Neutral Citation Number: [2008] IEHC 303

THE HIGH COURT
JUDICIAL REVIEW

2007 No. 1517 J.R.

BETWEEN

J.B.

APPLICANT

AND
THE MENTAL HEALTH (CRIMINAL LAW) REVIEW BOARD,
THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND
THE CENTRAL MENTAL HOSPITAL

NOTICE PARTY

Judgment of Mr. Justice Hanna delivered the 25th day of July, 2008.

1. By order dated the 19th November, 2007, the applicant in this case was given leave to apply for judicial review. The applicant was permitted to seek a number of reliefs:

> (i) A declaration that in light of the factual determination contained within the "Report of Mental Health (Criminal Law) Review Board, Second Hearing – 1st June, 2007", the applicant is entitled to be discharged subject to such conditions as may be deemed appropriate by the Mental Health (Criminal Law) Review Board in accordance with s. 13(8) of the Criminal Law (Insanity) Act 2006, as amended by s. 197 of the Criminal Justice Act 2006, (hereinafter referred to as "the Act of 2006").
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> (ii) A declaration that insofar as the Act of 2006 fails to state expressly the manner in which such conditions as may be imposed by the first respondent pursuant to s. 13(8) of the Act of 2006 should be enforced, the Central Mental Hospital is obliged to develop a protocol in that regard.
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> (iii) An order of *mandamus* directed towards the first respondent compelling it to make an order authorising the conditional discharge of the applicant from the custody of the Central Mental Hospital, subject to such conditions as may be considered appropriate in accordance with the provisions of s. 13(8) of the Act of 2006.
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> (iv) A declaration that the failure of the first respondent to make an order discharging the applicant from the custody of the Central Mental Hospital, subject to such conditions as may be considered appropriate and in accordance with s. 13(8) of the Act of 2006 is *ultra vires* the provisions of the Act of 2006.
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> (v) Further and in the alternative, and without prejudice to the foregoing, a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 that s. 13 of the Act of 2006, insofar as it may require a person in the circumstances of the applicant to be refused a conditional discharge and thereby to be deprived of his liberty, is incompatible with the State's obligations pursuant to Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
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> (vi) Further and in the alternative, and without prejudice to the foregoing, a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 that s. 12(8) and s. 13 of the Act of 2006, insofar as it fails to provide the applicant with a public hearing by the first named respondent, or a full, public and proper appeal from the first named respondent's decision is incompatible with the State's obligations pursuant to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
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> (vii) Such further or other order as this Honourable Court may consider appropriate.
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> (viii) An Order providing for the costs of and incidental to these proceedings.

2. At the hearing of these proceedings reliefs (ii), (vi) were abandoned. The main focus of the applicant's case related to reliefs (i), (iv). Relief (v) in would come into play if the applicant failed in respect of the earlier reliefs.

Factual Background

3. There is no dispute as to the facts in this case which has its origins in tragic happenings on the 6th July, 2000. On that date the applicant killed his five year old daughter. At the time he was suffering from severe mental illness. He contemplated taking his own life. He was originally detained at the Central Mental Hospital on the 14th July, 2000. On the 31st January, 2002, a jury found him guilty but insane in the Central Criminal Court and the trial judge (Carney J.) ordered the applicant's detention at the Central Mental Hospital in Dundrum pursuant to s. 2 of the Trial of Lunatics Act 1883 [46 & 47 Vict., c. 38]. "…until the pleasure of [the Government] shall be known". The applicant has since been detained at the Central Mental Hospital in Dundrum, Dublin. By virtue of s. 20(2) of the Act of 2006 the provisions of that Act apply to the applicant. The relevant finding by a jury now is "not guilty by reason of insanity".

4. The first named respondent, the Mental Health (Criminal Law) Review Board (hereinafter referred to as "the Board" or "the Review Board"), whose statutory background I will shortly set out, was established by the Act of 2006, to carry out the function previously exercised by the Executive in relation to deciding whether to release or not from detention persons found not guilty by reason of insanity. The function of the Review Board is to conduct reviews of persons held in "designated centres" who are the subject of the Act of 2006. The applicant has, to date, been subject to four such reviews, the most recent being on the 15th May, 2008. The decision of the Review Board sought to be impugned in these proceedings was consequential to a review carried out on the 1st June, 2007.

5. The applicant did well and appears to have responded in a very real way to the care and treatment afforded him in the Central Mental Hospital. A moving feature of this tragic case is that his family wish to have him back and he wishes to be back with them. He has remaining a wife and son. As matters stand, it appears that the applicant is well. He is on temporary release and resides with his family four nights each week. On the remaining three nights he returns to the hostel on the grounds of the Central Mental Hospital which is the least secure area of that establishment. In fact, in many respects he has returned to the bosom of his family. He also is employed as warehouse operative as he was prior to the sad events which led to his detention in the Central Mental Hospital.

6. The central issues in the case, in a nutshell, are as follows. The applicant says he no longer fulfils the criteria which authorise his continued detention in the hospital. He is no longer suffering from mental illness and does not require in-patient treatment. The Review Board and the medical team treating him would be happy to discharge the applicant but wish to do with conditions attached. After some protracted negotiation (no one faults the applicant or his solicitor for fighting his corner) the applicant is happy to abide by the conditions proposed. However, the Board was concerned about the fact that under the Act of 2006 there appeared to be no provision for the enforcement of any conditions it might attach to the discharge of the applicant. The Board sought counsel's opinion on this and are concerned that releasing the applicant in the absence of a suitable enforcement regime with regard to the conditions would amount to an unconditional discharge of the applicant. The Board fears that a conditional discharge as provided for in the Act of 2006 is, in effect, unconditional. The text of the Board's Report of the 1st June, 2007 is set out hereunder.

> "Re: J.B.
>
> The patient continues to work full time four days a week and reside at home for the weekend. He shows no evidence of a mood disorder or psychosis. He does not currently suffer from a mental disorder.
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> At the time of the last review, the Board considered discharging the patient subject to certain conditions which were considered to be essential to his discharge. Since that time, the Board has received legal advice that, while it may impose certain types of conditions on a discharge, neither the Board nor the Central Mental Hospital has any power to enforce such conditions. The Board appreciates that the patient has agreed to and undertaken to comply with these conditions, but it is not believed that the patient should be granted what would amount to an unconditional discharge. This is particularly so as the Board notes that his Consultant Psychiatrist has some concerns in relation to anger management and believes that it might be beneficial for the patient to attend an Anger Management Course.
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> The present situation has been in being for some two years without any difficulty. The obvious next step would be that the patient should reside at home permanently and the Board would support this step if it were possible to impose enforceable conditions. The Board would hope that, at some time in the foreseeable future, a system may be put in place to enforce conditions imposed by the Board on his discharge, but while the Board would like to see the patient living permanently at home, it is not prepared to grant a discharge on conditions which cannot be enforced.
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> The Board would like to add that, if the Clinical Director chose to exercise his powers under Section 14 of the Act, and grant a Temporary Release on conditions acceptable to the patient, the Board would be supportive of such a move. In any event, if it becomes possible to enforce conditions of a discharge, the Board would be happy to conduct a further review at short notice."

7. In an affidavit sworn by Professor Harry Kennedy, the Clinical Director of the Central Mental Hospital, he says that he, and two other psychiatrists, Dr. Wright and her predecessor, Dr. Duffy, all agree that the following conditions should be attached to any conditional discharge of the applicant.

> (a) That he resides with his family at their home address.
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> (b) That he abstains from excess alcohol and illicit drugs.
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> (c) That he comply with random drugs tests and/or breathalyser tests.
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> (d) That he attend for regular review appointments and case conferences arranged by members of his treating mental health team.
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> (e) That he inform his treating mental team in the event that he experiences symptoms of mental illness.
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> (f) That he complies with medication as prescribed.
>
> (g) That he accepts home visits and telephone contact from members of the treating mental health team.
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> (h) That he co-operates with and permits members of the treating mental health team in contacting immediate relatives, employers and other close contact when it is felt to be clinically appropriate.
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> (i) Not to take up a position of responsibility for child care or working with children and further that in his family setting he should not have sole responsibility for the care of children.
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> (j) To limit his working week to thirty nine hours and not to engage in overtime or shift work.

8. He says that the proposed conditions are intended to be reviewable. Both he and his colleagues are apprehensive that, although the applicant is agreeable to abide by the conditions, they are not confident that he would adhere to them in the medium to long term unless required to do so by orders of the Review Board upon conditional discharge. Given the level of concern in relation to the applicant and his past history and his ongoing state of mind, Professor Kennedy avers that he is unsuitable for an unconditional discharge at this time and neither he nor his colleagues at the Central Mental Hospital could recommend such a discharge for the applicant.

9. The applicant contends that the Review Board must direct his release. He will abide by the conditions, notwithstanding the apparent absence of a compliance mechanism. He argues that here is no power to detain him since he no longer suffers from a mental disorder and is not need of in-patient treatment. He further argues that his further detention in the Central Mental Hospital offends against his right to liberty under the Constitution and under Article 5 of the Convention for the Protection of Human Rights and fundamental Freedoms, 1950.

Statutory Framework

10. The Act of 2006 was enacted on the 12th April, 2006. The long title states as follows:-

> "An act to amend the law relating to the trial and detention of persons suffering from mental disorders who are charged with offences or found not guilty by reason of insanity, to amend the law relating to unfitness to plead and the special verdict, to provide for the committal of such persons to designated centres and for the independent review of the detention of such persons and, for those purposes, to provide for the establishment of a body to be known as an Bord

Athbhreithnithe Meabhair-Shláinte (an dlí coiriúil), or, in the English language, the Mental Health (Criminal Law) Review Board, to repeal the Trial of Lunatics Act 1883, to amend the Infanticide Act 1949, and to provide for related matters.

11. Under s. 20(2) of the Act a person in the applicant's position is brought within the scope of the legislation. Section 5(2) of the Act of 2006 provides the basis of the applicant's current detention.

> "If the court, having considered any report submitted to it in accordance with subsection (3) and such other evidence as may be adduced before it, is satisfied that an accused person found not guilty by reason of insanity pursuant to subsection (1) 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, the court shall commit that person to a specified designated centre until an order is made under section 13."

12. Thus, in order to be made subject to an order of detention under s. 5(2), two preconditions must be met. The individual must be suffering from a mental disorder and, further, must be in need of in-patient treatment. The Act expressly adopts the definition of mental disorder as set out in s. 3 of the Mental Health Act 2001 ("the Act of 2001"). It provides:-

> "(1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where -
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> (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
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> (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.
>
> (2) In subsection (1) –
>
> "mental illness" means a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons;
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> "severe dementia" means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression;
>
> "significant intellectual disability" means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person."

13. A very significant innovation in the Act of 2006 was the creation of the Review Board by s. 11 of that Act. Section 11(2) provides as follows:-

> "The Review Board shall be independent in the exercise of its functions under this Act and shall have regard to the welfare and safety of the person whose detention it reviews under this Act and to the public interest."

14. Thus, in the exercise of its functions, the public interest must weigh as well as the interest of the applicant.

15. Section 12 of the Act of 2006 enumerates the powers of the Board with regard, *inter alia* to the holding of sittings, the hearing of evidence and so forth. No issue arises with regard to s. 12. We are concerned here with the provisions of s. 13 of the Act of 2006 as amended by s. 197 of the Criminal Justice Act 2006. This deals with the review of detention in the Central Mental Hospital and other designated centres. Each case of detention is to be reviewed at intervals, not in excess of six months (s. 13 (1)).

16. Section 13(3) and (4), relate to circumstances arising where someone has been detained under s. 4 of the Act of 2006 (unfitness to be tried) and s. 202 of the Defence Act 1954. Subsections (5) and (6) relate to a person detained under s. 5 of the Act of 2006 as in the case here. This governs circumstances where the clinical director of a designated centre forms the opinion that a patient detained under s. 5 is no longer in need of in-patient treatment. In such circumstances, the Board must order the patient in question to be brought before it and receive evidence concerning the mental state of the patient from the treating consultant psychiatrist. It is open to the Board to detain the patient or to release him or her unconditionally or subject to conditions for out-patient treatment or supervision or both.

17. Subsection (7) relates to a person detained under s. 4 and provides, *inter alia* for a power to detain or discharge unconditionally or subject to conditions, even in circumstances where a patient is still unfit to be tried but is no longer need of in-patient care or treatment at a designated centre. The subsection which we are most intimately concerned is subs. 8 which provides as follows:-

> "A patient detained pursuant to section 5 or to section 203 of the Defence Act 1954, may apply to the Review Board for a review of his or her detention and the Review Board shall, unless satisfied that such a review is not necessary because of any review undertaken in accordance with this section, order that the patient be brought before it, as soon as may be, and shall, having heard evidence relating to the mental condition of the patient given by the consultant psychiatrist responsible for his or her care or treatment, determine the question of whether or not the patient is still in need of in-patient treatment in a designated centre and shall 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."

18. It is evident that s. 13 provides no express sanction. The Board can come to three conclusions. Firstly, it can further detain the applicant. Secondly it can release the applicant subject to conditions and supervision or indeed both. Thirdly it can discharge the applicant unconditionally. This contrasts with s. 14 which governs the regime of temporary release. This regime is exercised by the

Clinical Director of the designated centre with the consent of the Minister for Justice. The applicant is enjoying the benefit of this at present. The temporary release can be made subject to conditions such as, for example, when the applicant is to return to the hospital or where he is to reside outside. What if a patient does not comply?

19. Section 14(5) provides:-

> "A patient who, by reason of having been temporarily released from a designated centre, is at large shall be deemed to be unlawfully at large if –
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> (a) the period for which he or she was temporarily released has expired, or
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> (b) a condition to which his or her release was made subject has been broken."

20. Subsection 7 goes to empower a member of An Garda Síochána or an officer or servant of the designated centre to arrest without warrant a person who is breach of conditions. It provides as follows:-

> "Without prejudice to any other power conferred by law, a member of the Garda Síochána shall, or an officer or servant of the designated centre may, arrest without warrant any person whom he or she suspects to be unlawfully at large while subject to an order for his or her detention in a designated centre under this Act and bring him or her back to such centre."

The parties' submissions

21. In his written submissions, the applicant suggests that the principle issue before the Court is a simple one. In a way that is true. The respondents, as one would expect, are the Mental Health (Criminal Law) Review Board, the Minister for Justice, Equality and Law Reform and Ireland and the Attorney General. The Clinical Director of the Central Mental Hospital has been engaged as a notice party and has sworn the affidavit referred to above. The notice party is supportive of the first named respondent. All other respondents (the State) take a position which is broadly supportive of the applicant.

22. For the applicant, Mr. McDonagh S.C. argues that Mr. B. no longer fulfils the criteria set out in s. 5 of the Act of 2006 namely that he is not suffering from a mental disorder within the meaning of the Act of 2001 and he does not require in-patient treatment. Not only is such the position, but the Board have said so and wish to discharge to him, albeit on conditions. Mr. McDonagh submits that if the applicant does not abide by the conditions imposed the arrest procedure under s. 14(7) of the Act of 2006 could be invoked. Alternatively, he submits that conditional discharge means that the original order detaining the applicant was still in force and could be invoked if necessary and the applicant detained.

23. It is submitted that if the applicant is wrong and no means of enforcing compliance exists, such was the intention of the Oireachtas. To endeavour to infer such a regime into the Act would be tantamount to rewriting the statute. Reference was made to s. 5 of the Interpretation Act 2005 which provides as follows:-

> "(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2(1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
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> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

24. The text of s. 13(8) of the Act of 2006 makes no provision whatsoever for enforcement and this contrasts with what is set forth in s. 14 of the Act. Thus, has spoken the Oireachtas. It is submitted that the grounds for the applicant's detention no longer exist. Therefore he must now be released albeit subject to the conditions to which he has agreed to submit. Should difficulties arise in the future with regard to the applicant's mental condition, ample powers are available under the Mental Health Act 2001 to meet the situation and, where necessary, to confine the applicant, should such unfortunate circumstances arise.

25. Mr. McDonagh submitted that the applicant's present detention is contrary not only to the Constitution but also to the Convention for the protection of Human Rights and Fundamental Freedoms, 1950 and reliance was placed by the applicant on *Winterwerp v. The Netherlands* [1979 – 1980] 2 E.H.R.R. 387.

26. Even if the applicant was wrong in his interpretation of s. 13(8) he would still draw upon the jurisprudence of the European Court of Human Rights and would seek to rely on the *Winterwerp* decision which determined that the a person may only be detained if he or she is and continues to be suffering from an unsoundness of mind which makes detention necessary for the protection of the patient and others. Mr. McDonagh S.C. accepted that in a later decision, *Johnson v. United Kingdom* [1999] 27 E.H.R.R. 296 the Court held that discharge need not be immediate if time is required, for example, to organise aftercare and that this indicated that other factors over and above the patient's soundness of mind could bear on the decision. However, leaving to one side the prospect of the statutory scheme providing for step down facilities, he relies on the fundamental premise that a statutory provision which permits a person's detention when he or she is no longer suffering from an unsoundness of mind would be incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

27. The fact that there may or may not be amending legislation proposed which might govern this, was immaterial (no such prospect was identified to this Court). The applicant was not required to wait until such was put in train.

28. General support for the applicant's view of the Act and, implicitly, the proposition that if the applicant was incorrect in his interpretation of s. 13(8), that the Act could fall foul of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, was proffered on behalf of the State by Mr. Tim O'Leary S.C. He identified the central issue as being the Board's

entitlement to refuse to discharge the applicant on the grounds that the conditions intended to be imposed by them could not be enforced. He agreed with the applicant's contention that the Board had clearly decided that the applicant was no longer suffering from a mental disorder and was no longer of need of in-patient treatment. He agreed with the Board's contention that the Act as currently drafted does not provide for enforcement of conditions and/or recall of a conditionally discharged patient. He drew attention to the contrasting situation which arises under the temporary release regime (which does not come under the Board's jurisdiction but rather that of the Clinical Director with the consent of the Minister for Justice). There it could arise that a person so released, if in breach of the conditions of his temporary release, could be deemed to be at large (s. 14(5)) and may be arrested by a member of an Garda Síochána or an officer of the designated centre without warrant (s.14 (7)).

29. The imposition of enforceable conditions would constitute an interference with the applicant's right to liberty. If such was the intention of the Oireachtas the Act would have so empowered the Board and done so in clear and unambiguous language.

30. However, Mr. O'Leary S.C. argued that the Clinical Director and the hospital authorities in general were not short of remedies, in that, as was contended on behalf of the applicant the provisions of the Act of 2001, could be invoked in aid where such unfortunate circumstances might arise.

31. He submitted that, on a clear and unambiguous interpretation of the Acts, the applicant could only be detained if the Board was of the view that he continued to suffer from a mental disorder and was still in need of in-patient treatment. If the Board came to a contrary view which, he argued, had occurred in this case, not to release the applicant would run contrary to his rights under the constitution and under the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

32. Mr. Aston S.C. appeared for the on behalf of the first named respondent and was broadly supported by Mr. McEnroy S.C. appearing for the notice party. Mr. Aston submitted that the central issue in interpreting s. 13(8) of the Act of 2006 was whether there was power to enforce a condition, including if necessary the power to recall a patient. The first respondent Board in the conscientious exercise of its duties and given the state of the evidence before it from the plaintiff's treating doctors was and is gravely concerned that it might make an order of conditional discharge which would amount, in reality, to an unconditional discharge. The Board wished to release this applicant back to his family, but subject to the conditions urged upon it by the applicant's doctors.

33. On its behalf, Mr. Aston S.C., pointed to the fact that the powers of the first respondent, like other statutory bodies "……are limited by the statute which created it and extended no further than is expressly stated therein or is necessarily and properly required for carrying into effect the purposes of incorporation or may fairly be regarded as incidental to or consequential upon those things which the legislation has authorised." (See *Keane v. An Bord Pleanála,* [1997] 1 I.R. 184, t p. 212, per Hamilton C.J.) Referring to *Inspector of Taxes v. Kiernan* [1981] I.R. 117, at pp. 121-122 and *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, Mr. Aston asserted (and nobody disagreed) that the words of a statute should be examined in their natural and ordinary meaning. However, the literal approach to the interpretation of statutes should not be employed were it results in an absurd interpretation negating the clear intention of the Oireachtas. (See *Director of Public Prosecutions (Ivers) v. Murphy* [1999] 1 I.R. 98). In such circumstances, the court should have regard to the general purpose of the provisions of the scheme of the statute including considering the long title, the proposed scheme itself and the pre-existing law which the scheme was designed to alter or replace. Once statutory purpose, is identified the court interprets the provision in question in a manner consistent with it and thereby absurdity is avoided. Purposive construction does not permit a court to rewrite or do violence to plain language. If the purpose of the Act is clear without rewriting, then such is the appropriate interpretation. He accepts that statutes interfering with liberty (e.g. *Dundon v. Governor of Cloverhill Prison*, [2006] 1 I.L.R.M. 321) or which create penal or fiscal liabilities e.g. *Inspector of Taxes v. Kiernan* [1981] I.R. 118, per Henchy J. at p. 122 must be strictly construed. However, he questions whether the stern interpretation appropriate in penal statutes was entirely material, given the oft stated paternalistic force driving interpretation of legislation designed to help persons suffering from mental illness.

34. Mr. Aston S.C. submitted that the provisions of s. 13 presenting officer the Act of 2006 are silent as to enforcement of discharge conditions or recall of a patient. The first named respondent was concerned that were it to assume an implied power in this regard, this may involve, in effect, rewriting the provisions rather than applying any legitimate modality of statutory interpretation.

35. The applicant had argued that the original order could, legitimately, be interpreted as still being in force and that, if the applicant was discharged conditionally, this state of being carried with it an implicit power to enforce conditions of discharge and to recall. Not so, argued Mr. Aston. Section 5(2) of the Act of 2006 the section under which the applicant is currently being detained in hospital lasts until an order is made under s. 13 of the Act. Once discharged there was no going back. The original order would be spent. In any event, compared to s. 14 where there is a clear power of arrest, its absence in s. 13 and the absence of any other sanction whatsoever speaks volumes. Section 20(2) of the Act of 2006 applies to the applicant as being a person found guilty but insane and detained under s. 2 of the Trial of Lunatics Act 1883 as if detained pursuant to s. 5 of the Act of 2006. Therefore, it followed that once he ceased to be detained by being discharged the Act no longer applied to him. Section 13 limits its powers to reviewing detention and not discharge. The applicant cannot both be detained and discharged. Such states of being were mutually exclusive.

36. Mr. Aston S.C. concluded his argument by saying that the Board, in reality, was faced with a stark choice: detain the applicant or unconditionally release him. The Board was put in an extremely difficult position given that it was mandated by the Act of 2006 to attend to the welfare of the applicant himself and to the wider public interest.

37. Mr. McEnroy S.C. broadly supported the stance taken by the Board but, conscious of the very specific role played by his client in the legislative framework he was at pains to draw the Court's attention to matters he considered to be of fundamental importance.

38. The applicant was not a person convicted of a criminal offence. Neither was he sent to a prison in the guise of a mental hospital. It would be inappropriate to consider the applicant's position in this way. He was committed to the Central Mental Hospital as a person not guilty by reason of insanity. The purpose of the applicant's detention was for clinical care and treatment. The Board's obligation was to carry out its reviewing function in accordance with the law and the Constitution with due regard to the interests both of the applicant and the public. No part of the function of the Clinical Director involved any form of punishment of the applicant.

39. Mr. McEnroy S.C. said that all of the doctors are of the view that the applicant is not fit for unconditional release and that the conditions set forth are designed to meet the clinical requirements of the applicant and are in his best interests.

40. It was entirely to the applicant's credit that he accepted the conditions but it was Professor Kennedy's view and the view of the medical team treating the applicant that conditions governing his discharge must be enforceable. Professor Kennedy was happy to grant temporary release under s. 14 of the Act of 2006 in terms that would appear quite generous. This might not be the optimal vehicle to meet the needs of the case but meet them it did in sufficient measure.

41. Again, Mr. McEnroy invited me to interpret the legislation purposively. The Oireachtas empowered the Board to release on condition. If the applicant and the Attorney General are correct, it cannot be said that conditional discharge is enforceable. In effect, no such category exists in law and it is meaningless.

42. Mr. McEnroy questioned what order could this Court make. What was the appropriate relief? Should it be remitted to the Board if I were to find in favour of the applicant? Perhaps, if I was satisfied that the applicant and the Attorney General were right, this Court should consider making a ruling if there was no such thing as a conditional discharge. Alternatively, I could decide was the Act to be interpreted as detain or release simpliciter. As an alternative and, by his own admission, creative process, could I consider determining that the original order was still in existence and subject to implied general powers to enforce same and, when necessary, to bring the applicant back into the hospital.

Conclusions
43. Article 40.4.1 of the Constitution provides that no citizen shall be deprived of his liberty save in accordance with law. In *Application of Gallagher (No. 2)* [1996] 3 I.R. 10, Laffoy J. observed at p. 31:-

> "Article 40, s. 4, sub-s. 2 enjoins this Court, upon a complaint being made that a person is being unlawfully detained, to forthwith enquire into the complaint and after giving the person in whose custody he is detained an opportunity to justify the detention, to order the release of such person from such detention unless satisfied that he is being detained in accordance with law. It is well settled that the expression 'in accordance with law' in Article 40, s. 4 does not mean simply in accordance with a statutory provision; adopting the words of Henchy J. in *King v. Attorney General* [1981] I.R. 233 at p. 257, it means
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> > 'without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution . . .'"

44. That case was an application for an inquiry under Article 40 of the Constitution and not a judicial review application as in this case. Therefore, the issue facing the Divisional Court was whether or not to release the applicant. In *Application of Gallagher (No. 2)* the applicant had been detained in the Central Mental Hospital pursuant to s. 2 of the Trial of Lunatics Act 1883. At pp. 44 - 45 Laffoy J. observed:-

> "The application of the principle of proportionality is inherent in the construction of s. 2, sub-s. 2 of the Act of 1883 stipulated by the Supreme Court *in Application of Gallagher* [1991] 1 I.R. 31 in that detention under that provision is permitted only so long as is necessary to achieve the objective of the provision. It follows, in my view, that when, on consideration of an application for release from detention under s. 2, sub-s. 2, a relaxation of total deprivation of liberty is indicated for a particular purpose, the relaxation put in train must be proportional to that purpose. Furthermore, in this case, the notice parties have justified the continued detention of the applicant in part on the adoption of the advice of the advisory committee. That being the case, in my view, the applicant is entitled to have the recommendations of the advisory committee properly implemented in accordance with the advisory committee's intentions, not merely the Minister's interpretation of them. This involves the applicant being afforded limited periods of monitored freedom consistent with the finding of the advisory committee and of sufficient frequency and duration to test him in a non-institutionalised environment for the purpose of aiding the determination of the central issue, whether he is suffering from a mental disorder warranting his continued detention, on the promised review by the advisory committee. While it is for the Minister, not the Court, to devise a scheme for the implementation of the recommendations of the advisory committee, such implementation is within the ambit of judicial review."

45. This brings us in the direction of what we are confronting in this case, namely the effective implementation of a treatment/supervisory regime. However, now we operate under the umbrella of the Act of 2006 and must focus on interpretation of s. 13(8) thereof: how is it to be construed?

46. At the hearing of this matter, no great controversy arose as to the cannons of construction to be applied. All parties agreed that the literal test, interpreting the wording of the statute in its natural and ordinary meaning was the appropriate starting block. But if the literal approach produces an absurd result and points us in a direction other than that intended by the Oireachtas, then one seeks to ascertain the intention of the Oireachtas in interpreting the Act. To this end one can look at, *inter alia*, the long title, the general purpose of the scheme of the statute, the pre-existing law which the Oireachtas intended to change. Once the purpose of the Act is ascertained, one should be able to interpret without lapsing into an absurdity.

47. A particular spirit drives the interpretation of statutes such as this which legislate in the area of mental health. This legislation is viewed as being paternalistic in nature. The position is well described by O'Neill J. in *M.R. v. Byrne* [2007] 3 I.R. 211. He says at pp. 220 - 221:-

> "Before embarking upon a consideration of the issues which have arisen in this case it is well to establish in general the correct approach when dealing with legislation of the kind involved here. It has been said and indeed it is common case that in approaching the construction of the Act, the purposive approach is to be adopted, and the following passage from the judgement of McGuinness J. in *Gooden v. St. Otteran's Hospital* [2005] 3 I.R. 617 where she is speaking of the Mental Treatment Act 1945 and says the following at p. 633, illustrates the point:-
>
> > 'I respectfully accept Denham J.'s analysis of the principles of interpretation as set out in that judgment. In interpreting s. 194, therefore, it would in my view be right to consider the purpose of the Act of 1945 as a whole. It is a wide ranging statute, dealing with all aspects of provision of treatment for those suffering from mental illness, ranging from the building of mental hospitals to details of their administration and staffing and to the reception and care of patients. It is divided into distinct but related parts. Section 194 occurs in that part of the Act which deals with voluntary patients in mental hospitals. It cannot, however, be read entirely in isolation from those parts of the Act which deal with patients who had been committed to mental hospitals as a result of reception orders. Still less should it be read in isolation from the surrounding sections in the same part, and in particular s. 195.'

48. The same approach is in my view entirely appropriate in respect of the interpretation of the Act of 2001, which repealed the whole of the Mental Treatment Act 1945, other than part VIII and ss. 241, 276, 283 and 284. In addition the Act of 2001 also repealed the whole of the Mental Treatment Act 1953, the whole of the Mental Treatment (Detention in Approved Institutions) Act 1961 and the whole of the Mental Treatment Act 1961 other than ss. 39 and 41. As is apparent from the preamble to the Act, the Act is a piece of legislation which comprehensively deals with the involuntary admission of persons suffering from mental disorders to approved centres and establishes the Mental Health Commission and Mental Health Tribunals and an Inspector of Mental Health

Services for the purposes of the independent review of the involuntary admission of persons to approved centres.

49. In *Re Philip Clarke* [1950] I.R. 235 the former Supreme Court when considering the constitutionality of s. 165 of the Mental Treatment Act 1945, in the judgment of O'Byrne J. delivering the judgment of the court described the general aim the Act of 1945 as follows at pp. 247 and 248:-

> 'The impugned legislation is of a paternal character, clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and well-being of the public generally. The existence of mental infirmity is too widespread to be overlooked, and was, no doubt present to the minds of the draftsmen when it was proclaimed in Art. 40.1 of the Constitution that, though all citizens, as human beings are to be held equal before the law, the State may, nevertheless, in its enactments have due regard to differences of capacity, physical and moral, and of social functions. We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity, to remain at large to the possible danger of themselves and others.
>
> The section is carefully drafted so as to ensure that the person, alleged to be of unsound mind, shall be brought before, and examined by, responsible medical officers with the least possible delay. This seems to us to satisfy every reasonable requirement, and we have not been satisfied, and do not consider that the Constitution requires, that there should be a judicial inquiry or determination before such a person can be placed and detained in a mental hospital.
>
> The section cannot, in our opinion, be construed as an attack upon the personal rights of the citizen, on the contrary it seems to us to be designed for the protection of the citizen and for the promotion of the common good.'

In my opinion having regard to the nature and purpose of the Act of 2001 as expressed in its preamble and indeed throughout its provisions, it is appropriate that it is regarded in the same way as the Mental Treatment Act 1945, as of a paternal character, clearly intended for the care and custody of persons suffering from mental disorder."

50. Such an approach must inform and direct the interpretation of the Act of 2006. The statutory framework is designed to promote the care and well being of the applicant and persons in his position. It is both empowering and protective. The Board must review each case of a person coming within the scope of the Act of 2006 at regular intervals, not more than six months apart. I have already described in brief some of the features of the scheme of the Act. However, it is important to note that the Board is enjoined to have regard to the welfare and safety of the applicant and to the public interest. (See s. 11(2) of the Act of 2006 cited above).

51. In interpreting the Act, however, one must be careful not to invade the realm of the legislator by interpreting legislation in such a way as would amount to a re-writing of same. In *Gooden v. St Otteran's Hospital* [2005] 3 I.R. 617, at pp. 639 - 640, Hardiman J. said:-

> "I believe however that in construing the statutory provisions applicable in this case in the way that we have, the court has gone as far as it possibly could without rewriting or supplementing the statutory provisions. The court must always be reluctant to appear to be doing either of these things having regard to the requirements of the separation of powers. I do not know that I would have been prepared to go as far as we have in this direction were it not for the essentially paternal character of the legislation in question here, as outlined in In *Re Philip Clarke* [1950] I.R. 235. The nature of the legislation, perhaps, renders less complicated the application of a purposive construction than would be the case with a statute affecting the right to personal freedom in another context. The overall purpose of the legislation is more easily discerned and, where the medical evidence is unchallenged, the conflicts involved are less acute than in other detention cases. I do not regard the present decision as one which would necessarily be helpful in the construction of any statutory power to detain in any other context."

52. 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?

53. 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.

54. That order is the judicial mechanism bringing the applicant within the care of the designated centre. Once there, the issue of his discharge, formerly determined by the executive in accordance with law, now falls to the Board. On the establishment of the Board, the applicant comes under a new statutory framework in which the Board carries out the functions previously exercised by the executive.

55. As we have seen, although conditions may be attached to an order discharging a patient the Board has no statutorily created means of enforcing any conditions it might decide to impose. Nor can it call in aid the Act of 2006 to exercise supervisory functions once a discharging order has been affected. The silence of s. 13 in this respect is telling when one considers the provisions of s. 14 of the Act relating, as they do, to temporary release. That section does empower the Clinical Director and his staff to move in response to a breach of conditions. So too may a member of an Garda Siochána.

56. It is not unreasonable to conclude that the mind of the Oireachtas was focused on the issue of enforceability or not. In my view the absence of any similar provision in s. 13 drives one to the conclusion that it was the intention of the Oireachtas that although conditions might well be imposed on a discharge order, no means was to be available by way of sanction or enforcement or recall to the hospital or any other way to enforce those conditions.

57. It is, I suppose, possible to see circumstances in which conditions could be so minuscule and informal as not to require the availability of sanction. But, even if that were a conceivable state of affairs, such is not the case as far as this applicant is

concerned. It would not be unfair to describe the terms of the proposed conditional discharge as being stern. It is the want of enforceability of such conditions that drives the attitude of the applicant's treating doctors and fuels the Board's legitimate concerns.

58. The option which the Board wishes to exercise cannot be exercised because they are not empowered to do so. The form of release that they envisage as being appropriate is not within their ambit of authority. It is not an order capable of being made within the framework of the Act of 2006. The Oireachtas have not given the Board any means of compelling compliance with terms of discharge. This Court was invited, inter alia, to interpret the Act purposively to such extent as to identify implicit authority to this end. I decline to do so. To attempt to infer into the Act some sort of inherent regime which, inter alia, could fashion a power to arrest without warrant, in my opinion goes far beyond the boundaries of the interpretative cannons under which we operate. To hold that such could be done would, in my view, amount to an attempt to legislate and would offend to an unconscionable degree the principle of the separation of powers.

59. It is worth repeating that the Board must act in the interest of the applicant and of the public at large. On the clearest medical evidence the Board feels it cannot, much as it would like to, discharge the applicant. The medical evidence which it has considered is expressly focused on the interest and well being of the applicant as a patient and of his family and the public. The refusal to discharge is founded upon the unsuitability of the other options available under the statute. In the circumstances, I am satisfied that the Board has acted reasonably and within jurisdiction.

60. The consequences of this have not resulted in the total deprivation of the applicant's liberty but rather a limited curtailment of it as a consequence of the exercise of the temporary release provisions of the Act of 2006. Most of the week he resides at home and engages in employment. This regime is what is presently the best available in the applicant's interests. The unanimous view of the applicant's doctors is that to move beyond it to conditional discharge would not be so.

61. In all the circumstances and in view of the interests to which the Board are enjoined to have regard under the Act of 2006, I am of the view that they acted lawfully and within jurisdiction in ordering his further detention and in a manner which meets the scrutiny of the Constitution given that the applicant is at liberty to a degree commensurate with his medical needs and interests and the public interest.

62. The applicant's secondary position is that if his current status is lawful and in accordance with Irish law in the Constitution he is, therefore, entitled to a declaration that his deprivation of liberty pursuant to s. 13(8) of the Act of 2006, is incompatible with the State's obligations under Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. It barely needs repeating at this stage that the said convention became part of Irish domestic law under the provisions of the European Convention on Human Rights Act 2003. Section 2(1) of the Act provides as follows:-

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

63. Section 3(1) of the Act provides as follows:-

> "Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

64. "Organ of the State" is defined in s. 1 of the Act as including:-

> ". . . a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised"

65. The applicant seeks to rely upon Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The material Article is 5(1)(e) which states:-

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.
>
> . . .
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants".

66. The applicant sought to rely on *Winterwerp v. The Netherlands* [1979/1980] 2 E.H.R.R. 387. In that case the applicant had been detained under the relevant Netherlands legislation dealing with mentally ill persons. He was detained by virtue of court orders which were made from time to time. However, he was not made aware that the hearings were going on and was not, therefore, able to be present or to be legally represented. Some of his requests for discharge were not forwarded to the court by the public prosecutor who, under Netherlands law was apparently entitled so to act in certain circumstances. Not only did Mr. Winterwerp remain in detention, but, as a consequence, he lost the capacity to administer his own property. It was the unanimous view of the Court that his inability to have his detention reviewed by a court and the failure to hear him constituted a violation of Article 5(4). The Court went on to hold that the denial of the applicant's right to administer his property constituted a violation if Article 6(1).

67. This would seem to have been a case involving, in effect, a total deprivation of Mr. Winterwerp's liberty. At pp. 401 – 402 of the Report the Court says:-

> "35. There is no dispute that since 1968, except for a few periods of interruption, the applicant has been deprived of his liberty in pursuance of the Mentally Ill Persons Act (see paras. 23 to 31 above). He claims to be the victim of a breach of Article 5(1) which, insofar as relevant for the present case, reads as follows:
>
> 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> . . .

(e) the lawful detention . . . of persons of unsound mind . . .

A. 'The lawful detention of persons of unsound mind'

36. Mr. Winterwerp maintains in the first place that his deprivation of liberty did not meet the requirements embodied in the words 'lawful detention of persons of unsound mind'. Neither the Government nor the Commission agrees with this contention.

37. The Convention does not state what is to be understood by the words 'persons of unsound mind'. This term is not one that can be given a definitive interpretation: as was pointed out by the Commission, the Government and the applicant, it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitudes to mental illness change, in particular so that a greater understanding of the problems of mental patients is becoming more widespread.

In any event, sub-paragraph (e) of Article 5(1) obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society. To hold otherwise would not be reconcilable with the text of

Article 5(1) which sets out an exhaustive list of exceptions calling for a narrow interpretation. Neither would it be in conformity with the object and purpose of Article 5(1), namely, to ensure that no one should be dispossessed of his liberty in an arbitrary fashion. Moreover, it would disregard the importance of the right to liberty in a democratic society."

68. The Court goes on to state as follows, at p. 403:-

"The Commission likewise stresses that there must be no element of arbitrariness; the conclusion it draws is that no one may be confined as 'a person of unsound mind' in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation (see para. 76 of the report). The applicant and the Government both express similar opinions.

69. The Court fully agrees with this line of reasoning. In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."

70. In conclusion, the Court stated at p. 411 of the Report:-

"To sum up, the various decisions ordering or authorising Mr. Winterwerp's detention issued from bodies which either did not possess the characteristics of a 'court' or, alternatively, failed to furnish the guarantees of judicial procedure required by Article 5(4), neither did the applicant have access to a 'court' or the benefit of such guarantees when his requests for discharge were examined, save in regard to his first request, which was rejected by the Regional Court in February 1969. Mr. Winterwerp was accordingly the victim of a breach of Article 5(4)."

71. It seems that Mr. Winterwerp's circumstances bear little resemblance to those of Mr. B. Mr. B. enjoys a substantial degree of liberty albeit in a curtailed sense. The applicant has abundant statutory rights under the Act of 2006 which protect against the very violations of which Mr. Winterwerp complained with regard to such matters of notification of hearings and ability to engage in a statutory system upon review of his detained status. In my view, as far as the applicant before this Court is concerned, no question can arise of arbitrariness or caprice.

72. In a sense, the *Winterwerp* case was advanced by the applicant as presenting almost an absolute. If you were not suffering from a mental disorder, you could not be detained because of same.

73. However, the jurisprudence of the European Court of Human Rights does not go that far as is apparent from *Johnson v. United Kingdom* [1999] 27 E.H.R.R. 296. In that case, a man who had been diagnosed with mental illness whilst on remand for assault was committed to a hospital in 1984. His case was reviewed from time to time until, in 1989, a conditional discharge was ordered. After a short period of release, the applicant was kept in detention pending the provision of suitable "step down" facilities. He was continuously detained between the 15th June, 1989, at which point the relevant Tribunal found him to be no longer suffering from mental illness and the 12th January, 1993, the date upon which his absolute discharge was ordered.

74. At para. 60 of the judgment the Court says:-

"In this latter respect the Court recalls that, according to its established case law, an individual cannot be considered to be of 'unsound mind' and deprived of his liberty unless the following three minimum conditions are satisfied: first, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, and of sole relevance to the case at issue, the validity of continued confinement depends upon the persistence of such a disorder."

75. The Court found a violation under Article 5 of the applicant's rights, but, at paras. 61 - 63, stated as follows:-

"61. By maintaining that the 1989 Tribunal was satisfied that he was no longer suffering from the mental illness which led to his committal to Rampton Hospital, Johnson is arguing that the abovementioned third condition as to the persistence of mental disorder was not fulfilled and he should as a consequence have been immediately and unconditionally released from detention.

The Court cannot accept that submission. In its view it does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released.

Such a rigid approach to the interpretation of that condition would place an unacceptable degree of constraint on the responsible authority's exercise of judgment to determine in particular cases and on the basis of all the relevant circumstances whether the interests of the patient and the community into which he is to be released would in fact be

best served by this course of action. It must also be observed that in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science. Whether or not recovery from an episode of mental illness which justified a patient's confinement is complete and definitive or merely apparent cannot in all cases be measured with absolute certainty. It is the behaviour of the patient in the period spent outside the confines of the psychiatric institution which will be conclusive of this.

62. It is to be recalled in this respect that the Court in its *Luberti v. Italy judgment* [(1984) 6 E.H.R.R. 440, para. 29] accepted that the termination of the confinement of an individual who has previously been found by a court to be of unsound mind and to present a danger to society is a matter that concerns, as well as that individual, the community in which he will live if released. Having regard to the pressing nature of the interests at stake, and in particular the very serious nature of the offence committed by *Luberti* when mentally ill, it was accepted in that case that the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.

63. In the view of the Court it must also be acknowledged that a responsible authority is entitled to exercise a similar measure of discretion in deciding whether in the light of all the relevant circumstances and the interests at stake it would in fact be appropriate to order the immediate and absolute discharge of a person who is no longer suffering from the mental disorder which led to his confinement. That authority should be able to retain some measure of supervision over the progress of the person once he is released into the community and to that end make his discharge subject to conditions. It cannot be excluded either that the imposition of a particular condition may in certain circumstances justify a deferral of discharge from detention having regard to the nature of the condition and to the reasons for imposing it. It is however of paramount importance that appropriate safeguards are in place so as to ensure that any deferral of discharge is consonant with the purpose of Article 5(1) and with the aim of the restriction in sub-paragraph (e) and, in particular, that discharge is not unreasonably delayed."

76. Again, I must point to the fact that the regime under which the applicant is living his life and working is very different from that experienced by Mr. Johnson. We are not dealing here with the sort or level of "compulsory confinement" to which I believe the Court was referring. The Board, as mandated by statute, is overseeing a regime which is in the applicant's interest. This may well evolve to a situation (I hope it does) where the applicant may be released on informal conditions such as would not require any draconian sanctions. Indeed, it is to be hoped that a full discharge without conditions of any sort would occur. As this matter stands, whether the applicant's current situation be unsatisfactory or otherwise, I do not perceive it to amount to a violation of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. I repeat that the Act of 2006 mandates the Board to have regard to the interests of the patient concerned and the general public. The applicant has been afforded a significant measure of liberty founded upon unanimous medical advice and the Board has properly and lawfully acted upon same.

77. This is not an accidental or fortuitous outcome. It is a consequence of the operation of overall scheme created by the Act of 2006 and to which the Board have had appropriate regard. I am of the view that the applicant's current status does not offend against Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and that s. 13 of the Act of 2006 is not incompatible with it.