THE HIGH COURT

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

[2012 No. 637SS]

BETWEEN/

E.C.

APPLICANT

AND

CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 5th day of April, 2012

1. An apparent altercation between the applicant, Mr. C., and a member of An Garda Siochana, on Merrion Square in Dublin in early February, 2009 led to the applicant being charged with an offence under s. 11 of the Firearms and Offensive Weapons Act 1990. Specifically, Mr. C. was charged with producing a flask of petrol and a cigarette lighter with a view to intimidating the Garda in question. The applicant was subsequently remanded by the District Court in circumstances I will presently describe. The charging and subsequent detention of the applicant set in train the events which have given rise to this present application pursuant to Article 40.4.2 of the Constitution. This application in large part turns on the resolution of rather difficult questions of interpretation concerning the operation of the Criminal Law (Insanity) Act 2006 ("the Act of 2006").

2. Mr. C. first came before the District Court on 13th February, 2009. The attendance note prepared by the Chief Prosecution Solicitor indicated that the applicant was found to be very distressed on that date. While he was assigned legal aid, the presiding judge (Her Honour Judge Malone) evidently considered that a medical examination was warranted and that a hearing as to his fitness to plead would also be necessary. The applicant was remanded in custody to Cloverhill Prison. Following an adjournment, a report appears to have been prepared for the benefit of the District Court to the effect that the applicant was not fit to be tried. The prosecution sought time for directions and the case was adjourned on two occasions. It appears that on 8th April, 2009 the case was adjourned for a psychiatric report.

3. In the interval, two medical orderlies at Cloverhill Prison certified on 5th March, 2009 that Mr. C. was suffering from a mental disorder in respect of which he could not be afforded appropriate care and treatment within Cloverhill Prison. The Prison Governor accordingly exercised the powers vested in him by s.15(2) of the Act of 2006 and directed Mr. C.'s transfer to the Central Mental Hospital. (The Governor's certificate is actually dated the 5th February, 2009, but this is an obvious slip and the reference should be to 5th March, 2009). The transfer took place on the following day, 6th March, 2009.

4. It would seem that on 8th April, 2009, Judge Brady had requested that a psychiatric report be prepared in respect of Mr. C. by the Central Mental Hospital. A report had previously been prepared by Dr. Conor O'Neill, a consultant forensic psychiatrist attached to the Central Mental Hospital on 5th February, 2009. This report was available to Dr. Olivia Gibbons, a Registrar in Psychiatry, who prepared a fresh report on 20th April, 2009, under the supervision of Professor Harry Kennedy, the well-known consultant psychiatrist, who is the Director of the Central Mental Hospital and, indeed, the respondent to this application. This report, which was admirably comprehensive, sought to advise on matters of "psychiatric diagnosis, treatment and fitness to plead".

5. The matter next carne before the District Court on the 23rd April, 2009, and 21st May, 2009. The precise sequence of events at those hearings and the order made by the Court on those occasions are central to the issues which arise on this application. It has proved somewhat difficult at this remove to determine precisely what did happen at these sittings and the actual order which has been produced is lamentably unclear. Before endeavouring to reconstruct these events, it is necessary first to examine the inter-action of two key statutory provisions, namely, s. 4(3) and s. 4(6) of the Act of 2006.

Key provisions of the 2006 Act: s. 4(3) and s. 4(6)

6. An analysis of the s. 4(3) and s. 4(6) of the Act of 2006 is central to a resolution of the legal issues which are presented by this application. Section 4(3)(a) declares that where a person is charged with an offence before the District Court, any question "as to whether or not the accused is fit to be tried shall be determined by the Court." Section 4(3)(b) next provides that in a case:-

> "...to which paragraph (a) relates, the Court determines that an accused person is unfit to be tried, that Court shall adjourn the proceedings until further order ...

7. Pausing here, it will be seen that where the District Court has determined that the accused is unfit, it is obliged to adjourn the proceedings. Section 4(3)(b) then continues by providing that the Court may:-

> "(i) if it is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6) and any other evidence that may be adduced before it that the accused person is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, commit him or her to a specified designated centre until an order is made under section 13, or
>
> (ii) if it is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6) and any other evidence that may be adduced before it that the accused person is suffering from a mental disorder or from a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre, make such order as it thinks proper in relation to the accused person for out-patient treatment in a designated centre."

8. It is will be seen that in addition to its obligation to adjourn the proceedings, the Court may also order - and it is a permissive power- that the accused person receive either in-patient (s. 4(3)(b)(i)) or out-patient care (s. 4(3)(b)(ii)) at a specified designated centre. The Central Mental Hospital is the designated centre for this purpose: see s. 3(1) of the Act of 2006. So far as the present case is concerned, it is only necessary to examine the in-patient care option.

9. Before the District Court can commit the accused to in-patient care at the Central Mental Hospital, the Court must be satisfied of certain matters which are a pre-condition to the valid exercise of this jurisdiction. First, it must be satisfied that the accused is suffering from a mental disorder within the meaning of the Mental Health Act 2001. Second, the Court must consider that the accused is in need of in patient care and treatment at the Central Mental Hospital. Finally, for completeness, it should be noted that the accused may only be so detained "until an order is made under s. 13". Critically, however, the Court can only arrive at these findings as to the necessity for in-patient treatment at the Central Mental Hospital "having considered the evidence" of an approved medical officer "adduced pursuant to sub-section 6" and any other evidence that may be adduced on this question.

10. The term "approved medical officer" is defined by s. 1 as meaning a "consultant psychiatrist (within the meaning of the Mental Health Act 2001)". The term is then defined in turn by s. 2(1) of the Act of 2001 as meaning a consultant psychiatrist employed by a health board or who is employed by an approved centre or whose name is entered on a specialist register of psychiatry maintained by the Medical Council of Ireland.

11. It follows, therefore, that the District Court cannot make an order committing the accused for in-patient care at the Central Mental Hospital following a finding of unfitness unless it has received evidence from a consultant psychiatrist pursuant to s. 4(6). Furthermore, this will *first* necessitate a committal of the accused to the Central Mental Hospital for a period of not more than 14 days (s.4(3)(a)(i)) at which centre the accused person must be examined by a consultant psychiatrist (s. 4(3)(a)(ii)). Compliance with these statutory requirements is integral to the making of a valid order under s. 4(3)(b)(i).

12. For completeness, I should record here that s. 4(6) was amended by the terms of the Criminal Law (Insanity) Act 2010 by the insertion of a new s. 4(6) by s. 4(g) of the latter Act. But since these changes - which are probably not in themselves hugely different from the pre-existing s. 4(6) - post-date the events which are material to the present case, it is unnecessary to consider them.

The sequence of events before the District Court

13. It is against this background that we can assess the precise sequence of events before the District Court. According to the attendance note prepared for the Chief Prosecution Solicitor, the matter was listed before District Judge Brady on 23rd April, 2008, for the purpose of determining the issue of fitness to be tried. For this purpose District Judge Brady had three medical reports which, apparently, had been directed by the court order. These reports had been prepared by Dr. Olivia Gibbons, Dr. Stephen Monks and Dr. Conor O'Neill. Having considered the matter over lunch, on the resumption of the Court sitting, Judge Brady held that the accused was "presently" unfit to be tried and specifically relied on Dr. Gibbons' report in arriving at this conclusion. The judge then made an order pursuant to s. 4(3)(b)(i) committing the accused for in-patient care.

14. Pausing once more at this juncture, it is clear that the District Court was then bound to adjourn the proceedings once a finding of unfitness had been made. The District Judge was further empowered to direct that the applicant receive in-patient care, but *only* in circumstances where the Judge had first received a report from a consultant psychiatrist pursuant to s. 4(6). As we have already noted, this would necessarily involve committing the accused to the Central Mental Hospital for treatment for a maximum of fourteen days for the purpose of receiving a report of a consultant psychiatrist for this purpose.

15. The attendance note for that day concludes thus:-

> "The accused was remanded to Cloverhill District Court on 21 May 2009. He [*i.e.*, Judge Brady] pointed out that, if the accused is still unfit to be tried on that date, the Central Mental Hospital can simply write to the District Court office before then."

16. The attendance note for 21st May, 2009, recites that:-

> "The prison service were informed by the Central Mental Hospital that they did not intend producing the accused on the 21/5/09 as no change in the condition of the accused.
>
> The Court noted that there would be no order on the sheets. These sheets will become reactivated in the future if the CMH seek an order under s. 13 of the Criminal Law (Insanity) Act 2006."

17. The attendance note for that day concludes thus:-

> "The accused was remanded to Cloverhill District Court on 21 May 2009. He [i.e., Judge Brady] pointed out that, if the accused is still unfit to be tried on that date, the Central Mental Hospital can simply write to the District Court office before then."

18. Piecing together the sequence of events from the series of affidavits, what appears to have happened is that as the accused was already detained in the Central Mental Hospital following the s. 15(2) transfer from Cloverhill Prison on 6th March 2009 and, as, moreover, Judge Brady stood possessed of a comprehensive and recent report from Dr. Gibbons which clearly established his unfitness to plead, it appears to have been considered that Mr. C. could be transferred to the Central Mental Hospital without further ado.

19. Inasmuch as Judge Brady took this view- and, in truth, there seems to be little dispute but that he did -he clearly fell into error and acted *ultra vires*. The psychiatric reports enabled him to reach the conclusion that the accused was unfit to plead. At that point, he was obliged by s. 4(3)(b) to adjourn the proceedings pending the (possible) recovery of the accused from his mental illness. If, as one would hope, Mr. C. recovers so that he is fit to stand trial at the some point in the future, then in principle he may stand trial at that point: *cf* here the comments of Hardiman J. in *O'Callaghan v. Director of Public Prosecutions* [2011] IESC 30.

20. This, however, is a somewhat different matter from determining whether the accused person *now* needs to be committed for in-patient care at the Central Mental Hospital. Before that step is taken, the court must remand the accused for that purpose to the Central Mental Hospital for a maximum of 14 days and receive a fresh report from a consultant psychiatrist directed not simply to the question of unfitness, but to the slightly separate question of whether a person found to be unfit to plead now needed in-patient care. It is perhaps easy to overlook these requirements in circumstances where (as here) the accused was already detained in the Central Mental Hospital and where a comprehensive report concerning his mental health and general capacity had already been

prepared. But this is a separate statutory requirement which cannot be dismissed as mere surplusage.

The District Court order
21. The order made by the District Court is, regrettably, replete with drafting errors and it is, in fact, internally contradictory. The critical part of the order is in the following terms:-

> "THIS IS TO COMMAND YOU to whom this warrant is addressed to lodge the accused in [a] designated Centre ...at [the] CENTRAL MENTAL HOSPITAL, DUNDRUM, DUBLIN 14 there to be detained by the clinic[al] director pursuant to section 4(6)(a)(i) and (ii) of the Criminal Law Insanity Act 2006 to appear on the 21st May 2009 at Cloverhill District Court at 10.30..... .
>
> It was adjudged that the accused is unfit to plead [and that the] accused is suffering from a mental disorder within the meaning of the 2001 Act pursuant to section 4(3)(b)(i) commit him to [the] Central Mental Hospital until further order
>
> ADJOURN GENERALLY WITH LIBERTY TO RE-ENTRY."

22. The first part of the order directed that the accused be detained at the Central Mental Hospital pursuant to s. 4(6)(a)(i) and (ii). This would convey the understanding to anyone familiar with the legislation that the applicant was being committed to the Central Mental Hospital for the purposes of assessing whether he needed in-patient care, albeit that the detention period prescribed was longer than the statutory maximum of 14 days. The second part of the order suggested that the accused, having been found unfit to plead, was now being committed to the Central Mental Hospital for an indefinite period pending further order, pursuant to an order made under s. 4(3)(b)(i).

23. In these circumstances the unsatisfactory nature of the order renders it manifestly bad on its face. Adopting the felicitous words of Peart .J. in a not dissimilar situation in *J.OG. v. Governor of Cork Prison* [2007] 2 I.R. 203, 213, the order "lacks the integrity worthy of a document whose effect is to authorise the deprivation of a person's liberty." The present case is accordingly a far cry from a case such as *G v. Judge Murphy (No. 1)* [2011] IEHC 359 where I refused to quash a return for trial simply because the District Court Judge was described as a judge of the "District Court Service". Quite apart from the fact that this was purely a slip which caused no prejudice, the order in that case was simply a procedural one dealing with a return for trial. It was not, as here, the basis for the involuntary detention of the applicant. Moreover, while it is true that, as I noted in *G.*, the District Court enjoys a jurisdiction under the slip rule contained in O. 12, r. 17 of the District Court Rules 1997 to correct errors of this nature, the fact that the District Court might *later* exercise that corrective jurisdiction does not prevent that order from being found to be bad order on the return to the Article 40 inquiry.

24. In other words, if the current order offered as the legal basis for the detention is actually bad on its face (as distinct from suffering from some purely harmless error or slip), the fact that the order might be (or even probably would be) rectified at some stage *in the future* by the District Court, whether under the slip rule or pursuant to that Court's inherent jurisdiction, cannot in itself convert that order into a valid order for the purposes of the *present* Article 40 inquiry: *cf* by analogy my own judgment in *Liu v. Governor of the Dochas Centre* [2011] IEHC 359.

25. Quite independently of these considerations, the law in this area has, in any event, been decisively settled by the Supreme Court's judgment in *G.E. v. Governor of Cloverhill Prison* [2011] IESC 41. Here Denham C.J. held that an order of this kind forming the basis of the detention of any person "should contain clear information on its face as to the basis of its jurisdiction". For all the reasons mentioned above, the order of the 23rd April, 2009, does not come even remotely close to fulfilling this standard.

26. Summing up at this point, it is manifest that the District Court order was *ultra vires* s. 4(3)(b)(i). The actual order adduced on the return to the Article 40 application is furthermore inherently contradictory and unsatisfactory. As it is bad on its face, it is not - subject to arguments advanced by the respondent which I will next examine - a valid return to the Article 40 inquiry, *even* if the order might be amended by the District Court at some stage in the future.

Whether the events of April/May 2009 have been superseded by the decisions of the Mental Health (Criminal Law) Review Board?
27. Counsel for the respondent, Mr. McGuinness, has argued strongly that, irrespective of any conclusions which I might reach concerning the events of April/May 2009, the order of the District Court has in fact been superseded by a series of reviews made by the Mental Health (Criminal Law) Review Board. The Review Board has conducted nine separate reviews of the applicant's case, the latest being on 2nd March, 2012. Here the Review Board observed:-

> "... his consultant still considers him unfit to stand trial, but the Board is glad to hear that his solicitor intends to return him to Court for consideration as to his fitness in a few weeks.
>
> The Board is satisfied that he suffers from a serious mental disorder which requires in-patient treatment at the Central Mental Hospital and that he is properly detained there and should remain so detained pending further review."

28. In this context it will be recalled that an accused who is detained at the Central Mental Hospital pursuant to s. 4(3)(b)(i) remains detained there "until an order is made under s. 13". Accordingly, therefore, the District Court order remains the basis for the detention of the applicant, *unless* an order has been made under s. 13. The net question, accordingly, is whether an order has, in fact, been made pursuant to s. 13.

29. As originally enacted, s. 13 contained ten discrete sub-sections. As if the Act of 2006 was not already sufficiently difficult to follow, the Oireachtas elected to delete the original s. 13(1) and then to re-number the remaining nine sub-sections, so that the originals. 13(2) now becomes the new s. 13(1) and so forth: see s. 197 of the Criminal Justice Act 2006. For present purposes, I propose to utilise the new numbering of s. 13 as thus amended and to summarise the provisions of the relevant sub-sections.

30. Section 13(1) imposes a duty on the Review Board to review the detention of patients so detained at intervals of not greater than six months. Section 13(2)(a) provides that in the event that the clinical director of a designated centre forms the view that a patient currently detained under s. 4 is not longer unfit to stand trial, then he or she shall forthwith notify the court in the event that he forms that view and the court shall then "order the patient to be brought before it, as soon as may be, to be dealt with it as the court thinks proper."

31. Section 13(4) obliges the clinical director to notify Review Board of his opinion that the patient, although still unfit to be tried, no longer requires in-patient care or treatment at the Central Mental Hospital. Section 13(5) then empowers the Review Board in that

eventuality to hear and determine the question of whether the pre-existing in-patient treatment is still required. The Board is then empowered to make:-

> "such order as it thinks proper in relation to the patient, whether for further detention, care or treatment in a designated centre or for his or her discharge, whether unconditionally or subject to conditions for out-patient treatment or supervision or both."

32. Section 13(7) then provides that the Review Board may order that the patient be brought back before the court which made the original order under s. 4(3)(b)(i) if it determined that the patient was no longer fit to be tried. Finally, s.13(9) provides that the Review Board may "on its own initiative" review the detention of a patient detained pursuant to s. 4 and the provisions of s. 13(7) "shall apply to such review as if the patient had applied for the review under the subsection concerned".

33. The real question, therefore, is whether the Review Board has made any order under s. 13 such as would supersede the originals. 4(3)(b)(i) order made by Judge Brady. This issue has been considered by this Court in the parallel context of orders made under s. 5 of the Act of 2006 following the delivery of a special verdict to the effect that the applicant is not guilty by reason of insanity: see *B v. Mental Health (Criminal Law) Review Board* [2008] IEHC 303 and *L. v. Clinical Director of the Central Mental Hospital* [2010] IEHC 195. Section 5(2) provides that in that eventuality where the court considers that the accused is suffering from a mental disorder and is in need of in-patient care at a designated centre, the court "shall commit that person to a specified designated centre until an order is made under s. 13". Section 13(5), s. 13(6) and s. 13(8) contain parallel provisions for review of such patients equivalent to those under s. 13(2), s. 13(5) and s. 13(7) with regard to patients who are the subject of s. 4(3)(b)(i) order.

34. What, then, is meant by the words "until an order is made under s. 13" as they appear in s. 4(3)(b)(i)? There is no doubt at all but the Act should be given a purposive interpretation and one which, in particular, best protects the interests and welfare and patient: see, *e.g.*, the comments of O'Byrne J. in *Re Philip Clarke* [1950] I.R. 235, 247-248; those of O'Neill J. in *MR v. Byrne* [2007] 3 I.R. 211, 220-221 and those of Hanna J. in *B v. Mental Health (Criminal Law) Review Board* [2008] IEHC 303. Nevertheless, as Hanna J. noted in *B.*, there are definite limits to this principle of interpretation and, specifically, these statutory provisions cannot be judicially rewritten.

35. Somewhat different views have been expressed by other judges of this Court in relation to the analogous problem arising in the case of accused persons who have been found not guilty by reason of insanity. Is the order of the Court committing such persons to the Central Mental Hospital "until further order" overtaken by the general consideration of the applicant's case by the Review Board or is it necessary that the Review Board should make some specific order concerning the applicant? In *B.* Hanna J. hinted that the mere fact that the matter was so reviewed did not *in itself* mean that the original court order was thereby superseded, although he did not actually have to decide the point:-

> "Section 13(8) of the Act of 2006 is silent as to any regime for the supervision of a person provisionally discharged from a designated centre. As already observed, one of three orders can be made- the further detention of the patient, the unconditional discharge of the patient or his or her discharge subject to conditions for out-patient treatment or supervision or both. In describing what is in sequence the first option open to the Board, the form of words employed, namely for further detention, is interesting. Section 5 (2) cited above, governs the circumstances facing the applicant. The order of Carney J. committing the applicant to the Central Mental Hospital has an expressed currency: "... until an order is made under s. 13". On one interpretation, it could be argued that once the Board ordered the further detention of the applicant the original order of Carney J. became spent. Even if the Act did not express the nature of the detention order to be made by the Board in the terms it did, an order refusing to discharge a patient still amounts to an order under s. 13. What, consequentially, was the status, indeed relevance, of the s. 5 criteria?
>
> In any event this line of argument was not pressed by any party and I decline to make any finding upon it. The answer to any question raised thereby does not get us any further in determining this matter. I am content to hold that the order of Carney J. is still *in situ*."

36. In *L v. Clinical Director of the Central Mental Hospital* [2010] IEHC 195 Peart J. took a somewhat different view on this question:-

> "In the present case, I am of a different view in relation to the original committal order surviving beyond the making of an order under s. 13 of the 2006 Act, and consider that an order made under s. 5 following a special verdict can survive only until an order is made by the Board on the first review by the Review Board under s. 13 of the Act, since that is what the section states. It seems to me that the order made under s. 5 (2) is simply a mechanism for bringing the person into the CMH, so that an opportunity can be provided for the professionals there to decide whether the person is suffering from a mental disorder (under 2001 Act) and is in need of in-patient treatment. A special verdict is a not guilty verdict. The committal order made thereafter is not therefore one to be seen in any penal or punishment context. There is no reason why that category of committal order should endure beyond a point where the medical professionals reach conclusions for the purposes of s. 13 of the Act. What is of concern at the time of the special verdict is handed down is whether or not the person is ill, as defined, and in need of in-patient care or treatment. Once that question is determined under s. 13, there is no reason why the trial judge's committal order would continue to endure, and wording of s. 13 of the Act is consistent with that."

37. I am acutely conscious of the desirability of consistency in judicial decision making and, indeed, I would normally defer to the views of my High Court colleagues even if they did not strictly bind me and even if I disagreed with the line of authority in question: see, *e.g., PI v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66. While I respectfully agree with Peart J. that there may be no reason "why that category of committal order should endure beyond a point where the medical professionals reach conclusions for the purposes of s. 13 of the Act", yet I cannot personally identify a provision contained in s.13 which would enable one to conclude that the mere fact that the patient has been referred to the Review Board *in and of itself* supersedes the earlier court order. Given the imperative need for legal certainty in the context of the duration of orders providing for the deprivation of liberty, if the mere fact that the applicant's case came to scrutinised by the Review Board would in itself authorise his continued detention, one would expect this to have been stated in express terms by s. 13 itself.

38. This is especially so given that s. 13 is careful to prescribe what does in fact constitute an order in this context. This is clear from provisions such as s.13(2)(a), s. 13(4) and s. 13(7)(a). In all of those instances the Review Board (or, as the case, may be the court) is obliged to make orders either providing for the matter to come before the court for fresh consideration or, alternatively, varying the terms of the detention, care or treatment.

39. To my mind, the critical words contained ins. 4(3)(b)(i) must be understood in their statutory context, so that the fundamental

principle of *noscitur a sociis* comes into play at this point: see, *e.g.*, the classic comments of Henchy J. in *Dillon v. Minister for Posts and Telegraphs*, Supreme Court, 8 June 1981. The entire context of s. 4(3)(b)(i) presupposes that the applicant will remain in detention in the Central Mental Hospital pursuant to the authority of the original order of the court to that effect *unless and until* the Review Board decides otherwise and varies that detention order by means of a further order. This might, for example, happen by means of an order under s. 13(4) following a notification from the clinical director pursuant to s. 13(3) that the patient, although still unfit to be tried, was no longer in need of in patient care at the Central Mental Hospital. Or the Review Board might order pursuant to s. 13(7) that the patient be brought back before the court which made the original order under s. 4(3)(b)(i) if it determined that the patient was no longer fit to be tried.

40. In these circumstances, I find myself coerced to the conclusion that the Review Board has merely considered the position of the applicant, but has in fact made no such order under s.13 in that sense. It is for these reasons that I find myself respectfully disagreeing with the greatest reluctance and the utmost diffidence m respect of the interpretation of s. 13 as articulated by Peart J. in *L.*

41. Indeed, it might be thought to be implicit in the closing words of the Review Board's last review on 2nd March 2012 ("...The Board is satisfied that he suffers from a serious mental disorder which requires in-patient treatment at the Central Mental Hospital and that he is properly detained there and should remain so detained pending further review") that it considered that the applicant was detained pursuant to the initial court order. This is further reflected in the decision of the 1st Review hearing on 16th July 2009 which noted that on "23rd April 2009 the Court found him unfit to stand trial and is now detained under s.4 of the 2006 Act." It may be further noted that the Review Board twice declined to make orders pursuant to s. 13(7) whereby Mr. C would be brought back before the District Court: see 7th Review (5th May 2011) and 8th Review (13th October 2011).

42. If this analysis is correct, then the authority for the detention rests completely with the order made by the District Court on 23rd April 2009. That order is, however, *ultra vires* for the reasons which I have already set out.

The State (Byrne) v. Frawley

43. Mr. McGuiness urged me to apply the principle contained in *The State (Byrne) v. Frawley* [1978] I.R. 326 and subsequent case-law to the case at hand. The underlying principle there is one of estoppel by conduct and the finality of criminal convictions. The underlying theme of that line of case-law is that an accused person cannot knowingly elect to take a particular course of action (such as, for example, to take the facts of *The State (Byrne) v. Frawley* itself, knowingly electing to continue with a jury he knew to be unconstitutionally constituted) and later repent of that decision post-conviction by instituting Article 40 proceedings collaterally to impeach a criminal conviction which is not final. There is here, of course, no conviction and, for obvious reasons, Mr. C. was in no position to make any knowing or conscious election. It is essentially for that reason that I conclude that this line of case-law has no application to the present case.

Conclusions

44. For the reason just stated, I must hold that the applicant's detention is not in accordance with law and I must further direct his release in accordance with Article 40.4.2 of the Constitution. In line, however, with the observations of Clarke J. in *JH v. Russell* [2007] IEHC 7, [2007] 4 I.R. 242, 262-264 as consistently applied by other members of this Court (see, *e.g.*, the comments of Finlay Geoghegan J. in *D. v. Director of the Central Mental Hospital* [2007] IEHC 100 and those of Sheehan J. in *JB v. Director of the Central Mental Hospital* [2007] IEHC 340, [2007] 3 I.R. 61, 64- 65), I propose to stay the making of that release order for a short time to enable such steps as may be taken as considered appropriate in the interests of Mr. C.'s own personal welfare, including, if thought appropriate, an application for the detention of the applicant under the provisions of Mental Health Act 2001.

45. I will accordingly hear counsel on the precise form of order proposed.

Postscript

46. In the aftermath of the delivery of the judgment, counsel for the Director of Public Prosecutions, Mr. McDermott, informed me that in the event of the Court making an order releasing the applicant, he proposed to apply for judicial review to quash such part of the District Court as was found to be bad. Following exchanges between counsel, it was agreed that this step would probably be unnecessary in that in the event that the Director considered that the applicant had recovered sufficiently so that he was now fit to stand trial, the criminal prosecution could then be re-entered before the District Court on due notice.