

**THE HIGH COURT****Record Number 2007 No. 330 SS****IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION****BETWEEN****A. M.****APPLICANT****AND****HARRY KENNEDY, CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL****RESPONDENT****AND****HEALTH SERVICE EXECUTIVE  
MENTAL HEALTH COMMISSION  
MENTAL HEALTH TRIBUNAL****NOTICE PARTIES****Judgment of Mr Justice Michael Peart delivered on the 24th day of April 2007**

1. This application on behalf of the applicant is brought for the purpose of an inquiry by the Court into the lawfulness of his detention at the Central Mental Hospital at Dundrum, Dublin. The affidavit grounding the application is sworn by Mr Mark Felton, a solicitor appointed on the 14th February 2007 by the Mental Health Commission to represent him at a hearing before the Mental Health Tribunal which was to take place on the 20th February 2007.

2. It appears that the detention of the applicant commenced at Our Lady's Hospital, Navan by Temporary Admission Order made on the 24th August 2005 under the provisions s. 184 of the Mental Treatment Act, 1945, as amended.

3. Having absconded from that hospital during treatment, he was transferred to the Central Mental Hospital, since Our Lady's Hospital, Navan did not have the capacity to provide the specialist treatment which it was felt that he needed at that time. Upon the expiration of the six month period of that detention on the 24th February 2006, it was renewed by order for a further period of six months.

4. This extension would have endured until the 24th August 2006. But it appears that on the 18th August 2006 as the previous extension was nearing its expiration, a decision was taken that a further renewal was needed, and there is an endorsement on the Form 6 which reads "extended for a further period of six months from 18/8/06" and that is signed by Dr Anne Jackson, Consultant.

5. Dr Harry Kennedy, the Clinical Director of the Central Mental Hospital has averred in his affidavit that the practice at the hospital is that the endorsement is entered on the Form 6 in advance of or at the time of the expiration of the period of detention, and that this Form 6 was not to commence operation until the 24th August 2006, and further that it has always been his belief that one period of detention could not overlap another. The reference to "18/8/06" may simply have been an error, but one way or another the question is whether the applicant's renewal endured only up to the 18th February 2007, being six months from the date set forth in the endorsement, or whether it in fact endured until the 24th February 2007 since the previous period of renewal made on the 24th February 2006 was to last up to the 24th August 2006. If the latest renewal endured only to the 18th February 2007, then the Tribunal ought to have carried out its review prior to that date. But if it endured until the 24th February 2007, then the Tribunal was entitled on the 20th February 2007 to review the detention.

6. All medical opinion available to the Court is of the view that the further detention of the applicant is needed for his own safety and the safety of others, and that he suffers from schizophrenia and needs in-patient treatment.

7. Mr Felton ascertained from the applicant when he spoke to him on the 20th February 2007 that he had been reviewed on the 19th February 2007 and had been handed some paperwork in relation to a renewal order. The Court has been shown a renewal order made on the 19th February 2007 under the Mental Health Act, 2001 and signed by Dr Anne Jackson. This renewal order is for a period of three months. Mr Felton submitted to the Tribunal on the 20th February 2007 that since the period of detention for six months from the 18th August 2006 had expired on the 18th February 2007, the Tribunal had no jurisdiction to review the detention. The Tribunal rose to consider the position but came to the conclusion that since the detention had commenced on the 24th August 2005, and had run from that date with a number of required renewals, it was clear that the renewal made on the 18th August 2006 was clearly intended to run from the 24th August 2006 and not from the 18th August 2006, and that therefore on the 20th February 2007 the Tribunal was entitled to review it. Having heard the medical evidence the Tribunal affirmed the Renewal Order made on the 19th February 2007. A full note of the Tribunal's decision has been made available to the Court.

8. On the 9th March 2007 the Tribunal again sat in order to review the status of the renewal order dated 19th February 2007. Mr Felton was notified of that hearing. However it appears from Mr Felton's affidavit that at that sitting it was indicated to him by the Tribunal that since the previous sitting of the Tribunal had affirmed the detention of the applicant "it seemed in all the circumstances that the matter was now of such complexity that the intervention of this Honourable Court was warranted in order to clarify the situation". The exhibited record of the Tribunal's decision made on the 9th March 2007 states simply that:

"Having reviewed the record of Mental Health Tribunal proceedings of the 20/02/07, we are of the view that the renewal order of the 19/02/07 was affirmed by that Tribunal and consequently we have no jurisdiction to review that order."

9. An affidavit sworn by Bríd Clarke, Chief Executive of the Mental Health Commission who is a Notice Party to this application has averred that following the coming into operation of Part 2 of the Mental Health Act, 2001 by Statutory Instrument 411 of 2006, it received details from relevant approved centres of detention as to persons detained under sections 184 and 185 of the Mental Treatment Act, 1945, and that in accordance with s. 72(5) of the 2001 Act the respondent hospital made returns to the Commission in relation to all patients detained there, including the applicant herein. She states that on the 2nd November 2006 the Commission received a Form 24 in relation to the applicant. There is a "received" stamp appearing on this form which bears the date "04 November 2006" but Ms. Clarke states that this in fact refers to the date on which the details contained in the form were entered on the computer system at the Commission's offices as opposed to the actual date of receipt of the form. That Form 24 states, inter alia, that the date of commencement of the applicant's detention was "24/08/2005" and states the date of expiry of his detention as "18/02/2007". She makes the point in her affidavit that this form was completed by the Clinical Director of Our Lady's Hospital, Navan and not by the Clinical Director of the respondent hospital, the Central Mental Hospital, where the applicant was in fact detained. She states in that regard: "It was not therefore taken into account by the Commission". She goes on to state that on the 2nd November 2006 the Commission received a second Form 24 in relation to the applicant – this time from the Central Mental

Hospital, Dundrum. That form is exhibited and states thereon the detention of the applicant commenced on the 24th August 2005 and that the date of expiry of the detention order is "24/02/2007". She states further that she believes that in view of the "apparent error as regards the date of expiration of the detention order" the director of the Mental Health Tribunal telephoned the Clinical Director of the Central Mental Hospital, Dr Kennedy and informed the latter that the form appeared to be incorrect, and that Dr Kennedy agreed to review the matter. This is not referred to in Dr Kennedy's affidavit specifically, but Ms. Clarke states that in any event a third Form 24 was received from the Central Mental Hospital by fax on the 13th November 2006 and on which the date of expiry is stated to be "24/02/07". She states that on the basis of this third Form 24 the Commission proceeded, as required by s. 72(4) of the 2001 Act to appoint a Mental Health Tribunal to review the detention of the applicant, as well as appoint a legal representative (Mr Felton) and an independent psychiatrist.

10. Ms. Clarke goes on in her affidavit that the Commission operates on the basis of information contained in the Form 24, and that is not its practice to have sight of the Form 6 order, nor did it in fact see a copy of the actual order (Form 6) which contains the endorsement as to the extension of detention for six months from "18/08/06", until the 13th March 2007 when a copy was requested by the Commission's solicitors from the solicitors acting on behalf of the Central Mental Hospital.

11. Section 72(4) of the 2001 Act, a transitional provision to deal with existing detentions which had been authorised under the 1945 Act, provides that:

"The detention of the person referred to in subsection (2) or (3) shall be referred to a tribunal by the *Commission before the expiration of the period referred to in subsection (2) or (3)*, as may be appropriate, and the Tribunal shall review the detention as if it had been authorised by a renewal order under section 15(2)".(my emphasis)

12. The detention of the applicant had been authorised under s. 184 of the 1945 Act, and in that regard he is a person to whom s. 72(2) of the 2001 applied, rather than s. 72(3) of same. Section 72(2) provides:

"In the case of a person who immediately before such commencement stood detained under section 184 or 185 of the Act of 1945 his or her treatment or detention shall be regarded as authorised by virtue of this Act *until the expiration of the period during which he or she may be detained pursuant to the said section 184 or 185* as may be appropriate."(my emphasis)

13. It is worth setting out the provisions of s. 189(1)(b)(i) of the 1945 Act (as inserted by s. 18 of the 1961 Act), which was in operation at the time the applicant's detention was "extended for a further six months from 18/08/06" by Dr Jackson on the 18th August 2006. Section 189(1)(b) provides:

"(b) Where an order is endorsed under this section –

(i) the chief medical officer shall –

(I) *give to the person to whom the order relates a notice stating particulars of the endorsement* and that such person or the applicant for the reception order may send to the Inspector of Mental Hospitals an objection to the extension of the said period, and

(II) give a like notice to the applicant for the order, ..... " (my emphasis)

14. Although the applicant in his documentation filed for this application has named only the Central Mental Hospital as respondent, and the Health Service Executive and the Mental Health Commission as Notice Parties, I have permitted, following an application in this regard, the Mental Health Tribunal to be added as a Notice Party and to be heard in argument. Mr Paul Anthony McDermott BL has appeared on their behalf.

15. Mr McDermott has correctly stated that it is not the function of the Tribunal to determine whether or not the applicant on the 20th February 2007 was in lawful detention, and that its function was to review the detention pursuant to the provisions of section 18 of the 2001 Act. What the Tribunal was in fact reviewing on the 20th February 2007 was the renewal order which had been made on the previous day, the 19th February 2007. The fact is that it was satisfied that the meaning of the series of orders and renewal orders made in respect of the applicant was that his detention endured until the 24th February 2007, rather than the 18th February 2007, and it carried out its review as required and affirmed the order of the 19th February 2007. Mr McDermott makes the point that the important consideration from the Tribunal's point of view on the 20th February 2007 was to determine that the applicant still suffered from a mental disorder which required his continued detention and treatment, and that in so deciding it went about its task in an entirely proper way.

16. He makes the point also that at all times the Tribunal and other concerned have acted with the utmost good faith and in the best interests of the applicant in respect of whom all the medical evidence is to the effect that he is in need of further detention and treatment in his own interests and the interests of others who might be at risk if he is not so detained and treated. In my view there is no room to disagree with that submission.

17. Mr McDermott has referred in his submissions to the paternalistic nature of the 2001 Act and its predecessor the 1945 Act, and to the way in which the Courts have over the years given a purposive interpretation to the provisions to reflect the special nature of the purpose of the enactments, namely the protection of ill and vulnerable persons and those around them, and that the lawfulness of the applicant's detention should be considered in this nuanced way, and not in a way that might be traditionally done in relation to other forms of detention. However, even in the case of the latter, Mr McDermott has referred to a recent judgment of Kearns J. in *DPP v. Moorehouse* [2006] 1 IR 421 where the learned judge referring to the principle of strict interpretation of a penal statute, went on to state:

"That is not to say that a penal statute cannot be construed in a purposive manner, or that the court should readily adopt a construction which leads to an artificial or absurd result."

18. But I am conscious that in the present case the Court is not embarking upon an exercise in statutory interpretation, but rather attempting to ascertain the meaning to be given to an endorsement made to a detention order on the 18th August 2006.

19. Mr McDermott has referred also to judgments such as that of O'Byrne J. in *Re Philip Clarke* [1950] IR 235, those of McGuinness J and of Hardiman J. in the Supreme Court in *Gooden v. St. Otteran's Hospital* [2005] 3 IR 617, as well as that O'Neill J. in *MR v. O'Byrne*, unreported, High Court, 2nd March 2007. In these judgments the paternalistic nature of the legislation in relation to mental health patients was emphasised.

20. Mr McDermott has referred to the provisions of s. 189(1) of the 1945 Act which I have set forth already and emphasises the reference therein to the fact that the Chief Medical Officer, if satisfied that the patient will not have recovered on the expiration of the period during which he may be detained, "may by endorsement extend the said period by a further period not exceeding six months....". He submits that the clear purpose of this enactment is to provide for what he describes as 'six-monthly periods of detention', where the first order expires six months after it is made, and that the first renewal expires six months after that date, and in a way that means that the renewal order cannot kick in or have effect until the actual expiration of the previous period. He suggests that this interpretation is consistent with what has been stated by Clarke J. recently in *H v. Russell*, unreported, High Court, 6th February 2007, where he stated that:

"It is clear that the legislation acknowledged that any such opinion might turn out to be incorrect. Otherwise there would be no need for extensions. However, it seems to me to be clear that what the legislature contemplated in respect of the successive periods of detention under the relevant provisions was that they were to be short-term (i.e. six months) detention periods designed to cover a situation where it was anticipated that the person concerned would recover in that period but where extensions up to a total of twenty four months could be certified provided that there remained a reasonable prospect of recovery in the shorter term."

21. Mr McDermott makes the point also that it would make no sense for the second order to come into effect before the expiration of the first order, i.e. on the 18th August 2006, as there would then be two detention orders in existence between the 18th August 2006 and the 24th August 2006.

22. Ms. O'Hanlon SC for the applicant submits that Mr McDermott's submission amounts to saying that the legalities of detention should be ignored, and that the over-riding consideration is simply whether or not the applicant is ill. This in her submission is to ignore the possibility that the applicant could be available for treatment as a voluntary patient. She submits also that it would have been open to Dr Jackson on the 18th August 2006 to have endorsed the detention order in such a way as made it clear that the extension of detention which she was ordering on the 18th August 2006 was to take effect from the expiration of the previous period on the 24th August 2006, but that this did not occur. She submits that it is clear that after the 18th February 2007 the detention of the applicant became unlawful, in spite of the best intentions of all concerned. She submits that the purported renewal order made on the 19th February 2007 is of no effect, and that the Tribunal therefore had nothing lawful to review and affirm on the 20th February 2007 when it sat.

23. As stated by McGuinness J. in *Gooden v. St. Otteran's Hospital* [supra] the sole issue before this Court in an application of this kind is whether or not the applicant is detained in accordance with law. This was stated by that learned judge having referred to the fact that there was no doubt about the seriousness of the illness afflicting that applicant and the fact that personnel at the hospital concerned had acted only in the best interests of that applicant.

24. In *Gooden*, and in *Re: Philip Clarke* the Courts were dealing with issues which involved statutory interpretation, and the question as to whether the Courts should adopt a literal interpretation of the relevant statutory provisions or give them a purposive interpretation in the light of the objectives of the legislation was addressed in the judgments. Mr McDermott urges that the Court in the present case should do likewise so as to ensure that the objective of the statutory scheme now in place is achieved in the best interests of the applicant.

25. However in the present case it is not the meaning to be attributed to any statutory provision which I must decide. It is clear that the applicant was detained from time to time under s. 184 of the 1945 Act by virtue first of all of the original temporary patient order made on the 25th August 2005, and subsequently by renewals thereof, including that made on the 18th August 2006.

26. Neither is the Court required to decide by way of statutory interpretation if the Tribunal which sat on the 20th February 2007 was entitled to affirm the renewal order which was made on the 19th February 2007. If the endorsed order made on the 18th August 2006 only kicked in on the 24th August 2006, then the renewal order made on the 19th February 2007 was one which was entitled to be made (i.e. before the expiration of the previous renewal order). But if the renewal order did what it purported to do, namely extend the detention period for six months from that date, then the renewal order made on the 19th February 2007 was of no effect and the Tribunal had in effect no valid order to review and affirm when it sat on the 20th February 2007.

27. It follows in my view that this Court must decide what the renewal endorsement made on the 18th August 2007 means. That is not something which engages the Court in statutory interpretation, and accordingly the cases to which the Court has been referred and in which a purposive interpretation was adopted in these types of cases are of limited assistance, except of course for the purpose of highlighting the very real fact that the statutory scheme put in place is there in order to ensure that the best interests of the patient are safeguarded.

28. In my view the meaning to be given to the endorsement made on the 18th August 2006 must be informed by the fact firstly that s. 189(1)(a)(i) of the 1945 Act provides for an endorsement which extends detention not for a period of six months but rather for a period "not exceeding six months". Secondly, the Court's determination must be informed by the fact that s. 189(1)(b) requires that the patient be given a notice stating particulars of the endorsement. This serves the obvious purpose of telling the patient the period for which he may be thereafter detained, and allows the patient to object to the extension of the period.

29. I refer to these matters because in the present case, and if s. 189(1)(b) was complied with, and I have no reason to believe that it was not, the applicant was perfectly entitled to be of the view that the order "does what it says on the tin", namely that he may be detained for six months from the 18th August 2006. It is not to be assumed that the requirement to give the patient notice is a mere empty formal procedure devoid of real meaning, and that the period can be deemed at some later stage, if convenient to so do, to be a period other than what is perfectly clear and unambiguous from the notice given to the patient at the time, and from the wording of the endorsement itself. It might be different if what was endorsed on the order was a period which was not permitted by law. But in the present case, the period endorsed, even if it is interpreted as commencing at the expiration of the previous order, namely the 24th August 2006, is a legally permissible period, being a period which is some days less than six months.

30. In my view the applicant was entitled to think that his detention was authorised until the 18th February 2007, and that it would expire on that date if by then it was not further renewed. That is what the endorsement says. I do not accept that this meaning is precluded by the fact that the previous order made was to expire on the 24th August 2006. No purposive statutory interpretation can alter what is stated in the endorsement. The only way in which this Court could hold that the renewal order made on the 18th August 2006 endured until the 24th February 2007 would be to decide that it does not matter what is stated on the form of endorsement, and that the only matter to be considered is the over-riding interest of ensuring that the applicant is detained in his own and others' best interests. Such a manner of approaching the meaning of orders depriving a person of his or her liberty could not in my view be correct, as it would nullify the very purpose of inserting safeguards in the statutory procedures put in place. In matters involving the

deprivation of liberty, and I place persons such as the applicant who are ill in no lesser a position than other persons whose liberty is in other circumstances curtailed or removed, the greatest care must be taken to ensure that procedures are properly followed, and it ill-serves those whose liberty is involved to say that the formalities laid down by statute do not matter and need not be scrupulously observed. That is not to say that where the meaning of a statutory provision is unclear or open to different interpretations the meaning which is consistent with a purposive interpretation of the legislature's intention is not the one which should be adopted. That is a different question altogether.

31. Occasionally mistakes will be made by busy personnel, and no matter how well intentioned those personnel may be, and no matter how conscientious they are in looking after and considering only the best interests of the patient, and I of course include all the personnel concerned in the present case in that category, mistakes have legal consequences, and cannot simply be erased for the sake of convenience.

32. The interests of the patient can nevertheless be looked after even in a situation where such a mistake has arisen, and this can be achieved by an imaginative and purposeful type of order, or the timing of the Court's order designed to facilitate an orderly resolution of how the applicant should be detained and treated hereafter. But to pretend that nothing wrong occurred is to deny the right to liberty other than in due course of law, and that is a slippery slope down which I cannot bring myself to venture.

33. For these reasons I am not satisfied that on the 19th February 2007 the applicant was lawfully detained, and I am satisfied that the detention order dated 19th February 2007 is one which could not be lawfully made given the expiration of the previous order on the previous day, and the affirmation of that order by the Tribunal on the 20th February 2007 was of no effect.

34. I will not however make any order for release until the parties have had an opportunity to decide how, in the best interests of the applicant who I am satisfied is ill and in need of continuing treatment and detention, his further detention from now until his sufficient recovery can be achieved in accordance with law.