Neutral Citation Number: [2010] IEHC 195

THE HIGH COURT

2009 2081 SS

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN:

L.

APPLICANT

AND

HARRY KENNEDY, CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

RESPONDENT

AND

MENTAL HEALTH (CRIMINAL LAW) REVIEW BOARD

NOTICE PARTY

Judgment of Mr Justice Michael Peart delivered on the 5th day of May 2010:

Following his arrest in the immediate aftermath of his mother's death the applicant was remanded from the District Court to Mountjoy Prison in December 1998, but some days later was transferred to the CMH where he remained as a patient until his trial and conviction. The clinical diagnosis at that time was that he was suffering from a drug-induced psychosis against a background of bi-polar affective disorder.

On the 7th April 2000, the applicant was found "guilty but insane", by a jury at the Central Criminal Court, of the murder of his mother in 1998, following which, under the provisions of s. 2 of the Trial of Lunatics Act 1883 ("the 1883 Act"), then in force, he was committed by the trial judge to the Central Mental Hospital ("CMH") where he has been treated ever since.

On 12th April 2006 the 1883 Act was repealed and replaced by the Criminal Law (Insanity) Act, 2006 ("the 2006 Act") which, inter alia, provides by s. 20 (2) thereof that the 2006 Act *"shall apply to a person found guilty but insane and detained under section 2 of the Trial of Lunatics Act 1883, as if he or she were a person detained pursuant to an order of the court made under section 5 and accordingly, such person shall be entitled to the benefit of the provisions of this Act."*

The applicant is therefore a person who is deemed to be detained pursuant to the provisions of s. 5 of the Act, and therefore entitled to the protections and procedural safeguards provided for by the 2006 Act and, in particular as far as the present case is concerned, the provisions related to periodical review of his medical condition, and the need or otherwise to continue to be detained at the CMH, and the powers of the Review Board in that regard.

Relevant statutory provisions:
Section 5 of the 2006 Act provides for the return by the jury of a verdict referred to as a "special verdict" to the effect that the accused person is "not guilty by reason of insanity", replacing the former verdict in such cases under the 1883 Act of "guilty but insane".

Before returning a "special verdict" the jury must be satisfied that the accused person was suffering at the time of the offence from a mental disorder, such that he/she ought not to be held responsible for the act alleged by reason of the fact that he or she (i) did not know the nature and quality of the act; (ii) did not know that what he or she was doing was wrong; and (iii) was unable to refrain from committing the act.

It is important to mention at this point that the definition of 'mental disorder' under the 2006 Act for the purposes of a special verdict by the jury differs from the definition of a 'mental disorder' under the Mental Health Act, 2001, and it is the latter which becomes relevant following any committal to the CMH and for the purposes of the reviews by the Mental Health (Criminal Law) Review Board "the Review Board") thereafter.

The treatment which the applicant has received over the years since he first became a patient at the CMH has resulted in a situation where the relevant medical opinion is that he is no longer suffering from a mental disorder, as defined by the 2001 Act such that his continued detention is necessary. However, a view has been taken that he should not be unconditionally discharged, but, rather, should be released but only on certain conditions related to his supervision. The relevant clinicians are of the view that even though he does not fulfil the criteria for mental disorder under the 2001 Act, he does suffer from a mental disorder for the purposes of the 2006 Act, a different definition.

Due to what is seen as a lacuna in the legislation, and in this regard reference has been made to the judgment of Hanna J. in *JB v. The Mental Health (Criminal Law) Review Board and others*, unreported, High Court, 25th July 2008, the Review Board considers that such conditions as might be imposed upon any release of the applicant could not be enforced, resulting in a situation where if the applicant was to breach any condition so imposed, he could not be recalled to the CMH.

It has therefore been decided by the Review Board that he should continue to be detained, on the basis it would not be in his best interests or the interests of the public generally that he should be unconditionally discharged. In that regard, the Review Board has relied upon the provisions of s. 11 (2) of the 2006 Act as its authority to detain the applicant in the absence of enforceable conditions which could be attached to a conditional discharge. That provision 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."*

"Mental disorder" under the 2006 Act is defined by stating in section 1 that it "includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication".

It will be recalled that in order to bring in a "special verdict" of not guilty by reason of insanity the jury must be satisfied that at the time of the offence the accused person was suffering from such a mental disorder and that because of it the accused should not be held responsible for his actions.

However, once that verdict is delivered by the jury, the 2006 Act definition ceases to have any relevance, because the scheme of the Act provides at s. 5 (2) that if the Court is satisfied that the person is (i.e. at the time of the verdict) suffering from a mental disorder as defined under the 2001 Act "and is in need of in-patient care or treatment", the Court shall commit the person to the CMH "until an order is made under section 13" (i.e. the first review).

Section 5(3) provides that for the purposes of s. 5 (2) if the Court is satisfied that the person is (i.e. at the time of the verdict) suffering from a mental disorder "and may be in need of in-patient care or treatment" (my emphasis), the Court may commit the person to the CMH for examination in that regard but for a period not exceeding 14 days. That period may be extended but not beyond 6 months. During that period of committal the Chief Medical Officer of the CMH shall report to the court on whether in his or her opinion the accused person committed for examination is suffering from a mental disorder within the meaning of the 2001 Act and is in need of in-patient care or treatment at the CMH.

It seems to follow from the wording of section 5 that if such a report was provided to the Court and it stated that the person is suffering from a mental disorder as defined by the 2001 Act but in-patient care or treatment was not considered necessary, the Court has no power to make any order for the committal of the person; and that if such a report states that the person is suffering from such a mental disorder and is in need of in-patient care or treatment, the Court must make an order under section 5 (2) for committal to the CMH "until an order is made under section 13 by the Review Board" (my emphasis).

It is part of the applicant's submission in the present case that the applicant, being a person whose detention is deemed now to be one pursuant to the 2006 Act, is a person in respect of whom the 2006 Act definition of mental disorder now has no relevance, and that he is at this stage a person whose detention can only be under the authority of an order of the Review Board pursuant to the provisions of s. 13 of the Act, and that the order by the Central Criminal Court by which he was originally committed to the CMH under the 1883 Act is spent since he is now under the regime introduced by the 2006 Act.

It has been submitted also that since the medical opinion is now that he no longer suffers from a mental disorder as defined by the 2001 Act and that his being an in-patient at the CMH is not required, there is no lawful basis for his continued detention on foot of any order of the Review Board made under s. 13 (8) of the 2006 Act.

It is submitted that he must be discharged either conditionally or unconditionally in such circumstances. It is submitted that the unenforceability of conditions subject to which the CMH would otherwise feel it appropriate to discharge the applicant, is not sufficient to permit the Review Board to detain the applicant where the medical evidence is not sufficient to permit detention under s. 13 of the Act.

The relevant functions and powers of the Review Board under s. 13 in relation to a person such as the applicant who is detained, or deemed to be detained, under s. 5 of the 2006 Act are set forth as follows:

> *"(5) Where the clinical director of a designated centre forms the opinion in relation to a patient detained pursuant to section 5 …… that he or she is no longer in need of in-patient care or treatment at a designated centre he or she shall forthwith notify the Review Board of this opinion.*
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> *(6) Where the Review Board receives a notification under subsection (5) it shall 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 and treatment, determine the question whether or not the treatment referred to in subsection (5) is still required and shall make such order as it thinks proper in relation to the patient, whether for his 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.*
>
> *(7) ……*
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> *(8) A patient detained pursuant to section 5 …… 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 under 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."*

In his Certificate filed on this application for the purpose of demonstrating the lawful basis of detention at the CMH, the respondent has relied firstly upon the order of the trial judge for the committal of the applicant dated 7th April 2000, and has attached also the eight decisions made by the Review Board under s. 13 of the 2006 Act following the introduction of the 2006 Act, the last of those decisions being made on the 20th November 2009. This last decision records that decision in the following way:

> *"The Board was informed that all the patient's leave has been cancelled and that he has been moved from Laurel Lodge to Unit 7 because of an incident that occurred when he was on day leave. It appears that he made an arrangement for another patient at the CMH to be brought to his apartment, although this arrangement was never carried through. His Consultant at the time and the Clinical Director took the view that this was a serious breach of the conditions under which the patient had temporary release and warranted termination of such release and transfer back to Unit 7.*
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> *The Board, however, notes that although the Consultant was aware of Mr Lynch's relationship with the other patient, his written release conditions did not prohibit any meetings between them.*

The Board can appreciate the point that, in these circumstances, the patient may well have had cause to believe that a meeting was permissible. It is also cognisant, however, of the view that, taking into account of the circumstances generally surrounding his leave arrangements as described by his Consultant, Mr Lynch knew or ought to have known that the planned meeting would, at a minimum, raise a doubt concerning the depth of his commitment to abide by the spirit as well as the letter of the conditions applying to his leave. It would not be possible for his Consultant to give assurance that personal safety and public interest requirements were met while there were doubts in that regard.

The patient has not been on any medication for any mental disorder for well over two years and prior to this incident had been compliant with the conditions of his leave. It does not appear to the Board that he is in need of in-patient treatment in the Central Mental Hospital and his solicitor has again requested that he should be granted an unconditional discharge. The Board can only repeat its view that this would not be either in his interests or those of the public, and that if he is discharged, it should only be subject to enforceable conditions in relation to supervision. Meanwhile, the Board believes that he is properly detained in the Central Mental Hospital and should remain so detained pending further review, which should take place in two months' time." (my emphasis)

The background to the incident referred to in this decision is that in March 2009 the applicant had been granted what is referred to as "level 5 leave" by the Department of Justice, Equality and Law Reform which permitted him to spend one night per week away from the CMH, and that the applicant chose to spend that night at his father's house. This was increased to two nights per week in April 2009. However, in May 2009, the applicant appears to have rented an apartment in Fairview from his own resources and began to spend the two nights' weekly leave at that location. It appears that in September 2009 it became known through information received from the female patient concerned, that the applicant had put in place arrangements for her to be brought to that apartment by a male friend of the applicant's. While this did not actually occur, the attempt was regarded as a breach of his conditions of leave and a breach of trust with his treating team, and thereafter a decision was taken to return him to Unit 7 and to suspend all his external leave from the CMH. It was on the 20th November 2009 that the Review Board affirmed his detention for a further two months, and it was that decision which at the date of the hearing before this Court was the certified basis for his detention.

This information has been gleaned from a note by Dr Mary Davoren of a Multi-Disciplinary Case Conference held on the 16th December 2009 which goes on to describe a lack of cooperation by the applicant with staff and his treating team after his return to Unit 7, and a lack of motivation to work through his clinical issues at that time. This lack of cooperation appears to have persisted through December 2009. It is stated also that at the multi-disciplinary team conference on the 16th December 2009 the view was expressed that the applicant on that date did not fulfil the criteria for mental disorder for the purposes of the 2001 Act, and that he was considered at that time to suffer from a bi-polar disorder which is in remission, and that his behaviour patterns continued to demonstrate an underlying emotionally unstable personality disorder. This memo goes on to record at para. 8.1 : "*Therefore he is considered to suffer from a mental disorder within the meaning of CL (I) Act 2006*" (my emphasis). It states further at para. 11 that he is not on any medication other than for physical conditions, and under "Diagnostic Issues" it is stated that "[the applicant] is considered to be suffering from an Emotionally Unstable Personality Disorder (ICD-10 F60.3) ……..there has been no obvious evidence of any florid psychotic symptoms since [the applicant] has been discontinued from his anti-psychotic medication since February 2007". Under "Risk Assessment" it is stated that there is no evidence that the applicant is at any increased risk of self-harm, and no history of self-harm since his admission to CMH, though there is a history of impulsivity. As to him constituting a risk to others it is noted that the killing of his mother "was in the context of drug abuse and acute psychotic illness" and "if his mental state remains stable this risk would remain low". But it is stated also: "However, this risk would increase if the patient misused illicit substances". As to the risk of him misusing drugs outside the CMH it is noted that he has stated that he has no intention of using any psychoactive substances in the event of his discharge, but it states also: "*However, in an unsupervised setting this risk is likely to increase. Therefore it would be appropriate for [the applicant] to undergo random drug testing if discharged*".

As at the 16th December 2009 the Treatment Objectives from a medical point of view were stated as follows in the said memo:

"1. All future treatment objectives are contingent upon the patient re-engaging with the clinical team.

2. Not considered suitable for conditional discharge even if this were available due to non-adherence with treatment plan."

Damien Mohan, a consultant forensic psychiatrist at the CMH, has sworn an affidavit in the present application. He gives a history of the applicant's background of mental illness, and the events which have led to the applicant being a patient at the CMH. He goes on to describe the various and progressive phases of treatment available to such patients while detained, and then in relation to the applicant specifically he states that the applicant has been progressed through the various stages of treatment which he has described and he refers to the case conference which was convened by the CMH on the 16th December 2009 to which I have referred. Then he states at para. 53 of his affidavit:

"53. I say that at the present time the applicant suffers from a bipolar disorder which is in remission and his behaviour pattern continues to demonstrate an underlying emotionally unstable personality disorder. I further say and believe that while the applicant does not satisfy the criteria of a "mental disorder" within the meaning of section 3 of the Mental Health Act, 2001 he does satisfy the criteria of having a "mental disorder" within the meaning of section 1 of the Criminal Law (Insanity) Act, 2006".

Mr Mohan then describes how in February 2009 how the applicant was transferred from his team to that of another consultant forensic psychiatrist at CMH with responsibility for the 'rehabilitation and recovery' programme in the hospital, and that the applicant was then moved from Unit 7, which is the low dependency unit, to another part of the CNH complex known as Laurel Lodge. He states that at that stage the applicant did not show any symptoms of florid psychosis and nor was he being prescribed any psychotropic medication. He then refers to what I have already set forth, namely that in March 2009 the applicant was permitted to reside with his father for one night per week, later in May 2009 extended to two nights per week. Mr Mohan then refers to the applicant obtaining a apartment in Fairview, and to the incident which I have set forth relating to his attempt to have a friend his bring a female patient to that apartment, and to the consequence of that for the applicant, namely the suspension of his external leave, and his return from Laurel Lodge to Unit 7 of CMH.

Mr Mohan then concludes by stating that the applicant has refused to give the hospital an account of what happened in relation to that September 2009 incident and that he has refused also to engage with his clinical team, and that this refusal continued up to the date of swearing of that affidavit, namely the 18th December 2009, and that "*it is the opinion of the hospital that in the present circumstances the applicant is not a person suitable for discharge from the hospital*".

The respondent himself has sworn an affidavit on the 11th January 2010, in his capacity as Clinical Director of CMH. He states that he is familiar with what has been stated by Mr Mohan and agrees with the views expressed and adopts them. Among his averments are that the applicant is not a person suitable for discharge from the hospital, and that he is a person to be considered as being affected by the transitional provisions of the 2006 Act and that he is entitled to the statutory rights and processes under the 2006 Act since its commencement. He concludes his affidavit by stating at para. 13:

> *"I say that I remain of the clinical view that it is neither safe nor appropriate in the applicant's welfare interests for him to be unconditionally discharged from this hospital. I further say and believe that the risks to his mental health welfare in the event of an unconditional discharge from this hospital would, from a clinical perspective, be unacceptable and would likely result in serious harm to his mental health welfare."*

Feichín McDonagh SC for the applicant has made extensive submissions and has provided helpful written submissions, as have all parties. Mr McDonagh submits firstly that the committal order made by the trial judge at the conclusion of his trial is no longer of any effect and cannot itself be relied upon for the lawfulness of the present detention of the applicant. No party disagrees with that submission, and neither do I. Clearly once the 2006 Act was commenced the applicant was thereafter deemed to have been committed under the provisions of the 2006 Act, and is entitled to all the procedures and statutory provisions set forth in that Act. That includes a review of detention under and in accordance with the provisions of s. 13 of the Act. Mr McDonagh has submitted that in so far as the respondent or the Review Board seek to rely upon the applicant fitting a definition of mental illness as defined by the 2006 Act, and as referred to by Dr Kennedy in his affidavit and in other documents this is erroneous, and that this is not affected in any way by the best interests provisions of s. 11 of the Act. His submission is that such a best interests provision is not a provision which gives any power to detain *per se,* and that its purpose is simply to provide some guidance or exhortation to relevant decision-makers when making decisions in accordance with the legislation.

The essential submission in this case is that for the applicant's detention to be lawful, he must be a person who satisfies the provisions of s. 13 of the 2006 Act, and in that regard that the Board must determine "*whether or not the patient is still in need patient care or treatment at the CMH*". Mr McDonagh emphasises that under the scheme of the Act, a person may well be considered by the clinical personnel to be suffering from a mental disorder, even one under the 2001 Act definition, but yet who is not considered to need in-patient care or treatment. In other words, simply to suffer from a mental disorder is not sufficient to justify detention, and the fact that the applicant has arrived at the CMH through the criminal process following his conviction does not alter that fact. He has referred to the undoubted fact there would be many persons in any community in the State who may unfortunately suffer from a mental disorder but who are treated other than as an in-patient, and that a person such as the applicant should be treated no differently, and further that the scheme of the Act is designed in a way that achieves that and requires it. Put another way, it is submitted that a person who does not suffer from a mental disorder as defined in the 2001 Act cannot be made the subject of an order for detention under s. 13 of the Act and must be discharged.

He submits also, as I have referred to, that nothing in s. 11 which is relied upon by the respondents, can serve the respondents' purpose in justifying the continued detention of the applicant at the CMH.

Mr McDonagh has submitted that if the applicant was to have been on trial for this offence on today's date, a jury would have been entitled to bring in a special verdict, since it was satisfied that the applicant was suffering from a mental disorder under the 2006 Act definition as a result of which he should not be held responsible for the crime, but that on the evidence now available from the CMH he would not be someone who could be committed to the CMH pending the making of an order under section 13 by the Review Board, since he is not a person who "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", as provided for in s. 5 (2) of the 2006 Act. It follows therefore, in his submission, that his continued detention is not authorised now in view of the clinical opinions expressed. He submits that if the applicant could not now be committed under s. 5 of the Act, his detention cannot any longer be lawful. Mr McDonagh submits that the Review Board has failed to appreciate this point, when it takes the view that the detention should be regarded as authorised where the applicant may meet a 2006 Act definition of mental disorder, and where it is of the view that no enforceable conditions can be attached to a conditional release.

It is submitted in this case that the Board have been of the view for some time that the applicant does not suffer from a 2001 Act mental disorder, and also that in-patient care and treatment is not required, and further that the only matter impeding the discharge of the applicant under the powers contained in s. 13 of the Act is a view that while the applicant is suitable for a conditional discharge under that section, there are no such conditions which can be imposed which would be enforceable in the event that the applicant failed to adhere to or comply with such conditions. The conditions which would be placed upon such a discharge would appear in the nature of giving urine samples to ensure that he is not abusing psychotropic substances, or being otherwise supervised in that regard. The view of the Review Board is that he poses a potential risk to the public, if he was to start once again to take such substances, and, quite understandably, this would be a concern in circumstances where the CMH could not recall him to the CMH if that were to occur. It is for these reasons that they rely on s. 11 of the Act.

Mr McDonagh has submitted that such concerns are not sufficient to permit the Review Board to make an order under s. 13 of the Act, and has referred to the relevant provisions for involuntary detention under the Mental Health Act 2001 should the applicant be found to require further detention for care and treatment.

In so far as the respondents might seek to rely on the paternalistic nature of the 2001 Act and, indeed, the 2006 Act and seek to justify the detention of the applicant by reference to that concept, Mr McDonagh submits that such a paternalistic approach may well have relevance to a person suffering from a mental disorder, as defined, but that it cannot be persuasive in the present case where it appears to be accepted that the applicant is not a person who is suffering from such a mental disorder.

Mr McDonagh characterises the present detention of the applicant as preventive detention since it is not detention authorised by the legislation for any medical or care and treatment purposes under the Act, and submits that this was never within the contemplation of the Oireachtas when they replaced the former statutory scheme with the scheme under the 2006 Act.

Felix McEnroy SC for the CMH has indicated that it is the nature of the applicant's current medical condition which is relied upon in order to justify his detention, and that the CMH is entitled to have the clinical view, following the events of September 2009 when external leave was revoked and he was returned to Unit 7, that, as stated by Mr Mohan in his affidavit, the applicant suffers from a "*bipolar disorder which is in remission and his behaviour pattern continues to demonstrate an underlying emotionally unstable personality disorder*."

Mr McEnroy has also sought to submit that it is arguable that the order of committal of the applicant which was made by the trial judge on the 7th April 2000 is still extant, and in that regard has referred to certain comments made by Hanna J. in his judgment

(under appeal) in *JB v. Mental Health (Criminal Law) Review Board & ors*, unreported, High Court, 25th July 2008. Those were judicial review proceedings in order to, inter alia, compel the respondent Board to discharge the applicant conditionally. The Board, as in the present case, was of the view that there was no provision in the 2006 Act for the enforcement of any conditions which might be attached to a discharge, and that any conditional discharge would amount to an unconditional discharge accordingly. While the applicant in that case had indicated his agreement to such conditions, the Board was not confident that he would adhere to them. It was contended for the applicant that in such circumstances the Board was required to discharge him subject to conditions, and that there was no power to continue to detain him since it was the case that he no longer suffered from a mental illness as defined in the 2001 Act and was not in need of in-patient treatment.

A factor in JB which must be mentioned at this stage is that a very important piece of evidence was that the clinical director of CMH in that case was happy to allow that applicant to avail of temporary release under s. 14 of the 2006 Act in terms which the learned judge described as "quite generous" (see p. 20 of his judgment). That level of freedom appears to have weighed heavily in the mind of the learned judge when he concluded that the applicant's status did not offend against Article 5 of the European Convention on Human Rights, and that s. 13 of the 2006 Act was not incompatible with same.

As to the question whether the order of the trial judge which originally committed the applicant in that case to the CMH remained extant following the first review of detention under s. 13 of the 2006 Act, and remains in force to the present day and can serve to justify the continued detention of the applicant, Mr McEnroy has referred to a passage of the said judgment which commences at page 27 thereof, where the learned judge stated as follows:

> *"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?*
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> *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."* (my emphasis)

In his submissions, Mr McEnroy has submitted that, according to this conclusion, the order of the trial judge made on the 7th April 2000 continues to exist as a basis for the applicant's detention, and in so far as the applicant may seek to submit that the judgment of Hanna J. is incorrect, Mr McEnroy has referred to the judgment of Clarke J. in *Re: Worldport Ireland Ltd (in liquidation),* unreported, High Court, 16th June 2005 where that learned judge referred to the comity of the judiciary and to the desirability that a judge of first instance ought usually to follow the decision of a judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. In the present case, it is not so much that I think that the learned judge is wrong. The judgment is under appeal and it is not for me to express any view in that regard and I do not. But as I read the judgment, while the learned judge stated what he did, he was not intending to reach a final and concluded view about that question, since neither party had pressed the point one way or the other, and it seems to me that the learned judge was proceeding on a working basis that the order remained *in situ*. It is of some relevance that the learned judge was not dealing with an application for release under Article 40.4.2 of the Constitution, but proceedings by way of judicial review, and to that extent at least the comments of the learned judge can be viewed as being *obiter dicta*.

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

Mr McEnroy has submitted that all concerned with the care and treatment of the applicant at the CMH have had the best interests of the applicant and the public at the centre of their decision-making. He has referred to the detailed description of the care and treatment programme which has been and is available to the applicant at the CMH. He submits that it is clear that the therapeutic goal for all concerned has been to give back to the applicant as much freedom as is consistent with the public interest, especially given the undisputed facts which caused him to be in the CMH in the first place.

Mr McEnroe has also submitted that the applicant is not correct to say that the 2006 Act is not relevant once a special verdict has been handed down by the jury. He submits that if that was to be the situation then the Oireachtas could simply have introduced some amendment to the 2001 Act in relation to a 'special verdict'. He submits that a new discrete procedure has been introduced to those in respect of whom a special verdict has been made, and that the procedures must be looked at carefully, as provided for in s. 13 (8) of the 2006 Act, and that one should not simply look at a definition of mental disorder by reference to the 2001 Act, and he draws attention to the manner in which mental disorder is defined in an inclusive way in the 2006 Act, and again to the fact that the applicant is a person who has a mental condition which fits that definition, namely an emotionally unstable personality disorder.

He refers to the function of the Review Board as set forth in s. 13 (8) and to the fact that it provides that a person is detained under s. 5 of the Act (as is the applicant) may apply for a review, and that having heard the evidence relating to his medical condition it "*shall … determine the question of whether or not the patient is still in need of in-patient treatment at the CMH*", and thereafter make an order either for further detention, care and treatment, or for discharge either conditionally or unconditionally. He submits that it is not, by reference to provisions of that section, part of the function of the Review Board on a s.13 review to decide if the patient still suffers from a 2001 Act type mental disorder, that consideration being relevant only to the procedures under s. 5 when

the committal is made which lasts until the first review under s. 13 of the Act. It is submitted that at a Review Board hearing the only matter required to be determined is whether a person such as the applicant, who was detained because he was suffering from a mental disorder and was in need of in-patient care or treatment, is still in need of that in-patient treatment.

Mr McEnroe submits that it is clear therefore that even though a person may not fit the 2001 Act definition of mental disorder by the time of any particular review under s. 13 of the 2006 Act, he may still under s. 13 be detained further provided that the Board is of the view that he is still in need of inpatient care or treatment, and that the 2006 Act definition applies generally in relation to that Act, which includes the condition of the applicant. He submits that the inclusive type of definition contained in s. 1 of the 2006 Act is not to be taken as being exhaustive. In written submissions, the question is asked as to why, if the applicant is correct in his asserted view that the only basis upon which he can be detained in the hospital is if the Board is satisfied at the conclusion of a statutory review that he is suffering from a mental order within the meaning of the 2001 Act, there is a statutory definition of a mental disorder in s. 1 of the 2006 Act, and why do the review provisions relating to the Board in the 2006 Act make no reference to the definition of mental disorder contained in the 2001 Act?

That submission is in contrast to the applicant's submission that it could not be the intention of the Oireachtas that a person, who could not have been committed in the first place to the CMH under s. 5, could nevertheless, having been so detained, continue to be detained for care and treatment for some condition falling short of a 2001 Act mental disorder, and that such a mental disorder is a condition precedent to ongoing or further detention under s. 13 of the Act, even though that section is silent in that regard.

To some extent that issue is not particularly relevant to this particular application, since according to the evidence the applicant is considered not only to be not suffering from a 2001 Act mental disorder but also that he no longer is in need of in-patient care and treatment, the only difficulty being that the Board is unwilling, in the interests of the public, to discharge the applicant on conditions which it feels it cannot supervise or enforce in the event of the applicant breaching same.

Mr McEnroe submits that the Board were entitled to have regard to the fact that conditions imposed on any discharge of the applicant cannot be enforced and to have the view that such a conditional discharge amounts to an unconditional discharge – something which they are not prepared to do. In that regard, he refers to the separate regime for temporary release subject to conditions which are contained in s. 14 of the Act and to the fact that that section makes specific provision for the arrest of such a person if conditions are breached, thereby bringing to an end the temporary release.

Having regard to the provisions of s. 11 of the Act, it is submitted that the Board was entitled to decide as it did, and that the continued detention of the applicant by the CMH is in accordance with law.

Anthony Aston SC has made submissions on behalf of the Review Board. He submits that this Court should have regard to the continuum of treatment which has been given to the applicant. He agrees that the committal order made by the trial judge under s. 5(2) of the 2006 act endures only until such time as an order is made by the Review Board under s. 13 of the Act, but he disagrees with Mr McDonagh's submission that once a person is no longer suffering from a 2001 Act mental disorder he must be released, and he submits that this cannot be seen as being the intention of the Oireachtas, given that the Act is silent in that regard, particular in s. 13 (8), and having regard to the over-arching best interests of s. 11 (2) of the 2006 Act requiring the Board to have regard not just to the welfare and safety of the applicant, but also to the public interest when making its decisions.

Mr Aston has drawn attention to the absence of any provision in the 2006 Act for the enforcement of any conditions which might be imposed upon a discharge by the Review Board, and to the contrast in that regard with the provisions for granting temporary release provided for in section 14 of that Act. Under those provisions, conditions may be attached to temporary release, and s.14 (4) of the Act requires the person to comply with such conditions, and where a person is in breach of any conditions imposed, he/she is deemed to be 'unlawfully at large' whereupon under powers contained in s. 14 (7) "*a member of the Garda Siochana 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 …… and bring him or her back to such centre*".

These enforcement provisions are not conferred upon the Review Board, of course. They are powers given to members of An Garda Siochana and to the clinical director of the designated centre and staff therein. But Mr Aston draws attention to the absence of any enforcement provisions which might be imposed upon a patient who the Review Board considers should be conditionally discharged. It is accepted that in the case of the applicant, the Review Board was satisfied on the evidence before it that the applicant was not suffering from a mental disorder which necessitated in-patient treatment, but that it considered also that he was not suitable for unconditional discharge, and should be discharged subject to a residence requirement and in relation to on-going supervision and care. It was, as already referred to, the lack of any powers under the 2006 Act to take any steps where such conditions may not be adhered to, which motivated the Review Board to make the order in November 2009 for further detention, albeit with a further review to be carried out two months later.

Submissions made in relation to Article 5 – European Convention on Human Rights:
The submissions made by all parties on this application have addressed not only the question of the lawfulness of the applicant's detention by reference to the relevant statutory provisions, but also by reference to some jurisprudence of the European Court of Human Rights in relation to Article 5.1 of the Convention. That Article was the subject also of submissions in the case already referred to, namely *JB v. The Mental Health (Criminal Law) Review Board and others*. There are factual similarities between that case and the present one in as much as in JB the applicant was not at the relevant time suffering from a mental disorder requiring in-patient treatment, yet he was not, like the present applicant, considered suitable for unconditional release. It was decided by a Review Board that conditional discharge in such circumstances was not in either the interests of the applicant or in the public interest, and that any discharge would have to be subject to enforceable conditions.

Mr McDonagh on the other hand, as already referred to, has highlighted the fact that in all probability the learned judge, in finding that there was no breach of Article 5 rights, was influenced by the undisputed fact that JB was the beneficiary of a generous amount of liberty by way of temporary release. It appears that he was on temporary release and spending four nights a week at home with his wife and son. The other three nights per week were spent at the CMH but in the least restrictive unit. This situation was found by the learned judge to result in a "limited curtailment" of JB's liberty.

But all parties have referred in particular to the two cases – *Winterwerp v. The Netherlands* [1979/1980] 2 E.H.R.R. 387; and *Johnson v. United Kingdom* [1999] 27 E.H.R.R. 296. These cases were the subject of discussion also in JB., and in view of the very clear summary of those cases given by Hanna J. in JB, I feel that it is unnecessary to do so again here. Mr McDonagh for the applicant submits that it is clear from this jurisprudence that a basis requirement for the lawfulness of detention under the Convention is that a person be suffering from a mental illness which requires him or her to be involuntary detention for the purpose of appropriate care or treatment. But he accepts that in Johnson the Court was clearly of the view that the absence of such a mental illness did not

mandate immediate release, and that some time could pass thereafter while necessary step-down procedures and preparations for release were put in place, and that the process for ultimate release could be gradual.

Mr Aston has referred in that regard to the judgment of the European Court of Human Rights in *Johnson* and submits that the judgment of the Court in that case supports the position adopted by the Review Board that having regard to the public interest the further detention of the applicant in the circumstances of this case is permissible within Article 5 of the European Convention on Human Rights, and that the Board must have regard to the case law in the exercise of its powers under the 2006 Act.

In Winterwerp the Court recalled that the principle underlying Article 5.1 was that no person should be deprived of his liberty unless he has been reliably been shown to be of unsound mind and that the mental disorder is such that compulsory confinement is warranted. The Article has as its objective that no person should be the subject of arbitrary detention. Under Winterwerp principles, detention of a person of unsound mind depends, in Convention terms, on three criteria: (a) the patient must be reliably shown upon objective grounds to be suffering from a true mental disorder; (b) the disorder must be of a kind and degree that warrants compulsory confinement; and (c) the validity of any continued detention depends upon the persistence of such a mental disorder, established upon objective medical expertise. However, as clarified in Johnson, the fact that the third of these criteria may cease to be fulfilled does not lead inevitably to a requirement under Article 5 for immediate and unconditional discharge.

It is worth quoting a passage from *Johnson* in this regard, which has been referred to by Mr Aston for the Review Board. It is a passage which appears also in the JB judgment at p. 36 thereof. While on the facts of that case a violation of Article 5 was found to have occurred, the Court went on to state as follows:

> *"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 be 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."*

Mr Aston submits that accordingly under the case-law of the ECHR the national authority is entitled to exercise a measure of discretion in deciding whether in the light of all the relevant circumstances and interests at stake it would be appropriate to direct the immediate discharge of a person who is no longer suffering from the mental disorder which led to his detention in the first place, or any other mental disorder, and that this is reflected in the provisions of s. 11 (2) of the 2006 Act. Mr McEnroy makes a similar submission on behalf of the CMH.

Conclusions:
It is common case that having been found guilty but insane and committed to the CMH following his conviction in April 2000, the applicant by virtue of s. 20 of the 2006 Act is entitled to the benefit of the provisions of that Act. In that regard it is s. 13 (8), as renumbered, which is principally relevant.

It is not disputed either by any party that the applicant no longer suffers from a mental disorder as defined by the 2001 Act. Neither is it disputed by the applicant that he suffers now from the unstable personality disorder already referred to.

It is not disputed by the CMH or the Review Board that such personality disorder as the applicant suffers does not require his compulsory detention at the CMH. In fact, while it is not considered that it would be appropriate, having regard to the public interest, to discharge him unconditionally, he is considered by the Review Board to be a person who would be suitable for discharge subject to conditions including supervision.

On the application before this Court there has been no evidence of what precisely any such conditions might be. The applicant is prepared to abide by such conditions as may be imposed, and there is no evidence before this Court which would be sufficient to establish as a matter of probability that the applicant would not abide by such conditions as might be imposed. It is true that in September 2009 a view was taken by the CMH that he had breached the trust reposed in him by the attempt to make an arrangement whereby a female patient would be brought by his friend to his rented apartment during his temporary release, and that following his return to the CMH he has not cooperated with the medical staff, but that seems to me likely to be a form of protest against the cancellation of his temporary release and bringing him back into Unit 7, and not necessarily evidence that if discharged conditionally he would not abide by those conditions. The view has been taken that while the applicant may have been reasonably under the impression that the attempted arrangement was permissible but that it speaks to whether or not there can be confidence that he would abide by conditions for a conditional discharge. The relevant portion of the decision of the Board dated 20th November 2009,as already set forth, states as follows:

> *"The Board, however, notes that although the Consultant was aware of Mr Lynch's relationship with the other patient, his written release conditions did not prohibit any meetings between them.*
>
> *The Board can appreciate the point that, in these circumstances, the patient may well have had cause to believe that a meeting was permissible. It is also cognisant, however, of the view that, taking into account of the circumstances generally surrounding his leave arrangements as described by his Consultant, Mr Lynch knew or ought to have known that the planned meeting would, at a minimum, raise a doubt concerning the depth of his commitment to abide by the spirit as well as the letter of the conditions applying to his leave. It would not be possible for his Consultant to give assurance that personal safety and public interest requirements were met while there were doubts in that regard."* (my emphasis)

There is no disputing the fact that, while providing for arrest and recall to the CMH in respect of a person breaching the terms of a temporary release under the provisions of s. 14 of the 2006 Act, the Oireachtas has chosen to make no provision in s. 13 for any power to recall to detention a person, who is conditionally discharged, and who breaches any conditions attached to such conditional discharge, or for enforcing those conditions in any manner whatsoever. It would appear to me that this absence of any power to recall to detention or to in any way enforce conditions attached to a conditional discharge is a deliberate and conscious choice made by the Oireachtas, since in the very next section of the same Act a power to recall is provided for. The provisions of s.13 (8) must be read in that light. In passing I would note that in the equivalent UK legislation there is a power to recall a person to detention in such circumstances (see s. 73(4) of the Mental Health Act, 1983, and of course that must be borne in mind when reading the judgments of the ECHR in cases against the United Kingdom. It is a different statutory regime, at least to the extent of enforcement and recall. In contrast to the law in this jurisdiction a conditionally discharged patient under UK law does not cease to be liable to be detained under the 'hospital order' made following conviction for an offence.

Where the manner in which s. 13 of the 2006 Act is clear and unambiguous, the intention of the Oireachtas is clear and unambiguous. In such circumstances, this Court must not overstrain, by way of a purposive interpretation, in order to read into s. 13 (8), perhaps by reference to s. 11 of the Act, in all cases where conditional discharge is considered appropriate by the Review Board, a power to decline to impose conditions, because the Review Board has taken the view that any such conditions cannot be enforced, and instead to continue to detain the person concerned.

It seems to me that to have such a fixed policy, if it be such, is to ignore the express terms of the Act, and to go beyond its statutory powers. I do not believe that s. 11 is sufficient to enable the Review Board to ignore the possibility of a conditional discharge, and confine itself to making decisions either to detain or discharge unconditionally. That is not what s. 13 (8) says. In my view the relevance of s. 11 is that, having decided that a person is not required to be detained, and ought not to be discharged unconditionally, it must have regard to the welfare and safety of the person and to the public interest when deciding upon what conditions are appropriate to be attached to the discharge. I do not believe that it is open to the Review Board to decide that because there is no provision for recall or other enforcement of conditions it will confine its purview to either further detention or unconditional discharge.

Nowhere in the papers before me on this application is there any evidence that the Review Board considered what, if any, conditions would be appropriate in this case taking into account the safety and welfare of the applicant and to the public interest, and having had the opinion of the relevant medical experts that the applicant was suitable for conditional discharge.

Neither is there any evidence that the Review Board was of the opinion, whether evidence-based or otherwise, that the applicant would, if discharged subject to certain conditions, breach any such conditions. It would clearly be open to a Review Board, on appropriate evidence, to form the opinion that the person meets the criteria for a conditional discharge, to form a view as to what those conditions should comprise, but nevertheless conclude, again based on relevant evidence, that the person would not abide by or comply with some or all such conditions. By way of s. 11 of the Act, the Review Board would in my view be entitled to continue to detain the person in such circumstances, where either the person's own safety and welfare, or the public interest required it.

If the Review Board has a general policy, and it seems that it does, that it will not order a conditional discharge because there are no powers to enforce conditions imposed, the arbitrary detention of persons who are considered suitable for conditional discharge will result, and, furthermore, such a policy must operate on a presumption, and an unfair one in many cases perhaps, that the person though expressing a willingness to abide by conditions, will in fact breach them. This will lead to arbitrariness in the decision to detain, and may constitute a breach of obligations under Article 5 of the Convention.

In JB, it seems clear that the learned Hanna J. considered that the very liberal regime of temporary release which that applicant continued to enjoy distinguished JB from a case such as Johnson, and enabled the learned judge to conclude that the Review Board had acted reasonably in its decision to continue the detention, and that the status of that applicant was not a violation of Article 5 of the Convention and that s. 13 of the Act was not incompatible with it. His conclusions in this regard are at p. 30 of his judgment when he stated:

> *"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 interest and the public interest."*

The position of the applicant herein is markedly different to JB whereby he is detained at the CMH with all temporary release cancelled. He has no element of liberty whatsoever. The reasons for that situation have been set forth by reference to the decision of the Review Board dated 20th November 2009.

In my view, what has gone wrong in the case of the applicant is that the Board has proceeded unilaterally to the view that the applicant will breach conditions which might otherwise be attached to a conditional discharge. They have come to that view only on the basis of the September 2009 incident. I do not read the decision recorded as set forth above as finding that the applicant was particularly at fault or culpable in thinking that his attempt at having contact at his apartment with that other person was not a breach of his conditions for temporary release. There seems to be an acceptance on the part of those concerned that there may have been some uncertainty about that, and yet it has had serious implications for the applicant's liberty.

Once the Review Board was satisfied that the applicant was not suffering from a 2001 Act mental disorder in respect of which his care and treatment necessitated that he be detained, and therefore that he could not simply be detained, and once it was satisfied also that the applicant ought not to be unconditionally discharged, it was obliged to consider the only remaining option under the section, namely the question of a conditional discharge. I do not believe that it was appropriate not to consider that option, which is effectively what happened because of its own policy.

What it ought to have done in my view was to identify and satisfy itself as to what the appropriate conditions would be both in the interests of the care and welfare of the applicant himself and the wider public interest, and then, including by giving the applicant an opportunity to be heard in relation to them, decide on the available evidence including of past behaviour, if the applicant was likely to abide by them. That process may well have led the Review Board to a reasoned conclusion that at that point in time it was not, taking into account the public interest, appropriate to discharge him conditionally, and that further detention was therefore required.

If this were an application for reliefs by way of judicial review, perhaps to quash the decision of the Review Board, this Court could consider doing so and remitting the matter to the Board for a fresh decision which could be made having regard to what I have just stated. But the relief sought under Article 40.4.2 of the Constitution which limits this Court to either a finding that detention is in

accordance with law, or, if not, to order the release of the applicant. There are no other possibilities. Having said that, however, a body of case-law has developed under the 2001 Act whereby in the event of detention being found to be other than in accordance with law, the Court nevertheless hesitates for a while and allows some time for the interests of the person concerned to be safeguarded in some way by appropriate steps being taken to ensure his/her safety and well-being. Such persons may well be suffering from an undisputed mental disorder yet procedures have been conducted in such a way as to not be in accordance with the statutory code. Such persons remain vulnerable, and it would be unconscionable for a Court in such circumstances to simply release them to the side of the street, without any regard for their safety and welfare, and the safety of the public. In other words, a paternalistic approach is taken in those special and limited circumstances, even within the very narrow confines of the Court's jurisdiction under Article 40.4.2 of the Constitution.

The present applicant is different. He does not suffer from a mental disorder. He suffers from a personality disorder for which he is not required to take any medication and which does not require detention for any treatment. He has been on no medication at all for over two years. He does not therefore require to be detained for the purpose of any recommended treatment or for ensuring that he continues to take medication. He is suitable for release into the community, subject to his complying with certain conditions, which would appear to be directed towards ensuring that he does not abuse psychotropic substances, and this would be achieved by the analysis of urine samples on a regular basis. It does not seem to me that the same paternalistic imperative comes into play in these circumstances.

Lawfulness of detention:
The fact that the applicant no longer suffers from a mental disorder as defined in the 2001 Act is not of itself something which mandates his discharge, with or without conditions, under s. 13 (8) of the 2006 Act. Such a mental disorder operates as a key to the entrance gate, but once admitted and under the regime prescribed by the 2006 Act a person may recover either partially or completely so that he/she is no longer within the definition of mental disorder under the 2001 Act. It does not follow that because he no longer suffers from the mental disorder which justified his/her detention at the CMH in the first place that he must be discharged. The order of the trial judge in my view endures only until an order is made by the Review Board following the first review. Thereafter it is the Review Board which determines whether the person remains detained, or whether he/she is discharged either conditionally or unconditionally.

The protection to which such a person is entitled is a review from time to time under s. 13 (8) when all relevant medical evidence and opinion will be available to the Review Board which will then exercise its powers under that section, including by having regard to the interests referred to in s. 11(2) of the Act. Though, as I have already stated, section 11(2) of the Act does not itself confer any power to detain. But it must guide the decisions which the Board makes under s. 13 (8).

The Board had been concerned for some time about the absence of any powers to enforce conditions. The Review Board decision dated 17th December 2008 for example noted that the consultant agreed that the applicant was no longer at that time suffering from a mental disorder as defined in the 2001 Act. But it concluded, correctly in my view, that even where the person was not in need of in-patient treatment, the section empowered the Board to continue to detain for care and treatment purposes. It has power also to discharge conditionally, but in this case and at that time the Board would, according to its decision "*probably discharge him conditionally if the Act contained any powers of enforcement of conditions as there could then be supervision after discharge ….*" But it was in favour of short periods of temporary release, and of again considering the question of his unconditional discharge "*if he shows himself able to cope with unaccompanied leave for a comparatively short period*".

By February 2009 the Board at its review decided that "*it would still not be in his interest to grant unconditional discharge in view of his limited experience of coping on his own, particularly having regard to his physical limitations*". Again detention was to be ameliorated by "as much leave as possible" under s. 14 of the Act.

By July 2009, the applicant was considered to be ready for a move to his apartment for two nights per week and that this would be in his best interests, provided there was supervision and that he would submit to random drug-testing. But at least it was decided that, while the absence of powers to enforce conditions meant that the applicant could not be discharged conditionally, his gradual move to independent living could be achieved under the s. 14 temporary release provisions.

By November 2009 unfortunately, the incident in September 2009 had occurred and this was considered to be sufficiently serious to warrant the cancellation of all temporary release. That in turn appears to have prompted the applicant to respond by withdrawing cooperation with the treating staff. He has now been detained simpliciter, since the Board retains its view that conditional release is inappropriate in the absence of powers to enforce conditions, having regard to the public interest and his own interests.

I have set out this sequence again, in part by repeating what has already been set forth earlier in this judgment, in order to show the continuum of consideration by the Board of the position of the applicant. It is clear that there has never been any capricious or arbitrary decision to simply detain the applicant from time to time for no apparent reason. They have been conscious of the improvement in the applicant's condition and that he no longer needed to be detained for treatment as such. It is two years or more since he has received any treatment as such. He has not been on medication other than for physical symptoms. They are at all times concerned not to discharge the applicant unconditionally, simply because of its view that any conditions which it would impose would have to be capable of supervision and enforcement. There can be no doubt that at all relevant times, the Board and those at the CMH in whose care he has been and is, have had the applicant's best interests at the heart of their decision-making.

The ultimate question which this Court must decide is whether the decision to detain which was made by the Review Board on the 20th November 2009, as recorded in the record of that decision which bears the date 30th November 2009, is one the Board was entitled to make or was it one which is unlawful and requiring the release of the applicant. The applicant has submitted that once he is no longer suffering from a mental disorder he must be discharged. That is not correct in my view. Section 13 (8) makes no reference to making any finding as to whether a mental disorder still exists. The section gives the Board a wide discretion by the use of the words " such order as it thinks proper 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". That does not mean that the Board is entitled to make whatever order it wants. It must act rationally, judicially and in accordance with principles of constitutional justice. It seems to me that provided that it goes about its decision-making task in a proper manner, the decision to detain the applicant in the circumstances of the present case is made in accordance with law, and does not mandate the applicant's release on the basis that his detention is unlawful.

It seems to me that it is in accordance with the case-law of the European Court of Human Rights in relation to Article 5 of the Convention, a fair measure of appreciation is permitted to a body such as the Review Board in deciding whether or not to discharge a person, conditionally or unconditionally, or whether it is necessary to continue to detain him, the most important principle for Article 5 purposes being that a person be protected from any decision which is purely arbitrary or capricious, and which could detain a person

for insufficient reason and for an unreasonable length of time without adequate redress or remedy.

An interesting case in point is that of *Kolanis v. The United Kingdom* [application no. 517/02], 21st June 2005. That applicant had been convicted of causing grievous bodily harm with intent, but was found also to be suffering from a mental illness. She alleged that her continued detention after a Mental Health Review Tribunal had directed her release subject to conditions was no longer justified and was without appropriate procedural safeguards, and she sought her discharge. The medical evidence was that a discharge was not appropriate but that she should instead be transferred to hostel-type accommodation under the care of a supervising consultant psychiatrist. The Review Tribunal nevertheless decided that she should be conditionally discharged, the conditions being that she resides with her parents, that she co-operate with supervision by a social worker and a forensic consultant psychiatrist, and that she should comply with such treatment as might be prescribed for her. That decision was made in August 1999. However, discharge was deferred until such time as "*satisfactory arrangements had been made to meet the conditions imposed*". It suffices to say that it proved impossible to fulfil the conditions, principally because for all sorts of reasons it proved impossible to find a forensic psychiatrist who was prepared to supervise the person if she was to be residing at her parents' home. By early 2000 the applicant was bringing judicial review proceedings to quash the decision on the basis that it contained conditions which were impossible to fulfil, and to compel the health authority to provide her with psychiatric treatment in accordance with the conditions imposed. It was submitted in those proceedings that she was entitled to be discharged, that the health authority was in breach of its statutory duties for failing to provide the necessary services, and that the failure to comply with those conditions within a reasonable time was a breach of Article 5 of the Convention. At first instance it was concluded that the health authority was not under an absolute duty to implement the conditions imposed, and that what was required was that it take all reasonable steps in that regard, and that it had done so. An appeal was dismissed by the Court of Appeal, and in due course the House of Lords refused a petition of appeal therefrom.

The European Court of Human Rights having heard submissions noted in its judgment (para.70) noted that the reasoning of the Mental Health Review Tribunal showed that "the discharge of the applicant was only regarded as appropriate if there was continued treatment or supervision necessary to protect her own health and the safety of the community, and that in the absence of such treatment her detention continued to be necessary in line with the purpose of Article 5 (1) [of the Convention]". The Court went on at paragraph 71 to state:

> *"As events in the present case showed, the treatment considered necessary for such conditional discharge may not prove available, in which circumstances there can be no question of interpreting Article 5 (1) (e) as requiring the applicant's discharge without the conditions necessary for protecting her and the public, or as imposing an absolute obligation on the authorities to ensure that the conditions are fulfilled. …… In the situation under consideration a failure by the local authority to use its best efforts or any breach of duty by a psychiatrist in refusing care in the community would be amenable to judicial review. The Court is therefore not persuaded that local authorities or doctors could wilfully or arbitrarily block the discharge of patients into the community without proper grounds or excuse, or that it occurred in this case."*

This passage demonstrates the non-absolute right to discharge where no mental disorder exists, and the measure of appreciation to be accorded to decision-makers in relation to the question of whether it is appropriate to discharge, conditionally or unconditionally, or whether to detain.

The facts of Kolanis are of course necessarily somewhat different to the present case where it is not the impossibility of fulfilling whatever conditions might be imposed that led to the making of a detention order, but rather the absence of a mechanism for the enforcement of same, should the applicant fail to observe them or any of them. In such circumstances the UK statutory scheme enables the person to be recalled, but that is not the case under the 2006 Act. But it seems to me that the jurisprudence of the European Court of Human Rights respects national law, providing that one way or another adequate safeguards exist to guarantee that a person is not made the subject of an arbitrary detention and with no adequate form of redress by way of review or application for release or otherwise. It does not seem to me that the fact that there is, quite consciously and deliberately on the part of the Oireachtas, no prescribed means of enforcing conditions or possibility of recalling a person conditionally discharged leads to a violation of Article 5 rights by denying any reality to the prospect of a conditional release, given the known view of the Review Board in relation to enforceability.

My concern in the present case is the process by which the Board determined, in so far as it did at all, what conditions might be appropriate for a conditional discharge, and to whether there was evidence before the Review Board, or at least some rational basis for a conclusion, that the applicant would as a matter of probability not comply with such conditions. After all, the decision to be made in that regard has implications for the liberty of the applicant, and it would be important that he have a fair hearing in that regard and an adequate opportunity to address any concerns arising in that regard. As I have stated already, the decision seems to have been predicated on the presumption that the applicant would not comply with conditions, and the only basis for such a view seems to have been the incident in September 2009, and it seems to have been accepted by all concerned that there is room for doubt as to whether he was actually in breach of any condition of his temporary release, and that it could be reasonable to take the view that he would have considered that he was not.

However, on the present application, the only issue is whether the detention of the applicant is in accordance with law. I believe that it is – both in terms of the statute and in terms of Article 5.1 of the Convention.

Other considerations could come into play if the present application was one brought by way of judicial review. In such proceedings the applicant might have sought to quash the decision and order made on the 20th November 2009 on the basis that the Board had not properly considered what particular conditions would have to be attached to a conditional discharge, and had failed to consider properly whether or not there was sufficient evidence to justify a conclusion that the applicant would not comply with any or all of such conditions. Questions of fair procedures might also arise. The applicant might have sought an order of mandamus directing that a further meeting of the Review Board take place at which all these matters would be reconsidered, and at which the applicant would be able to address concerns as to compliance. I should not, and do not, express any view on such questions lest by doing so I trespass beyond the confines of this case and into territory which may be relevant in other proceedings in which there would be an opportunity to provide complete evidence of any matter relevant to a consideration of the process leading to the decision in November 2009.

For all these reasons, I refuse the relief sought on this application.