deemed to be a consultant psychiatrist responsible for the case and treatment of the patient, the Court took the view that, *"it is of course the case that for reasons of practicality more than one psychiatrist would have to be considered as "responsible for the care and treatment of the patient concerned. This would arise as a matter of necessity where for example the psychiatrist primarily responsible for the care and treatment of a person was absent for one reason or another such as holidays or illness at a time when it was necessary to make a renewal order pursuant to either Section 15(2) or Section 15(3) of the 2001 Act. Obviously in this situation another psychiatrist who was*

involved in the care and treatment of the applicant in the approved centre in question could lawfully make a Renewal Order. In my opinion however a psychiatrist not attached to the approved centre where the person was detained, and not involved in the care and treatment of the patient concerned but who was brought for the purposes of review, could not exercise the power of renewal contained in Section 15(2) and Section 15(3)".

The Court went onto say, *"the restriction of this power to the "Consultant Psychiatrist responsible for the care and treatment of the patient" is one of the significant safeguards provided by the Oireachtas in this legislation for the benefit of persons suffering from mental disorder within the meaning of Section 3 of the Act of 2001 and in my opinion a failure to comply with this provision vitiates the lawfulness of a detention based upon a Renewal Order signed by someone who lacked the power to make that order".*

The Court also held that the scheme of detention provided for in the 2001 Act is based upon the creation of short periods of detention each disconnected from the other so that on every renewal the detention has to be fully justified.

The Court in making its decision looked at the dominant evidence and also what was in the best interests of the patient and held that, *"A finding of invalidity of a renewal order which in itself is valid in all respects, because of a defect in a previous renewal order and admission is a wholly undesirable eventuality and in all probability not in the best interests of persons suffering from a mental disorder, " and stated "The rendering invalid of an otherwise valid Renewal Order by reason of a defect in a prior Renewal Order or Admission Order is in my view inimical to good order in this process and ultimately not in the best interest of someone suffering from mental disorder."*

The Court went on to hold that it is incumbent upon a person in respect of whom an admission or a renewal order has been made, to make such a complaint in relation to their detention arising out of an admission or a renewal order and in respect of which a MHT has jurisdiction, to that MHT when it convenes or by way of an Article 40.4 enquiry. In this case that was not done and the patient lost competence to bring the claim or place reliance on these defects to challenge the validity of the renewal order of the 28 March 2007.

Form of Order

Found to be in lawful detention.

Other key issues commented on in the judgment

The MHT"s remit under Section 18(1) is limited to failures of compliance which are of a minor or insubstantial nature.

10. RW v St John of Gods Hospital, HSE (Respondents)

Written Judgment of Mr Justice Peart delivered 22 May 2007.

The Facts

The patient had been detained on 1 November 2006 on a temporary admission order due to expire on 25 April 2007. A MHT had reviewed this order on 27 March 2007 under the transitional arrangements and affirmed the order. A renewal order was made on 23 April 2007 by the responsible consultant psychiatrist and this was reviewed by a MHT on 10 May 2007 and affirmed. The patient's legal team urged a different interpretation of the transitional provisions, i.e. that when the MHT sat on 27 March 2007 its affirmation would result in a new order which would last for 21 days.

The Findings

The Court noted that the above view was a misunderstanding of the transitional arrangements and the Section 72(2) and (4) were clear and unambiguous and that the relevant provisions had been correctly complied with.

Form of Order

Found to be in lawful detention.

Other issues commented on but not dealt with in the judgment

At the commencement of the hearing it was noted by the Court that Article 40 is limited to dealing with whether the person is in lawful detention or not and should not deal with issues as to treatment.

HSE was joined as a party but was not the detainer but the funder of the detainer. It had no role in the care or treatment of the patient. It was agreed that it should not be a party to the application.

11. MD v St Brendan's Hospital, MHC, MHT (Respondents)

Judgment of Mr Justice Peart delivered 24 May 2007.

The Facts

The patient was made involuntary pursuant to an admission order made on 26 April 2007. A MHT sat on 15 May, however on the 10 May, five days before the MHT sat, a renewal order was made for 3 months by the responsible consultant psychiatrist. It was this renewal order that gave rise to the High Court challenge. The MHT which sat on 15 May affirmed the admission order. The patient's legal representative argued that the renewal order must not be made until the admission order has been reviewed because (1) the renewal order comes into effect on the date it is made therefore the admission order was spent and the patient lost the right to have that order reviewed, or (2) the renewal order had no effect, or (3) if renewal only comes into effect after the expiration of admission order and the admission order is revoked, the patient is still detained on foot of the renewal order.

The Findings

The Court held that Section 15(2) and (3) were clear and unambiguous and that an order takes effect on the expiration of the previous order. In this case the renewal order made on the 10 May took effect on the expiration of the 21 day period of the admission order and if the admission order had been revoked the patient would have been free to leave as the renewal order had not yet come into effect.

Form of Order

Found to be in lawful detention.

Other issues commented on in the judgment

The notification to the patient of the renewal order by the Approved Centre in accordance with Section 16(2) should be carefully complied with. The Court held that this did not affect the lawfulness of detention.

This decision was appealed to the Supreme Court where Mr. Justice Hardiman delivered a written judgment dated 27 July 2007.

12. JH v Jonathan Swift Clinic, St James Hospital, Dublin. (Respondents), MHT (Notice Party)

Judgment of Mr Justice Peart delivered 25 June 2007.

The Facts

The patient indicated a wish to leave and accordingly Sections 23 and 24 of the 2001 Act were invoked and the patient was made involuntary.

A MHT affirmed the order.

Arising from the above sequence of events the applicant made two main complaints as to why the detention was not in accordance with the law;

1. The admission order was made 20 minutes outside the 24 hour period provided for in Section 23(1); and

2. The consultant psychiatrist who made the admission order was not the Responsible Consultant Psychiatrist as provided for in Sections 23 and 24.

The Findings

The Court held that a purposive approach should be adopted and regard should be had to Section 4(1) of the 2001 Act. The Court held that one has to balance the interest of a patient against failure to adhere strictly to time limits and procedures. It noted that not every incident of non-compliance will result in a detention being unlawful.

The Court held that once the certificate is signed by the second consultant psychiatrist pursuant to Section 24 (2) (a), then it is a mandatory requirement for the responsible consultant psychiatrist to involuntary detain the patient. Therefore, even if there was a 20 minute delay from the end of the 24 hour period to the time that the admission order was signed, the patient had not been prejudiced.

The Court considered the entirety of the facts and held that there should not be a slavish adherence to the 24 hour period and to release a patient in circumstances which would militate against the very purpose of the legislative protection, which is to care for a vulnerable person. The Court emphasised that each case requires to be dealt with on its own facts.

The Court held that the conclusions reached were consistent with a situation where the Oireachtas had specifically empowered a Tribunal to overlook a failure to comply with a provision where it does not affect the substance of the order or cause an injustice.

The Court also held that from the moment the locum consultant psychiatrist came on duty that he was the consultant responsible for the patient's care. Therefore he was the responsible consultant psychiatrist for the purposes of Section 24(2) and (3). The Court said on that basis it did not need to deal with Section 24(6).

Form of Order

Patient found to be in lawful detention.

Other issues commented on in the judgment

The Court stated that a Mental Health Tribunal would have been entitled to rely on Section 18(1) to cure the defect which had risen in this case but had not done so. In coming to that conclusion it relied on the decision of Mr Justice Charlton in the TOD case.

13. JB(2) v CMH, (Respondent) and MHC, MHT (Notice Parties)

Written Judgment of Mr Justice MacMenamin delivered 15 June 2007.

The Facts

The key argument in this case was that the consultant psychiatrist who signed the renewal order was not the consultant psychiatrist responsible for the patient's care and treatment and did not have the authority to make the renewal order. The renewal order had been made by a consultant psychiatrist from the approved centre where the patient had been admitted but was not now detained.

The Findings

The Court held that in this case it had been shown that the consultant psychiatrist who signed the renewal order had clearly been involved on an ongoing basis in the patient's care and treatment from 2002, despite the fact that he was not on the staff of the approved centre currently detaining the patient. It was stated that this decision could be distinguished from the WQ case on the facts. The Court emphasised that the consultant psychiatrist making a renewal order must be truly engaged in the care and treatment of the patient in accordance with the definitions in the Act. The definition of "treatment" in the 2001 Act was considered and it was held that this definition, taken with Section 15, does not preclude more than one consultant psychiatrist being involved in the patient's care and treatment.

Form of Order

Found to be in lawful detention.

Other issues commented on in the judgment

The purposive intention of the legislation reiterated but also agreed with the finding in the WQ case that the MHT's remit is limited to failures of compliance which are of a minor or insubstantial nature.

14.JB(3) v CMH, (Respondent) and Dr Ronan Hearne

Ex-tempore judgment of Mr Justice Sheehan delivered 15 August 2007

The Facts

The key issue in this case was "*whether or not Section 18(4) of the Mental Health Act, (2001) necessarily imports a right or an authorisation for the Mental Health Tribunal to effectively extend the time of a renewal order in certain situations".* In this particular case the MHT was adjourned on two occasions. There was a dispute between the first named respondent on the one hand and the applicant and the notice parties on the other hand as to whether the two adjournments amounted to one or two 14 day extensions, the latter quite clearly stating there was only one 14 day adjournment, and the question arose as to whether the adjournments effectively extended the period of the renewal order (be it by 14 or 21 days).

The Findings

The Court held that it had to decide if section 18(4) imports a right or an authorisation for a Mental Health Tribunal to effectively extend the time of a renewal order in certain cases. The Court held having heard the facts and the law that it would be going too far to import into the section the implication that adjournments allow for a renewal order to be extended and went on the say that " *...an order for renewal is effectively made by a consultant psychiatrist following a consultation and an assessment of the situation and he can only make the order for period of up to three months and no more. I take the view that if it was envisaged that that matter could be extended, then there would have to be some further involvement or some further assessment".*

Form of Order

Found to be in unlawful detention.

15.B -v- The Clinical Director of Our Lady's Hospital Navan and Others

Ex-tempore Judgment of Mr Justice Sheehan delivered 5 November 2007.

Facts

The patient was admitted to St Patrick's Hospital in Dublin as a voluntary patient on 28 September 2007. 2 October 2007 the patient's status changed from voluntary to involuntary. On 9 October 2007 the patient was reviewed by an Independent Consultant Psychiatrist pursuant to the 2001 Act. On 10 October, the applicant was transferred to Our Lady's Hospital Navan. On 22 October the Mental Health Tribunal reviewed and affirmed the admission order. On the same date a renewal order was made to detain the patient for a further three months. On 26 October an application was made to the High Court regarding the validity of the detention.

Grounds for Application

1. The decision of the Tribunal was invalid because of the flawed manner in which the Tribunal was conducted. Accordingly, the Applicant was in unlawful custody and the subsequent renewal order was invalid.

2. By virtue of Section 21 (4) of the 2001 Act the renewal order made should have been made by the Responsible Consultant Psychiatrist at the original detaining centre, St Patrick's, being the approved centre from which the patient was transferred.

Findings

The Court held that Section 21 (4) of the 2001 Act should be viewed as an enabling provision and should be interpreted with flexibility and not viewed as an additional hurdle. The Court relied on the submissions of the Respondents', in particular, noted that what the 2001 Act contemplated is that these temporary Orders would be applicable only for as long as the basic order is in place and that once a patient was transferred the Consultant Psychiatrist in the new approved centre could make the order.

In relation to the other issue, the Court held that the Mental Health Tribunal was entitled to rely on the evidence before it in determining that Section 23 of the 2001 Act has been complied with. The considerations were fact specific to the case.

Form of Order
Found to be lawful detention.

16. PMc G -v- The Medical Director of the Mater Misericordiae Hospital in the City of Dublin and the Clinical Director of St Aloysius Ward Psychiatric Unit of the Mater Misericordiae Hospital in the City of Dublin, the HSE and the Mental Health Tribunal

The written Judgment of Mr Justice Peart delivered 29 November 2007

The Facts

The case concerned the transfer of a patient from an approved centre to a hospital for the purposes of medical treatment as opposed to psychiatric treatment. There was a breach of the provisions of Section 22 of the 2001 Act. It was on the basis of this breach that the application was brought that the patient's detention was unlawful.

The Findings before the Court

The Court considered Section 22 of the 2001 Act and the fact that the Clinical Director of an approved centre may arrange for the transfer of a patient to a hospital.
The Court concluded that while there was a failure to comply with the provisions of Section 22 when the patient was moved from the approved centre to a hospital for medical treatment, on the basis that the transfer was not arranged by the Clinical Director as required, the failure did not render the detention unlawful.

The Court in coming to this decision also noted that the Mental Health Tribunal had correctly stated that they did not have jurisdiction to deal with this particular issue as it was not an issue which came within the remit of Section 18 (1).

The Court noted that the particular circumstances of the case had to be taken into consideration and furthermore, what was in the best interests of the patient. The patient was transferred to hospital in the patient's best interest and done for a bona fide reason. The Court stated that if there had been any evidence that the transfer had not been required for medical reasons then it this would have been an entirely different situation and would have implications for the fundamental rights of the patient.

Form of Order made

Patient found to be in lawful detention.

17.RL v St Brendan's Hospital, & MHC (Respondents)

Judgment of Mr Justice Feeney delivered 17 January 2008.

The Facts

The patient was made involuntary pursuant to an admission order made on 22 December 2007. There were a number of complaints made in relation to the admission; all but one of these related to s13 of the 2001 Act.

There were three complaints made in relation to s13(2) which relate to the removal of the patient to the approved centre. It was suggested that there was a failure in a number of regards in relation to how section 13(2) was applied in relation to the lack of evidence concerning the inability to arrange for the removal, in relation to the manner of the request of the registered medical practitioner and, particularly, in relation to the absence of members of staff of the approved centre being involved in the actual removal.

The other complaint made in relation to the admission, not related to sl3 of the 2001 Act, was in relation to the independent medical examination carried out by the consultant psychiatrist appointed under si7. It was contended that the patient was interviewed without the assistance of an interpreter. The sl7 consultant psychiatrist found the patient had reasonable English.

The MHT affirmed the admission order.

The Findings

The Court held that the admission order was a properly made admission order and therefore as of the date of the application to the High Court in January of 2008 the applicant was in lawful detention.

The Court was satisfied that no criticism could properly be laid at the consultant psychiatrist appointed under sl7 in relation to carrying out the required examination and expressing an opinion pursuant to the statute.

Form of Order

Found to be in lawful detention.

This decision was appealed to the Supreme Court where Mr. Justice Hardiman delivered a written judgment dated 15 February 2008

18.MM v Central Mental Hospital (CMH) (Respondents)

Judgment of Mr Justice Peart delivered 1 February 2008.

The Facts

The patient was made involuntary pursuant to the provisions of s184 of the 1945 Mental Treatment Act and his transfer to the CMH had been authorised in 1998 by his consultant psychiatrist in North Lee MH Services Cork where he had resided at that time. He had been under the care of a consultant psychiatrist at the North Lee MH Services. It had been that consultant psychiatrist who, since that date, had signed the various orders renewing the patient's detention in the CMH, both under the 1945 Act and under the 2001 Act, even though he was not on the staff of the CMH. On 22 February 2007 this consultant psychiatrist signed a three month renewal order which was affirmed by a MHT on 12 March 2007. He also signed a further 6 month, and a 12 month order in due course as they fell due; each of which was affirmed by a MHT. At the time of the A40 application the patient was subject to the 12 month order.

The ground on which this A40 was based was that a consultant psychiatrist other than the consultant psychiatrist responsible for the care and treatment of the patient signed the renewal order. The patient's solicitor raised this with the MHT when the order extending the detention for a period of 12 months was being reviewed and raised issues as to which CP made decisions regarding the patient's day to day care and treatment at the hospital.

The Findings

The Court concluded that the essential issue to be determined in this case was whether the consultant psychiatrist at the North Lee MH Services in the circumstances of the present case could be regarded as coming within the meaning of *"the consultant responsible for the care and treatment of the patient concerned"* in s15(2) of the 2001 Act, now that the patient was in the CMH. The long-standing relationship and continuing involvement in the patient's welfare left the court in no doubt that the North Lee consultant psychiatrist was the person with the best knowledge of the patient's illness, treatment and care requirements. That finding was found to be not inconsistent or incompatible with the consultant psychiatrist at the CMH also having a sufficient degree of knowledge of the patient's illness, care and treatment requirements to be also qualified to have signed the renewal orders. It was stated that if the consultant psychiatrist at the CMH had signed such an order her capacity to do so could not be impugned, given her day to day involvement at the hospital. The question was raised as to whether the 2001 Act by referring to *"the consultant responsible for the care and treatment of the patient concerned"* in s15(2) and in other sections, is indicating that only one such consultant psychiatrist can be acting in that capacity. The Court's view was there is discretion left open by the 2001 Act as to who in any particular case can be regarded as the person who is *"the consultant responsible*...", and that it need not be one consultant psychiatrist who is attached to the hospital in which the patient is detained, provided that the consultant psychiatrist so considered can be objectively seen to be so placed. Each case will need to be considered on its own facts and circumstances, and the primary concern will always have to be whether the best interests of the patient are protected.

Mr Justice Peart followed the decisions of Mr Justice O'Neill in WQ and Mr Justice McMenamin in JB. The Court held that the renewal order under which the patient was detained in this case was appropriately signed.

Form of Order

Found to be in lawful detention.

This decision was appealed to the Supreme Court where there is a written judgment of Mr. Justice Geoghegan dated 7 May 2008

19. Han(D) v. The President of the Circuit Court (Respondent) and Dr. Garland, Dr. Blennerhassett, Dr. Farren, Prof. McKeon, The Mental Health Commission and The Mental Health Tribunal (Notice Parties)

Written Judgment of Mr. Justice Charleton, delivered the 30 May 2008

Judicial review - whether s. 19 grants jurisdiction to examine the historical basis for the detention - the ambit of the MHT jurisdiction - the award of damages under the Act

The Facts

The Applicant was involuntarily committed to an approved centre under the Act. The Applicant's detention was thereafter affirmed by the Mental Health Tribunal. The Applicant then appealed the detention to the Circuit Court pursuant to s.19 of the Act. By the time, the matter came before the Circuit Court the Applicant had been discharged and, consequently, Mr. Justice Deery struck out the appeal on the grounds that it was moot.

The Finding

This judgment considered the scope of the appeal to the Circuit Court against a determination of the MHT pursuant s. 19 of the Act.

Mr Justice Charleton made the following conclusions:

□ The Circuit Court, on a literal sense of the wording of s.19 of the Act, has no function in deciding on anything to do with the historical basis for detention. Its sole function is focused on the current state of health of the patient, i.e. whether as of the date of hearing before the Circuit Court, the patient is suffering from a mental disorder.

□ The Circuit Court has no jurisdiction to decide any appeal from a decision of a MHT unless the person is then the subject of an admission or a renewal order.

□ If a patient who was detained pursuant to an admission order or renewal order has become well but exercises his entitlement to a review under s. 28 of the Act, it is clear such a review is historical. That review will include a consideration of whether or not a patient was suffering from a mental disorder at the time relevant sections of the Act were used against them.

□ In contrast to the jurisdiction bestowed by s.19, the Mental Health Tribunals enjoy wider powers under s. 18 of the Act. The Tribunal is not only concerned with whether the patient is suffering from a mental disorder but whether the procedures and time limits set out in ss. 9, 10, 12, 14 and 16 have been complied with and, further, if they have not been so complied with whether there has been an injustice.

Form of the Order

The application for judicial review was refused. No order made.

Other issues of note

Mr. Justice Charleton commented that an appeal before the Circuit Court under s.19 should be dealt with *"as promptly as possible";* a delay of some months, in this regard, *"appears to go outside the strictures as to time imposed by the Act"*

20. Z (M) v. Abid Saeed Khattak and Tallaght Hospital Board (Respondents)

Written Judgment of Mr. Justice Peart, delivered 28 July 2008

Article 40 inquiry - relationship between ss.9 and 12 of the 2001 Act - nature of the examination by a GP under s.10 - meaning of "as soon as may be" in the context of s. 14(1) - the consequences of a breach of s. 16(1)

The Facts

Mr. Z was taken into custody by Gardai at Mountjoy Garda Station pursuant to sl2 of the 2001 Act. A GP was contacted to come to the Station to carry out a medical examination. By the time the GP, Dr. W, arrived at the Station, the Applicants brother, Mr. EZ, was present. Dr. W asked EZ to sign the application for a recommendation pursuant to s9 of the Act. **The Findings**

The Court found the detention to be lawful and rejected the following submissions made on behalf of the Applicant:

1. It was submitted that since the applicant was taken into custody by the Gardai under powers contained in s.12 of the Act, the process which led to his detention in Tallaght Hospital should have continued under the provisions of that section, by the application for a recommendation being made to Dr. W by a member of the Garda under s,12(2), whereas it was in fact made by the applicants brother, EZ under the provisions of s.9 of the Act.

   The Court held that the fact that the process had been initiated under s.12 did not preclude matters proceeding further under s.9. However, the Court considered that it would be „*desirable*" that the applicant would be informed of the altered legal basis for his detention.

2. The examination of Mr. Z by Dr. W was performed in the course of an informal *"chat"* whilst both doctor and patient smoked a cigarette at the rear of the Garda Station.

   Peart J., indicated a "*certain disquiet*" at the manner of examination. The Court noted, however, that Dr. W was a registered medical practitioner and therefore met the professional requirements under the Act. The examination in relation to a recommendation was likely to be less detailed and thorough than that carried out by a psychiatrist following admission.

3. It was submitted that the delay of seven and a half hours which occurred between the Applicants arrival and admission to Tallaght Hospital, and his examination by Dr. Khattak was not carried out *"as soon as may be"* as required by s. 14(1) of the Act.

   The seven and a half hour delay did not contravene s. 14(1). It was further noted that s,10(2) of the Act contemplated that such an examination may not occur for as long as up to 24 hours following admission.

4. There was a delay of three days in notifying the MHC of the Applicants Admission Order, notwithstanding the requirement in s. 16(1) that such notification be made within 24 hours.

   This was held to be a technical breach which did not affect any right of the Applicant in any fundamental way or at all.

Form of Order

The Applicant was found to be in lawful detention

21. W (F) v. The Department of Psychiatry James Memorial Connolly Hospital

Written Judgment of Mr. Justice Hedigan, delivered 18 August 2008

Article 40 inquiry - validity of detention under S.12(1) of the 2001 Act - whether Gardai required to exercise "independent judgment" under s.12 - whether the Hospital is a legitimate informant for the purposes of s.12 - effect of administrative error contained in s.10 recommendation

The Facts

The Applicant was admitted to Connolly Hospital on foot of an application made by her spouse and following an assessment pursuant to s.14(2) of the Act. However, this admission order was subsequently considered to be invalid since the Applicant had issued proceedings under the Domestic Violence Act against her spouse some short time previous to the making of the admission order. The applicant was released and immediately taken into custody by the Gardai under s. 12(1) of the Act and on foot of advice received from Connolly Hospital.

The Findings

The Court found the detention to be lawful.
Counsel for the Applicant had challenged the detention on the following grounds:

- The Applicant had not been released in reality from an admitted unlawful detention; or, in the alternative
- Even if she had been, then her subsequent removal by the Gardai to Connolly Hospital was not valid because the Gardaí's initial belief under s. 12(1) was not an independent judgment and neither was the subsequent recommendation made by the consultant psychiatrist. Both were at the behest of the medical staff at Connolly Hospital.

In rejecting these arguments, the Court appeared persuaded by the *bona fide* efforts of the hospital staff to protect the best interests of the Applicant. The Court held:

> *"Dealing with a very difficult situation, their predominant interest was the care and safety of the applicant. Their action ensured as best they could that when the applicant did leave their care, she did not depart into the night with no arrangements to ensure her safety and well-being."*

It was further held that the fact that the department of psychiatry at Connolly Hospital was itself precluded under s.9(2)(a) of the Act from making an application for involuntary admission to their own centre, does not preclude them from being an informant.
Finally, it was conceded in cross-examination by the medical practitioner who made the recommendation that, in filling out Form 5, he should not have ticked Box A but rather Box B or possibly even both. The Court considered that the substance of the order was unaffected by this administrative error and consequently that no injustice was visited upon the applicant.

Form of Order

The application was refused.

22. T.S. v. The Mental Health Tribunal and Ireland and the Attorney General and the Minister for Health and Children and the Mental Health Commission (Respondents) and Bola Oluwole and Ciaran Power (Notice Parties)

Written Judgment of Mr. Justice 0"Keefe, delivered 24 October 2008 (unapproved)

Judicial review - constitutionality of s.19 of the Act - compatibility of s. 19 with the ECHR

The Facts

The Applicant was involuntarily detained at St. Brigid's Hospital, Ballinasloe, Co.

Galway, which detention was affirmed by the Mental Health Tribunal. The Applicant then issued a notice of appeal to the Circuit Court pursuant to s. 19 of the Act. The Circuit Court appeal was then adjourned pending the outcome of the judicial review of the Applicants detention which is the subject of the proceedings herein.

The Findings

The Applicant complained that the effect of s.19(4) of the Act (the Circuit Court appeal) is that the burden of proof is imposed upon the Applicant to prove that he is not suffering from a mental disorder. The Applicant argued that this onus was: in breach of Article 5.4 of the Convention, that it was unconstitutional and that it was in breach of natural justice and fair procedure.

The Court rejected the Applicants contention.

The Court examined the decision of *H v. Mental Health Review Tribunal London North and East Region [2001] 1 MHLR 48.* In that case the English Court of Appeal struck down a provision of English mental health law as being incompatible with Article 5 of the Convention because the impugned provision placed a burden of proof of the patient to show that he was no longer suffering from a mental disorder. Mr. Justice O'Keefe held that the *ratio decedendi* in *H* was to the effect that the burden of proof must not be placed on the patient at the "first instance review". The first instance review under the 2001 Act was governed by s. 18 and this review procedure did not place any burden on the Applicant.

Furthermore, it was held that there was nothing in the case law to suggest that "*normal principles applicable in valid procedures before a court which apply, namely that the appellant must prove his or her case, should be disapplied in appeals relating to detention on psychiatric grounds".*

It followed, that s. 19 of the 2001 Act was not in breach of the Convention.

The Court also rejected the contention that s.19 was in breach of the Constitution. O'Keeffe J. reiterated that *"the effect of s. 19(4) replicates the general principle applied in appeals, namely that the appellant must prove his or her case*". The Court also pointed to the presumption of constitutionality enjoyed by s.19. In light of the foregoing,

the Court concluded that the Applicant had failed to demonstrate that s.19 was repugnant to the Constitution.

Form of Order

Application refused.

Other issues of note

O'Keeffe J. declined to comment on submissions by the Respondents to the effect that consideration of the compatibility of a provision of Irish law with the Convention only arises subsequent to a consideration of the constitutionality of such provision.

23. S.M. v. The Mental Health Commission, The Mental Health Tribunal, The Clinical Director of St. Patricks Hospital (Respondents) and Attorney General and Human Rights Commission (Notice Parties)

Written Judgment of Mr. Justice McMahon, delivered 31 October 2008

Judicial review - subs. (2) and (3) of s. 15 - meaning of "not exceed 12 months" - certainty - proportionality

The Facts

The Applicant, who had been involuntarily detained at the Respondent Hospital, was subject to a renewal under s.15 of the Act. The renewal order was expressly stated to be one which does "*not exceed 12 months".* **The Findings**

The central issue was whether the power vested in the consultant psychiatrist under s. 15 of the Act is satisfied when he makes a renewal order expressly stating it to be one which does "*not exceed 12 months".*

The Court held:

- A renewal order made under subs. (2) and (3) of s.15 and which does not specify a particular period of time, but merely provides that it is an order for a period "not exceeding 12 months" is not an order permitted under the legislation and is void for uncertainty. Such an order does not specify any period, in the sense that it does not specify a particular length of time.

  An order made under s.15(2) or s. 15(3) must be for a specific time period and failure to indicate the exact period renders any such order void for uncertainty.

- Section 15, since it purports to restrict a constitutional right to liberty albeit for the patient's own good and safety and the safety of others, should be interpreted in a proportionate way so that the detention is not for longer periods than are necessary to achieve the object of the legislation.

- The Respondent had argued that a renewal order for a period "not exceeding 12 months" is an order for a fixed period of twelve months. McMahon J. considered that to accept this interpretation would mean that the patient would have an order for the maximum period allowed in every situation when a shorter period might be warranted. This would in turn deprive the patient of a fresh tribunal hearing and an examination by an independent psychiatrist as well as the possibility of a fresh appeal to a Circuit Court.

- The Respondent argued that s.15 of the Act should be read in conjunction with s.28 (the obligation on a psychiatrist to revoke the admission/renewal order

  when he/she is of the opinion that the patient no longer suffers from a mental disorder). Read in this context, no real disadvantage occurs to the patient by having the order for a fixed period of 12 months.

The Court found that, while it is true that s.28 obliges the treating psychiatrist to revoke admission orders or renewal orders as soon as the patient is well, s.15 is concerned with providing a mechanism for external scrutiny and must be interpreted first and foremost independently of s.28 to realise this objective.

Form of Order

The Court directed that the Applicant be released from her detention at St. Patrick's Hospital. The Court placed a stay of four weeks on the order.

Other issues of note

McMahon J. accepted that "as a general principle" the Courts might where possible adopt a purposive approach to interpreting the Mental Health Acts bearing in mind the paternal nature of the legislation itself. In the case at hand, however, there was no room for the purposive approach to interpretation where a particular section is clear and unambiguous.

24. EJW v. Dr. Watters, Clinical Director of St. Senan's Psychiatric Hospital and The Mental Health Commission (Respondents)

Written Judgment (unapproved) of Mr. Justice Peart, delivered 25 November 2008

Judicial review - access to patient's medical records - implied powers under s.17 of the Act

The Facts

The Applicant was involuntarily detained at St. Senan's Psychiatric Hospital and, consequently, was assigned a legal representative pursuant to s.17(l)(b) of the Act. Prior to the review of the detention before the MHT, the legal representative requested access to the Applicants records from the Respondent Hospital. The legal representative was refused such access by the Hospital on the basis that the medical records could not be released to a third party without the consent of the Applicant and that the Applicant did not possess the requisite capacity to give such consent.

The Findings

The Court held that the Respondent hospital could make available the patient's medical records to the assigned legal representative prior to the hearing before the MHT.

It had been conceded by all parties to the proceedings that there was no express legislative provision under the Act which authorised the Hospital to release the medical records of the Applicant in the present case.

Furthermore, it was common case between the parties that the Tribunal could, in the exercise of its powers under s.49, direct the disclosure of medical records to the legal representative in such circumstances as arose in this case.

In response, the Court noted that an application for the disclosure of medical records before the MHT would invariably necessitate an adjournment of the substantive review of the detention, thereby incurring further delay. The facility of an adjournment is, therefore, not an adequate vindication of the rights of the patient.

In acceding to the declaration sought by the Applicant, the Court made the following findings:

□ To deny a legal representative the opportunity to obtain adequate information about a patient prior to appearing before the Tribunal is "to *expect the legal representative to perform his/her role while blindfolded. In addition it disadvantages such a patient in a way that another patient who has such capacity is not disadvantaged'.*

□ To afford prior access to the legal representative is such an obvious and necessary ingredient of the role of the legal representative that it was not considered necessary to make any specific provision in relation to it.

□ The concerns of the Hospital as to a potential breach of patient confidentiality could be "*adequately, reasonably and fully addressed and respected by the existence of the professional duties and obligations of the legal representative, as a member of the solicitor's profession".*

□ The legal representative is to be considered as "*standing in the shoes of the patient"* and, as such, the disclosure must not be confused with the provision of access to some other person who is a stranger.

□ The Court's finding does not preclude the hospital or treating psychiatrist from reasonably forming a view in a given case that the decision to give such access should await a decision of the Tribunal. However, the reason for forming such a view would need to be "*exceptional in nature"*.

Form of Order

The Court made a declaration that in a case where a patient has not the mental capacity to give a written consent, the disclosure by the hospital or treating psychiatrist therein, to the assigned legal representative of the medical records and/or medical file relevant to the reason(s) why the admission order or renewal order has been made, is necessary to protect the interests of the patient and not a contravention of the duty of confidentiality upon members of the medical profession as enunciated in the medical Council's Guide to Ethical Conduct and Behavior.

Other issues of note

The Court held that, under the Act, the patient has legal representation from the moment that the Commission appoints the legal representative and that the patient's legal representative is acting on behalf of that patient, not simply in relation to the hearing of the review hearing which could be more than two weeks away but generally in order to protect the patient's interests.

25. G(P) v. Michelle Brannigan (Respondent) and The Health Service Executive and The Mental Health Commission (Notice Parties)

Written Judgment of Mr. Justice McCarthy, 12 December 2008

Article 40.4 inquiry - s.4 of the 2008 Act - replacement renewal orders - whether a review of such an order required even though the currency of that order has expired

The Facts

The Mental Health Act 2008 introduced amendments to the 2001 Act in respect of the time periods of involuntary detention which may be prescribed by the treating psychiatrist. Section 4 of the 2008 Act contains transition measures to deal with detention orders which had been made under the 2001 Act and which orders were still current and in existence at the date on which the 2008 Act came into force. Section 4 envisages that where a patient is the subject of an unexpired renewal order on the date of entry into force of the 2008 Act, a consultant psychiatrist may make a "*replacement renewal order"* for the period remaining unexpired. It was a further provision of the 2008 Act that the Mental Health Tribunal should, within twenty-one days, review the "*replacement renewal order"* even if the original renewal order itself was the subject of a concluded review.

Such circumstances arose in the present case. However, the Applicants period of detention had elapsed before the Tribunal had reviewed the replacement renewal order and before the expiry of twenty-one days. The Applicant challenged the lawfulness of her detention under the replacement renewal order, and subsequent renewal orders, since the replacement renewal order had not been the subject of a review.

The Findings

The Applicant was found to be in lawful detention.

The Court found that the 2008 Act did not require a review of a replacement renewal order before the Tribunal in circumstances where the period of detention under the replacement renewal order had elapsed before such review had taken place (once the period of detention under the replacement renewal order was less than twenty-one days).

The Court found that *"the only jurisdiction conferred upon a Mental Health Tribunal to conduct a review of detention is during the currency of the detention contemplated by the order, so far as reviews pursuant to s. 18 are concerned".* In particular, Mr. Justice McCarthy held as follows:

- In reviewing a detention order by way of assessing the patient's state of health, the jurisdiction of the Tribunal is limited to assessing the *existing* state of health of the patient. If the Tribunal were required to conduct a review of the patient's health after the relevant detention period had expired, such a review would necessitate an inquiry into whether the patient had in the past (when the detention order was current) been suffering from a mental disorder.

  An alternative to the affirmation of a detention order is its revocation with a direction that the patient be discharged. The latter presupposes that the patient is actually detained pursuant to the order and not otherwise.

- If a replacement renewal order had to be reviewed, even after its expiry, then any subsequent renewal would necessarily be "*conditional*" on the replacement renewal order being approved. Such would create a *"state of uncertainty"* as condemned by McMahon J. in *S.M. v. Mental Health Commission* (Unreported High Court, 31st October 2008).

Form of order

The period of detention was of such brevity as to exclude the requirement for the review of the replacement renewal order and the renewals thereafter are lawful.

Other issues of note

In finding that the only jurisdiction conferred upon a Mental Health Tribunal to conduct a review of detention, under s. 18, is during the currency of the detention contemplated by the order, the Court distinguished s.28(5) of the 2001 Act. That provision, it was agreed, permits the commencement of or continuation of reviews, even after the discharge of a patient, at the patient's option.

This case relates to the 2008 Act and the introduction by the 2008 Act on 30 October 2008 of replacement renewal orders for a limited period to address the anticipated issues presented by the judgment of Mr. Justice McMahon in the SM case delivered on 31 October 2008.

26. CC (No.l) v. Clinical Director of St. Patrick's Hospital and The Mental Health Commission (Respondents)

Written Judgment of Mr. Justice McMahon, delivered 20 January 2009

Article 40.4 inquiry - alleged wrongful detention by Gardai - whether such detention would invalidate an admission order - the jurisdiction of the MHT to review the detention by Gardai

The Facts

An application to involuntarily detain the Applicant was made pursuant to s.9 by the Applicant's husband and the consequent recommendation was by the Applicant's GP. Sometime thereafter the Applicant was removed by the Gardai to St. Patrick's Hospital where an admission order was made pursuant to s. 14 of the Act.

The Applicants assigned legal representative raised as a preliminary issue before the Tribunal that the Applicant had been in unlawful detention whilst in the custody of the Gardai and, further, that this unlawful detention had tainted the process of admission that flowed therefrom.

The Tribunal refused the application and affirmed the admission order

The Findings

The application was refused.

The Court accepted that it appeared as though the involvement of the Gardai had not been invoked under ss. 12 and 13 of the Act and, therefore, there was an issue as to the justification for the Garda intervention. The Court held, however, that the Respondents should not be held responsible for the wrongful conduct of third parties.

Moreover, the Court was of the opinion that there was no connection between the Garda action and the decision of the clinical director and the hospital authorities, over and beyond the fact that the hospital's action followed the Garda action. Once the recommendation of the GP is received by the clinical director, "*the actual procedures set out in the Act kick in, commencing with an examination followed by an admission order".*

A removal cannot be read as a *sine qua non* to an admission order. An admission order is a separate standalone matter. The validity of an admission order is not to be assessed by *"some historical frailty causally unconnected with the director's determination".*

The second question concerned whether some illegality attached to the Tribunals finding that it had no jurisdiction to review the alleged unlawful detention by the Gardai.

The Court upheld the Tribunals finding in this regard.

The Court cited with approval the decision of Feeney J. in *R.L.* where it was held that in circumstances where there was non-compliance with s. 13, this did not vitiate a valid admission order under s.14. The Court in *R.L.* went on to comment that the jurisdiction of the Tribunal to review the validity of detention does not include review of the operation of s.13.

The Court held that once the Applicant learned that the Tribunal lacked jurisdiction, the Applicant could have withdrawn from the Tribunal to pursue other avenues of recourse. The Applicant's participation in the process legitimated the deliberations of the Tribunal.

Finally, the Court commented that the Applicant was free to bring separate legal proceedings either in tort or for breach of contract or for breach of constitutional duty for the historic wrong involved in the alleged initial wrongful detention by the Gardai.

Form of Order

Application refused. No further order.

Other issues of note

The Court highlighted that in these proceedings, as in the case of *R.L.* upon which the Court heavily relied, that it was common case between the parties that the applicant suffers from a mental disorder within the meaning of the Act.

27. **O'C(J) v. The Mental Health Tribunal (Respondent) and The Mental Health Commission (Notice Party**)

Ex-tempore Judgment of Mr. Justice O'Neill, delivered the 23 January 2009 (Agreed counsel's note)

Judicial review - jurisdiction of the Tribunal to inquire into lawfulness of detention by the Gardai

The Facts

The Applicant was involuntarily admitted to St. Michael's Hospital, Clonmel. The Applicant had been removed by Gardai to Clonmel Garda Station as a result of involvement in a fracas and, subsequently, an application was made by the Applicants brother under the Act to have the Applicant involuntarily detained.

On review of the detention before the MHT, the legal representative assigned to the Applicant raised the issue of the lawfulness of the Applicants custody at the Garda Station and, further, queried the lawfulness of the process which led to the making of the admission order. The legal representative then sought an adjournment to bring three Gardai before the Tribunal. This application for an adjournment was refused.

The Findings

The application was refused.

The Applicant sought judicial review on two grounds: first, the refusal by the MHT to permit an adjournment; and second, the failure of the MHT to give reasons for the refusal.

The Court held that the Tribunal was not entitled to embark on an open ended enquiry as to the lawfulness of the detention. The Tribunal had before it all the documentation which led to the admission order. Since no suggestion was raised that there was anything untoward on the face of the documents, the Tribunal could proceed on the basis of s.9 of the Act. In these circumstances, the evidence of the three Gardai was not relevant.

The Court went on to hold that there were adequate reasons given by the MHT for the refusal.

Form of Order

The application was refused. No further order.

28. CC (No.2) v. Clinical Director of St. Patrick's Hospital (Respondent) and The Mental Health Commission (Notice Party)

Written Judgment of Mr. Justice Hedigan, delivered 6 February 2009

Article 40.4 inquiry - whether a finding of the MHT restricted ss.23 and 24 powers of detention - the degree of independence required of the second psychiatrist pursuant to s.24 of the Act

The Facts

The Applicant, who had been admitted under a valid admission order, was subject to a renewal order pursuant to s.15 of the Act and which said order was made on 19 December 2008. This renewal order was revoked at a hearing before the Mental Health Tribunal on 5 January 2009. The Tribunal held that the Applicant was no longer suffering from a mental disorder within the meaning of s.3(l)(b) of the Act and ordered that she be discharged. The patient voluntarily remained at St. Patrick's Hospital until the 15 January when she indicated her intention to leave.
When the Applicant communicated this intention to the staff at St. Patrick's Hospital, the Applicant was involuntarily detained pursuant to s.23(l) for a period of twenty-four hours for formal assessment. After the twenty-four hours the Applicant was reassessed by a further psychiatrist at St. Patrick's Hospital who then certified the Applicant for involuntary detention and treatment pursuant to s.24(3).

The Findings

The Applicant was found to be in lawful detention.
The Applicant sought to impugn the lawfulness of her detention on two grounds:

- The Respondent had continued to detain her in spite of a decision of the Mental Health Tribunal to revoke her involuntary admission order; and

- The Respondent's decision to detain her was made on foot of an invalid procedure as the doctor who certified her continued detention pursuant to s.24 had a previous clinical involvement with her and as such did not possess the requisite degree of independence.

The Court emphasised the obligations of the responsible consultant psychiatrist, by virtue of s.28, to ensure that a patient is not inappropriately discharged. Further, the Court held that the Oireachtas must not have intended that a decision of the Mental Health Tribunal should in some way be immune from contradiction for an indeterminate period after its issue. It was held:

> *"The finely nuanced and potentially changeable differences that may exist between those patients who meet the criteria for involuntary detention and those who do not, require that the decision of a Mental Health Tribunal should not be regarded as creating a bar for some indeterminate period to bona fide clinical judgments by treating consultants. The nature of mental illness demands a certain flexibility, albeit one requiring careful oversight by the courts."*

The Court considered there to be a "*strong possibility*" that Applicant's mental state on the 5 January, when reviewed by the MHT, was different to Applicants mental state on the 14 and 15 of January when the admission order was made.

The Court also rejected the Applicant's argument that s.24 requires the second consultant psychiatrist to be independent from the particular patients medical history.

> *"The terms of the Act are once again quite clear as to what is required, I do not think that the phrase „ another consultant psychiatrist who is not a spouse or relative of the applicant" can conceivably be read to involve the highly limiting criterion being suggested by the applicant in the present case. "*

Form of Order

The application was refused.

29. E.H. v. The Clinical Director of St. Vincent's Hospital, Dr. Freyne and The Mental Health Tribunal (Respondents)

Written Judgment of Mr. Justice 0"Neill, delivered 6 February 2009

Article 40.4 inquiry - definition of „voluntary patient" under the Act - the operation of ss.23 and 24 of the Act

The Facts

On 10 December 2008, the Applicant had her involuntary detention order revoked by the Mental Health Tribunal. On 11 December 2008, the Applicant was given a form entitled: "*Notification of Change of Status from Involuntary to Voluntary"*. The Applicant remained at the Respondent hospital until the 22 December 2008. On 22 December, in response to an attempt by the Applicant to leave the Hospital, staff at the Hospital invoked s.23 of the Act so that the Applicant became an involuntary patient.

The Findings

The issue before the Court was whether the invoking of s.23 of the Act on 22 December 2008 was invalid on the grounds that the detention of the Applicant from 10 to 22 December 2008 was unlawful because it was claimed by Counsel for the Applicant that during that period she was not a voluntary patient.

The Court held that:

□ The definition of "*voluntary patient*" in the Act was cast in the wide terms used in order to provide for the variety of circumstances wherein a person is in an approved centre receiving care and treatment, but not subject to an admission order or a renewal order, including such situations where a detention pursuant to an admission order or renewal order breaks down but where the patient is suffering from a mental disorder and receiving care and treatment.

□ There is a clear linkage between the definition of "*voluntary patient*" and ss.23 and 24 which are designed to cater, inter alia, for mishaps or unexpected developments which result in there being no admission order or renewal order in respect of a patient who is suffering from a mental disorder and requires treatment as an involuntary patient but who has attempted to leave the approved centre.

□ Even if the Applicant was illegally detained during the period 10 to 22 December, that did not stop that situation being brought to an end by the use of ss.23 and 24.
With regard to the detention of individuals of "*unsound mind*", Article 5 of the ECHR introduces an overarching requirement that such individuals should not be deprived of their liberty in "arbitrary fashion". At no time during the Applicant's detention could that detention be characterised as a deprivation of liberty in an arbitrary fashion.

Form of Order

The Applicant is in legal detention. Application refused.

This decision was appealed to the Supreme Court and there is a written judgment of Mr. Justice Kearns dated 28 May 2009

30. C(S) v. Clinical Director of St. Brigid's Hospital

Written Judgment of Ms. Justice Dunne, 26 February 2009

Article 40 inquiry - whether unlawful invocation of s. 12 of the 2001 Act - relationship between s. 12 and s. 14

The Facts

The Applicant, having driven his vehicle down a one-way street and then driven straight into a shop, was arrested by the Gardai and, thereafter, released on bail. While the Applicant was on bail, both the Applicant's GP and a psychiatrist, Dr. McCauley, communicated concerns to the Gardai to the effect that they had "*serious concerns about the risks [the Applicant] poses to his family and to the public*". On foot of this communication the Applicant was arrested by Gardai pursuant to s.12 and admitted to an approved centre pursuant to s.14 of the 2001 Act.

The Applicant argues that the psychiatrist's written recommendation for detention expressly recommends the Applicant's detention on the grounds that the Applicant is suffering from a mental disorder such that a failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his condition and such that detention and treatment of the person concerned would be likely to benefit or alleviate the condition of the person to a material extent.

In this regard, the Applicant emphasises that in the recommendation the psychiatrist pointedly omits to specify that the Applicant is being detained on the grounds that, as a result of the Applicant's disorder, there is a serious likelihood of the Applicant causing immediate or serious harm to himself or to other persons. Consequently, it is contended that the Gardai unlawfully invoked s.12 of the Act. If is further contended that, as the arrest under s.12 was impermissible, the subsequent involuntary admission order was tainted by that illegality and, therefore, the involuntary detention order is invalid.

The Findings

The Applicant was found to be in lawful detention.

The Court held that the fact that the detaining psychiatrist, upon his examination of the Applicant, did not tick the box at paragraph 8(a) of the involuntary admission order relating to serious likelihood of the person concerned causing immediate and serious harm does not mean that the Gardai did not have reasonable grounds to act under s.12. The Gardai acted on foot of letters from the Applicants doctors (Dr. O'Neill and Dr. McCauley), which letters referred to the serious risk posed by the Applicant as a result of his mental state.
Ms. Justice Dunne noted that there was a time lag between the initial examination of the Applicant by Dr. McCauley on the 6 February and the 19 February when the arrest was carried out. The Honourable Judge then stated: "*...there must be a temporal link between the event or events giving rise to reasonable grounds under s. 12 and the exercise of the power of arrest under that section."* In the present circumstances, however, the Court considered that it was sufficient that Dr. O'Neill and Dr. McCauley had discussions between the 6 and 19 which led them to make contact with the Gardai. The Gardai had then acted promptly on foot of the communication from the doctors.

The Court indicated that *"as a general proposition a breach of the provisions of s.12 of the 2001 Act would not affect the subsequent process by which someone may be*

detained'. (CC v. Clinical Director of St. Patrick's Hospital and The Mental Health Commission approved, and *R.L. v. The Clinical Director of St. Brendan's Hospital* cited in support)

Finally, the Court rejected submissions on behalf of the Applicant that the safeguards contained in s.9 of the 2001 Act would be set at nought by permitting the exercise of the power of arrest under s.12 in these circumstances. Ms. Justice Dunne pointed to the fact that a person arrested under s.12 was subject to an examination by a GP for the purposes of a recommendation and, if such a recommendation was forthcoming, the said person must be subject to an examination by a consultant psychiatrist prior to admission.

Form of order

The arrest under s. 12 was valid. The Applicant is in lawful detention.

Other issues of note

It was noted by Ms. Justice Dunne that the Gardai could not have invoked s.9 of the 2001 Act in the present case because the provisions of s.9(4) require that the person making the application has to have observed the person the subject of the application not more than 48 hours before the date of the making of the application.

The Court declined to comment on whether an unlawful invocation of s.12 by the Gardai which resulted in the arrest of a person at his home could constitute a breach of Article 40.5 of Bunreacht na hEireann.

31. A.R. v. Clinical Director of St. Brendan's Hospital and the Mental Health Tribunal (Respondents) and the Mental Health Commission (Notice Party)

Written Judgment of Mr. Justice O'Keeffe, delivered 24 March 2009

Article 40.4 inquiry - defect in the renewal order - jurisdiction of the Tribunal under s. 18 to cure defects in admission/renewal orders

The Facts

The Applicant who is an involuntary patient at the Respondent hospital was subject to a renewal order extending his detention pursuant to s. 15 of the Act. This renewal order was subsequently affirmed by a sitting of the Mental Health Tribunal.

The Applicant challenged the legality of his detention on the following grounds.

First, it was argued that the renewal order signed by the psychiatrist was invalid as a result of the psychiatrists failure to specifically indicate on the renewal order form that he was of the opinion that the Applicant was suffering from a mental disorder.

Second, it was contended that, in light of the aforementioned defect, the Tribunal erred in law in affirming the renewal order.

The Findings

The Applicant was found to be in lawful detention.

The Court relied heavily on the decision of Charleton J. in *T.O'D v Kennedy* [2007] 3 IR 689 in finding that the Tribunal had jurisdiction under s.18 of the Act to affirm the renewal order.

The Court cited the following dictum of Charleton J. with approval:

> *"/ would hold that the purpose of section 18(1) is to enable the Mental Health Tribunal to consider afresh the detention of mental patients and to determine, notwithstanding that there may have been defects as to their detention, whether the order of admission or renewal before them should now be affirmed. In doing so, the Mental Health Tribunal looks to the substance of the order. This, in my judgment, means that they are concerned with whether the order made is technically valid, in terms of the statutory scheme set up by the Act or, if it's not, whether the substance of the order is sufficiently well justified by the condition of the patient. "*

In the opinion of the Court in the case at hand, this test in *T.O'D* is to be favoured over that of O'Neill J. in *W.Q. v. Mental Health Commission* [2007] 3 IR 755, namely that only failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by a Mental Health Tribunal.

Mr. Justice O'Keeffe held that "*section 18(1) is not confined in its application to minor matters such as the forwarding of notice to the patient or the preparation of documentation to the Commission. Section 18(1) is capable of application to sl5(4) in circumstances such as arose in this case..."*

The Court considered that, since the Tribunal had heard the evidence of the psychiatrist who admitted the patient and was in a position to consider all relevant documents, the Tribunal was entitled to affirm the order pursuant to its powers under

s.18. The Tribunal specifically addressed section 18(l)(a)(ii) and considered the relevant issues under the section. In affirming the order the Tribunal had regard to the best interests of the Applicant and the interests of other persons who may be at risk of serious harm.

Form of order

The Tribunal acted lawfully and was entitled to apply section 18(l)(a)(ii) in the manner it did. The Applicant is in lawful detention.

Other issues of note

Counsel on behalf of the Applicant relied on the European Court of Human Rights decision in *Nakach v. the Netherlands* (30th September 2005), which held that despite the fact that the decision to detain an applicant on the grounds of his mental health was justified in substance, the failure to comply with a procedural requirement under domestic law was such as to render the detention unlawful. Mr. Justice O'Keeffe expressly rejected *Nakach* indicating that it was decided under domestic law.

The Applicant had raised the issue of the Tribunal's refusal to take account of a previous decision of another Tribunal hearing. In reply, O'Keeffe J. stated: "*.../ agree with the views put forward in opposition that such decisions were of no relevance in circumstances where the full facts and evidence were not known.*"

32. D. v. Health Service Executive and the Mental Health Commission

Written Judgment of Mr. Justice Peart, delivered 23 April 2009

Article 40.4 - Involuntary detention - s 15(2) of 2001 Act - psychiatrist responsible for care and treatment of the applicant - the effect of a technical breach of s 17(l)(c)(ii) of 2001 Act

The Facts

The Applicant's detention at the relevant approved centre was extended by way of a renewal order made on 20 March 2009. This order was subsequently affirmed by a Mental Health Tribunal on 8 April 2009.

In these proceedings the renewal order of 20 March 2009 was challenged on two grounds: first, that the psychiatrist who signed the renewal order was not the psychiatrist responsible for the care and treatment of the Applicant as is required by s 15; and second, the independent psychiatrist who prepared the report for the Tribunal did not speak to or otherwise interview the consultant psychiatrist responsible for the Applicant as is required by s 17(l)(c)(ii) of the Act.

The Findings

The Court rejected both grounds of challenge to the renewal order.

The Court reaffirmed the interpretation of s15 to the effect that more than one person can be regarded as the "psychiatrist responsible for the care and treatment of the patient concerned". In order to decide whether the psychiatrist who signed the relevant renewal order can come within the definition, one must look to the facts of the case. Here, the Applicants regular treating psychiatrist, Dr. Shinkin, was out of work owing to illness.

The psychiatrist who was covering her workload, Dr. Dennehy, was doing so with the consent of Dr. Shinkin. Furthermore, Dr. Dennehy was familiar with the Applicant and the illness from which he was suffering.

Section 17 of the 2001 Act does require the independent psychiatrist to "interview the consultant psychiatrist responsible for the care and treatment of the patient" prior to preparing the report that he/she will submit to the Tribunal. The Court agreed with the Applicants Counsel that the provisions of s 17 must not be regarded as "mere empty formulae", nevertheless, the Court proceeded to say:

"But in the present case there was no doubt about the existence of a mental disorder such as would have justified the renewal order being affirmed. The defect, if it be that, in the report is not so fundamental as to invalidate the report to the extent that the tribunal could not be entitled to have regard to it."

Form of the Order

The Court refused the application.

33.E.F. v. The Clinical Director of St. Ita's Hospital

Written Judgment of Mr Justice O'Keeffe, delivered 21 May 2009

Judicial review relating to alleged breach of section 13(2) of the Act

The Facts

The Applicant's brother made an application under section 9 of the Act, following which a registered medical practitioner made a recommendation under section 10. The Applicant's brother was unable to arrange for her removal to the approved centre under section 13(1). Therefore, the registered medical practitioner asked the approved centre for assistance. The approved centre followed procedures put in place by the HSE in respect of the use of an assisted admissions service provided by *"Nationwide Health Solutions Limited"*.

Nationwide Health Solutions Limited effected the removal of the Applicant to the approved centre. An admission order was made, following which the matter came before a Tribunal. The Applicant complained to her Legal Representative regarding the manner in which she was removed to the approved centre. The Legal Representative sought clarification as to whether the assisted admissions team were members of staff of the approved centre.

Following receipt of further information, the Applicant issued judicial review proceedings on the basis that the approved centre acted unlawfully and in breach of section 13(2) of the Act in arranging to have the Applicant removed to the hospital by people who were not staff members. The Applicant referred to the decisions in *RL* and *AM*.

The Respondent argued that throughout the assisted admission there was *"…a senior HSE official in continuous command and control...the operational decisions and instructions are continuously give* [sic] *by this..."* person. It was also stated that the Assistant Director of Nursing was in continuous contact with all personnel involved in the removal. It was submitted that members of the assisted admissions team were members of staff.

The Findings

- The term "*staff*" is not defined in the Act but whether a person is a member of staff is *"question of fact"*.
- A corporate entity such as Nationwide Health Solutions could not be a member of staff. The nurses and staff provided by that entity were, at all material times, staff of that entity and not staff of the approved centre.

Form of Order

The Court granted the declarations sought by the Applicant.

Other Issues of Note

This decision lead to the introduction of Section 63 of the Health (Miscellaneous Provisions) Act 2009 which amended the definitions in section 13(2) and section 13(3) to allow assisted admissions to be carried out by persons other than employees of the approved centre.

34. M.P. v. Health Service Executive, Minister for Justice Equality and Law Reform and Dr. Sheila Casey

Written Judgment of Mr. Justice MacMenamin, delivered 27 April 2010 and *Further judgment delivered 21 December 2010

Section 73 of the Mental Health Act 2001 - application seeking leave of the court to take civil proceedings - "frivolous and vexatious"

The Facts

The Applicant was involuntarily admitted to Cavan General Hospital in February 2009.

The Applicant's detention was revoked in March 2009 when the Mental Health Tribunal found that the Applicant was not suffering from a mental disorder within the meaning of s 3 of the 2001 Act.

The Applicant made a number of claims in respect of the Respondents and their medical staff, including allegations that the Plaintiff was subject to torture by the doctors and ward nurses; that the Department of Justice had contacted her landlord and her neighbours with the intention of turning them against her; and that the national broadcasters were conspiring with the respondents to "stitch-up" a diagnosis of schizophrenia.

The matter came before the Court by way of an application made by the Applicant in person for leave to seek compensation in respect of the aforementioned allegations.

The Findings

The Court held that the relevant time period for which the Court must assess the conduct of the Respondents or their employees was from November 2008 (when general practitioner Dr. Casey first met the Applicant at her walk-in clinic) to March 2009 (when the Applicant left the care of Cavan General Hospital).

In considering whether to grant leave under s 73, the Court sought to achieve proportionality between the legislative objective of providing limited protection to medical staff acting under the Acts and the individual's right of access to the courts.

To this end, the Court held that the "reasonable grounds" for establishing bad faith or absence of reasonable care must be clear. Such a test may, in appropriate cases require a degree of corroboration, i.e. "something beyond mere bald assertion". In the present case, there was no evidence before the Court to support the Applicant's contention.

The Court further held that, in absence of any supporting evidence, the proceedings could confer no benefit on the Applicant and therefore they must be considered frivolous and vexatious.

Form of the Order

The Court refused leave under s 73 of the 2001 Act to seek compensation by way of civil proceedings.

Other issues of note

The Court appeared to read the alternate grounds contained in s 73 conjunctively. The Court held: "In the absence of *any* evidence of want of *bona fides*, the applicant's proceedings as against the identified Defendants in these motions become, *ipso facto,* "frivolous and vexatious" and could confer no benefit on the applicant."

*	Note on the Judgment delivered on 21 December 2010:

In December the applicant made a further application for leave under s 73, the basis for which replicated the substance of the April proceedings. In reply, the Respondent applied to the Court for an "Isaac Wunder" order, i.e. an order restricting the access to the courts of a plaintiff who habitually and persistently institutes frivolous civil proceedings.

The Court stated that the constitutional right of access to the courts was not an absolute right and it could be restricted where to do so would be a proportional response to the plaintiff's conduct. In the case at hand, however, the Court thought it neither "fair nor just to make a radical order against the Plaintiff". In the circumstances, the Plaintiff's application was simply struck out.

35. B.F. v. Our Lady's Hospital Navan, Clinical Director of the Central Mental Hospital and the Attorney General

Written Judgment of Mr. Justice Peart, delivered 4 June 2010

Judicial review - whether a voluntary patient can be discharged for the purposes of re-admission on an involuntary basis - whether a patient is entitled to retain „voluntary" status once he/she complies with proposed treatment - precondition that a patient is involuntarily detained prior to transfer to Central Mental Hospital

The Facts

The Applicant had a history of being voluntarily admitted to Our Lady's Hospital Navan. In August 2009, the treating medical staff proposed to transfer the Applicant to the CMH to avail of treatment which was not provided at Our Lady's. Section 21(2) of the 2001 Act only provides for the transfer of an involuntary patient to the Central Mental Hospital.

As a result, the treating psychiatrist at Our Lady's discharged the Applicant while acknowledging that he needed further psychiatric treatment. Upon discharge, the Applicant was immediately involuntarily admitted to Our Lady's pursuant to s 14 of the 2001 Act. The Applicant challenged the lawfulness of using s 14 for this purpose.

The Findings

The Court held that an approved centre is entitled, under the Acts, to discharge a voluntary patient who is not cured of whatever illness caused the admission in the first place.

Furthermore, having discharged the Applicant, the treating doctors were entitled to involuntarily readmit the Applicant pursuant to s 14.

A voluntary patient who expresses a wish to remain at a centre and retain their voluntary status is not automatically entitled to do so. This is particularly the case where there is medical opinion that the patient's very illness itself disables the person from making a properly formed opinion in that regard.

Finally, in the circumstances, the CMH is legally entitled to exercise a practice whereby it does not accept the transfer of patients who are not the subject of an involuntary detention order since this policy has a justifiable basis.

Form of the Order

The application for judicial review was refused. No order made.

36. Maria (E.T.) v. Clinical Director of the Central Mental Hospital and the Health Service Executive

Written Judgment of Mr. Justice Charleton, delivered 2 November 2010

Judicial review - declaration sought that Applicant's treatment breached Article 3 of the European Convention on Human Rights - whether the Applicant enjoyed a right of transfer to Central Mental Hospital **The Facts**

The Applicant was detained pursuant to the Mental Health Acts at St. Brendan's Hospital. The Applicant sought a declaration that her treatment at Brendan's, coupled with the delay in transferring her to the Central Mental Hospital, constituted torture, or inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights.

The Findings

The Court found no breach of Article 3 of the Convention.

On a point of law, the Court held that Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. It rather imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty.

In connection with the Applicants treatment at St. Brendan's, the Court described it as regrettable that the Applicant was being shadowed by security personnel and that the window of her sleeping quarters had been blocked out. Nevertheless, these precautions were understandable in the context of a series of assaults perpetrated by the Applicant on medical staff.

On the Applicants second argument, the Court accepted that, on balance, the Applicant would be better treated at the Central Mental Hospital than in St. Brendan's. However, Charleton J. indicated that it would only be in circumstances of the most extreme kind that the Court would intervene in a matter of allocating capacity in a medical system. He stated:

> "Absent cases of real urgency, where to fail to act would endanger or cause serious injury to health that is demonstrated to be avoidable and which would not endanger other patients in a similar situation, or where the prioritisation of patients is being conducted in an arbitrary or unreasonable manner, the court should not interfere in favour of a litigant patient so as to put him or her by court order above others on a waiting list."

Form of the Order

The application for judicial review was refused. No order made.

37. A.L. v. Clinical Director of St. Patrick's Hospital and the Mental Health Commission

Written Judgment of Mr. Justice Clarke, delivered 11 March 2011

Section 73 of the Mental Health Act 2001 - application seeking leave of the court to take civil proceedings - acting "without reasonable care "

The Facts

The Applicant, who was involuntarily detained at St. Patrick's Hospital, had her detention extended for a period of six months. Due to an administrative error, the

Applicant's renewal order was not referred to a sitting of a Mental Health Tribunal as is required under s 17 of the 2001 Act. In consequence, the Applicant contended that her detention was technically unlawful and that she was therefore entitled to compensation.

The matter came before the Court by way of an application for leave to seek compensation as is required under the Acts.

The Findings

The Court outlined the statutory test for leave to institute civil proceedings. Section 73(1) of the 2001 Act provides that such leave shall not be refused unless the Court is satisfied:

- that the proceedings are frivolous or vexatious, or
- that there are no reasonable grounds for contending that the person against whom proceedings are brought acted in bad faith or without reasonable care.

The Court interpreted the term "reasonable care" as applying not only to the standard of medical care but also, at least in principle, as imposing a duty on staff to comply with the necessary procedural requirements so as to ensure that a person is not in unlawful detention.

In the Courts view, it was possible that the applicant might succeed in her claim notwithstanding that it was agreed by all parties that the Applicant did suffer from a mental disorder at the time of the alleged unlawful detention, that she received satisfactory medical care, and that the alleged unlawfulness arose from an administrative error only.

Moreover, it was not necessary, as a matter of law, that the Respondent or its staff were *actually* aware of the administrative error in order for the Respondent to be found liable for damages.

Form of the Order

The Court granted leave under s 73 of the 2001 Act to seek compensation by way of civil proceedings.

Other issues of note

The Court noted that the ambit of s 73 in restricting potential liability to "bad faith" or "want of reasonable care" replicated the ambit of liability prescribed by s 260 of the Mental Treatment Act 1945 (the predecessor to the 2001 Act). In *Blehein v. The Minister for Health and Children* [2008] IESC 40, the Supreme Court found the restricted ambit of s 260 to be disproportionate and therefore in breach of the Constitution. In the words

of Clarke J. in this case: “The fact that a similar restriction is to be found in s 73 must, at least, raise some questions about the constitutional validity of the identical restriction contained in s 73.”

38. HSE v. X (APUM)

Written Judgment of Mr. Justice MacMenamin, delivered the 29 July 2011

Judicial review - declaratory relief - definition of „treatment" - patient compelled to undergo treatment - s 57 of 2001 Act - statutory interpretation - balancing of constitutional rights

The Facts

The Respondent was an involuntarily patient at the Central Mental Hospital. The patient was validly detained and therefore was compelled to undergo certain medical treatment "intended for the purposes of ameliorating [her] mental disorder" as provided under the Mental Health Acts. In addition to this medication, directed specifically at the patient's mental disorder, the treating staff sought to obtain blood samples, a practice designed to ensure that the medication did not have adverse side effects on the patient. The patient resisted the attempts by staff to obtain these blood samples.

The medical evidence was that the patient did not have the capacity to make decisions with regard to her medical treatment.

The HSE, being the body responsible for the staff at the CMH, applied to the High Court to inquire whether certain forms of medical procedure which they deemed necessary to ameliorate the patient's disorder could be lawfully administered. In effect, guidance was sought as to the statutory interpretation and application of the legislation. The point was made that while the 2001 Act permitted treatment without consent there is a possibility that it may not permit the drawing of a blood sample without consent. The question that specifically arose was whether the health professionals had the legal power or authority under the 2001 Act to restrain a patient for the purpose of drawing blood under supervision and is this "ameliorating a medical disorder"?

The Findings

The Court noted that the detention was involuntary and necessary. It was also noted that the patient was not a ward of court.

The Court held that the provision of the Act permitting medical staff to compel an involuntary patient to undergo „treatment" also allows for a medical procedure which „is ancillary to and part of the procedures necessary to remedy and ameliorate [the patient's] mental illness or its consequences.

In arriving at this conclusion, the Court reasoned as follows:

- The court notes that the 2001 Act is silent on any review for "treatment". The word "treatment" is ambiguous and is capable of being interpreted broadly or narrowly.

- The Courts are to adopt a purposive interpretation of the Mental Health Acts (i.e. to construe ambiguous provisions in a manner consistent with the overall intention of the legislature rather than simply to adopt a strictly literal meaning of legislative provisions.)

□ The intent of the Oireachtas in the 2001 Act is to give priority to the constitutional values of the patient's life and health. It went on to say that it would be an "absurd" and "unintended" interpretation that those treating the patient to restore her health would be precluded from taking measures necessary to safeguard the life of the patient.

□ As the patient lacked the capacity to make decisions in accordance with the terms of the Act, the Court therefore had to apply an objective test as to what is in her best interest. There is no evidence that the patient's wishes would be otherwise if she enjoyed full capacity. The correct balance between competing rights requires that the vindication of the patient's right to have her life and health safeguarded must take precedence over her right to autonomy and liberty.

Form of the Order

A declaration that the taking of blood samples in conjunction with administering medication against the patient's wishes was permitted under the Acts in the present circumstances and at the present time.

39. M.McN. v. Health Service Executive and L.C. v. Health Service Executive

Written Judgment of Mr Justice Peart, delivered 15 May 2009

Article 40.4 - whether mental capacity to provide consent a condition of being a voluntary patient

The Facts

The Applicants had been subject to involuntary admission orders at Western Regional Hospital. Those orders were later revoked by the Applicants' treating psychiatrist and it was agreed that the Applicants would remain at the hospital on a voluntary basis.

The medical condition of both Applicants later deteriorated to the point where neither applicant had the cognitive capacity to give her consent to being a voluntary patient. The treating doctors indicated that both applicants were in need of care at the hospital and, in the event that either attempted to leave, it was likely that the s 23/24 mechanism would be invoked.

The Applicants' case was that they were in effect detained at the Respondent hospital but were not afforded the protection of the safeguards surrounding involuntary admission provided under the 2001 Act.

The Findings

Peart J. rejected the Applicants' contention.

The Court stated that no inquiry could be made into the correctness or otherwise of the treating consultant's decision to revoke the initial detention order which was made on the basis that the Applicants were not suffering from a mental illness necessitating their detention. There was no countervailing medical opinion before the Court. Moreover a patient's condition is a fluid matter: the patient may improve or deteriorate.

On the primary issue to be determined, the Court saw no reason why either of the Applicants fell outside the definition of a voluntary patient as envisaged by the 2001 Act. In the Courts view the mere fact that the unit in which the Applicants reside is locked and secure should not be seen in the context of forced restraint amounting to a false imprisonment or other unlawful detention. To the extent that the Applicants are supervised or restricted in their movement that should be seen in the context that both Applicants suffer from mental and general medical illness and it is in this context in which they are present at the approved centre.

If it were the intention of the treating doctors to invoke section 23 that could only be done if the requirements of that section were met.
The Court found that the provisions of section 29, which governs voluntary patients, entitled the hospital to keep a patient who is *non compos mentis* quite apart from the exercise of any common law duty of care. There is no statutory requirement under the Act that a person must be capable of expressing, and express, a consent to being in an approved centre on a voluntary basis before that person can be categorised as being a voluntary patient.

Even though the form completed by the consultant psychiatrist (Form 14) discharging the Applicants stated that the Applicants had "chosen to remain in the approved centre on a voluntary basis," this was merely the manner in which the form was worded and cannot of

itself influence the proper interpretation of the term voluntary patient within the meaning of section 2 of the Act.

The fact that the treating psychiatrists may not have intended to discharge the Applicants at the time that they revoked the order of detention does not render the revocation unlawful. The provisions of section 29 of the Act support the idea that a person whose detention order has been revoked may remain at the approved centre after he or she has ceased to be formally detained.

Form of Order

M.McN. was found to be lawfully present at the Respondent approved centre.

L.C. had passed away as of the date this judgment was handed down.

40. P.L. v. St Patrick's University Hospital and Dr Seamus O Ceallaigh

Written Judgments of Mr Justice Peart, delivered on 24 January 2012 and 14 December 2012

Judicial review - voluntary patient - capacity of patient to consent to voluntary status - absence of safeguards for voluntary patients - whether appropriate for medical staff to discuss the possibility of voluntary status with a patient

The Facts

The Applicant had been involuntarily admitted to the Respondent hospital. The order confirming his involuntary status was subsequently revoked on 12 October 2011 when the consultant psychiatrist responsible for his care and treatment formed the view that the Applicant no longer satisfied the criteria for involuntary detention.

Nevertheless, having discussed his condition with his treating psychiatrist, the Applicant expressed his willingness to remain at the hospital and to be treated as a voluntary patient.

On 21 November 2011 the Applicant decided that he wanted to leave the Respondent hospital and attempted to do so by trying to jump over a boundary wall. The Applicant was later persuaded to remain in the hospital by treating staff as a voluntary patient and without the Respondent invoking Sections 23 /24 of the 2001 Act. The following day, on 22 November 2011, the Applicant again expressed his desire to leave the hospital.

The Court was asked to consider whether the Respondent had effectively detained the Applicant on 21 and 22 November 2011 but had deprived the Applicant of the protections of the 2001 Act had an order been made for involuntary admission.

The Findings

The Court found that the Applicant's presence at the Respondent hospital was lawful on the basis of the following facts. First, the Court found that when the Applicant expressed his willingness to remain at the hospital as a voluntary patient he had sufficient mental capacity to make that decision. Second, the Court emphasised that it was not disputed that the Applicant was suffering from a mental illness on the dates relevant to the proceedings.

The Court also addressed the decision of the medical staff to speak to the Applicant on the relevant dates so as to encourage him to remain at the hospital voluntarily rather than to invoke the 2001 Act. Peart J. stated that the treating medical staff enjoyed a "margin of appreciation" to discuss with the Applicant the most appropriate course of action and that this was preferable to simply releasing the Applicant without further consideration.
The Court went on to say that the fact that a patient in an approved centre is within the definition of a voluntary patient does not mean that he or she must be permitted to come and go as he or she pleases. Voluntary status is a matter of statutory definition and not a consequence of an informed consent to be voluntary even if in a particular case, as in this case, the only reason why there is not a detention order is because the relevant psychiatrist is satisfied that the patient will agree to take his medication and be cared for without the necessity of a detention order.

The Applicant subsequently sought a declaration that the statutory provisions under consideration in the first judgment, as construed by Peart J., where incompatible with the European Convention on Human Rights. This resulted in the second judgement referred to above.

Peart J. had some sympathy with the central tenor of that argument at a level of principle. He stated that he was fully cognisant of the potential absence of procedural safeguards afforded to a patient once he or she fell within the definition of "voluntary patient".

The Court cited *M v. Ukraine* (2452/04, 19 April 2012) in which the European Court of Human Rights cautioned: "without safeguards for this type of [voluntary] patient, there may be improper inducements to circumvent the complicated procedure for compulsory hospitalisation by admitting a person on a voluntary basis."

Nonetheless, neither of these apprehensions lead the Court to find the Applicant's status unlawful where in the Court's view the Applicant had the capacity to give informed consent to remain at the Respondent hospital voluntarily and did in fact give such consent.

Form of Order

Both applications were refused.

41. X.Y. v. Adelaide and Clinical Director of St Patricks University Hospital and anor.

Written Judgment of Mr Justice Hogan, delivered 8 June 2012

Article 40.4 - adequacy of assessment leading to recommendation under s 10 - whether irregularity in initial admission order tainted subsequent order for detention

The Facts

The Applicant's general practitioner had been treating her since July 2011 when he diagnosed the Applicant with paranoia and delusions. In May 2012 the Applicant's family expressed their concern to the general practitioner that her condition had deteriorated. It was then decided that the general practitioner would observe the Applicant when she attended her son's graduation on 20 May 2012. On that date the general practitioner observed the Applicant from a distance in a car park. He did not speak with her. Arising from what he saw, and his knowledge of the Applicant's condition, he completed a recommendation pursuant to Section 10 of the 2001 Act (on a Form 5).

The Applicant later challenged a subsequent detention order on the basis that her initial admission order was unlawful because the general practitioner failed to carry out an assessment as required under section 10 of the 2001 Act.

The Findings

The Court found that in determining whether an adequate assessment has been carried out by the general practitioner for the purposes of section 10 "*some allowance may have to be made for the existing exigencies of the situation*" (Z v Khattak [2008] IEHC 262).

Moreover, the Court was absolutely satisfied that the Applicant had the benefit of an examination within the definition of section 1 of the 2001 Act prior to being involuntarily admitted. A comprehensive clinical assessment had been performed by a psychiatrist at the respondent hospital. Nonetheless the Court was willing to concede that whether the Applicant had the benefit of an examination by the general practitioner was a matter "*more finely balanced'.*

The Court used this reasoning to distinguish the facts at hand from those in issue in the decision of the European Court of Human Rights in *Varbanov v Bulgaria* [2000] ECHR 457. In that case the European Court concluded that a "medical assessment must be based on the actual state of the mental health of the person concerned and not solely on past events. A medical opinion cannot be seen as sufficient to justify deprivation of liberty if a significant period of time has elapsed."
The Court also stated that to the extent that the initial admission order had been irregular, such a failure did not invalidate a subsequent detention under section 14 of the 2001 Act which detention was otherwise valid: *L v the Clinical Director of St Brendan's Hospital* [2008] IEHC 11.

Form of Order

The Applicant was deemed to be in lawful detention.

Other issues of note

The findings in this case were qualified by the later case of *S. O. v. Adelaide and Meath Hospital of Tallaght* (High Court, Hogan J., 25 March 2013)

Relevant Judgments

SO. v. Adelaide and Meath Hospital of Tallaght (High Court, Hogan J., 25 March 2013);

Z v Khattak [2008] IEHC 262;
L v the Clinical Director of St Brendan's Hospital [2008] IEHC 11.

42. (D).H. v. The Clinical Director of St. Patrick's Hospital and Dr. J.C.

Ex tempore Judgment of Ms. Justice O'Malley delivered 18 June 2012

The Facts

A registered medical practitioner (GP) completed a recommendation under section 10 in relation to the Applicant for admission to the approved centre under section 3(1) (b) of the Act. It appears that three days later the assisted admissions team asked the GP to complete a second recommendation. The second recommendation was dated the same date as the first. The only difference between them was that the second recommendation referred to section 3(1) (a) as opposed to section 3(1) (b).

The Applicant issued judicial review proceedings, which were heard the day before a Tribunal was to review the Applicant's admission order.

A number of issues were raised but the Court confined itself to one point, the admission order.

The Findings

- An Assisted Admissions Team may occasionally have to advise GPs who have not filled out the relevant recommendation form before, but this should be restricted to making sure the form is fully filled in.

- The Court found that the admission order was not contaminated by what happened with the two recommendations.

- The errors made were made in good faith and did not undermine the protections afforded to the Applicant under the Act.

Form of the Order

Relief refused.

Other issues of note

The Court did not believe it was necessary to decide whether there can be only one recommendation. It indicated that it would leave the issue of whether a GP is entitled to change his diagnosis or the basis for the recommendation within seven days over to another case.

43. F.X. v. Clinical Director of the Central Mental Hospital and ors.

Written Judgment of Mr Justice Hogan, delivered 8 July 2012

Article 40.4 - delayed release of Applicant found to be in unlawful detention - whether delayed release is lawful - circumstances in which a suspensory order is appropriate

The Facts

The Applicant who had been charged with a criminal offence was found "unfit to plead" and detained in the Central Mental Hospital under the Criminal Law (Insanity) Act 2006. In the judgment delivered by Hogan J. on 3 July 2012 that detention was found to be unlawful.

According to the Court there was clear and cogent medical evidence that if the Applicant were to be released unconditionally he would pose a real and immediate risk to himself, identifiable individuals and to society at large. The question now under consideration was whether a stay might lawfully be placed on the order release, suspending its effect for a period of time, so as the Central Mental Hospital might make arrangements for the Applicant's care and treatment.

The Findings

The Court cited the traditional view expressed by Finlay CJ in *The State (Trimble) v. Governor Mountjoy Prison* [1985] IR 550 that a court must immediately direct the release of a successful applicant at least if fidelity to the language, structure and purpose of article 40.4 is to be maintained. The Court stated that while this decision was followed by the Supreme Court in the extempore judgement of *SC v Clinical Director of the Jonathan Swift Clinic* (5 December 2008) that it was not the intention of that court to depart from the body of jurisprudence of this jurisdiction on delayed release which begun with the decision of Clark J in JH v Russel [2007] 4 IR 242.

In the Court's view the decision to make a suspensory order under article 40.4 arises only where two conditions are satisfied: first, the detention under scrutiny must arise in the context of persons detained for their own good; and second, a stay does not arise when a patient poses no threat to himself or others.

Finally a decision to delay or suspend release should respect the fundamental principle that the order must direct release of the successful applicant within a short period of the making of that decision.

Form of Order

The Court ordered release of the Applicant to take effect at 5pm on 10 July 2012.

Relevant Judgments

The State (Trimble) v. Governor Mountjoy Prison [1985] IR 550;

SC v Clinical Director of the Jonathan Swift Clinic (5 December 2008);

JH v Russel [2007] 4 IR 242.

44. M.X. [Apum] v. Health Service Executive and ors.

Written Judgment of Mr Justice MacMenamin, delivered 23 November 2012

Challenge to the Constitutionality of s 60 of 2001 Act - procedure surrounding involuntary medical treatment - review of decision to medicate - patient's input into decision making - United Nations Convention on Human Rights of Persons with Disabilities - compatibility of s 60 with European Convention on Human Rights

The Facts

The Applicant was subject to an involuntary admission order at an approved centre. Consequent to that admission, which was not being challenged, the Applicant was being required to undergo a course of treatment prescribed by her treating psychiatrist and carried out pursuant to section 60 of the 2001 Act.

It was the uncontroverted medical evidence that the Applicant was not capable of fully understanding the nature, purpose and the likely risks of the proposed treatment.

The case entailed a lengthy examination of the practices, procedures and safeguards surrounding the implementation of the regime provided in section 60 of the 2001 Act, assessed in light of the Applicant's rights under the Irish Constitution as informed by the United Nation's Convention on the Rights of Persons with Disabilities (UNCRPD) and the European Convention on Human Rights (ECHR).

The Findings

By way of a preliminary issue, the Court considered whether the principles set out in the UNCRPD have the force of law in this jurisdiction despite Ireland's non- ratification of that treaty. The Court found that they do not since the EU has not assumed any large or appreciable jurisdiction over the law relating to mental capacity. Therefore the UNCRPD cannot be seen as a rule in the interpretation of an application of ECHR jurisprudence. The Court did accept, however, that the UNCRPD may be used as a guiding principle in the identification of standards of care and review of persons suffering from a mental disorder.

In addressing the substance of the Applicant's case the Court began by stating that an assessment of the mechanism provided by section 60 of the 2001 Act had important Constitutional dimensions. The invasive nature of the treatment to which the Applicant was being subjected results in a loss of bodily integrity and dignity. This engaged a range of values, referred to as 'personal capacity rights,' such as self- determination, bodily integrity, privacy, autonomy and dignity which are all unenumerated but protected by the Constitution under Article 40.3.

In a lengthy judgment the Court considered case law of the European Court of Human Rights on Article 5 and 8 of the ECHR and Article 13 of the UNCRPD. The Court then stated that the broader range of Constitutional "personal capacity rights" now fall to be informed by the UNCRPD as well as the principles enunciated in the judgments of the European Court of Human Rights.

The Court held that the constitutional protections must act as an appropriate counterweight to the nature of the incursion into these fundamental Constitutional rights and that this requires that when treating staff deem it necessary to invoke section 60 of the Act, the patient the subject of that decision should have his or her voice heard. If a patient lacks capacity, the patient should where necessary be assisted in expressing their

view as part of the decision making process. The patient's choice will not always be determinative, but must always be part of the balance.

Assisted decision-making in the Court's view need not necessarily involve lawyers. The views of the patient might be expressed by carers, social workers or family members.

The Court also drew attention to the fact that a patient's capacity may fluctuate or a patient may suffer from episodic mental illness. Borrowing from European jurisprudence the Court said that decision-making under section 60 should seek to apply a 'functional approach' to capacity involving both an issue specific and time specific assessment of the patient's decision-making ability. Therefore, there should be an independent review of the decision to compel treatment under section 60. This may require an amendment of the Form 17 procedure. It does not, however, require an assessment by an independent court or tribunal.

In the case at hand since the Applicant indisputably did not have capacity to make decisions it was for the Court to examine whether the choices made by the treating doctors were the least restrictive and involved the minimum practical incursion into the patient's rights. She was not capable of participating in the decision.

By the very nature of the case the Applicant had the decision to administer treatment under section 60 reviewed by a court and she therefore had not been denied an independent assessment of the decision.

Since the procedure under section 60, properly administered, was capable of being interpreted in a manner in line with the protection provided by the Constitution the Court refused to make a declaration of incompatibility with the ECHR.

Form of Order

The application was refused.

Other issues of note

The Court was satisfied that each of the treating doctors had fully complied with the procedure laid down in the statutory form required to be completed pursuant to Section 60 (Form 17) but was implicitly critical of the statutory from in its current state.

Having discussed a number of decisions of the Superior Courts which, in MacMenamin J.'s words tended to lay emphasis on a paternalistic intent of legislation concerning persons with incapacity, he emphasised that those decisions deal with the interpretation and application of statutes predominantly in the context of the right to liberty and the right to a fair trial. The Court went on to say that the position in relation to compelling treatment is "distinct".

While the court identified a positive obligation to assess the merits of a decision to compel treatment under section 60 it stated that "it will require a truly exceptional case to necessitate a court application." Therefore the Court does not anticipate that the application of section 60 will trigger consideration by a court as a matter of course.

Relevant Judgments

X v Finland (Decision of the European Court of Human Rights: Application no.34806/04, 3 July 2012

45. D.F. v. Garda Commissioner and ors.

Written Judgment Mr Justice Hogan, delivered 14 January 2013

Plenary proceedings - allegation of unlawful arrest under section 12 of the 2001 Act - allegation that Garda caused acute and unusual stress - preliminary issue as to whether the case ought to be heard before a jury or by a judge sitting alone.

The Facts

The Plaintiff is a severely autistic young man who had been in the care of his parents. In September 2010 the Applicant was arrested by the Gardai, pursuant to section 12 of the 2001 Act, when the Gardai were alerted that the Applicant had chased two women with a large stick in the vicinity of his grandparent's house.

The Applicant was not actually admitted to an approved centre because the Gardai were unable to contact a general practitioner to make the necessary recommendation. Instead the Plaintiffs mother arrived at the Garda station and the plaintiff was ultimately released. The custody record showed that the plaintiff had been detained for just under an hour. The Plaintiff contended that he was subjected to inhuman and degrading treatment by being subjected to unjustified use of restraints designed to and which did in fact cause him additional and unnecessary suffering.

This hearing considered a preliminary issue, namely, whether the Plaintiff was entitled to a jury trial to determine had he been unlawfully detained and did he suffer a personal injury at the hands of the Gardai and in breach of their duty of care.

The Findings

The Court considered the Supreme Court decision in *Sheridan v. Kelly* [2006] IESC 26 and section 1(1) and section 1(3) of the Courts Act 1988 and concluded that where a plaintiff claims damages as a result of one of two specified causes of action, i.e. false imprisonment or intentional trespass to the person, or both he is entitled to seek a jury trial where he pleads that he has suffered damages as a result of negligence.

Nevertheless, the Court concluded that the case should not be put to a jury unless or until a judge sitting alone had pronounced on the legal issue of whether the Plaintiff had been unlawfully detained and whether the Defendants were negligent in effecting the arrest. In the Court's view, it would be inappropriate for the jury to pronounce on issues which are essentially issues of law, at least where those issues do not rest on the judgment and good sense of the community of which the jury are representatives. The legality of an arrest is a matter of objective law in respect of which the jury have no expertise or function.

Form of Order

The Court directed that the Plaintiff was entitled to jury trial in respect of the claims made. However, pursuant to the Rules of the Superior Courts, Hogan J directed that all issues concerning the legality of the arrest and detention of the Plaintiff, including the claims for negligence and breach of duty, should be determined by the trial judge alone.

46. Health Service Executive v. J.M. and R.P.

Written Judgment of Mr. Justice Birmingham, delivered on 16 January 2013
Detention under section 25 of 2001 Act -forced medical procedure ancillary to treatment for mental disorder

The Facts

X.Y., the minor the subject of the proceedings, is a 15-year-old girl who is diagnosed as experiencing a bipolar affective disorder. On 15 October 2012 she was detained in Merlin Park Hospital pursuant to section 25 of the 2001 Act and noted to be a suicide risk.

This application concerned a proposal by X.Y.'s treating doctors to subject her to blood sampling against her will. The proposed blood sampling is ancillary to a proposed course of medication for X.Y.'s mental disorder. Her doctors also deemed it necessary in order to test for infection which may have been caused by X.Y.'s decision to withhold urine in an act of self-harm.

The Findings

The Court formed the view that X.Y. lacked the capacity to refuse consent to the taking of the blood samples.

The Court found that the definition of treatment in section 4 of the 2001 Act should be afforded a broad understanding so as to encompass the taking of blood samples for the purpose of blood monitoring. While the taking of the blood samples is not directly for the purpose of ameliorating a mental disorder, a broader or purposive interpretation might regard the taking of a blood sample as being linked to or ancillary to the administration of the prescribed medication which is being administered for the purpose of ameliorating a mental disorder.

The Court identified as a relevant fact that in this case the child's parents were supportive of the treatment that she is receiving and what is proposed: *Northwestern Health Board v. H. W. and C.W.* [2001] 3 I.R. 62.

Birmingham J concluded that in light of X.Y.'s medical condition the taking of blood samples ancillary to the administration of treatment was clearly proportionate.

Form of Order

The precise order is not contained in the judgment.

Other issues of note

The submissions on behalf of X.Y. proceeded on the assumption that it follows that a person who has the capacity to consent to medical treatment has the capacity to refuse treatment. However, the Court cast doubt on this assumption.

47. A.M. v. Harry Kennedy and ors.

Written Judgment Ms Justice Iseult O'Malley, delivered 8 February 2013 *Plenary proceedings - damages sought for unlawful detention - application for leave to bring such proceedings under section 73 of the 2001 Act*

The Facts

In the earlier decision of Peart J. in *A.M. v Kennedy* [2007] 4 IR 667 the Plaintiff was found to have been subject to an unlawful detention. The illegality arose when the first named Defendant, in his role as clinical director of the Central Mental Hospital, altered the expiry date of the Plaintiffs detention on a Form 24 purportedly to validate the Plaintiffs transition from being detained under the Mental Treatment Act 1945 to the Mental Health Act 2001.

The Plaintiff now sought the leave of the court in order to institute civil proceedings.

The Findings

The Court granted the relief sought.

Since the Defendants did not contend that the proceedings were frivolous or vexatious, they had to prove that there were no reasonable grounds for contending that they had acted in bad faith or without reasonable care.

The Court found that the initial judgment of Peart J. did not expressly focus on the first named Defendant's misunderstanding of the 2001 Act but rather looked to the legal effect of what happened. The legal effect was that the Applicant was for a period in unlawful detention. The Court determined the type of conduct which is captured by the term 'without reasonable care' in section 73. O'Malley J cited the decision of Clarke J. in *A.L. v the Clinical Director of St Patrick's Hospital* [2010] 3 IR 537 which states that the term 'reasonable care' should be interpreted as applying not just to an absence of proper medical care but also to an obligation to use care in ensuring that persons are not in unlawful custody. Therefore, in light of the established duty of care to adopt correct procedures in making a detention order, it was arguable that the Defendants were under a duty of care when notifying the Commission of the expiry date of the Applicant's detention.

The fact that the act violating the Applicant's constitutional rights was carried out under a misapprehension of the law did not excuse the Defendant's conduct. The Court found that a statutory immunity for deliberate (albeit bona fide) acts would go far beyond the accepted, legitimate objective of section 73 as endorsed by the Supreme Court in *Blehein*, i.e. to protect such persons from vexatious or groundless claims by those whose perceptions of their treatment may be affected by mental illness.

The Court noted that the precursor to section 73 of the 2001 Act, i.e. section 260 of the 1945 Act, was found unconstitutional by the Supreme Court in Blehein. In *A.L.*

Clarke J. observed that the new section was potentially subject to some of the same criticism as 260. The Court therefore was alerted to the 'Constitutional vulnerability' of section 73 which might be increased depending on the way the Court interpreted the provision in restricting access to the Court. However, O'Malley J. reiterated that the constitutionality of the provision was not being challenged.

The Court rejected the Defendant's argument that, even if there was negligence, it was not beyond a *de minimis* threshold. It stated that the facts were not sufficiently strong to support the Defendant's contention at least at the leave stage.

O'Malley J. also dismissed argument on behalf of counsel for the Mental Health Commission that it could not reasonably be found liable on the facts. While the Commission had submitted that its function was limited to setting up and facilitating tribunals, the Court observed that the Commission is responsible for the appointment of tribunal members and for convening tribunals in individual cases. On the facts of this case, since three separate forms were sent in respect of the Applicant, each of which gave different dates and the first two of which were clearly wrong on their face, it was arguable that the Commission should have been put on inquiry.

Form of Order

The Court granted leave to issue civil proceedings for damages against the Defendants.

Other issues of note

In connection with the ongoing debate as to whether section 73 of the 2001 Act is Constitutional the Court noted that the validity of the section had not been put in issue in the proceedings and that it enjoys the presumption of constitutionality. O'Malley J proffered the view that it is possible to interpret the provision in a manner that respects the statutory intent while not depriving the person whose constitutional rights have been breached of the right to seek a remedy.

Relevant Judgments

AL v Clinical Director of St Patrick's Hospital [2010] 3 IR 537

48.A.B. v. Commissioner of An Garda Siochana and ors.

Written Judgment Mr Justice MacEochaidh, delivered 8 February 2013

Article 40.4 - unlawful detention - release and immediate re-arrest - exercise of powers under section 12 of the 2001 Act

The Facts

The Applicant was arrested and charged with causing criminal damage at an optician's premises in Dublin on 28 February 2012. A subsequent psychiatrist's report diagnosed the Applicant as suffering from paranoid schizophrenia and stated that it was likely that he had been mentally ill for several years. At a District Court hearing on 15 November 2012 the judge found the Applicant "unfit to plead" and issued a committal warrant for detention at the Central Mental Hospital. Owing to restrictions on capacity, the Clinical Director of the Hospital declined to comply with the order of the District Court and refused to take the Applicant into custody. The District Judge refused to reconsider her committal warrant and as a result the Applicant was thereafter detained at Bridewell Garda station. The case came before the High Court as a challenge to that detention in the Garda station.

The Findings

The Court found that An Garda Siochana were not lawfully entitled to detain the Applicant as this would involve the indefinite detention of a potentially very unwell person in the unsuitable surrounds of a Garda station. The Court therefore indicated its intention to order the Applicant's release.

Nevertheless, the Court stated that it was mindful of the fact that the Applicant posed a danger to the public. It stated that it would consider a staggered release as was approved in *D.G. v. The Eastern Health Board* [1997] 3 IR 511 and *N v. Health Service Executive* [2006] 4 IR 374 but that it could not identify circumstances or an event which would cause the stay on release to expire and thus the effect of a stay would be to place the Applicant in indefinite police detention in circumstances where he needed in-patient assessment and possibly inpatient treatment.

The Court ordered that the Applicant be released from police detention but that he be immediately re-detained by An Garda Siochana in exercise of their powers under section 12 of the 2001 Act.

Form of Order

The Applicant was released from criminal detention and then immediately taken into custody by An Garda Siochana exercising their civil powers as contained in section 12.

Other issues of note

The Court cast doubt on the lawfulness of the exercise by An Garda Siochana of their powers under section 12 in respect of a person already in custody.

Relevant Judgments

JH v Russell [2007] 4 IR 24

49. S.O. v. Adelaide and Meath Hospital of Tallaght

Written Judgment of Mr Justice Hogan, delivered 25 March 2013

Article 40.4 - adequacy of assessment leading to recommendation under s 10 - whether irregularity in initial admission order tainted subsequent order for detention

The Facts

The Applicant had suffered from obsessive delusions and had been subject to ongoing psychiatric assessment and monitoring for a number of years. On 8 March 2013 the Applicant's brother and mother attended their general practitioner to express their concern at the Applicant's behaviour. At this meeting the Applicant's brother produced a tape recording of a conversation he had with the Applicant the previous day which he believed corroborated the concern among family members. The general practitioner was aware of the Applicant's previous psychiatric history. In view of that history and of the meeting with the Applicant's family members, the general practitioner proceeded to sign a Form 5 recommending the Applicant's involuntary admission to an approved centre.

The general practitioner did not carry out an examination of the Applicant prior to signing his recommendation.

The Findings

The Court begun by stating that no issue had been raised in relation to the Applicant's examination and/or subsequent treatment at the Respondent hospital. The sole issue to be decided by the Court was whether the failure of the general practitioner to carry out a formal examination of the Applicant prior to making his recommendation rendered the subsequent order for involuntary admission invalid.

First, the Court was satisfied that the general practitioner had not complied with the procedure provided in section 10(1) of the 2001 Act which states: "*where a registered medical practitioner is satisfied following an examination of the person the subject of the application that the person is suffering from a mental disorder, he or she shall make a recommendation...*" The Court then cited the definition of "examination" within section 1 of the 2001 Act: "*a personal examination carried out by a registered medical practitioner or a consultant psychiatrist of the process and content of thought, and the behaviour of the person concerned*." The Court concluded that no such examination was conducted prior to the making of a recommendation under the Act.

Second, Hogan J. considered whether the irregularity attaching to the Applicant's admission to the Respondent hospital was such as might be excused by the court particularly since it was accepted by the parties that the Applicant suffers from psychiatric illness and is in urgent need of psychiatric care. The Court cited the dictum of Kearns J. in *EH v. Clinical Director of St Vincent's Hospital* [2009] 3 IR 771 where it was found that "*mere technical defects, without more, in a patient's detention should not give rise to a rush to court, notably where any such defect can has been cured... Only in cases where there had been a gross abuse of power or default of fundamental requirements would a defect in the earlier period of detention justify release from in later one."*

Hogan J. distinguished the present case from the facts of *RL* which concerned a technical breach of section 13 of the 2001 Act. In his view, "while an important safeguard it could not be said that section 13 is as vital and critical to the orderly operation of the

admissions procedure as is the necessity for a prior recommendation by a registered medical practitioner based on actual examination of the patient."

The Court also distinguished the present case from the facts in *XY v. Clinical Director of St Patrick's University Hospital* [2012] IEHC 224 where the examination by the medical practitioner took the form of observation of the patient from a short distance in a car park. This, in the Courts view, represented "*and incidental invalidity in the examination process.*"

On the contrary, the facts in this case represented a *"complete failure"* to comply with the requirements of section 10. There was **"a default of fundamental requirements."** If a patient could be admitted by a general practitioner in the absence of any examination this would set at naught the safeguards deemed to be fundamental by the Oireachtas.

Form of Order

The complaint was upheld and the detention was found to be unlawful.

Other issues of note

Hogan J. expressed the view that the practical difficulties experienced by the general practitioner which prevented him carrying out an examination might be circumvented had the Applicant been arrested by a member of An Garda Siochana in accordance with section 12 of the 2001 Act.

50.D.F. v. Garda Commissioner and ors.

Written Judgment Mr Justice Hogan, delivered 11 June 2013

Plenary proceedings - allegation of unlawful arrest under s 12 of the 2001 Act - allegation that Garda caused acute and unusual stress- - application for reporting restrictions during the trial

The Facts

(Cf. *D.F. v. Garda Commissioner and ors* (High Court, Hogan J., 14 January 2013))

The Applicant, who was arrested under section 12 of the 2001 Act, sued the Gardai for false imprisonment and/or intentional trespass to the person. This case relates to a motion pursuant to section 27 of the Civil Law (Miscellaneous Proceedings) Act 2008 to have reporting restrictions imposed which would prevent the disclosure of his identity in open court.

The Findings

The Court found that notwithstanding the Plaintiffs tragic medical circumstances a cloak of anonymity fosters an environment where allegations can recklessly be made against a named and publicly identifiable individual with few, if any, personal consequences. The equal treatment of both accuser and accused in terms of publicity assumes a particular importance. Looked at from the perspective of the person accused of wrong-doing, it is unfair that the accused's identity should remain hidden while he or she must face the glare of publicity.

Form of Order

The Court refused to grant reporting restrictions for the trial of the proceedings.

51. K.C. v. Clinical Director of St Loman's and HSE

Written Judgment Mr Justice Hogan, delivered 4 July 2013

Article 40.4 - status of voluntary patient converted to involuntary - application under section 9 of 2001 Act

The Facts

The Applicant was admitted to the Respondent hospital on the application of a family member following the recommendation of a general practitioner. In the course of her assessment by a consultant psychiatrist the Applicant strenuously maintained that her professional status would be seriously compromised if she were to be admitted on an involuntary basis. In this manner it was agreed that she would remain at the hospital but as a voluntary patient. In the following weeks the Applicant's condition deteriorated and her treating doctors concluded that she was urgently in need of treatment but the Applicant refused to consent to treatment.

It was decided by the treating doctors to convert the Applicant's status from voluntary to involuntary by invoking the mechanism contained in sections 9 and 14 of the 2001 Act. The Applicant challenged this application of the Act on the basis that section 9 could only be applied to a person who had yet to be admitted to an approved centre and who therefore was physically outside the hospital. This was against a background where the Applicant had not expressed a wish to leave the hospital and where the hospital had considered all the other options to them based on the 2001 Act and the relevant case law.

The Findings

The Applicant's case was rejected. The Court held that the concept of an involuntary patient is fundamentally a legal concept designed to deal with the status of such a patient. The fact that the patient has already been physically admitted to the hospital as a voluntary patient is essentially irrelevant. Here one must separate the concepts of location and status. The adverbial qualification "involuntarily" entirely changes the focus away from that of admission (in the sense of physical admission to an approved centre) to that of status, since from that point onwards it is the Applicant's legal status as an involuntary patient which counts.

The Court further rejected the contention that the mechanism contained in sections 23 and 24 constitutes a close category of circumstances in which a voluntary patient may be detained.

Form of Order

The Court refused the Applicant's case and adjudged the Applicant to be in lawful detention.

52. G.F. v. Clinical Director of Tallaght

Written Judgment Mr Justice Hogan, delivered 4 July 2013

Article 40.4 - error in GP's recommendation - Tribunal's jurisdiction to cure defects

The Facts

The Applicant was involuntarily admitted on foot of an application by the Gardai when he was reported to them as having assaulted his partner on the street. The Gardai contacted a general practitioner who completed the appropriate Form 5 so as to make a recommendation under section 10. In error, the general practitioner failed to specify under which subsection of section 3 of the 2001 Act he had categorised the Applicant as suffering from a mental disorder. Nonetheless the admission order was later affirmed by a sitting of the Mental Health Tribunal.

The Applicant applied to the High Court seeking his release on the basis that he was unlawfully detained.

The Findings

The Court found that it was implicit in the determination of the Tribunal that it had invoked its powers under s 18(l)(a)(ii) to cure an irregularity which did not affect the substance of the order and did not cause of injustice in the circumstances.

Hogan J. noted that the general practitioner had carried out an examination of the Applicant and that it was obvious from the manner in which the form was completed that he had addressed the nature of the Plaintiffs symptoms. That being so, the case fell within the parameters of the decision in *AR v. Clinical Director of St Brendan's Hospital* [2009] IEHC 143 where the Court found a failure to comply with procedural requirements in a limited respect did not affect the substance of the order.

Therefore the Tribunal was entitled to apply its powers under s 18(l)(a)(ii) to affirm the order of detention.

Form of Order

The application was refused.

Other issues of note

Hogan J commented that while no procedural error is excluded ex ante from the scope of section 18, the task of the Tribunal under this section is essentially to examine whether the substance of the procedural protections was satisfied and to ensure that any non-compliance did not cause an injustice.

Relevant Judgments

AR v. Clinical Director of St Brendan's Hospital [2009] IEHC 143

53. M.K. v. Clinical Director, St. Patricks University Hospital & ors

Written Judgment of Ms Justice Laffoy delivered on 28 August 2013

Article 40.4 - voluntary patient - section 23 of 2001 Act invoked but section 24 not applied for a further 11 days - in the interim the patient had been transferred for medical treatment to a different hospital

The Facts

The Applicant was found to suffer from psychosis characterised by paranoia and delusions on a background of cognitive impairment and confusion. On 11 July 2013 he was admitted as a voluntary patient at the Respondent hospital. On the same day the Applicant attempted to leave the hospital leading his treating medical staff to invoke the section 23/24 procedure. While that process was in train the Applicant suffered a medical emergency in the form of a seizure requiring his transfer from the Respondent hospital to St James's hospital.

Upon his return to the Respondent hospital on 22 July 2013 the Applicant was detained under section 24. The Applicant challenged the lawfulness of his detention on the basis of the irregular manner in which section 23/24 had been invoked.

The Findings

In rejecting the Applicant's case the Court placed reliance on the Supreme Court decision in *E.H. v. Clinical Director of St. Vincent's Hospital* [2009] 3 I.R. 774.

The Court found that the consequence of the impracticability and probable impossibility of complying with the requirements of section 24 was that the Applicant retained the status of a voluntary patient, within the meaning of the Act, throughout.

The failure to comply with the requirements of section 24 arose because of the intervention of the emergency. In the Court's view, such failure cannot be characterised as "a *gross abuse of power*", nor can it be characterised as "*default of fundamental requirements*" such as was identified by Kearns J. in *E.H.* as a defect in an earlier period of detention which would justify release from a later one.

While the requirements of section 24 are unquestionably fundamental and not mere technicalities, it would be grossly unfair to find that failure to comply with them in the aftermath of the emergency was due to default, which would imply some form of wrongdoing.

Laffoy J. was satisfied that there was no default on the part of the personnel in St. Patrick's or any abuse of power in relation to the treatment of the applicant on 11 July 2013. On the contrary, there was an emergency which was appropriately dealt with.

Accordingly, the Court concluded that the applicant remained a voluntary patient in St. Patrick's until 22 July 2013, when s. 23 was once again invoked and the process mandated by s. 24 was implemented.

Form of Order

The Applicant was found to be in lawful detention.

54. X.Y. (a minor) v. Health Service Executive

Written Judgment of Mr Justice Birmingham dated 7 November 2013

The Facts

This case relates to an earlier judgment involving the same Plaintiff dated 16 January 2013.

The Plaintiff, a minor of 16 years, *inter alia* sought declarations that section 25(6) of the Mental Health Act 2001 was unconstitutional or, alternatively, that it was incompatible with the European Convention of Human Rights.

There was some discussion in relation to the differences in how adults and minors are treated in the 2001 Act.

The Findings

The Court refused to make the declarations sought and found that section 25 of the 2001 Act is capable of being implemented in a way that is constitutional and "*Convention compliant*".

The Court emphasised the safeguards contained in the Child Care Act 1991 that are incorporated into the 2001 Act by section 24(14) of that Act. It also indicated that it would be desirable for the HSE to bring to the attention of the Court the provisions relating to appointing a guardian *ad litem* so that this, or an alternative, could be considered.

Form of Order

Declarations declined. Plaintiff's case dismissed.

Relevant Judgments

Re XY [2013] 1 ILRM 305

55. E.G. v. The Mental Health Tribunal

Written Judgment of Mr Justice O'Neill dated 20 December 2013

Appeal on a point of law pursuant to section 19(16) of the 2001 Act

The Facts

This case arose from a Circuit Court Appeal under section 19 of the Mental Health Act 2001. A RCP made a 12-month renewal order under s.3(1)(a)and(b). A subsequent Mental Health Tribunal affirmed the renewal order under s.3(1)(b) only. The Plaintiff issued an appeal in the Circuit Court. The Judge affirmed the renewal order under s.3(1)(a)and(b). The Plaintiff appealed to the High Court on the basis that the Circuit Court Judge had exceeded his jurisdiction in purporting to amend the decision of the Tribunal.

The Findings

The High Court found that the Circuit Court was obliged under section 19 to consider whether a patient had a mental disorder contemporaneously and was entitled to conclude, in the first instance, whether there was a mental disorder, and secondly, which of the two types of disorder, mentioned in section 3 of the 2001 Act, was involved, regardless of what conclusions had been reached earlier, either by the Responsible Consultant Psychiatrist in making an order, or the Mental Health Tribunal. Having done this, the Court then has to affirm or revoke, not the decision of the Mental Health Tribunal, but the Renewal Order the subject of the Appeal.

The Court cited the decisions of Charleton J in *Han D* v *The President of the Circuit Court & Ors* and O'Neill J in *MR* v *Byrne* with approval.

Form of Order

Appeal dismissed.

56.P.D. v. Clinical Director Department of Psychiatry Connolly Hospital

Written Judgment of Mr Justice Hogan dated 10 February 2014

The Facts

The Responsible Consultant Psychiatrist erred in completing a renewal order. Firstly, the Responsible Consultant Psychiatrist filled out the reference to section 15(2), relating to a three-month order, instead of the reference to section 15(3), relating to a six-month order. Secondly, the wrong expiration date was inserted. The Responsible Consultant Psychiatrist tried to rectify this by writing a brief explanatory memorandum. A subsequent Mental Health Tribunal affirmed the order, finding the errors did not cause an injustice and were mere technical defects that it could remedy.

The Findings

The High Court found that errors made by a Responsible Consultant Psychiatrist in completing a renewal order rendered the order bad on its face. The Court, relying on the decision of the Supreme Court in *GE v Governor of Cloverhill Prison* [2011] IESC 41, found that the errors were too significant to be corrected by the Tribunal. The order failed to recite clearly the proper legal basis for the detention and the correct date on which it would expire. Therefore, the proper lawful basis for detention had not been established.

Form of Order

Immediate release in accordance with Article 40.4.2 of the Constitution.

57.The Mental Health Tribunal v. S.P. & Anor

Written Judgment of Ms Justice O'Hanlon dated 12 May 2014

Appeal on a point of law pursuant to section 19(16) of the 2001 Act

The Facts

This case arose from a Circuit Court Appeal under section 19 of the Mental Health Act 2001.

A Responsible Consultant Psychiatrist made a 6-month renewal order, which was subsequently affirmed by a Mental Health Tribunal. The respondent appealed that decision to the Circuit Court. A different Responsible Consultant Psychiatrist gave evidence in the Circuit Court that in her professional opinion a further period of four to six weeks was required in order to continue the respondent's treatment, and thereafter, he would be discharged back into the community. The Circuit Court Judge affirmed the making of the renewal order under s. 15 of the 2001 Act, but pursuant to s. 19(5) of the 2001 Act, reduced the duration of the order from 4 June 2014, to 28 April 2014, being a period of six weeks from the date of the Circuit Court hearing.

The Findings

The High Court found that section 19(4) of the 2001 Act limits the power of the Circuit Court to affirming or revoking a Renewal Order and does not provide any jurisdiction to the Circuit Court to vary the duration of the order. It accepted that under section 15 of the 2001 Act, it is only the Responsible Consultant Psychiatrist and not the courts that can make renewal orders. It would not be appropriate for the Court to interfere with their clinical judgment.

Form of Order

The High Court quashed the Circuit Court decision insofar as it purported to vary the duration of the 6-month renewal order. It confirmed the Circuit Court decision insofar as it affirmed the renewal order and further ordered that the duration of the that order remain until its original date.

58. HSE v. V.F.

Written Judgment of Mr Justice McDermott dated 5 December 2014

The Facts

The defendant had a troubled background, involving suicide attempts, alcohol abuse and admissions to alcohol and rehabilitation programmes. When the HSE's application came before the Court, the defendant was being detained in an Approved Centre pursuant to a renewal order made under the 2001 Act. The HSE sought an order providing for her transfer to another facility that was not an approved centre on the grounds that her underlying conditions were not being suitably addressed in the approved centre. There is no mechanism for transferring a patient to a facility other than an approved centre in the 2001 Act.

The Findings

The Court was not satisfied that the provisions of the 2001 Act could be used to effect the defendant's transfer. However, it also noted that a failure to detain the defendant would result in a real and substantial risk to her health, safety and life, which would be contrary to her best interests and welfare.

The Court noted that each of the doctors who had reviewed the defendant were satisfied that there was no less restrictive way of ensuring her life, safety and health. Therefore, the Court felt that the use of its inherent jurisdiction in these particular circumstances was proportionate.

The Court stated that it was imperative that the defendant's continued detention be reviewed at regular and short intervals.

Form of Order

The High Court made an order under its inherent jurisdiction for the transfer of the defendant in need of special therapeutic and welfare services from an approved centre to a nominated care facility in circumstances where a lacuna in the Mental Health Act 2001 meant that no order could be made under the Act to affect such a transfer.

The Court emphasised that the order was not being made as a matter of course but that it was a *"rare and exceptional"* order.

59.A.X. v. The Mental Health Tribunal & Anor

Written Judgment of Mr Justice Keane dated 19 December 2014

The Facts

The applicant was detained in an approved centre under the provisions of the 2001 Act. The applicant sought to judicially review a subsequent decision of the Mental Health Tribunal on the basis that it failed to provide adequate reasons for its decision.

The Findings

The High Court rejected the challenge to the decision of the Mental Health Tribunal affirming the involuntary admission of the applicant to an approved centre for treatment of a mental disorder.

It was submitted on behalf of the applicant that the Tribunal failed to provide proper or adequate reasons for its decision. The judgment contains a detailed discussion of the obligation on the Tribunal to provide reasons for its decision on a review.

It also considers whether a defect in a prior admission or renewal order can taint a subsequent renewal order.

Form of Order

The application was refused.

60.L.B. v. The Clinical Director of Naas General Hospital

Written Judgment of Ms Justice O'Malley dated 27 January 2015

The Facts

The applicant stated that the doctor had already formed a view of her mental state to the extent that she had prejudged the issue, and that the purported examination under section 10 of the 2001 Act was so inadequate as to amount to a fundamental failure to comply with the statutory requirements.

In summary, the doctor observed the applicant from a doorway when the applicant was in the company of her stepfather and a member of the Gardai in a Garda station.
The doctor had a brief conversation with her and observed her.

The Findings

The applicant relied on the decision of *SO v Clinical Director of the Adelaide and Meath Hospital of Tallaght* [2013] IEHC 132.

The High Court rejected the Article 40 challenge. The judgment considers the requirements of a valid section 10 examination, and in particular, whether a medical practitioner can have regard to personal knowledge he/she may have of a patient's case when conducting a section 10 examination.

The Court stated that the argument about pre-judgment on the part of the doctor was misconceived. There is no requirement that doctors asked for a recommendation under the 2001 Act should leave aside such personal knowledge as they may have of a patient's case, or such information obtained from family members or other parties as they consider to be reliable. To do so would be to leave aside the kind of information that doctors must often take into account in making a clinical finding. They are not to be equated with persons making quasi-judicial decisions – they are medical practitioners being asked to give an opinion on a medical state of affairs

Form of Order

Application refused.

61. HSE v. J.B.

Written Judgment of Ms Justice Bronagh O'Hanlon dated 5 March 2015

There are previous decisions in relation to JB dating from 2012 and 2014

The Facts

JB was a young adult suffering from a personality and conduct disorder, and who was receiving treatment in the UK. He expressed a wish to return to Ireland. The HSE sought to continue the placement of JB in a hospital in the UK for the purposes of receiving treatment, subject to monthly review.

The Findings

The High Court found that the defendant, JB, lacked capacity to make material decisions in terms of his medical treatment and therapy. The Court exercised its inherent jurisdiction to continue the present detention of JB for the purposes of overseeing an orderly transition of JB from the UK facility to an appropriate placement in Ireland.

The Court recommended that a committee of doctors be established to oversee his transition to Ireland and to advise on when and how such a transition might be effected.

The judgment includes a detailed discussion of the principles, which a Court must consider in determining whether an individual has capacity.

62. HSE v. K.W.

Written Judgments of Ms Justice Bronagh O'Hanlon dated 12 March and 14 May 2015 and of Mr Justice Noonan dated 7 July 2015

The Facts

The respondent, KW was a young adult suffering from a mental disorder not detainable under the Mental Health Act 2001, and who was receiving treatment in the UK. KW wished to return to Ireland.

The Findings

In March 2015, the Court found that KW lacked capacity to make decisions regarding her future care and treatment. It also directed her transition back to Ireland within three-months, or earlier if the treating medical team agreed. The Court, exercising its inherent jurisdiction, ordered that the respondent be involuntarily detained as a psychiatric patient in an adult psychiatric ward in an approved centre, under the care of the clinical director.

The March 2015 judgment includes a detailed discussion of the principles, which a Court must consider in determining whether an individual has capacity.

The matter came back before the Court in May 2015, at which time the HSE requested a stay on the order transferring the patient back to Ireland pending appeal. The Court found that the HSE's grounds for appeal were *bona fide*. However, in considering whether the balance of convenience necessitated the stay the Court was of the view that the paramount factor was the best welfare interests of KW. It found that granting the stay would subvert the positive constitutional obligation to KW, "*especially where such constitutional obligations necessitate Court intervention of a protective nature*".
In refusing the stay, the Court commented that the care plan provided by the HSE in relation to KW lacked adequate detail and allowing the stay in the absence of such detail would create a "*vacuity of care and supervision…*"

In July 2015, the HSE sought an order, on an agreed basis, for the immediate return of KW to Ireland as a voluntary patient. The Court was told of *"significant new evidence"* which had not been available to the High Court when it made its previous order. The Court heard medical evidence to the effect that KW has capacity, though she loses capacity when acutely distressed. The Court also heard medical opinion that the treatment KW had been receiving in the UK had not produced sufficient benefit to justify a continued deprivation of liberty.

The Court was satisfied that it did not have jurisdiction to involuntarily detain KW on an ongoing and indefinite basis. It discharged the previous order of the High Court and substituted an order directing the staff of the UK facility to return KW to Ireland. The Court noted that KW would become a voluntary patient. It stated it was obliged to ensure her discharge occurred in a controlled and safe manner so that her constitutional rights were properly and fully vindicated. The Court also noted that the litigation was having a significantly detrimental effect on KW's health and stated that it should be brought to an end at the earliest possible moment.

Form of Order

As above.

63. F.X. v. Clinical Director of Central Mental Hospital

Written Judgment of Mr Justice Noonan dated 25 March 2015

The Facts

The matter came before the court on foot of the order of O'Malley J. made on 13 March 2015, whereby she directed an inquiry pursuant to Article 40.4.2 of the Constitution into the lawfulness of the applicant's detention at the Central Mental Hospital.

The applicant attacked a fellow patient in a hospital with a knife, ultimately leading to that patient's death. The applicant was charged with murder, was found unfit to stand trial and was committed to the Central Mental Hospital pursuant to section 4(5)(c)(i) of the Criminal Law (Insanity) Act 2006 on 16 July 2012, subject to periodic review by the Mental Health (Criminal Law) Review Board.

The Findings

The High Court considered whether the legal basis for the detention of the applicant in the Central Mental Hospital was an order of the Central Criminal Court of 16 July 2012, or a subsequent order of the Mental Health (Criminal Law) Review Board. It also considered the lawfulness of the detention. The Court also had to consider whether the order of the Central Criminal Court of 16 July 2012 was spent because of the applicant's acquittal on the murder charge.

The judgment contains a discussion about the Criminal Law (Insanity) Act 2006 and the powers and duties of the Mental Health (Criminal Law) Review Board, which was established under that Act.

The Court found that the applicant's detention was in accordance with the law.

It also endorses the Supreme Court decision in *EH*. It stated *"…there is an onus on those representing a party suffering from a mental disability who is incapable of giving legal instructions to satisfy themselves that the applicant's best interests are served before seeking to move the court on his or her behalf under Article 40."*

Form of Order

Application dismissed.

64. M. v. Clinical Director of the Department of Psychiatry, University of Limerick

Written Judgment of Mr Justice Barrett dated 18 January 2016

The Facts

The Responsible Consultant Psychiatrist referred to the wrong year in the admission order. A Mental Health Tribunal affirmed the admission order and a subsequent renewal order was made. The applicant issued Article 40 proceedings in relation to her detention.

The Findings

The Court found the applicant's argument that a date error rendered an admission order invalid irrelevant because the admission order had been replaced by a *"new, separate and extant renewal order"*. The Court stated that there is no *"domino effect"* between a possibly invalid admission order that has become defunct and a renewal order that is valid on its face. The Court referred to previous case law in its decision. As there was no other challenge to the validity of the renewal order, the Court held that the continued detention of the applicant was *"entirely and unambiguously lawful."*

65. Health Service Executive –v- J.B. (No.2) [2016] IEHC 575

Unreported judgment of Ms. Justice O'Hanlon delivered on 6 October 2016.

The Facts

J. B., the subject matter of the proceedings, has resided in St. Andrew's Hospital, Northampton, England for many years. This case had been subject to continuous review by the High Court. *J.B.* was detained under the inherent jurisdiction of the High Court while he was a minor. The position was reviewed upon his reaching the age of majority in 2014 and the Court determined in 2015 that *J.B.* lacked capacity in terms of making material decisions regarding his medical treatment and therapy. The Court ordered his continued detention for the purposes of overseeing an orderly transition from St. Andrew's to an appropriate facility in Ireland.

J.B. has been diagnosed with bi-polar effective disorder which was in remission and also with a personality disorder. It was accepted by all parties that *J.B.* was not detainable under the Mental Health Act. Medical evidence put forward in the case highlighted, however, that if *J.B.* went off his medication, and if his bi-polar disorder were to return, he would be detainable under the Act.

It was submitted on behalf of *J.B.* that as an adult with capacity, he could no longer be detained under the inherent jurisdiction of the Court and this was the issue that the Court had to determine.

The Findings

The Judge found that the inherent jurisdiction only applies where there is an absence of a statutory scheme for the detention of the individual involved. The 2001 Act regulates the circumstances and manner of detention, psychiatric assessment and medical treatment of persons with a mental disorder. However, where a person suffers from a mental impairment which does not come within the scope of the Act for the purposes of involuntary admission by virtue of section 8, there is no statutory scheme that regulates when therapeutic intervention can be imposed. The Court found, therefore, that it cannot exercise its inherent jurisdiction to circumvent the express provisions of the Oireachtas, that a person cannot be detained for a personality disorder as to do so would violate the doctrine of the separation of powers.

The Court found, based on medical evidence, that *J.B.* had capacity. As an adult with capacity who was not presently detainable under the 2001 Act, any further detention of *J.B.* would be illegal.

The Judge noted that while a person may not be detainable under the 2001 Act, that person may still have significant needs and may be considered to have a disability within the meaning of section 2 of the Disability Act 2005. As *J.B.* had been in a psychiatric institution for many years, and in secure care prior to that, it cannot be expected that he would transition immediately back into the community without a suite of supports. Although he is not detainable under the 2001 Act, the Court found he had a reasonable legitimate expectation to have his rights vindicated by the State in the provision of a safe place of abode given his difficulties.

The Court held that the HSE owed *J.B.* a much higher duty of care than they owe to a person leaving secure care given the severity of his enduring difficulties and his treatment abroad for many years. The Court further held that the HSE is statutorily obliged to provide secure and

settled interim accommodation to *J.B.* under the Disability Act 2005 pending suitable long-term accommodation being provided by the local County Council.

66. Health Service Executive –v- T.M. [2016] IEHC 593

Unreported judgment of Ms. Justice O'Hanlon delivered on 27 October 2016

The Facts

T. M., an Irish citizen, had been subject to Court Orders detaining him in St. Andrew's Hospital, England for therapeutic and educational purposes for the previous four years.
T.M. was diagnosed with ADHD, and there was evidence of a mild intellectual disability and an emerging personality disorder. The current proceedings came at a point in which it was recognised by a number of expert witnesses that *T.M.* had stagnated in his treatment at St. Andrew's. *T.M.*, having reached the age of majority, wished to voluntarily transfer to a Nua Healthcare facility in Ireland.

On 7 October 2015, the Court held that *T.M.* had capacity to instruct counsel and defend the proceedings represented by a solicitor, but lacked the capacity to make material decisions in respect of medical treatment or to make decisions regarding his accommodation for the purposes of receiving such treatment. The Court ordered further independent psychiatric assessments and the issue of *T.M.*'s capacity came before the Court again.

The Findings

There was disagreement between the experts in the case as to whether *T.M.* could be detained involuntarily given section 3 of the Mental Health Act 2001. Having heard from a number of experts, the Court agreed with the independent report of Dr. Feeney that, on the basis of his ADHD diagnosis alone, *T.M.* could not be involuntarily detained.

The Court further noted *T.M.*'s stagnation in his treatment at St. Andrews, and concluded that it was highly unlikely and improbable that he would engaged in therapy if he were further detained in England, and therefore, such detention would not be proportionate or justifiable.

The Court recognised that there were significant risks associated with transitioning *T.M.* out of detention, including potentially lethal self-harm and violence which would be exacerbated by any consumption of drugs and alcohol. However, it was concluded that risk alone is not justification for detention, and there is an obligation on the HSE and the Child and Family Agency, including statutory obligations under the Child Care Act 1991 (as amended) to assist *T.M.* in his transition.

It was noted that in the absence of statutory authority to involuntarily detain an adult under the Mental Health Act 2001, the Court has on a number of occasions exercised an inherent jurisdiction to make such an order insofar as the adult in question lacked capacity. The Court referred to the decision in *HSE v JB* (2016), that the presumption of capacity can only be rebutted if the person is unable to:

- understand the treatment information,
- retain said information for long enough to make a decision as to their treatment
- weigh alternative treatment options
- communicate their decision

The Court sided with the conclusions of Dr. Feeney and Dr. O'Domhnaill of Nua Healthcare that T.M. had sufficient capacity, while noting its limitations due to his borderline intellectual disability and emotional immaturity. The Court concluded that such limitations did not put him in the category of cases where there is an inherent jurisdiction to involuntarily detain adults.

Counsel for T.M. challenged the Court's inherent jurisdiction to detain an adult lacking capacity, but given the fact that T.M. was no longer in detention in St. Andrew's, there was no need to determine the issue.

67. In The Matter of A.M., A Proposed Ward of Court: Health Service Executive –v- A.M. [2017] IEHC 184

Judgment of Mr. Justice Kelly, President of the High Court delivered on 27 March 2017.

The Facts

The HSE sought to have *A.M.* made a ward of court. This was opposed by *A.M.* on legal grounds, however the medical evidence before the Court to the effect that he was of unsound mind, suffering from paranoid schizophrenia and unable to manage his affairs went unchallenged. Extensive affidavit evidence before the Court set out *A.M.*'s history of charges, convictions and detentions in prison and psychiatric facilities. The Respondent was found guilty of manslaughter and sentenced to a period of imprisonment, during which he assaulted his consultant psychiatrist and was therefore transferred to the Central Mental Hospital to be released at the end of 2016. The HSE made an application for a temporary detention order on the basis of the risk he posed to the public and himself. The HSE intended to bring an application to have *A.M.* made a ward of court. This temporary order was granted.

A.M. objected to the proposed wardship application and argued it was an attempt to circumvent the safeguards in the 2001 Act and that there was no reason given for the course of action. The HSE argued the wardship application was necessary as it was not possible to detain *A.M.* under the 2001 Act when he was detained in Central Mental Hospital under the temporary wardship detention order.

The Findings

The Court noted that a person can be transferred from an approved centre to the Central Mental Hospital provided the prescribed procedure under section 21 of the Act is followed. The Court also noted that *A.M.* could not be transferred to the Central Mental Hospital under section 10 of the Act which provides for the involuntary admission of persons suffering from a mental disorder to an approved centre, other than the Central Mental Hospital, subject to assessment and approval by a registered medical practitioner. However, effecting the transfer of a person from a particular facility under one statutory scheme to that same facility under a different statutory scheme is not provided for in the Act.

The Court agreed that to effect *A.M*.s transfer to the Central Mental Hospital under the 2001 Act, it would have been necessary to have him admitted to an approved centre and then attempt to bring about his transfer back to the Central Mental Hospital under section 21 of the Act. The Court accepted the affidavit evidence on behalf of the HSE that this was not a possible in the present case as no approved centre was prepared to admit *A.M.* even for a limited period.

The Court held that nothing in the 2001 Act fetters the statutory warship jurisdiction vested in the Court under section 9 of the Courts Act 1961. These two statutory jurisdictions co-exist and it is a question of which of the two jurisdictions more appropriately addresses the needs of the individual. The Judge held that it was necessary and appropriate to detain *A.M.* pending further order of the Court in the Central Mental Hospital as it is the only facility which has a sufficient degree of certainty to ensure his safety and the safety of those who care for him.

Form of Order

As *A.M*. met the necessary criteria for admission to wardship, the Judge ordered that he be made a ward of court. The Judge highlighted that *A.M.*'s rights as a ward of court detained at the Central Mental Hospital are no less than those of a person detained at the same facility under the Act.

68. JF –v- Mental Health Tribunal [2018] IEHC 100

Judgment of Mr. Justice Coffey delivered 5 March 2018

The Facts

On 8 December 2017, JF's mother completed an application for JF's involuntary admission to an Approved Centre under the 2001 Act. On the same day, JF's GP, completed a recommendation for JF's involuntary admission

On the evening of 10 December 2017, JF's mother brought the application and recommendation to the approved centre. JF contends that the consultant psychiatrist on call made a decision to treat JF in the community (i.e. refused to admit JF), and a community health nurse was sent out to visit JF at home the following day. The respondent contends that no such decision is recorded in the clinical notes, and characterised the decision to send the nurse out to visit JF as no more than a decision "not to act precipitously" in order to explore whether JF could be treated in the community.

On 11 December 2017, a nurse visited JF's home, where JF indicated that he would not adhere to community treatment. As a result, JF was brought to the approved centre, and examined by a consultant psychiatrist at 2pm on 13 December 2017. On foot of this examination, an admission order under Section 14(1) of the 2001 Act was made that day. This admission order was affirmed by a Tribunal on 2 January 2018, and it is that decision which was the subject matter of the judicial review proceedings.

JF challenged the decision on three grounds:

1. that the Respondent erred in law in failing to determine that a decision refusing admission had been made by a Consultant Psychiatrist on 10 December 2017, and so the underlying application and recommendation were spent at the date of the purported making of the Admission Order on 13 December 2017;

2. that the Respondent erred in law in failing to determine that the examination of JF carried out by a Consultant Psychiatrist on 13 December 2017 was not carried out "as soon as may be" as required under Section 14(1) of the 2001 Act; and

3. having found that certain provisions of the 2001 Act had not been complied with and having further found that this failure did not affect the substance of the Admission Order (under Section 18(1)(a)(i) of the 2001 Act), the Respondent failed in its duty to give reasons for this decision.

The Findings

The Court held that the "decision" of 10 December 2017 did not amount to a refusal of admission for the purpose of Section 14(1)(b) of the 2001 Act. The Court noted that the entitlement of a consultant psychiatrist to refuse to make an admission order can only arise after he or she has carried out an examination of the person in question. In addition, a refusal to carry out an examination would not amount to a decision to refuse to make an admission order within the meaning of Section 14(1)(b) of the 2001 Act. The Court noted that the real concern was whether or not JF could be relied upon to take medication while living at home, so the decision to send out a nurse the following day was essentially a fact-finding mission to assess in the patient's own environment. The Court held that there was nothing in the evidence to suggest that the consultant psychiatrist did not intend to subsequently carry out

an examination. Accordingly, the "decision" of 10 December 2017 did not amount to a refusal to admit JF, and so the application and recommendation were not spent at that date.

The Court further held that the examination of JF on 13 December 2017 was carried out "as soon as may be" within the meaning of Section 14(1) of the 2001 Act. The Court noted that, in light of the paternal character of the 2001 Act, a purposive approach to its interpretation should be adopted. The Court referred to Section 4(1) of the 2001 Act, which states that, in making a decision concerning care or treatment, the best interests of the person shall be the principal consideration. The Court noted that, in light of this provision, Section 14(1) of the 2001 Act must be interpreted in such a way as to permit the exercise of clinical judgment to ensure the examination is carried out in a manner that protects the interests of the patient. The Court was satisfied that the clinical engagement with JF on 11 December 2017 was reasonable, proportionate and intended to attain the best interests of the applicant. The Court noted that JF posed no risk, and the "decision" of 11 December 2017 enabled the psychiatrist to procure relevant information about JF prior to examination and admission. Accordingly, the examination on 13 December 2017 did not fall foul of the requirement that it be carried out "as soon as may be".

JF also argued that the respondent had failed to give reasons for its decision that certain irregularities in JF's mother's application and Dr O'Connor's recommendation were of a type that could be excused under Section 18(1)(a)(ii) of the 2001 Act. These irregularities consisted of overwriting of the time of last observation on JF's mother's application, and the failure by Dr O'Connor to state his opinion that JF required involuntary detention despite the fact he had indicated he was of such opinion by ticking the relevant box in the previous section of the form.

The Court held that these irregularities were manifestly immaterial, noted that counsel for JF had conceded they were of a type that could be properly excused under Section 18(1)(a)(ii) of the 2001 Act, and that the relevant reasons had been set out in the respondent's affidavit. Accordingly, the Court held that this issue was moot.

Form of the Order

The Court thus refused to grant the reliefs sought.

69. JO'T v. Neil Healy[1], Angelo Grazioli, Commissioner of An Garda Siochana, Minister for Justice and Equality, Ireland and the Attorney General

Written Judgment of Mr. Justice McDermott, delivered 9 October 2018

Section 73 of the Mental Health Act 2001 - application seeking leave of the court to take civil proceedings – against the intended defendants named above.

The Facts

The second named defendant completed a recommendation using a Mental Health Commission Form 5 for the involuntary detention of the intended plaintiff. It is claimed that the Form 5 was invalid and completed without any lawful basis because no application from a recommendation for his involuntary detention had been made to Dr Grazioli using an appropriate Form 1 as required by s.9 (3) of the Act. It is also claimed that the recommendation was defective in that Dr Grazioli failed to conduct an examination of the intended plaintiff within 24 hours of receipt of an application contrary to the provisions of s 10(2).This Form 5 was faxed to Pearse Street Garda Station and a copy given to the intended plaintiff's wife. It also alleged that it was never the doctor's intention that the plaintiff would be involuntarily detained in reliance on the form but it was to be used for an unlawful purpose to pressurise him to submit to voluntary admission to hospital. The intended plaintiff was removed to Pearse Street Garda Station where he was held for a period in excess of two hours. He was then interviewed and examined by a medical practitioner who advised that he was not detainable under the 2001 Act and was subsequently released.

The Findings

The Court outlined the statutory test for leave to institute civil proceedings. Section 73(1) of the 2001 Act provides that such leave shall not be refused unless the Court is satisfied:

- that the proceedings are frivolous or vexatious, or
- that there are no reasonable grounds for contending that the person against whom proceedings are brought acted in bad faith or without reasonable care.

The Court outlined 'involuntary admission' under the 2001 Act.

Form of the Order

The Court granted leave to issue proceedings against the second named defendant seeking damages for negligence, breach of statutory duty, false imprisonment and breach of constitutional right to privacy in supplying applicants' medical details to the Gardaí.
The Court granted leave to issue proceedings against the third, fourth, fifth and sixth intended defendants for the same reasons as leave was granted in respect of the second intended defendant.
The Court emphasized that the leave threshold is very low and the claims made will be determined at the trial of action which will require a much higher standard of proof based on oral evidence.

70. B - v - MHT [2021] IEHC 192

Judgement of Ms Justice Creedon delivered on 16th March 2021

The Facts

The Applicant was involuntarily detained on the 18th May 2020 pursuant to an Admission Order made under the terms of the 2001 Act. On that date, the Applicant was initially detained by Garda Markham of Tallaght Garda Station pursuant to s. 12 of the 2001 Act. Garda Markham ticked the box at the top of the prescribed Form 3 Application Form to indicate that the application was being made pursuant to s. 12 of the 2001 Act. In section 8 of the form recommending the involuntary admission of the Applicant, the reason noted by Garda Markham for the application was that she was "concerned for mental health. Belief male is mentally unwell and in need of treatment". She stated at section 9 of the form that the Applicant was observed "In public in just a towel around his waist holding a lantern. Talking about wanting to be deported". Garda Markham signed the Form 3 and indicated that she observed the person at 13:00hrs and she went on to sign Form 3 at 13:15hrs.

After being taken into custody on the 18th May 2020 the Applicant was examined by Dr. James Moloney, a general practitioner. In the Form 5 completed by Dr. Moloney he recommended that the Applicant be detained in the approved centre.

Later the same day having been moved to the Approved Centre the Applicant was examined by Professor Brendan Kelly at 15.30hrs and Professor Kelly completed the prescribed Form 6 at 15.50hrs confirming his opinion that the Applicant continued to suffer from a mental disorder within the meaning of s.3(1) (b) (i) and (ii) of the 2001 Act and described the Applicant's symptoms as "psychotic, delusional, thought disordered, very little insight".

On the 5th of June 2020 the Mental Health Tribunal ("the Tribunal") reviewed the Admission Order in accordance with s18 of the Act. The tribunal gave a unanimous decision on the 5th of June 2020 which is set out in writing.

It was set out in the tribunal's written decision that a preliminary objection was made by the Applicant's solicitor that the Order should not be affirmed as Garda Markham had failed to comply with s. 12 of the 2001 Act as the Applicant contended that there was no evidence to indicate that the Applicant was in danger of causing immediate or serious harm to himself or others. The Applicant's solicitor pointed out that the GP had made a recommendation less than an hour later on the basis of the Applicant suffering from a mental disorder within the meaning of s3(1)(b)(i) and (ii) of the 2001 Act and that this resulted in an injustice to the Applicant. The Tribunal went on to affirm the Admission Order as set out in its written decision of the 5th of June 2020. What is at issue between the parties is the way s.12 was interpreted by the Mental Health Tribunal. The Applicant contended that the Tribunal's interpretation is flawed with the consequence that Certiorari and/or a Declaration should be granted in respect of the decision of the Mental Health Tribunal of the 5th of June 2020.

The Findings

The Court looked at Judgments of the Superior Courts:

- The Mental Health Act must be interpreted in a purposive way; *JB v The Director of CMH [2007] IECH1 132*

- There must be a balancing exercise carried out when interpreting this legislation; *SO v Clinical Director of Adelaide and Meath Hospital Tallaght [2013] IECH 132*

- “Best interests” is the principle consideration when making a decision under the MHA; and that best interest are secured by a faithful observance of and compliance with statutory safeguards. Only insubstantial failures can be excused. *JB v The Director of CMH [2007] IECH1 132*

Regarding the standard of proof, the Court agreed with the Respondent that the civil standard of proof is what is contemplated by the Act, and that great care needs to be taken in applying this standard to decisions of this nature. The Court agreed with Kelly P in JM v HSE that the decision should only be made upon “clear and convincing evidence”.

The Court noted that, what is required by S. 12(1) is reasonable grounds for belief on the part of the detaining member of An Garda Siochana, and that the power to detain under S. 12(1) was invoked by Garda Markham on the basis of the evidence set out by her on the Form 3, being the behaviour of the Applicant and the circumstances as they presented themselves to her.

The Court found there was sufficient evidence for the Tribunal from the Form 3 alone to justify the decision to satisfy itself that s12 (1) had been complied with by Garda Markham. The Court found the Tribunal did not make an unjustifiable leap, or an irrational decision and the Tribunal properly considered the evidence before it, including the two psychiatric reports, as it is required to do so by statute. It also had regard to the “best interests” principle.

The Court was satisfied that there was clear and convincing evidence before the tribunal in respect of the preliminary issue such that the tribunal acted lawfully and within jurisdiction in its consideration of the preliminary issue and that its decision does not provide any basis for the relief sought.

As a further safeguard, the Court looks to the whole of s.12 and notes that the requirements of s. 12(2) were fully complied with and the court is satisfied that there has been no compromise of the effective protection of the rule of law and that the admission decision is lawful.

Form of Order

The Court refused the relief sought.
The parties were requested to correspond with each other on the question of the appropriate form of Order, and on the question of costs

71. ADRIAN SWEETMAN - v - THE CLINICAL DIRECTOR OF ST. MICHAEL'S PSYCHIATRIC UNIT AND THE HEALTH SERVICE EXECUTIVE [2021] IEHC 447 2020 No. 9 JR

Judgement of Mr Justice Barr delivered on 2 July 2021

The Facts

This was a contested leave application, in which the applicant, who represented himself in the proceedings, sough leave to challenge an order made by a doctor to detain him in the psychiatric unit of the hospital, this order was made pursuant to section 23 of the Mental Health Act 2001 (as amended). The applicant submitted that there was no basis on which the section 23 order could validly have been made. The applicant submitted that having regard to the medical notes in relation to his presentation in the hospital at that time, there was no basis on which the doctor could reasonably have formed the requisite opinion to enable him to make an order pursuant to section23.

The Findings

There were a number of issues addressed by the High Court in this case.

<u>The test which to be applied when considering whether an applicant should be granted leave:</u>

Barr J considered the test which must be applied when considering whether an applicant should be granted leave to proceed by way of judicial review as was set down by the Supreme Court in **G v. The DPP** [1994] 1 IR 374, at p.377/378: -

"An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters: -
(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).
(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.
(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.
(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O.84, r. 21(1), or that the court is satisfied that there is a good reason for extending the time limit... (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

<u>Determining whether the applicant had made a prima facie case:</u>
Barr J held that in determining whether the applicant had made a prima facie case on the facts that he has an arguable case for the reliefs sought, it was not necessary that the court should form the opinion that the applicant was likely to win at the ultimate hearing; it is only necessary that the court is satisfied, having regard to all the evidence that was put before it at the leave hearing, that the applicant has raised an arguable case for the reliefs sought in the statement of grounds.

<u>Requirements under section 23 of the Act:</u>
Barr J considered the provisions of sections 23 and 24 of the 2001 Act, that were considered by the Court of Appeal in **PL v. Clinical Director of St. Patrick's University Hospital** [2019] 2 IR 266. Delivering the judgment of the court, Hogan J reviewed the provisions of the sections at para. 31 et seq. He pointed out that the statutory predicate for

the exercise of the power under section 23 and section 24 was different in each case. In the case of section 23, the psychiatrist or general practitioner or nurse (as the case may be), was only required to be "of opinion" that the voluntary patient was suffering from a mental disorder, whereas in the case of section 24 the relevant consultant psychiatrist must be "satisfied" following such an examination that the patient is suffering from a mental disorder. In relation to that distinction, he stated at paras. 37 and 40: -

"[37] In this context one must assume that in distinguishing between the use of the phrase being of "of opinion" in s. 23 and being "satisfied" in s. 24, the Oireachtas chose its words with some care. Any opinion formed pursuant to the exercise of a statutory power must be "bona fide held and factually sustainable and not unreasonable" and this phrase connotes "a laxer and more arbitrary level of … assessment" as compared with a statutory test which requires the decision maker to be "satisfied": see The State (Lynch) v. Cooney [1982] I.R. 337, at pp. 361 and 378 per O'Higgins C.J. and Henchy J. respectively.
[40] The language of s. 23, moreover, is deliberately broader and more extensive than that of s. 24. It is designed to deal with a short-term exigency and it is striking that in contrast to s. 24 the power of detention may be exercised by a broader range of medical and nursing personnel and without the need for a prior examination of the voluntary patient's mental health status. It is sufficient that members of the medical and nursing staff form the "opinion" that the voluntary patient "is suffering from a mental disorder". Provided that the opinion is formed bona fide, is not unreasonable and is factually sustainable, then the power of detention under s. 23 will have been lawfully exercised."

Barr J also considered the definition of what constitutes a mental disorder provided in section 3 of the 2001 Act, where section 3(1) provides that:-
"(1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where—
(a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or
(b)(i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and
(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."

It was held by Barr J that, having looked at all the circumstances that pertained in the early hours of 27th September 2019, there was no arguable case that could be made that the opinion formed by the doctor, or the order that he made pursuant to section 23 of the 2001 Act having formed the requisite opinion, were unlawful. Barr J held that the fact that the consultant psychiatrist, Dr Barry, reached a different opinion when she examined the applicant on the following morning did not affect the validity of the opinion held by the doctor who made the order pursuant to section 23 earlier that day. Barr J held that the doctor owed the applicant a duty of care not to discharge him in the middle of the night from a location where he could easily commit suicide by throwing himself into the nearby river. Thus, the court was satisfied that the decision reached by the doctor was consonant with his duty of care towards the applicant as a patient in the psychiatric unit.

Decision of the Court
The court refused the applicant leave to proceed by way of judicial review to seek an order of certiorari quashing the decision of the first named respondent to detain him pursuant to s.23 of the 2001 Act.

72. B –v - The Clinical Director of an Approved Centre [2021] IEHC 486

Judgement of Mr Justice Barr 13th July 2021

The Facts

This was an Article 40 application. The patient was the subject of an admission order to an approved centre on 26 May 2021. The MHT sat on 11 June 2021 to review the admission order and made an order under section 18(4) extending the period within which it could consider the admission order by 14 days. On 23 June 2021 the MHT resumed and concluded the hearing affirming the admission order. On 28 June 2021 a renewal order was made by the consultant psychiatrist responsible for the care and treatment of the patient. The question before the Court whether the renewal order should have been made on 23 or 28 June and was the patient in lawful detention from 23 June 2021.

Prior to the hearing of the case, an MHT sat on 12 July to review the renewal order and revoked same. The Court was asked and proceeded to hear the legal issue in question with regard to how section 18 (4) should be interpreted.

The Findings

The Court in reaching its decision sought to depart from the judgement of Mr Justice Sheehan in the JB -v- the Clinical Director of the Central Mental Hospital 2008. It found -

"The court is satisfied that the correct interpretation of section 18 (4) is that the 14 day extension provided for therein, operates from the end of the relevant period, being the 21 days within which the tribunal is allowed to consider the particular order permitting the detention of the patient…". The judgement went on to say "The court is satisfied that in its ordinary and natural meaning the words of the Act as used in section 18 make it clear that the tribunal can extend the time for its deliberations by 14 days and that that has the effect of extending the life of the relevant admission order, or renewal order. That is precisely what the Act provides." **Form of Order**

The court proposed to make an order (i) declaring that the applicant was not unlawfully detained at any time prior to and including 28 June, 2021 when the renewal order was made; (ii) pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008 prohibiting the publication of any material that would tend to identify the applicant, or the respondent, as the court is concerned that there could be "jigsaw identification" of the applicant if the respondent were identified.

Note – The matter is the subject of an appeal.

73. RGF – v - The Clinical Director Department of Psychiatry Midland Regional Hospital Portlaoise [2021] IEHC 502

Judgement of Ms Justice Hyland delivered on 19th July 2021

The Facts

This was an Article 40 application and raised the issue of when a patient may be considered a voluntary patient within the meaning of sections 23 of the Mental Health Acts 2001-2018 (the "2001 Act"). Having come to the attention of An Garda Siochana, the applicant was taken to Our Lady of Lourdes Hospital in Drogheda on an unspecified date and was voluntarily in the approved centre. He was subsequently detained on foot of an Admission Order on 21 May 2021 in Drogheda pursuant to sections 23 and 24 of the 2001 Act on the basis that he was suffering from a mental disorder and fulfilled the criteria in s. 3(1)(b)(ii). On 10 June 2021, a Renewal Order was made which was reviewed by an MHT on 30 June and revoked. The patient sought to leave as the order had been revoked by the MHT. 70 mins after the MHT revoked the order, the patient was involuntarily detained pursuant to sections 23 and 24. It was that detention that was the subject of the application.

The Findings

The parties relied on three cases –

1. E.H. v. Clinical Director of St Vincent's Hospital [2009] 3 I.R. 774

2. K.C. v Clinical Director of St. Loman's Hospital [2013] 1 I.R. 772

3. P.L. v The Clinical Director of St. Patrick's University Hospital [2019] 2 I.R. 266

The court considered the following issues – 1. Was the patient voluntary for the 70 mins; 2. Relevance of applicant's desire to leave the hospital; 3. Was the patient receiving treatment during the 70 mins; 4. Level of risk presented by the patient; and 5. Protections under sections 23 and 24.

Form of Order

The Court stated *"Finally, the purpose of s. 23 cannot be ignored when considering when deciding whether the applicant was receiving treatment. It has been identified that it is intended to be used to cater for mishaps or unexpected developments which result in there being no order in respect of a patient needing treatment (EH), or where a voluntary patient requiring ongoing treatment may seek to leave the hospital possibly in an unplanned and abrupt manner (KC). This case is an example of this par excellence. A mistake was made in relation to the name of the applicant. Quite correctly the Tribunal revoked the Order and considered that, given the circumstances of the mistake, it was not appropriate that they cure the mistake under their statutory power to do so. Nonetheless, the applicant continued to be suffering from a mental disorder and required treatment in the approved centre for same. This is precisely the type of situation that s. 23 was adopted to cater for. Here, had the applicant not had any interaction with the medical staff post the revocation, the purpose of s.23 could not have prevented the conclusion on the basis of the evidence that he was not being treated within the meaning of s.2. But in considering whether in any given case a person is being treated in an approved centre for the purposes of s. 23, the purpose of s.23 must be borne in mind."*

The Court concluded *"that the applicant was being treated within the meaning of s.2 [as a voluntary patient] during the 70-minute period between the revocation of the [...] order and the invocation of s.23 and therefore comes within the definition of a voluntary patient [as per EH]. This means the approved centre was entitled to invoke the procedures under s. 23 and s.24."*

The detention was found to be lawful.

The decision of the High Court was being appealed but the appeal did not succeed. The written judgment from the Court of Appeal setting out the reasons for its decision is awaited.

74. FC - v - MHT [2021] 2021 No. 198 JR

Judgement of Mr Justice Heslin delivered on 24th June 2021

The Facts

This was a judicial review.

The applicant challenged a decision made by the respondent on 12 February 2021 ("the decision"). The applicant had a long history of mental illness and suffered from paranoid schizophrenia. He was detained in an "approved centre" for the purposes of the Mental Health Acts 2001-2018 ("the 2001 Act"). On 25 January 2021, a "Renewal Order" was made by the applicant's responsible consultant psychiatrist, pursuant to the provisions of s. 15(3)(a) of the 2001 Act. This extended the applicant's detention for a period ending on 26 July 2021, subject to the applicant's right to seek a further review after three months, pursuant to s. 15(3)(b). On 12 February 2021, the respondent reviewed the Renewal Order and, by a majority decision affirmed the Renewal Order.

The Court noted that it was clear from the provisions of s. 18 that the respondent has a very important (but clearly defined and confined) jurisdiction, namely, to decide if the patient in question is suffering from a "mental disorder" and, if so satisfied, to affirm the Renewal Order and, if not so satisfied, to revoke the order. Heslin J advised that the fundamental question relates to whether the patient is suffering from a "mental disorder". The Court noted that s. 18 requires the respondent to consider if certain procedural matters have been complied with and, if not, whether such noncompliance affects the substance of the relevant order such that it should be revoked. There was no challenge made to the respondent at any stage, nor was there any challenge in the proceedings before the court, which relates to procedural matters. The sole issue the Court was concerned with relates to the respondent's determination that the applicant suffered from a mental disorder and the reasons in respect of same. The Court noted that the applicant's case is that no, or no sufficient, reasons were given and found that it was plain from s. 18 that if the respondent is satisfied that the patient is suffering from a mental disorder then, absent any procedural issues (and none arise in the present case) the respondent is required to affirm the admission/Renewal Order.

In the present case, there was no dispute about the fact that the respondent gave written notice of the decision, nor was there any dispute about the fact that it was given to the parties entitled to receive it. The sole issue was the adequacy of reasons for the decision

The Findings

The High Court found:

1. The reasons given by the Tribunal conveyed "the gist" of the basis for the decision and, when read alongside the overwhelming evidence which was before the Tribunal and being entirely consistent with it, the reasons given were undoubtedly sufficient to satisfy the Tribunal's statutory obligations pursuant to the 2001 Act. The Court rejected the Applicant's submission that, in determining whether the reasons given were sufficient, the Court should ignore the evidence which was before the Respondent.

2. There is therefore no question of any failure on the part of the Tribunal to meet any duties regarding the giving of reasons under common law, constitutional or Convention principles.

3. Given that all three consultant psychiatrists, whose evidence was before the respondent, took the view that the applicant was someone suffering from a mental disorder, and given that there was no dispute whatsoever between any of the consultant psychiatrists as to which subsection of s.3 (1) was satisfied, it could not seriously be suggested that the Applicant or his legal representative were unclear as to what evidence the Tribunal relied on, and there was no failure on the part of the Tribunal to explain why the majority of its members affirmed the renewal order, having regard to s.3 (1) (b).

4. The evidence demonstrates that the dual limbs of s. 3(b)(i) and (ii) were satisfied and noted that the overwhelming evidence before the Tribunal was that:

i. If discharged, the Applicant was likely to become non-compliant with medication which is essential to his treatment, leading to a deterioration in his condition;

ii. The Applicant is well settled and benefitting from medication purely because he is required to take same in the context of his involuntary detention for treatment;

iii. His condition would seriously deteriorate if he was released into the community in circumstances where, as is not in dispute, the respondent has no jurisdiction to make a community treatment order;

iv. The Applicant himself made wholly inconsistent statements with regard to his intention to take medication and his need for it, and with regard to acknowledging that he had an illness;

v. The continued detention of the Applicant was likely to benefit or alleviate his condition to a material extent;

vi. There was consensus that the applicant had no insight.

5. The Tribunal discharged the functions and duties imposed upon it pursuant to the 2001 Act. It gave adequate reasons for its decision and acted rationally in reaching its decision in accordance with the evidence before it. The Tribunal acted within jurisdiction and in accordance with the principles of constitutional justice. The Applicant has not established an entitlement to any relief claimed. **Form of Order**

The Court directed the parties to correspond with each other with regard to the appropriate order to be made, including as to costs

75. Ms K - v - Clinical Director of Drogheda Department of Psychiatry [2022] IEHC 248

Judgment of Ms Justice Hyland delivered on 12th April 2022

Facts

On 15 March 2022, the applicant had been detained in an approved centre on foot of an Admission Order (the Order) made pursuant to section 14 of the 2001 Act. Following a review by the Mental Health Tribunal the Order was revoked by reason of non-compliance with the provisions of section 9 of the 2001 Act.

Following the Tribunal's decision, the legal representative telephoned the applicant and the applicant confirmed to her legal representative that she wanted to leave the approved centre immediately; that she did not want to receive any more treatment or attend for any more consultations with the responsible consultant psychiatrist and that her intention was to continue with medications but only from her own home. The legal representative advised the applicant that she was no longer detained, that she could leave directly if this was her intention and to advise nursing staff that this was her position.

The Mental Health Act Administrator and a nurse at the approved centre deposed by affidavit that they had spoken to the applicant after the Tribunal decision but prior to the telephone conversation between the applicant and her legal representative and that the applicant had agreed to remain as a voluntary patient. They deposed that the applicant then had the conversation with her legal representative after which the applicant was adamant that she wished to leave immediately. The nurse deposed that after collecting her belongings, the applicant began experiencing hallucinations and his professional opinion was that the applicant would benefit from a discharge plan, he was concerned for her mental state and he detained the applicant, purportedly pursuant to section 23(4) of the Act. The applicant's responsible consultant psychiatrist arranged for the applicant to be examined by a consultant psychiatrist the following day and an admission order was signed by a second consultant psychiatrist, purportedly pursuant to section 24 (3) of the Act on 2 April 2022. The applicant made an application, pursuant to Article 40.4.2 of the Constitution for an inquiry into the lawfulness of her detention.

Findings

There were a number of issues addressed by the High Court in this case.

Before the High Court the applicant made two principal arguments. The first of these was that she was not a voluntary patient as defined in the Act and so the approved centre could not lawfully exercise the powers under sections 23 and 24 of the 2001 Act.

The second argument was that the Form 13 that the approved centre produced at the hearing of the inquiry as certifying the basis for the applicant's detention could not be relied on as it was not the same Form 13 that the Mental Health Commission ("the Commission") had provided to the applicant's legal representative when she was appointed. The new Form 13 contained the signature of the responsible consultant psychiatrist (this was omitted previously) and now recorded that a nurse, rather than a consultant psychiatrist, had exercised the power of detention under section 23(4). (There were two Form 13s.)

On the question of whether the applicant was a voluntary patient, the Court considered the decision of the Court of Appeal in RGF v. Clinical Director Department of Psychiatry, Midland Regional Hospital [2021] IECA 309 where the same question arose on the facts i.e whether, during the period between the making and notification of the Order of the Tribunal revoking the Admission Order and the re-detention of the applicant, was she being treated within the meaning of the 2001 Act.

Hyland J. emphasised that what constitutes treatment is to be decided on a case-by-case basis, stating at para. 27:

"The question of treatment must be carefully analysed on the individual facts of each and every case. It could never be the case that the mere presence of a person in an approved centre, having previously been a patient there, could be sufficient for a conclusion to be drawn that he or she is being treated there."

In the circumstances of this case, given that the applicant's conversation with the nurse was so short it could be considered treatment and as such did not meet the requirement for the application of sections 23 and 24, i.e., that the person is a voluntary patient

On the issue of the Form 13, the Court held that ensuring compliance with section 23(1) could never be treated as an administrative formality given that it is used to curtail the liberty of the person. The necessity for completing the form fully and accurately derives from its statutory basis and from the need for transparency

The Court held that the signing of section 9 on the Form by the first consultant psychiatrist after the original admission order had been completed was deeply unsatisfactory, not only because it was outside the 24-hour period mandated by section 24(5) but because it had been done without reference to the consultant who had in fact made the Admission Order. It held that only the responsible consultant psychiatrist can make an Admission Order and where the power to make the admission order under section 24 had been delegated to another consultant (as per section 24(6)), it was for the responsible consultant psychiatrist that made the Admission Order to be satisfied that all the procedures were properly complied with.

The Court held that a vital part of section 23 is the identity of the professional who detained the person. It held that if there was to be an amendment to the Form 13 in this respect, and the Court said it was not satisfied that this was possible, it would have to be by the person who was responsible for the completion of that form. There can be no ambiguity as to who is responsible for the accuracy of the information on the form as this is an important safeguard for the detained person. The Court held that there is a statutory requirement that the responsible consultant psychiatrist shall make an order in the form specified by the Commission and no such form that accurately reflected what took place was before the Court. The Court held that this was not cured by an affidavit. Therefore, the detention was also held to be unlawful by reason of the fact that there was no valid admission order before the Court.

Decision of the Court

The Court found that the applicant was unlawfully detained and directed her release

Full Judgment can be found here: : https://www.courts.ie/view/judgments/90ac97d9-6333-4f40-8912-09301ad8f847/00c8e659-81c6-4b19-a9f8-1d885cfaa20c/2022_IEHC_248.pdf/pdf

1. PL v The Clinical Director of St. Patrick's University Hospital, Dr. Seamus O'Ceallaigh, The Attorney General (Notice Party) and The Irish Human Rights and Equality Commission (Amicus Curiae)

Judgment of Mr Justice Gerard Hogan of the Court of Appeal delivered on 14 February 2018.

Facts

The case concerned an appeal from the decision of Mr Justice Peart in the High Court (see *PL .v. Clinical Director of St. Patrick's University Hospital* [2012] IEHC 15, [2014] 4 IR 385. The applicant was admitted as a voluntary patient to the respondent hospital on 26 August 2011 following a psychotic episode at home. The applicant remained in the Special Care Unit receiving treatment until 13 September 2011, at which point he expressed a desire to leave the hospital. Section 23 of the 2001 Act was then invoked, and an examination was carried out by the RCP as required by Section 24. He formed the opinion that the applicant was suffering from a mental disorder within the meaning of Section 3 of the 2001 Act and the applicant was detained pursuant to Section 24(1). The applicant was examined by a second consultant psychiatrist who also formed the view that the applicant should be detained. An admission order was signed by the RCP and affirmed by the Mental Health Tribunal. Later, a renewal order was signed by the RCP, which was affirmed. Throughout this period of involuntary detention, the applicant indicated he would prefer not to be in hospital.

On 12 October 2011, the RCP revoked the renewal order following receipt of a report by the Consultant Forensic Psychiatrist at the Central Mental Hospital. The applicant became a voluntary patient at this point, but was not invited to leave and remained on a locked ward. It was stated by the approved centre that the applicant acquiesced to his continued detention at this point. The applicant's solicitor became aware of the revocation on 18 October 2011 and she visited the applicant on 21 October 2011. The applicant requested to leave to go to the coffee shop with her, but was told a consultant would have to be contacted for such permission and that he could not leave until a risk assessment was carried out. This did not occur until 21 November 2011. On 11 November 2011, the RCP informed the applicant he would seek to have him transferred to Sligo to continue treatment there, to which the applicant agreed.

On 21 November 2011, an application for leave to seek reliefs by way of judicial review was granted by the High Court based on the events up to this point. Following this, the applicant's solicitor telephoned the hospital and was told the applicant had become violent that morning and was restrained and sedated, but that his status as a voluntary patient remained unchanged. It was stated that the applicant had failed to take his medication, attempted to jump the garden wall on three occasions and had been aggressive with staff. He indicated he was withdrawing his consent to remaining on a voluntary basis, and at 10:10 am that day the RCP made an order under Section 23 of the 2001 Act. The required second assessment was carried out and the Consultant who disagreed with the RCP's assessment that the applicant needed to be admitted as the applicant agreed to engage further in treatment as a voluntary patient.

The Findings

The central issue was whether there was a legal basis for restraining the applicant from leaving the hospital on 21 November 2011 given Section 23 was not invoked that day. The Court noted that any restriction on his liberty would be unlawful unless there was a legal basis for it pursuant to Article 40.4.1 of the Constitution. The Court held that from at least 12 October 2011 when the renewal order was revoked, the applicant was a voluntary patient as defined in the Act.
The Court held that Section 23 provides for the detention of a patient without the need for a prior examination provided the medical and nursing staff form the opinion that the patient is suffering from a mental disorder. On this basis, the decision to restrain the applicant from leaving on 21 November 2011 was unlawful as he was a voluntary patient from 12 October 2011, and could not be prevented from leaving at any appropriate time and by an appropriate means of exit.

The Court examined Section 28 of the Act, which requires a consultant psychiatrist to revoke an order and thereafter discharge the patient appropriately where the patient is no longer suffering from a mental illness. At this point, the Court made reference to the judgment of Mr Justice Peart in *McN v HSE* [2009], in which it was held that the respondent owed a duty of care to the applicants who suffered from dementia, which required they not be released under Section 28 until they were safe to do so, such as in the company of a family member. The Court, rejected this broad interpretation of "inappropriate discharge" and held that *McN* was wrongly decided on this issue. It was noted such logic would result in patients, without any family members to accompany them. would remain in *de facto* confinement, and the voluntariness of their detention would be purely theoretical. The Court held that voluntary patients cannot be prevented from leaving an approved centre, except pursuant to the provisions of s. 23. The Court did not make any further finding on Section 28.

Form of Order

The Court allowed the appeal and held submissions would be heard as to the precise form of order the Court should make in light of the judgment.

2. IF v Mental Health Tribunal, Mental Health Commission, Ireland, and the Attorney General [2018] IECA 101

Judgment of Mr Justice Hogan delivered 18 April 2018.

The Facts

The applicant came to the attention of the Gardai following an allegation that she had threatened her neighbours. An admission order was made by a consultant psychiatrist on the 7 October 2015, pursuant to the provisions of Section 14 of the Mental Health Act 2001. On the 27 October 2015 that admission order was affirmed by the first respondent, the Mental Health Tribunal, pursuant to Section 18(1)(a) of the 2001 Act. The applicant appealed to the Circuit Court against that decision pursuant to Section 19 of the 2001 Act. When the matter came before the President of the Circuit Court on 10 November 2015 the issue arose as to whether the Section 19 appeal was spent on the basis that the initial admission order had been overtaken by a subsequent renewal order. Judge Groarke ruled that the appeal was moot. The applicant then commenced judicial review proceedings in which she sought, inter alia, a declaration that the Circuit Court had erred in failing to make an adjudication on the merits of the appeal. That application was dismissed by the High Court on 8 November 2016. The applicant appealed to the Court of Appeal against that decision.

The Findings

Held by Hogan J that:

1. As a matter of *stare decisis* both Groarke P and Barrett J were correct to follow and apply the applicable law and understanding of the scope of Section 19 of the 2001 Act as reflected in the judgment of Charleton J in *Han v President of the Circuit Court* [2008] IEHC 160, namely, that the right of appeal applied only where the person in question "is" suffering from a mental illness;

2. In *Han* Charelton J was, with respect, incorrect in applying a purely literal interpretation of Section 19(1) of the 2001 Act, because this interpretation effectively rendered Section 28(5) unworkable;

3. Section 19(1) of the 2001 Act must therefore be read as if it read "is or was" suffering from a mental disorder;

4. The Circuit Court has a jurisdiction to hear an appeal against the affirmation of an admission order by a Tribunal under Section 18(1), even if that admission order has been subsequently replaced by a renewal order;

5. The Circuit Court has jurisdiction to hear and determine the original appeal under Section 19(1), even if the underlying admission or renewal order (as the case may be) has been replaced in the interval by a renewal order.

Held by Peart J in a separate Judgment:

1. The correct reading of Section 15 subsections (1) and (2) of the 2001 Act means that a renewal order extends the life of an admission order and does not replace it.

2. There is nothing in a renewal order which itself authorises the patient's detention as an involuntary patient and the consultant psychiatrist is simply certifying that a lawful basis for extending the admission still exists.

3. If the appeal of the Admission Order had been allowed in this case, then it would follow that the Renewal Order would have no relevance as the Renewal Order has no free-standing existence or legitimacy.

4. He distinguished the High Court decision of O'Neill J in *WQ v Mental Health Tribunal* [2009] 3 IR 744 and the Supreme Court decision of Kearns J in *EH v clinical Director of St. Vincent's Hospital* [2009] 3 IR 774 on the basis that in neither case was the Court considering whether a renewal order had some free-standing status or was simply extending the life of the detaining order.

Hogan J concurred with the judgment of Peart J. Gilligan J concurred with both judgments.

Appeal allowed.

3. A.B. –v- The Clinical Director of St. Loman's Hospital, The Health Service Executive, The Minister for Health, The Attorney General, Ireland (Respondents) and The Mental Health Commission, The Irish Human Rights Equality Commission (Notice Parties) [2018] IECA 123

Judgment of Mr Justice Hogan delivered 3 May 2018.

The Facts

In the High Court AB sought a declaration that insofar as Sections 3(1)(a) and 15 of the 2001 Act authorised his detention up until 13September 2016, and Sections 3(1)(b) and 15 continued to authorise his detention up until 12 September 2017, those sections were invalid having regard to the provisions of Article 40 of the Constitution. AB also sought declarations to the effect that the particular provisions were incompatible with Articles 3, 5, 8, 13 and 14 of the European Convention of Human Rights (ECHR). AB further sought an order of certiorari quashing a twelve month renewal order made on 13 September 2016 which purported to authorise his detention until 12 September 2017.

The High Court (Binchy J) held that while AB had no standing to pursue the constitutional challenge, he nonetheless held that AB had no effective means (whether by means of recourse to Article 40.4.2 of the Constitution or otherwise) of challenging his involuntary detention after having exhausted a recourse to the Tribunal or the Circuit Court), aspects of Part 2 of the 2001 Act were incompatible with Article 5(4) of the ECHR. The High Court accordingly granted a declaration to that effect pursuant to Section 5(1) of the European Convention of Human Rights Act 2003.

The appellants, the Clinical Director of St. Loman's Hospital, the Health Service Executive, the Minister for Health, the Attorney General and Ireland, appealed to the Court of Appeal against that declaration and the respondent cross-appealed against the decision holding that he had no standing to pursue the constitutional claim. The MHC did not take part in the court proceedings save to provide certain factual information to the Court.

The Findings

Held by Hogan J that Binchy J's finding that the respondent lacked standing to advance the constitutional challenge could not be sustained, as AB clearly fulfilled the requisite *Cahill v Sutton* [1980] IR 269 criteria. In light of the reasoning of the Supreme Court in *FX v Clinical Director of the Central Mental Hospital* [2014] IESC 1, *Ryan v Governor of Midlands Prison* [2014] IESC 54 and *SMcG v Child and Family Agency* [2017] IESC 9,

Hogan J held that in Article 40.4.2 proceedings the High Court does not have jurisdiction to rule on the medical merits of the application. Hogan J held that an involuntary patient detained under Section 15(3) for a period of up to 12 months does not have an effective means of vindicating his right to personal liberty by securing an independent review of that detention following the making of the renewal order and the conclusion of any Section 19 appeal to the Circuit Court.

Hogan J held that it was plain that the State failed in its duty to vindicate the right to personal liberty as best it may by failing to provide for an effective opportunity whereby the involuntary patient detained for this period of time can have his or her detention independently reviewed within a reasonable time. Hogan J held that this amounted to a breach of Article 40.4.1 when read in conjunction with Article 40.3.1 and Article 40.3.2.

Hogan J concluded that the sub-section empowering this involuntary detention without the necessary attendant safeguards, namely, Section 15(3) of the 2001 Act, must be adjudged to be unconstitutional. Hogan J held that this declaration of unconstitutionality in respect of Section 15(3) of the 2001 Act should stand suspended until the 8th November 2018 when the finding of unconstitutionality will take effect without further order. Appeal allowed.

4. A.C. –v- Cork University Hospital and Josie Clare, Cork University Hospital and The Health Service Executive (Respondents) and General Solicitor for Minors and Wards of Court Commission (Notice Parties) [2016] IECA 123

Judgment of Mr Justice Hogan delivered 2 July 2018.

Unlawful detention – Article 40 of the Constitution – Hospital – Applicant seeking to appeal against High Court decisions to refuse Article 40 applications – Whether applicant was unlawfully detained by the respondent

Facts

In July 2016 the son of the applicant made two separate applications to the High Court pursuant to Article 40.4.2 of the Constitution for an enquiry into the legality of what he contended was the unlawful detention of the applicant at the respondent hospital, Cork University Hospital. The son contended that the hospital had unlawfully refused to permit his mother to leave the hospital. Kelly P refused both applications and directed pursuant to s. 11 of the Lunacy Regulations Ireland Act 1871 that a medical visitor be appointed to report to the High Court as to the capacity of the applicant to make any decisions concerning her welfare or her property. That process culminated in a decision to take the applicant into wardship a month later in August 2016. The son appealed to the Court of Appeal against the decisions to refuse the Article 40 applications.

The Findings

Held by Hogan J that Article 40.4.1 provides that all detention must be in accordance with the law. Hogan J held that the reasons and motives of the detainer are not relevant to any consideration of this issue of law. Hogan J held that since no power to detain the applicant in the circumstances had been identified, it followed that he was not satisfied that the respondent hospital acted lawfully in restraining and preventing her leaving the hospital in the company of her son and daughter on 23 June 2016.Hogan J held that he would to that extent allow the appeal. Appeal allowed.

5. A.C. and P.C. –v- General Manager of St. Finbarr's Hospital and Health Service Executive (Respondents) [2018] IECA 272

Joint Judgment of Mr Justice Michael Peart, Mr Justice Hogan and Ms Justice Marie Baker delivered 30 July 2018.

Unlawful detention – Inquiry application – Article 40.4.2 of the Constitution – Second applicant seeking an inquiry into the legality of the first applicant's detention – Whether the judges of the High Court to whom the application was presented each fell into error by failing to hear and determine the application

Facts

The second applicant applied to the High Court on 16 July 2018 for an order pursuant to Article 40.4.2 of the Constitution directing an inquiry into the legality of the detention of the first applicant, his mother, in St. Finbarr's Hospital. The first High Court judge to whom he sought to make the application declined to consider it on the ground that it ought to be made to the more senior judge who was then immediately available in the adjoining court as that judge was in charge of the listing of the day's judicial business.

The second applicant then sought to make his application to that second judge. Rather than direct an inquiry the judge gave the second applicant leave to issue a notice of motion returnable to the non-jury list on 23 July 2018 on notice to the respondents, the hospital and the Health Service Executive (HSE).

On 23 July 2018 the matter was listed before the third High Court judge who was then presiding over the non-jury list. The HSE drew his attention to an earlier order of the High Court made on 9 October 2017 purporting to prevent the plaintiff from taking any proceedings which address either the "life, the liberty or the welfare of his mother other than by application in the wardship proceedings and such application not to be brought unless two clear days' notice is given to the General Solicitor for Minors and Wards of Court".

The third judge declined to hear the Article 40.4.2 application himself and transferred it to the President of the High Court. The second applicant asked the President to recuse himself on the ground that the order for the detention of his mother had been made by him, but the President declined to do so. The second applicant did not proceed to move the application for an inquiry before the President. The second applicant then sought to appeal to the Court of Appeal against those various orders.

The Findings

Held by Peart, Hogan and Baker JJ that, in the events that transpired, the judges of the High Court to whom the application was presented each fell into error by failing to hear and determine the application for an inquiry under Article 40.4.2 of the Constitution once the second applicant sought to move it.

Peart, Hogan and Baker JJ held that the second applicant remained free, should he wish to do so, to make an application ex parte pursuant to the provisions of Article 40.4.2 to any judge of the High Court for an inquiry into the legality of his mother's detention at the hospital. Application granted.

6. R.G.F -v- The Clinical Director Department of Psychiatry, Midland Regional Hospital [2021] IECA 309

Judgment of President George Birmingham of the Court of Appeal delivered on 19 November 2021

Facts

This concerns an appeal of an Article 40 application.
By way of background, on 25 May 2021 the applicant was detained in an approved centre on foot of an admission order made pursuant to section 24 of the Mental Health Acts 2001-2018 ("the 2001 Act").

On 10 June 2021 this admission order was affirmed by a Mental Health Tribunal and on the same date a renewal order was made pursuant to section 15(2) of the 2001 Act, extending the detention of the applicant for a further period of three months.

On 30 June 2021 a Mental Health Tribunal revoked the renewal order, pursuant to section 18(1)(b) of the 2001 Act, on the ground that there were defects in the statutory procedures. The applicant was informed of the revocation and he subsequently informed staff that he wished to leave the approved centre. A period of approximately 70 minutes passed and the applicant was involuntarily detained pursuant to sections 23 and 24 of the 2001 Act. It is this detention which the applicant sought to challenge by way of the Article 40 application.

The High Court held that that the applicant was lawfully detained under the 2001 Act, and his application was dismissed. The applicant then sought to appeal this decision to the Court of Appeal.

The Findings

In determining the lawfulness of the applicant's detention, the Court of Appeal considered whether all the conditions required for the invocation of section 23 were present.

The Court first considered whether the applicant came within the definition of a voluntary patient. The cases considered by the Court were E.H. v. Clinical Director of St Vincent's Hospital [2009] 3 I.R. 774; K.C. v Clinical Director of St. Loman's Hospital [2013] 1 I.R. 772 and P.L. v The Clinical Director of St. Patrick's University Hospital [2019] 2 I.R. 266.

The Court agreed with the High Court judge that the applicant came within the meaning of a voluntary patient.
The Court then turned to what it described as the live issue in the case: whether the applicant received treatment in the approved centre during the 70-minute period between the notification of the revocation order and the redetention of the applicant.

In determining this question, the Court relied on the affidavit of the applicant. Although the applicant denied receiving treatment following his notification of his intention to leave the centre, he did outline that during this period he had a 20-minute meeting with his consultant psychiatrist in the presence of a staff nurse. At this meeting the Applicant was asked repeatedly to stay, and he was asked if he would take medication when he left.

The President stated that this meeting and the sustained efforts by the consultant

psychiatrist,
in the presence of the staff nurse, to persuade the applicant to remain in the hospital, together
with exploring the issue of whether he was prepared to take his medication outside a hospital
setting, was of considerable medical significance, and met the threshold of administration of treatment.

In dismissing the appeal, the Court concluded that the applicant's detention pursuant to section 23 was lawful as during the relevant period the applicant was receiving patient treatment; he was doing so as a voluntary patient within the meaning of the Mental Health Act 2001; and he was present in the approved centre at a time when he was not the subject of an admission order or a renewal order.

Application before the Supreme Court

RGF v The Clinical Director, Department of Psychiatry, Midland Regional Hospital, Portlaoise [2022] IESCDET 35
The applicant sought leave to appeal the decision of the Court of Appeal to the Supreme Court . This application was refused as set out in a determination of the Court issued on 09 March 2022.

In summary, the Court determined that the proposed appeal centred on the application of express statutory language to the particular facts of the case. The issue of interpretation had already been considered in E.H. v Clinical Director of St. Vincent's Hospital [2009] 2 IR 774 where the Supreme Court found that "paternalistic intent of the legislation" justified a broad purposive interpretation. Since the applicant in the current case does not argue that the E.H. approach was wrong or distinguishable, the proposed appeal is confined to the particular facts of this case, and no matter of general public importance arises.

It was further held that it was not necessary in the interests of justice that there be a further appeal to the Supreme Court as the applicant had a full hearing in the High Court followed by a full appeal to the Court of Appeal

7. C v. John Casey [2022] IECA 24

Judgments of Pilkington J. and Murray J. of the Court of Appeal delivered on 02 February 2022

Facts

This case concerns the granting of leave to commence proceedings under section 73 of the Mental Health Act 2001-2018 (2001 Act).

By way of background, the applicant was taken into garda custody following a road traffic accident. The respondent is the doctor who was on call that night and attended the applicant at the garda station due to the applicant's complaints of chest pain. Following an examination by the doctor, it was noted in custody record that the applicant was fit for interview. A short time later, the doctor returned and saw the applicant again, following which he recommended admission under the 2001
Act.

There is a conflict of facts between the applicant and the doctor regarding what happened during the assessments. The applicant claims that the doctor did not follow the required procedures and was induced by gardaí to sign off on a Form 5 recommendation for involuntary admission to an approved centre.

In the High Court, the application for section 73 was refused. The High Court judgment can be found here: https://www.courts.ie/view/judgments/a74a12c5-ec1f-454e-929d-ddd12c824b7a/44a3300b5988-42a3-8aa0-594770fd8649/2018_IEHC_281_1.pdf/pdf

The matter was appealed.

The Findings

The Court of Appeal issued two concurring judgments by Judge Pilkington and Judge Murray, which considered the following issues:

- Whether an expert report is required at the leave stage. In the High Court Barrett J. referenced the failure to furnish such a report and referred to Reidy v National Maternity Hospital [1997] IEHC 143; Cooke v Cronin & anor [1999] IESC 54; and Greene v Triangle Developments [2008] IEHC 52, which all confirmed the necessity of procuring an expert opinion prior to the initiation of professional negligence proceedings. However, as stated by Pilkington J. at paragraph 113, there is no statutory requirement within the 2001 Act for the furnishing of an expert report prior to issuing a leave application pursuant to s.73. In his judgment Murray J. stated that he did not believe that the applicant's failure to obtain an expert report was fatal to the applicant's claim as his case is centred on a claim of fact as to whether an examination was carried out in the manner described. which it will be for the trial court to resolve as a matter of evidence, and the effect of which it will have to determine as a matter of law.

- Whether the fact that a claim might be statute barred is relevant – It was decided that it was not necessary to decide the issue at this stage and that issue would be decided at the full hearing of the application for Section 73, if leave was granted

- <u>Request for leave to bring proceedings</u> – The key issue on appeal was whether the applicant met the test for leave as articulated by Clarke J. in *in AL v. The Clinical Director of St. Patrick's Hospital and anor* [2010] 3 IR 537 at paragraph 11:
"*where … there is any legitimate basis on which a court might arguably conclude that a relevant intended defendant had acted without reasonable care, then it follows that leave must be granted.*"
Murray J. summarised the defining features of the s.73 jurisdiction at paragraph 7:
"(i) The default position is reversed. Whereas under the 1945 Act a plaintiff had to satisfy the court of identified statutory criteria before being permitted to proceed with his action, under s. 73 the court must grant leave unless it is satisfied of the limiting grounds now prescribed.
(ii) The plaintiff does not have to establish 'substantial grounds' for any aspect of his or her claim. Now, the reversed burden merely requires that the court before refusing leave be satisfied of one of two matters.
(iii) The first of these matters is that the proceedings are 'frivolous or vexatious'. This, of course, reflects the requirement imposed on any plaintiff where an application to dismiss their claim is brought pursuant to Order 19 Rule 28 of the Rules of the Superior Courts.
(iv) The second is that 'there are no reasonable grounds for contending that the person against whom the proceedings are brought acted in bad faith or without reasonable care'. Whether by accident or design, this mirrors the basic trigger for an application for a stay under the 1890 Act. (v) The only causes of action that may be maintained by a person in respect of an act purporting to have been done in pursuance of the 2001 Act are those which involve a defendant acting in bad faith or without reasonable care. This follows from the second ground for refusing leave, and is underscored by s. 73(3): 'Where proceedings are, by leave, granted in pursuance of subsection (1) of this section, instituted in respect of an act purporting to have been done in pursuance of this Act, the Court shall not determine the proceedings in favour of the plaintiff unless it is satisfied that the defendant acted in bad faith or without reasonable care'."

  The Court held that the question in hand was not whether the applicant was likely to succeed in his claim but rather whether the respondent had at that point and on the basis of affidavit evidence alone established a basis on which it can be said that there are no reasonable grounds for the appellant to advance the claims that he seeks to make. The Court did not accept that the respondent had and therefore, this was sufficient to allow the applicant to proceed with his claims

Decision of the Court and Form of Order

The Court of Appeal set aside the Order of the High Court Judge (including in respect of costs) and granted leave to the applicant pursuant to s.73 of the 2001 to issue the intended proceedings in the form of the draft Civil Bill submitted to the Court.

Full judgments can be found here: https://www.courts.ie/view/judgments/c658180b-c17f-4e5baaf1-1fbe70207ce1/f4f218c8-0f6d-48a0-96af-98a7d097ec7d/2022_IECA_24_Murray%20J.%20(Unapproved).pdf/pdf#

8. G.B v. Mental Health Tribunal [2022] IECA 71

Judgment of Mr Justice McCarthy delivered on 24 March 2022

The Facts

The focus of the appeal was whether or not the Tribunal acted within jurisdiction in its conclusion that the provisions of section 12 of the 2001 Act had been complied with. A full summary of the facts can be found above in the High Court summary - **B - v - MHT [2021] IEHC 192**

The Findings

On this appeal two propositions were advanced. The first was that there was not any or any sufficient evidence before the Tribunal to allow it to reach the conclusion that it did, namely, that the provisions of section 12 had been complied with and in particular that Garda Markham had "reasonable grounds for believing that [the applicant] is suffering from a mental disorder and that because of the mental disorder there is a serious likelihood of the person causing immediate and serious harm to himself or herself or other persons …". The second was that insufficient reasons had been given by the Tribunal for its decision; no leave was granted on that ground and accordingly the matter was not addressed by the Court.

The Court held that there was indeed no or no sufficient evidence upon which the Tribunal could have reached the conclusion that there had been compliance with the provisions of section 12(1) and in particular on the basis of which it could have properly reached the conclusion that the Garda held the requisite opinion on reasonable grounds. It stated -

"Moreover, there was no evidence as to what, or indeed any, opinion might have been held by Garda Markham. The Tribunal simply inferred, from the contents of the Form 3 completed by her, that Garda Markham must have held the necessary opinion. I do not suggest that in a procedure of this kind it will invariably be the case that, in terms, the opinion be stated (say, by written statement) as it would be in a court. Nor am I suggesting that the opinion which an arresting Garda must hold for the purposes section 12(1) be one which would withstand forensic analysis. Of its very nature, the opinion which the Garda must form is one based on a non-medical behavioural observation of a person, and the threshold for the formation of the reasonable opinion necessary for the purposes of section 12(1) is low. The evidence that that opinion has been formed does not have to be recorded in any particular way and can be established informally by – for example – a signed statement by the Garda in question or a record to that effect on the relevant forms. Nonetheless, compliance with the relevant provision involves a tribunal in addressing whether or not the necessary opinion was actually so held by the officer concerned on objective grounds. It might in theory be possible to draw an inference from facts of which a tribunal was satisfied to the effect that a particular opinion has been formed even though not stated but in my view on any analysis of the material a conclusion that the relevant opinion existed is untenable; as characterised by counsel for the applicant at the hearing it was a "leap too far" (if indeed a "leap" would ever be lawful). As can be seen from Forms 5 and 6 provision is made therein for doctors to state their opinions; there is no reason why such opinion could not be stated similarly in, say, an amended Form 3 or the Garda asked to make a brief statement in a proper case. No criticism can be made of the applicant's solicitor for not seeking an

adjournment or "calling" the Garda (in point of procedure counsel told us this latter course was not possible and he stressed the inquisitorial nature of the procedure)"

A number of ancillary matters were also addressed by the Court –

1. The Tribunal can rely on the contents of the Form 3 to establish the factual circumstances of what occurred when s12 was invoked. The contents should be considered on a case-by-case basis and additional evidence may be required in certain circumstances. The Form 3 may not of itself be considered to be evidence of the Garda having the requisite opinion.

2. The Tribunal can also rely on the medical evidence to establish the factual circumstances at the time that s12 was invoked.

3. In relation to the standard of proof, the ordinary standard of proof in civil matters, namely, proof on the balance of probabilities applies – there is no reason to suppose that because of the importance of the issues a different standard pertains.

Decision of the Court

The Court allowed the appeal

Full judgment can be found here: https://www.courts.ie/acc/alfresco/3528f603-61b1-4f74-bfdf-e927d26e5647/2022_IECA_71_(Unapproved).pdf/pdf#view=fitH

9. B. v. Clinical Director of an Approved Centre [2022] IECA 105

Judgment of Ms Justice Ní Raifeartaigh delivered on 05 May 2022

Facts

A full outline of the facts can be found in the summary of B –v - The Clinical Director of an Approved Centre [2021] IEHC 486.

In brief, on 26 May 2021 the applicant was the subject of an Admission Order. On 11 June 2021 the Mental Health Tribunal (MHT) made an order pursuant to section 18(4) of the 2001 Act extending the period within which they could consider the order by 14 days.

On 23 June 2021, the MHT affirmed the Admission Order and on 28 June 2021 a Renewal Order was made by the RCP.

The applicant applied to the High Court pursuant to Article 40 on the grounds that the renewal order was made by the consultant psychiatrist after the lawful period of detention had expired and it was his argument that his lawful detention expired either (a) 14 days from the date of the MHT's decision to extend (the 25 June), or (b) on the date of the MHT's decision (the 23 June).

The High Court rejected the applicant's argument and held that he was legally detained.

Findings

A preliminary issue raised was that of mootness. The applicant had been discharged in July 2021, between the time the High Court case was heard and the delivery of judgment by the High Court and the respondent argued that the appeal was moot. In dismissing the respondent's argument Ní Raifeartaigh J. placed particular importance on the fact that the respondent had consented to delivery of judgment by High Court even though applicant had been released at this point. The Court also stated that in circumstances where one party has consented to the trial judge delivering judgment notwithstanding that the matter has become moot, since the hearing of the case, the other party should in general be entitled to appeal in the event that the outcome is adverse to him or her.

On the substantive issue of the interpretation of section 18(4) of the 2001 Act, Ní Raifeartaigh J. stated that the plain wording of section 18(4) left no ambiguity, the extension of time was the length of the admission order -21 days plus 14 days - effectively 35 days if there is no revocation of the order in the interim by the consultant. A decision to revoke would lead to the expiration of the lawful period of detention on the date of that decision.

Ní Raifeartaigh J. noted that an extension pursuant to section 18(4) does not replace an admission or renewal order but merely prolongs its lifespan. The Court also stated that the obligation of a consultant psychiatrist to discharge a person as per section 28 continues to apply, thus providing an important safeguard that detention will not continue where it is not clinically required.

Decision of the Court

The Court held that the applicant was lawfully detained at the relevant time and the appeal was dismissed. A summary of the judgment can be found here: https://www.courts.ie/view/judgments/7842b9e1-1a14-48d6-add0-5a46a6cc79ec/e5035b9f-a190-4d40-a238-32b3c816085f/2022_IECA_105%20(Unapproved).pdf/pdf

1. MD v St Brendan's Hospital, MHC, MHT (Respondents)

Judgement of Mr Justice Hardiman delivered 27 July 2007. (Fennelly, J., & Macken J.)

The Facts

As set out in the judgment of Mr Justice Peart delivered 24 May 2007.

The Findings

The appeal was dismissed.

The Court held that the admission order was not spent at the time the MHT sat and that the making of the renewal order prior to the sitting of the MHT did not bring to an end the detention under the admission order, or deprive the MHT of jurisdiction. The Court upheld the decision of Mr. Justice Peart in the High Court dated 24 May 2007 which found as follows

"It seems to me that there is a clear sequencing of events contemplated by the terms of

Sections 14, 15, 17 and 18 of the Act. Various periods of detention and extensions of detention are provided for, and none of these periods can be seen as overlapping. Each new period of detention commences upon the expiry of the previous period ***[Emphasis added].*** *Each period of detention is required to receive a review also, and it does not seem to me to be contrary to any stated in the sections under scrutiny, or the plain meaning intended by the Oireachtas, to conclude that an order renewing an admission order may for any reason be made a day or some days or at anytime in fact before the review of that admission order has been completed, since the renewal order would take effect only at the conclusion of the specified twenty one day period following the making of the admission order"*

Other Issues Addressed

The Court stressed the importance of the notification to patients pursuant to Section 16 of the 2001 Act noting that it is a mandatory statutory provision. The patient has an absolute right to be informed of the period of his detention. The information given to the patient must relate to their detention at the time he/she is served with the notification. The Court questioned whether the patient notification form was the best that could be devised. **Note - the patient notification form was subsequently amended.**

2. RL v St Brendan's Hospital, & MHC(Respondents)

Judgement (ex tempore) of Mr Justice Hardiman delivered 15 February 2008.
(Geoghegan, J., & Kearns J.)

The Facts

As set out in the judgment of Mr Justice Feeney delivered 17 January 2008.

The Findings

The appeal was dismissed. The Supreme Court held that there was, on the face of it, a breach of s13(2). The judgment stated that the *"requirement that the removal be by members of the staff at the Centre seems an extraordinary one given that the need for a removal under the section may arise suddenly and may arise in circumstances much more acute than those exhibited in this case. "*

The Supreme Court saw no reason whatever to believe that an irregularity or a direct breach of sl3 would render what is on the face of it a lawful detention on foot of an admission order invalid.

On the issue of no interpreter the Supreme Court found that it was perfectly clear both from the affidavits and from the medical notes that although interaction with the patient was not as fluent and natural as it would have been had she been a native English speaker that the doctor felt able to make the certification in question and to take the history.

The Supreme Court upheld the decision of Mr. Justice Feeney delivered 17 January 2008

Other Issues Addressed

The judgment stated, *"It would appear desirable for those responsible for the legislation in this area to consult with the hospital staff who after all have to implement the Act and achieve a situation in which the statutory requirements are in some way realistic. "*
Note - Section 13 was amended by Section 62 of the Health (Miscellaneous Provisions) Act, 2009.

3. MM v CENTRAL MENTAL HOSPITAL (CMH) (Respondents)

Judgement of Mr Justice Geoghegan delivered 7 May 2008. (Denham, J., & Macken, J.)

The Facts

As set out in the High Court judgement of Mr Justice Peart delivered 1 February 2008.

The Findings

The appeal was dismissed. The Supreme Court held that the allegation of invalidity in respect of the renewal order was based on one point only; who was the consultant psychiatrist responsible for the patient's care and treatment and should it be regarded the consultant psychiatrist at the North Lee MH Services, the consultant psychiatrist at the CMH or both. The Supreme Court arrived at the same view as Mr Justice Peart on this matter, which was that, both consultant psychiatrists could properly fall within the description of consultant psychiatrist responsible for the patient's care and treatment.

The Supreme Court stated that the absence of a statutory definition of the expression *"the consultant psychiatrist responsible for the care and treatment of the patient"* was deliberate and given the lack of statutory definition it is clearly a question of fact.

The Supreme Court upheld the decision of Mr. Justice Peart delivered 1 February 2008

4. B(L) v. The Minister for Health & Children, Ireland, and the Attorney General

Written Judgment Ms. Justice Denham, delivered 10 July 2008

Appeal from order of the High Court - the constitutionality of s.260 of the Mental Treatment Act 1945 (as amended) - Articles 6 and 34 of Bunreacht na hEireann - the standard of proof to obtain leave under s.260

The Facts

This is an appeal to the Supreme Court against a finding by the High Court that s.260 of the Mental Treatment Act 1945 is unconstitutional.

The Findings

Section 260 of the Mental Treatment Act 1945, as amended by s.2(3) of the Public Authorities Judicial Proceedings Act, 1954 provides that no civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of the 1945 Act without the leave of the High Court and that such leave shall not be granted unless "the High Court is satisfied that there are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care".

As such, the High Court was confined to considering two grounds, namely acting in bad faith or without reasonable care, and its only discretion is in determining whether either of those grounds is substantial.

The Court considered this limitation an impermissible interference by the legislature in the judicial domain contrary to Article 6 of the Constitution providing for the separation of powers and Article 34 providing for the administration of justice in the courts. Furthermore, the interference caused by s.260 is disproportionate to the intended objectives of the 1945 Act.

Form of Order
The High Court order was approved.

Other issues of note
At the date of hearing, the 1945 Act had been repealed by the Mental Health Act, 2001. The relevant provision in the 2001 Act is Section 73 but this section was not at issue in this appeal. The above decision is relevant in terms of the wording of Section 73.

5. SC v. The Clinical Director Jonathan Swift Clinic James Hospital

Ex tempore Judgment of Mr. Justice Hardiman, delivered 5 December 2008

Applicant found to be in unlawful detention before the High Court - stay placed on order for release - Trimbole v. The Governor of Mountjoy Prison - whether or not a stay could be placed on such an order

The Facts

By order of Mr. Justice Birmingham on the 4 December 2008 the Applicant was found to be in unlawful detention at the Respondent institution. Consequent to making his order, Mr. Justice Birmingham placed a stay of twenty-four hours on the order for the Applicants release. It was the order of a stay that was the subject of the proceedings before the Supreme Court.

The Findings

The Court ordered the release of the Applicant.

It was conceded by the Respondent, during legal argument, that the reason for which the stay was sought was to afford the Respondent institution some time during which they might arrange for the applicant to be lawfully detained.

The Court declined to pronounce on whether or not there may ever be a stay on an order for release from psychiatric detention. Nevertheless, the Court did hold that the decision in *Trimbole v. The Governor of Mountjoy Prison [1985] IR 550* "suggests strongly that such a release must be immediate".

Form of Order

The Court ordered the release of the Applicant.

6. CC (No.2) v. Clinical Director of St. Patrick's Hospital (Respondent) and The Mental Health Commission (Notice Party)

Mr. Justice Kearns, Ms. Justice Fidelma Macken and Mr. Justice Finnegan presiding on 23 January 2009 [Solicitor's note of attendance]

The Facts

These are set out in the written judgment of Mr. Justice Hedigan, delivered 6 February 2009.

The Finding

-Appeal refused.

The Applicant submitted two arguments:

- □ That the Superior Courts had a power to inquire into the validity of the detention order, pursuant to Article 40, notwithstanding that there was no error on the face of the Order.

- □ That the statutory scheme provided the last word in relation to a patient to be provided to a Tribunal and that the manner in which it was currently operating would negate that power if consultant psychiatrists were able to re-detain a patient in the immediate aftermath of a Tribunal decision.

The Supreme Court held that it should not embark on an Article 40 inquiry into the validity of the detention order when it was conceded on behalf of the Applicant that the detention order was valid on its face.

Further, the Court indicated that interpretative arguments on the Act were a matter for judicial review and that it was by means of judicial review that the case should proceed.

Form of Order

Appeal refused. The proceedings were to be reconstituted as a judicial review before the President of the High Court.

7. EH-v- the Clinical Director of St Vincent's Hospital, Aideen Frehne and the Mental Health Tribunal

Judgement of Mr Justice Kearns on 28 May 2009 (Murray CJ, Finnegan J, Macken J, Fennelly J.)

The Facts

These are as set out in the High Court Judgement of Mr Justice O'Neill and again in this judgement.

Findings

The Court was principally concerned with whether the patient was deemed to be "voluntary" patient for the purposes of the Mental Health Act 2001. The Supreme Court referred to the decision of Mr Justice O'Neill in the High Court and in particular, the following - "It would seem to me that the definition was cast in the wide terms used in order to provide for the variety of circumstances wherein a person is in an approved centre receiving care and treatment, but not subject to an admission order or a renewal order, including, in my view, the type of situation which has indeed arisen in this case, namely, where a detention pursuant to an admission order or a renewal order breaks down, but where the patient is suffering from a mental disorder and receiving care and treatment. I say this, bearing in mind the clear linkage between the definition and sections 23 and 24, which are designed to cater inter alia, for mishaps or unexpected developments which result in their being no admission order or renewal order in respect of a patient who is suffering from a mental disorder which requires treatment as an involuntary patient who attempted to leave the approved centre".

The Court held that the terminology adopted in Section 2 of the 2001 Act ascribes a very particular meaning to the term "voluntary patient" it does not describe such a person as one who freely and voluntarily gives consent to an admission order. Instead, the express statutory language defines a "voluntary patient" as the person receiving care and treatment in an approved centre who is not the subject of an admission or renewal order. The Court Order states that the definition could not be given in an interpretation which is *contra legem.*

The Court also stated that any interpretation of a term in the Act must be informed by the overall scheme and paternalistic intent of the legislation as set out in the provisions of Section 4 and 29 of the Act.

The Court also held that the trial Judge had ample evidence upon which to find that the patient was a voluntary patient within the meaning of the Act.

The Court also noted that the grounds upon which the patient's detention was certified, which was not challenged, was a valid Order in all respects.

Form of Order

The Appeal was dismissed and the Order affirmed.

Other Issues

The Court in its conclusion states that the proceedings were initiated and maintained on unmeritorious grounds. It goes on to say that it was difficult to see in what way the

proceedings advanced the interests of the patient who patently was in need of psychiatric care. It was also said that the mere fact that the Commission assigned a legal representative to a patient following the making of an admission or renewal order should not give rise to assumption that a legal challenge to a patient's detention is warranted unless the best interest of the patient so demand. It is stated that mere technical defects, without more, in a patient's detention should not give rise to a rush to Court, notably where such defect can or has been cured, as was the situation in this case. The Court emphasised that only in cases where there has been a gross abuse of power or default of fundamental requirements would a defect in an early period of detention justify release.

8. FX v. Clinical Director of the Central Mental Hospital

Written Judgment of Chief Justice Denham dated 23 January 2014

The Facts

This was an appeal to the Supreme Court from a decision of the High Court in July 2012 that found FX's detention to be unlawful.

The Central Mental Hospital, the appellant, submitted that the High Court should have refused the Article 40 application, as the Constitution does not extend to orders for detention made by the Central Criminal Court.

The Findings

The Supreme Court found that the High Court had jurisdiction under Article 40.4.2 to inquire into the lawfulness of a detention ordered by the Central Criminal Court, subject to certain limitations.

FX issued a cross appeal relating to the stay that the High Court ordered in relation to his release under Article 40. The Supreme Court found that there is no provision in the Constitution for a stay. Therefore, any such order *"is made in the process of controlling a release, for the purpose of protecting a person who is incapable of protecting themselves."* The Supreme Court also stated that no issue of *habeus corpus* arose; "*therefore, no issue of a stay arose*".

Form of Order

The Supreme Court dismissed the appeal and the cross appeal.

Other issues of note

It is worth noting that by the time the Supreme Court heard the matter, the decision of the High Court in July 2012 was superseded by subsequent decisions of the Central Criminal Court.

The decision also considers elements of the Criminal Law (Insanity) Act 2006.

9. HSE –v- AM

Written Judgment of Mr. Justice MacMenamin dated 29 January 2019

The Facts

This was an appeal to the Supreme Court from a decision of the High Court in In the Matter of AM, A Proposed Ward of Court: Health Service Executive –v- AM, Judgment of Mr. Justice Kelly, President of the High Court delivered on 27 March 2017.

The issue for determination was whether the HSE or any other person who seeks to have a person involuntarily detained on mental health grounds, can do so by way of wardship procedure and by the invocation of the inherent jurisdiction of the High Court, notwithstanding the fact that the appellant satisfies the criteria for a detention order under the Mental Health Act 2001.

The Findings

The Supreme Court found that the High Courts wardship jurisdiction is sufficiently broad to allow it to have been invoked in this case. AM was of 'unsound mind'. He was required to be in the Central Mental Health Hospital. In this case it was "necessary" and "appropriate" to make the order. The President of the High Court engaged in a lawful exercise of wardship jurisdiction. In the circumstances of this case, the orders made were necessary and appropriate to vindicate the rights of AM and also to protect the rights of the public. The Supreme Court found no error in the High Court Judgment and dismissed the appeal.

Other issues of note

The Court outlines the purposes of, and relationship between orders in wardship and those under the Mental Health Act 2001. Orders in wardship and those made under the Mental Health Act 2001, generally, have different purposes. Ward of court applications are broadly intended to protect *persons who lack capacity* to make decisions regarding their own welfare. By contrast, the provisions of the Mental Health Act 2001 outline the circumstances in which a person suffering from a mental disorder may be the subject of an involuntary detention order.

10. IF v MHT

Written Judgment of Ms. Justice Dunne dated 29 May 2019

The Facts

The applicant appealed to the Circuit Court against the decision of a mental health tribunal pursuant to Section 19 of the 2001 Act. When the matter came before the President of the Circuit Court on 10 November 2015 the issue arose as to whether the Section 19 appeal was spent on the basis that the initial admission order had been overtaken by a subsequent renewal order. Judge Groarke ruled that the appeal was moot. The applicant then commenced judicial review proceedings in which she sought, inter alia, a declaration that the Circuit Court had erred in failing to make an adjudication on the merits of the appeal. That application was dismissed by the High Court on 8 November 2016. The applicant appealed that decision to the Court of Appeal which allowed the appeal in a judgment on 18 April 2018. The Mental Health Commission then appealed the Court of Appeal decision.

The Findings

Ms Justice Dunne states that at all stages (with the exception of Section 28(5)) the focus of any hearing before a Tribunal or the Circuit Court is the current state of the patient concerned and whether the patient is or is not suffering from a mental disorder. The judgment states that to interpret a Renewal Order as being a separate and distinct Order, such that a Renewal Order made immediately after the expiry of an Admission Order in practical terms renders moot any appeal of an Admission Order affirmed by a Mental Health Tribunal, would be at variance with the underlying policy of the 2001 Act. In so finding, she found that the approach of Mr Justice Charleton in the Han-v-President of the Circuit Court [2011 1 I.R. 504] was correct and did not agree with Mr Justice Hogan's decision on this point in the Court of Appeal.

Ms Justice Dunne further states that the approach of Mr Justice Peart in the Court of Appeal is correct in concluding that the Renewal Order extends the life of the Admission Order made under Section 15 (1) of the 2001 Act. Ms Justice Dunne did not accept the reasoning of Mr Justice Hogan in the Court of Appeal in relation to Section 19 or Section 28.

The judgement states that "It would appear that the provision of Section 28(5) which provides for a review in circumstances where the patient has been discharged can only apply historically." and "… where the patient has already been discharged there can be no question of either affirming or revoking the order concerned" the section contemplates an historical review". Mr Justice Dunne goes on to state that "the case does not concern the application of section 28" and a full consideration of the section can be left over to another case.

Order

Appeal dismissed.

11. M. C. v. The Clinical Director of The Central Mental Hospital (The Mental Health(Criminal Law) Review Board is a notice party)

Written Judgment of Mr Justice Baker delivered 4 June 2020

The Facts

Ms C was committed to the Central Mental Hospital (CMH) with a diagnosis of schizoaffective disorder. In June 2006, following the enactment of the Criminal Law (Insanity) Act 2006 (the 2006 Act) she was reclassified as a person found not guilty by reason of insanity. Ms C's detention was kept under review by the Mental Health Review Board (the Review Board) under s.13 of the 2006 Act, which was amended by Section 13A. Section 13A states as follows "The Review Board shall not make a conditional discharge order in respect of a patient until it is satisfied that such arrangements as appear necessary to the clinical director of the designated centre concerned have been made in respect of the patient, and for that purpose, the clinical director concerned shall make such arrangements as may be necessary for — (a) facilitating compliance by the patient who is the subject of the proposed order with the conditions of the order, (b) the supervision of the patient, and (c) providing for the return of the patient to the designated centre under section 13B in the event that he or she is in material breach of his or her conditional discharge order."

On 9 August 2012, the Review Board permitted her release subject to conditions. The conditions imposed were sought to be varied by Ms C and on 12 December 2013, the Review Board acceded to her application for a variation of the conditions concerning her choice of residence. It is the events following the decision by the Review Board in December 2013 that gave rise to an application for judicial review, an appeal from the decision of the High Court refusing judicial review to the Court of Appeal and subsequently, the granting of leave to appeal to the Supreme Court.

The issue in dispute concerns the place of residence of Ms C. Until the Review Board made its determination in December 2013, the decision as to where Ms C would reside remained vested in her treating psychiatrist in the CMH. The variation decided by the Review Board in December 2013 was that Ms C herself could decide her place of residence. As part of that process, by letter of 13 December 2013, the Review Board directed the Clinical Director of the CMH ("the Clinical Director"), to assess and then confirm the making of certain arrangements to facilitate the proposed variation, and for the ongoing supervision and enforcement of the revised conditions. By his letter of 19 December 2013, the Clinical Director declined to assess or put in place the arrangements necessary to facilitate the variation in the conditions of release.

The Clinical Director in his letter of 19 December 2013 noted that the proposed variation of the material conditions was contrary to the advice of Dr O'Neill, treating consultant forensic psychiatrist and that he himself agreed with her advice. He pointed out that "all risk assessments" indicated that Ms C "would be vulnerable if living under the same roof as her husband", that those living arrangements had been the "source of high expressed emotion leading to relapses of her illness" which in the past had been "directly relevant to risk" of harm to herself or to her husband. He noted also certain factual matters that led him to believe that those risks were still operative. He dealt specifically with the proposed variations of the conditions, and in regard to condition 1.1., said that he did not consider it to be "useful", as if Ms C did inform the health service treating team of her condition from time to time she would be in compliance, but that the risk would remain. In regard to condition 1.2, the Clinical Directors view was that, in essence, the practical consequence of that condition was akin to an absolute discharge, and that the condition did not "represent a condition that would either ameliorate risk or allow an intervention."

In his replying affidavit, the Clinical Director suggests that the variation of conditions (and ipso facto the making of a conditional order) must be "by arrangement with the clinical director", and "should be with the consent of the treating consultant who will carry out 'the supervision of the patient'."

The Findings

The Court considered the following:

1. Whether the claim for declaratory relief and for damages was moot, either because there was no live controversy between the parties, or because the claim was "insubstantial", the test applied by the Court of Appeal;
2. Whether the refusal by the Clinical Director to make the necessary arrangements to facilitate the operation of the decision of the Review Board was lawful and how the provisions of s13A of the 2006 Act are to be interpreted;
3. Whether Ms C was entitled to damages and on what basis.

The Court found:

1. The Court held that the claim was not moot. The Court relied on the decision of the Supreme Court in Lofinmakin v Minister for Justice [2013 IESC 49] which reviews and summaries the legal principles relating to mootness. The Court sought to look at mootness on the facts given that other elements of the legal principles had not been met. The Court found that the case raised "*an important question to be determined, subjectively important from the point of view of Ms C because of the embarrassment and humiliation she says she suffered and she makes a complaint of violation of those rights supported by credible evidence, and, so long as it remains in dispute and is reflected in a concrete and unanswered claim for redress, is not in my view, moot because of the nature of the claims asserted and the central importance of the rights in the constitutional and Convention legal order*." In addition, the Court stated that the Court of Appeal did not adopt the correct approach with *de minimis* principle (the law will not concern itself with matters of minimal significance or trifles) and stated the Court of Appeal omitted to have regard to the subjective importance of the declaratory relief, the breach was not insubstantial, tenuous or minimal and was that this in any event is not the correct basis to asses a claim for mootness.
2. The Court held that the language of section 13 A is mandatory and the use of the word "shall" required the Clinical Director to make the arrangement directed by the Review Board. The legislation did not permit the Clinical Director to refuse to assess what conditions were necessary or to refuse to take steps to support the compliance with, supervision of and enforcement of the conditions. It was found that the Review Board has an independent adjudicative function which balances clinical considerations, the personal rights of the patient, and the public interest generally. The decision of the Review Board as a matter of statute, has legal effect and its directions to the Clinical Director must equally be seen as having legal effect and compelling him to take the steps mandated. It was found that the Clinical Director wrongly refused to comply with the proposed conditional order of the Review Board and put in place the arrangements necessary to give practical effect to the proposed conditional order that the Review Board intended to make.
3. The Court also found that there was no basis for a constitutional remedy and that Ms C was not entitled to frame her action as one for breach of constitutional rights as she had available to her an effective remedy at common law, albeit she was unable on the facts to establish *mala fides* or knowledge by the Clinical Director that his actions were in breach of statutory powers and obligations.
4. The Court took the view that it should consider the final element of the claim – that Ms C rights under the Convention were breached, that Irish law did not provide an effective remedy for that claimed breach and that damages be awarded under section 3 of the 2003 Act. Rather than remit the matter to the High Court, the Court agreed to consider the issue themselves further to receiving further submissions from the parties. That aspect of the case is ongoing.

Form of Order
Parties to make further submissions.