THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 123

Record No. 2017/ 344

Peart J.
Hogan J.
Gilligan J.

BETWEEN

A.B.

APPLICANT/

RESPONDENT

- AND -

THE CLINICAL DIRECTOR OF ST. LOMAN'S HOSPITAL,

THE HEALTH SERVICE EXECUTIVE,

THE MINISTER FOR HEALTH,

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS/

APPELLANTS

- AND -

THE MENTAL HEALTH COMMISSION

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 3rd day of May 2018

1. This is now the third time this year in which this Court has been obliged to consider the interpretation and application of the Mental Health Act 2001 ("the 2001 Act"). The first two cases, *PL v. Clinical Director of St. Patrick's University Hospital* [2018] IECA 29 and *IF v. Mental Health Tribunal* [2018] IECA 101, raised very important questions concerning respectively the status of voluntary patients and the scope of an appeal from a Mental Health Tribunal to the Circuit Court. The present appeal however raises issues of far-reaching importance concerning the operation of the 2001 Act and the very constitutionality of a key part of that legislation. The significance of the present case for the practical operation of the 2001 Act cannot really be over-stated.

2. Before embarking upon a consideration of these issues, it is only right to say that this Court has had the great privilege of reading written submissions and listening to oral submissions from all parties of the very highest quality. The Court is accordingly indebted to the parties for their assistance.

The background to the application

3. The applicant (whom I shall term Mr. B.) was born in 1983. He has an intellectual disability and he has unfortunately suffered from learning delay and behavioural problems since early childhood. This has proved acutely challenging for his family, but it is only right that in this judgment the devotion and care for him so evidently displayed by his parents, Mr. and Ms. B., is appropriately acknowledged. This is also true of many others, ranging from medical professionals, nurses, carers, teachers and others. As Ms. B. stated in her affidavit, "many people have worked hard to assist in the management of his disability and to try to allow him to have a decent quality of life."

4. Mr. B. attended a range of special schools during his childhood and displayed a propensity to aggression and anti-social behaviour. Ms. B. complains plaintively about the lack of appropriate State supports at various times during his life, supports which she maintains – doubtless with good reason – meant that he lost valuable training and therapy at various important stages in his life. While Ms. B. maintains that her son has benefited from various types of community living for persons with intellectual disabilities, she acknowledges that in recent years her son's behaviour has become increasingly more challenging, with episodes of violent and erratic behaviour. This behaviour became more threatening when Mr. B. did not take his medication. By this stage the family's general practitioner had concluded that Mr. B. posed a very real threat to himself and to others and that absent supervised long-term residential care, there was a real risk of a fatality.

5. In May 2015 Mr. B. suffered from a serious psychotic episode where he had persecutory delusions that he and his family were under attack. The applicant was terrified by these delusions and he was initially admitted as a voluntary patient at St. Loman's Hospital. Within a day he attempted to leave, but he was then detained pursuant to s. 23 of that 2001 Act. On the 28th May 2015 an admission order was made for a 21 day period, which decision was affirmed by a Mental Health Tribunal ("the Tribunal") on the 17th June 2015.

6. There then followed a series of renewal orders which were generally made for a period of three months (and later for a period of six months and later again for a period of 12 months) under s. 15(2) and s. 15(3) of the 2001 Act and which orders were in turn affirmed by the Tribunal. Mr. B. has been in involuntary detention at St. Loman's since that date until he was discharged in September 2017 when bespoke accommodation was provided for him by the HSE. During that period of involuntary detention he was under the care of the receiving consultant psychiatrist, Dr. Mark Rowe.

7. It was Dr. Rowe who made a renewal order on 17th June 2015 pursuant to s. 15(2) of the 2001 Act authorising the applicant's detention for a period of three months, which order was later affirmed by the Tribunal. A further order authorising the applicant's detention was made by Dr. Rowe on the 14th September 2015, which was affirmed by the Tribunal on 1st October 2015.

8. On the 14th March, 2016, Dr. Rowe made an order pursuant to s. 15(3) of the 2001 Act authorising the applicant's continued detention for a period of six months up to 13th September 2016. Dr. Rowe concluded that Mr. B. was suffering from a mental disorder within the meaning of s. 3(1)(a) of the 2001 Act, namely, "because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or to other persons."

9. It is nonetheless of interest to note that following his detention in St. Loman's in May 2015, Mr. B.'s psychotic symptoms were managed and kept under control. Indeed in November 2015, Dr. Rowe has expressed the view that the applicant had recovered sufficiently to be discharged if he were to receive the necessary residential support. Ms. B. describes this support as comprising:

> "an individualised programme in his own home, where he has twenty-four hour supervision. These necessitate a site with a building which lends itself to being split in two so there can be two independent properties, one for the applicant and the other for the staff who support him. The staff can then be available to provide support on a twenty-four hour basis without overly encroaching on him. The applicant requires support at all times to help him with his daily activities and his anxiety, and yet he requires some distance from staff at times when being around other people becomes too overwhelming for him. He experiences loneliness and if left by himself for extended periods of time, rumination and anxiety are likely to develop."

10. Mr. B. had, in fact, been receiving such support services from the Muiríosa Foundation for a number of years. The Muiríosa Foundation identified suitable accommodation for the applicant at a premises in a rural county. It subsequently entered into a lease of the property for a period of five years in anticipation of placing the applicant in that property, supported by Muiríosa. It is claimed that public funding for Mr. B.'s care by Muiríosa was approved at this time, but this is disputed by the HSE. What is not in doubt, however, is that in May 2016 Ms. B was advised by the disability services section of the HSE that there were insufficient funds to provide supervised accommodation at these premises. Ms. B. maintains that the consequence of the failure to provide accommodation in the community is that the applicant remains detained indefinitely in a psychiatric ward for which there is no clinical justification.

11. As I have just noted, the sixth month renewal order was reviewed by the Tribunal on the 30th March 2016. The applicant's solicitor, Ms. Corona Grennan, attended before the Tribunal and she objected to the continued detention of the applicant on the grounds that the psychiatric unit in which he was detained was not an appropriate place in which to accommodate him. At this hearing Ms. Grennan referred to letters written by Dr. Rowe as far back as the 15th December 2015 and the 25th January 2016 in which he stated that the applicant's psychiatric illness had resolved "months ago" and that the applicant had remained in the psychiatric ward since his recovery from that condition only because of a lack of suitable residential placement in disability services. Dr. Rowe expressed the view that the applicant was in need of a suitable residential placement and also identified certain risks posed by his continued detention in a psychiatric ward in St. Loman's.

12. By its decision of the 30th March 2016 the Tribunal affirmed the renewal order, saying:

> "The Tribunal is satisfied that in view of the patient's moderate learning disability together with secondary episode disturbed behaviour meets the criteria for significant intellectual disability within the meaning of s. 3(1)(a) of the Act. Consequently the Tribunal affirms the renewal order."

13. The Tribunal made no reference to the issue of alternative accommodation because – as the Chairman of the Panel averred in a replying affidavit – that was not an issue to which it considered it might properly have regard. At all events, the HSE subsequently had to withdraw the proposed provision of a residential placement in the community because of a lack of funding. This was communicated to Ms. B. by letter of 15th May, 2016. Mr. B has instructed Ms. Grennan that he is very unhappy in the psychiatric ward and wishes to leave the ward as soon as possible to live in the proposed accommodation with the support of the Muiríosa Foundation.

14. On the 4th May 2016, Ms. Grennan wrote to St. Loman's Hospital drawing attention to earlier correspondence from Dr. Rowe which indicated that the psychiatric unit in which the applicant is detained is neither suitable nor appropriate for the applicant. She said that Mr. B. remained very vulnerable in the acute psychiatric ward and had been the victim of at least one assault. She concluded by stating that:

> "We will be writing to the HSE seeking confirmation that funding will be provided for suitable alternative accommodation. If we do not receive a satisfactory response within the next seven days, we will have no alternative option to take whatever legal action is appropriate to vindicate Mr. B.'s rights."

15. As Binchy J. was to comment in the course of his judgment in the High Court, "the initial impetus for the proceedings was to secure alternative suitable accommodation for the applicant." The HSE responded to this correspondence on the 20th May 2016. The General Manager of the disability section, Ms. Walsh, stated that the estimated cost of the proposed placement of the applicant in alternative accommodation under the supervision of the Muiríosa Foundation was approximately €290,000 per annum. She said that:

> "Given current significant budgetary constraints within disability services, funding approval remains pending at the time of writing. You will also understand that Mr. B. is not the only person in the State who requires high support supervision in the community at this time, and that it is inappropriate for priority to be afforded to those persons simply by reason of the fact that legal proceedings are threatened or initiated on their behalf."

16. Ms. Walsh continued by saying that Dr. Rowe was of the opinion that because of the severity of the applicant's intellectual disability, his judgment was so impaired that to discharge him from St. Loman's would be likely to lead to a serious deterioration in his condition, and would prevent the administration of appropriate treatment, and that the ongoing detention and treatment at St. Loman's was benefiting the applicant to a material extent. She said that it would be entirely inappropriate to discharge the applicant from St. Loman's given the significant, ongoing and immediate risk of harm that he poses to his immediate family.

17. A senior official from the Department of Health, Ms. Marian Meaney, also replied to Ms. Grennan in a letter dated the 10th June 2016 stating that the Minister was endeavouring to secure the necessary funding for the facilities required both by the applicant and many others around the country. She stated that once confirmation of funding was received, the third named respondent would then be in a position to address the needs of the applicant.

18. On the 27th June 2016 leave was granted by the High Court to commence the present judicial review proceedings. Mr. B. had in the meantime also appealed the decision of the Tribunal of the 30th March 2016 to the Circuit Court. On the 28th July 2016 His Honour Judge Comerford affirmed that decision, saying that he was satisfied that the applicant suffered from a mental disorder.

19. The next major development took place on the 13th September 2016, as on that day Dr. Rowe made a new renewal order in respect of the applicant pursuant to s. 15(3) of the 2001 Act detaining the applicant for a 12 month period. On this occasion Dr. Rowe based his conclusions regarding the applicant's mental condition based on the criteria set out in both s. 3(1)(a) and s. 3(1)(b) of the 2001 Act. It will be recalled that s. 3(1)(a) refers to the likelihood of a person causing harm to himself or to others, whereas s. 3(1)(b) refers to the need to detain a person suffering from a mental illness, severe dementia or other significant intellectual disability in order to prevent a deterioration of his or her condition and whose detention would be likely to alleviate his/her condition. This order was affirmed by the Tribunal on the 28th September 2016, but on the basis of s. 3(1)(b) of the 2001 Act only, *i.e.*, while Dr. Rowe was of the view that the renewal order should be made because the applicant fulfilled both the "risk" and "treatment" criteria set out in s. 3(1)(a) and (b), the Tribunal considered that he met the criterion as to treatment only in s. 3(1)(b). The applicant also appealed this order of the Tribunal to the Circuit Court under s. 19 of the 2001 Act, but he later withdrew this appeal.

20. In its decision affirming the renewal order, the Tribunal found, *inter alia*, that the applicant is suffering from a mental disorder, namely, a severe intellectual disability as defined by s. 3(1). It also found that Mr. B. required ongoing medication to minimise the occurrence of a psychotic illness and also to manage his level of aggression. The Tribunal stated that Mr. B. was reluctant to take his medication and is likely to be non compliant with his required medication treatment regime if discharged.

21. It appears that funding has now been made available to provide the applicant with supervised accommodation in the community, in the premises which have been leased. Mr. B continued to be detained in St. Loman's up to September 2017 pending the putting in place of all necessary arrangements, including obtaining HIQA approval and staff recruitment. The estimated annual cost of providing these facilities and attendant care is of the order of €312,000 per annum.

An outline of the applicant's case

22. A far-reaching constitutional claim lies at the core of the applicant's case. The applicant in essence seeks a declaration that insofar as ss. 3(1)(a) and s. 15 of the 2001 Act authorised the applicant's detention up until the 13th September 2016, and ss. 3(1)(b) and s. 15 continued to authorise his detention up until the 12th September 2017, those sections are invalid having regard to the provisions of Article 40 of the Constitution. The applicant's case in essence is that in the case of the longer periods of involuntary detention under the 2001 Act – such as six months (s. 15(2)) and twelve months (s. 15(3)) – he has no realistic or effective mechanism available to him whereby he can establish that he is no longer suffering from a mental illness. Thus, in other words, once the renewal order has been affirmed by the Tribunal and any possible appeal to the Circuit Court under s. 19 has been dismissed, the applicant maintains that he must continue in involuntary detention under the 2001 Act for the remainder of the renewal order even though he might no longer be suffering from a mental disorder.

23. The various respondents maintain that if this situation were ever to arise the applicant would have a variety of remedies open to him. They contend that the responsible consultant psychiatrist would be under a duty to release the patient in such circumstances (s. 28) and any failure properly to exercise these powers could be quashed in judicial review proceedings. They further say that it would also be open to such an applicant to seek his release under Article 40.4.2 of the Constitution on the ground that he was no longer suffering from a mental disorder within the meaning of the 2001 Act. I propose presently to return to these issues.

24. The applicant also seeks declarations to the effect that these particular provisions are incompatible with Articles 3, 5, 8, 13 and 14 of the European Convention of Human Rights for similar reasons. The applicant further seeks an order of *certiorari* quashing the twelve month renewal order made on the 13th September 2016 which purports to authorise the applicant's detention until the 12th September 2017.

25. Before proceeding further it is next necessary to set out the relevant provisions of the 2001 Act.

The relevant provisions of the 2001 Act

26. Section 3 of the 2001 Act defines a "mental disorder" as meaning: " mental illness, severe dementia or significant intellectual disability where:-

> (a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or
>
> (b)(i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and
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> (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."

27. Section 15 deals with admission orders and renewal orders:

> "(1) An admission order shall authorise the reception, detention and treatment of the patient concerned and shall remain in force for a period of 21 days from the date of the making of the order and, subject to subsection (2) and section 18 (4), shall then expire.
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> (2) The period referred to in subsection (1) may be extended by order (to be known as and in this Act referred to as "a renewal order") made by the consultant psychiatrist responsible for the care and treatment of the patient concerned for a further period not exceeding 3 months.
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> (3) The period referred to in subsection (1) may be further extended by order made by the consultant psychiatrist concerned for a period not exceeding 6 months beginning on the expiration of the renewal order made by the psychiatrist under subsection (2) and thereafter may be further extended by order made by the psychiatrist for periods each of which

does not exceed 12 months (each of which orders is also referred to in this Act as "a renewal order").

(4) The period referred to in subsection (1) shall not be extended under subsection (2) or (3) unless the consultant psychiatrist concerned has not more than one week before the making of the order concerned examined the patient concerned and certified in a form specified by the Commission that the patient continues to suffer from a mental disorder."

28. Section 18 of the 2001 Act provides for the establishment of Mental Health Tribunals whose task it is to review the correctness of each admission order and renewal order within 21 days of the making of such orders. Section 19 of the 2001 Act provides for a right of appeal from a decision of the Tribunal to the Circuit Court.

29. Finally, s. 28 deals with the duty of the responsible consultant psychiatrist to revoke the relevant admission order or renewal order where he or she is of opinion that the patient is no longer suffering from a mental disorder within the meaning of s. 3 of the 2001 Act.

Summary of the judgment of the High Court

30. In his judgment (*AB v. Clinical Director of the St. Loman's Hospital* [2017] IEHC 360) Binchy J. held while the applicant had no standing to pursue the constitutional challenge, he nonetheless held that as the applicant had no effective means (whether by means of recourse to Article 40.4.2 of the Constitution or otherwise) of challenging his involuntary detention after the having exhausted a recourse to the Tribunal or the Circuit Court), aspects of Part 2 of the 2001 Act were incompatible with Article 5(4) of the European Convention of Human Rights. The Court accordingly granted a declaration to this effect pursuant to s. 5(1) of the European Convention of Human Rights Act 2003. That order provides as follows:

> "The Court DOTH DECLARE that pursuant to section 5 of the European Court of Human Rights Act 2003 that Part 2 of the Mental Health Act 2001 is incompatible with Article 5(4) of the European Convention of Human Rights in so far as it does not provide persons who are detained under a 12 month renewal order (made pursuant to section 15(3) of the Act) with an entitlement to initiate a review of their detention following the expiry or exhaustion of their rights pursuant to section 19 of the said Act."

31. The respondents have accordingly appealed to this Court against that declaration and the appellant, Mr. B., has cross-appealed against the decision holding that he had no standing to pursue the constitutional claim.

The judgment of the High Court on the *locus standi* issue

32. Perhaps the first issue which requires to be considered is whether the applicant has the requisite standing to advance this constitutional challenge. In his judgment in the High Court Binchy J. concluded that the applicant could not satisfy the *Cahill v. Sutton* test (*Cahill v. Sutton* [1980] I.R. 269). It is necessary to set his reasoning and conclusions on this point in full:

> "There can hardly be any doubt that the initial impetus and intention of these proceedings was to secure for the applicant the funding for the provision of supervised accommodation for him in the community which the applicant thought had been promised, and subsequently withdrawn. That funding has since been reinstated and that accommodation should be available to the applicant over the coming months. In the meantime however, he protests that his detention in an acute psychiatric ward is wholly unsuitable to his needs and damaging to his health. It is not disputed that it is unsuitable for his needs, but the first and second respondents are doing their best to meet the applicant's needs in the meantime, not least by providing him with up to 70 hours per week outside the hospital environment under the care of the Muríosa foundation.
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> While the applicant has not expressly admitted in these proceedings that he suffers from a mental disorder, he has not denied it either and nor has he put it in issue in the proceedings. It is expressly acknowledged by the applicant in the proceedings that he suffers from an intellectual disability and that he requires to be in 24 hour supervised care. His complaint is that his care should be provided in the community and not in a psychiatric unit. It has to be said that there is something of a contradiction in acknowledging that 24 hour supervision is required, but at the same time requesting the quashing of a detention order until such supervision is available in the community (as distinct from in St. Loman's Hospital itself). While there appears to be agreement amongst all of the psychiatrists who have attended the applicant that his detention in an acute psychiatric ward in St. Loman's Hospital is unsuitable (ever since he recovered from the initial psychotic incident that resulted in his detention in May 2015), there is also agreement that this is better than the alternative of releasing him into the community having regard in particular to the likelihood (as found by the Tribunal) that he would not take the depot medication that he requires to take in his own interests and in the interests of others.
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> While it is stated in the statement of grounds that the detention of the applicant is arbitrary and disproportionate, it is not explained how this can be so in circumstances where (as it was at the time of the preparation of the amended statement of grounds) there are no facilities available for the provision of accommodation in the community for the applicant with 24 hour supervision. It is acknowledged by the applicant that 24 hour supervision is required, but nonetheless it is argued that until that it is available in the community (as distinct from in the hospital environment) he should be released back into the community, unsupervised. There is no criticism of the procedures followed leading up to the making of any of the detention orders to which the applicant is subject, including the order of September 2016. No argument is made that the prescribed procedures were not followed or that the procedures themselves operate in any way unfairly. While the applicant seeks to impugn s. 3 of the Act of 2001, no arguments were advanced as to why that section, which sets out the definition of "mental disorder" for the purposes of the Act is in itself, or operates in any way contrary to Article 40 of the Constitution or the provisions of the Convention relied upon by the applicant.
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> The applicant also impugns s. 18 of the Act of 2001, which is the section under which the Tribunal is required to consider the detention of a patient and either to revoke or affirm the same. No argument is advanced to explain why this section is, or operates in any way, contrary to the Constitution or the Convention. It might also be observed that if this section was declared to be unconstitutional in isolation, that would not affect an admission order made and renewed under ss. 14 and 15 of the Act of 2001; there would simply not be a review by a Tribunal.
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> As regards his Convention arguments, counsel for the applicant argued that the applicant's rights under Article 5§4 of the Convention have been violated because of the absence of any mechanism of review of his detention for the duration of the renewal order of 13th September, 2016. No arguments were advanced as regards any violation of the applicant's rights under 3, 8, 13 and 14 of the Convention. It may be seen from this analysis that the applicant is not so much complaining about what the Act provides for, but rather what the Act does not provide for i.e. any review (whether initiated by the applicant himself or not) of the applicant's detention for a twelve month period. However, it is argued on

behalf of the state respondents and also on behalf of the first and second named respondent that this is an entirely academic argument in circumstances where the applicant acknowledges that he has a mental disorder and does not advance any arguments that he has been improperly detained pursuant to the provisions of the Act of 2001. In these circumstances, it is argued, that even if he could invoke a review of his detention by a tribunal now, he could not benefit from such a review (since he does not dispute that he suffers from a mental disorder) and for this reason, it is submitted, the applicant has no locus standi to challenge the constitutionality of the Act of 2001. There is much force in this argument. In circumstances where it is not disputed that the applicant suffers from a mental disorder, and does not argue that the procedures set out by the Act have not been complied with, then the Tribunal must affirm the order detaining the applicant. The absence of a review of his detention until September 2017 makes no difference to the circumstances in which the applicant finds himself, because even if such a review were available, the Tribunal would have to affirm the order for his detention, and the applicant makes no complaint about the obligations of the Tribunal in this regard as set out in s. 18. Accordingly, the applicant is unable to meet the threshold set in Cahill v. Sutton in that he cannot assert that, because of the alleged unconstitutionality of ss. 3 and 18, his interests are adversely affected, or stand in real or imminent danger of being adversely affected by the operation of the statute. In my view therefore, the applicant does not have locus standi to challenge the constitutionality of the Act of 2001, on the grounds advanced in these proceedings."

33. Binchy J. then went, however, to rule that the applicant was entitled to a declaration of incompatibility pursuant to s. 5 of the European Convention of Human Rights Act 2003 saying:

> "In answer to this complaint, the respondents point to all the safeguards in the Act of 2001, as well as the remedies of judicial review and the right to make an application to court under Article 40 of the Constitution. But, for the reasons given above, none of these safeguards or alternative remedies, either considered individually or as a whole, corresponds to the right conferred by Article 5§4 of the Convention. While this may be academic in the case of the applicant, who has not disputed that he suffers from a mental disorder within the meaning of the Act of 2001, the fact remains that he has a right under Article 5§4 to have the lawfulness of his detention reviewed at reasonable intervals."

34. It will thus be seen that whereas Binchy J. held the applicant lacked standing to maintain the constitutional challenge, he nonetheless held that he had standing to seek and obtain a declaration of incompatibility pursuant to s. 5 of the European Convention of Human Rights Act 2003 ("the 2003 Act"), albeit that the judge concluded that it was appropriate that he should grant this relief of his own motion.

35. Perhaps the first thing to be said about this is that one might expect that an applicant who enjoyed the requisite standing to seek and obtain a declaration of incompatibility under s. 5 of the 2003 Act, even if (as here) the High Court granted this relief on its own motion would also have the necessary standing to pursue a constitutional claim. For my part, I find it difficult to see how there could in principle be such a differentiation of this kind on the issue of standing as between the Constitution and the ECHR. It is, perhaps, in its own way telling that at the hearing of this appeal none of the parties who actively participated in that appeal (Mr. B., the HSE, the Minister for Health and Ireland and the Attorney General, and the Irish Human Rights and Equality Commission) were prepared to stand over this aspect of the trial judge's judgment. (The Mental Health Commission did not actively participate in the first hearing on the 8th March 2018, but it did participate in the second hearing on the 27th April 2008 when it addressed the questions raised by the Court with the parties.)

36. While it is unnecessary for the present purposes to express any definitive view on the issue of *locus standi* in the context of the granting of a declaration of incompatibility under s. 5 of the 2003 Act, it is perhaps sufficient to say that the principles in *Cahill v. Sutton* are in practice likely to be the starting point. It must be recalled that unlike the special case of EU law (and which is, in any event, dealt with by Article 29.4.3 *et. seq.* of the Constitution), the extent to which the ECHR has been incorporated into our domestic law and the remedies available to the citizen in respect of the rights guaranteed by that Convention are all matters of legislative choice for the Oireachtas. Accordingly, it seems unlikely that the Oireachtas would have sought in this context (*i.e.*, one with strong – albeit not exact – parallels to the declaration of unconstitutionality regime) to depart from the well established principles regarding standing in constitutional cases articulated in *Cahill v. Sutton*, although, to repeat, it is unnecessary to be definitive on this wider topic.

37. The first question, therefore, is whether the applicant can bring himself within the ambit of *Cahill v. Sutton* by showing, in the words of Henchy J. ([1980] I.R. 269 at 282), that he has adduced circumstances demonstrating that "the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right." In my view, contrary to the views expressed by Binchy J., the applicant can clearly satisfy this test.

38. Looking with more particularity at the complaint which is made on behalf of the applicant against the constitutionality of the 2001 Act, it can be seen that the essential complaint is that in the case of the longer renewal orders provided for by s. 15(3) of that Act he is denied an effective opportunity to demonstrate that he is no longer suffering from a mental illness. Article 40.4.1 of the Constitution provides that no person shall be deprived of his personal liberty save in accordance with law. Any such legislative restriction on that right to liberty must, however, not ignore "the fundamental norms of the legal order postulated by the Constitution": see *King v. Attorney General* [1981] I.R. 233, 257, *per* Henchy J. These fundamental norms include the dignity and freedom of the individual (as per the Preamble), the rule of law and a free society as part of the democratic nature of the State (Article 5) and the protection of the person and good name (Article 40.3.2). Furthermore, Article 40.3.1 provides that any such law must respect and, as far as practicable, "defend and vindicate" these personal rights.

39. While, of course, it has been clear since at least the decision of the Supreme Court in *Re Philip Clarke* [1950] I.R. 235 that the Oireachtas could validly enact legislation providing for the involuntary detention of patients on the ground that this is imperatively necessary for the protection of their general welfare or the protection of others, the converse proposition is that the Oireachtas could not validly enact legislation providing for the detention of persons who are no longer suffering from such illness. It is scarcely a surprise to note that no party to this appeal suggested otherwise.

40. The applicant submits that he is deprived of the opportunity of any meaningful review of his mental condition once the renewal order has been affirmed by the Tribunal and any appeal to the Circuit Court under s. 19 has been dealt with. One could readily envisage circumstances where, for example, the Tribunal sat within weeks of the making of a 12 month renewal order under s. 15(3) and affirmed that order. Even if an appeal is taken to the Circuit Court under s. 19, that appeal is likely to be heard and determined within four to six weeks of the Tribunal decision. On the assumption that the Circuit Court affirms the Tribunal decision, then the applicant says – and that this is really at the heart of his case – that he is denied any effective opportunity of demonstrating by means of an independent review during this period that he is no longer suffering a mental disorder within the meaning of s. 3 of the 2001 Act such that he should be entitled to be released.

41. If the applicant's submission that he has no such effective opportunity for a review of his condition is correct, then there can be little doubt but that the relevant provisions of the 2001 Act would be unconstitutional on the ground that they contravene the provisions of Article 40.4.1 as read in conjunction with Article 40.3.1 and Article 40.3.2. This, after all, was the point which was made by Costello J. in his judgment in *R.T. v. Director of the Central Mental Hospital* [1995] 2 I.R. 65, 80-81 when he said:

> "There are serious defects not only in the transfer procedures but also in the provision which enables indefinite detention in the Central Mental Hospital. There is no practical way in which a transferred patient can procure his re-transfer or his liberty or have his continued detention reviewed.
>
> These defects in the statutory procedures have serious legal consequences as they directly impinge on the constitutional right to liberty of temporary patients. Such patients have a right to their liberty, at most, eighteen months after the reception order which restricted their liberty was made. If transferred under the section then they may be detained there lawfully after the expiration of that period for an unlimited time which, as this case eloquently demonstrates, may extend over many years. The defects in the section are such that there are no adequate safeguards against abuse or error both in the making of the transfer order, *and in the continuance of the indefinite detention which is permitted by the section*. These defects, not only mean that the section falls far short of internationally accepted standards but, in my opinion, render the section unconstitutional because they mean that the State has failed adequately to protect the right to liberty of temporary patients." (emphasis supplied)

42. While these comments were made in the course of a judgment which held that s. 207 of the Mental Treatment Act 1945 was unconstitutional and where the lack of safeguards for patients were even more pronounced that those disclosed here, the same general principle nonetheless obtains so far as the present case is concerned. That principle can be summarised by saying that the Oireachtas must provide for adequate safeguards to ensure that the involuntary detention of mental patients is kept under regular and independent review. If the applicant's core case that the 2001 Act contains no such adequate safeguards in the case of the longer detention periods provided by s. 15(3) (whether by reference to the Act itself or by reference to other safeguards, such as the right to apply to the High Court under Article 40.4.2 of the Constitution) is correct, then his constitutional rights have been affected by virtue of his prolonged involuntary detention such as would satisfy the requirements of *Cahill v. Sutton*.

43. While Binchy J. thought it relevant in this context that it was undisputed that the applicant suffered from a mental disorder, I cannot, with respect, agree that this is necessarily dispositive of the locus standi question. Just because Mr. B., for example, may have been suffering from a mental disorder in September 2016 when the 12 month renewal order was affirmed by the Tribunal, does not mean that he would necessarily be found to be so suffering from such a disorder in, say, March 2017. There was, in any event, much in the present case to suggest that Mr. B.'s mental disorder was capable of treatment in certain circumstances (as Dr. Rowe has indeed suggested) and that his mental health may improve over time to the point that an involuntary detention would no longer be necessary or appropriate. Indeed, the events which post-dated the judgment of the High Court are in their own way proof of this, because since September 2017 Mr. B. is now living in bespoke accommodation in the community and is no longer in involuntary detention.

44. If that is so, then if his legal arguments are correct, he has been unconstitutionally denied any effective opportunity to seek an independent review of his on-going detention once the Tribunal process and the appeal to the Circuit Court respectively have been exhausted. The entitlement may be regarded in the particular circumstances of this case as part of the duty imposed upon the State by Article 40.3.1 (and, by extension, Article 40.3.2) of the Constitution to defend his constitutional rights as far as practicable and to vindicate those rights.

45. It follows, therefore, that for all of these reasons and contrary to the decision of the High Court on this point, the applicant can plainly satisfy the requirements of *Cahill v. Sutton* and, accordingly, he has the necessary standing to advance his constitutional challenge.

46. This conclusion has immediately presented the Court with some practical difficulties in terms of how this Court should further proceed given that Binchy J. never addressed the merits of the constitutional argument. Should – or could – this Court itself address the constitutional question in the absence of a High Court determination on these constitutional merits? If the constitutional issue were to be remitted to the High Court, what then should happen to the declaration of incompatibility which Binchy J. had granted of his own motion pursuant to s. 5(2) of the 2003 Act. These are matters which the Court did not find it easy or straightforward to decide and, indeed, following the close of the oral argument on the 8th March 2018 it invited the parties specifically to address and consider them. These issues were separately addressed in written submissions prepared by the parties and in further oral argument held on the 28th April 2018.

47. In deliberating on these questions it might first be useful to consider the practical implications of either course of action.

Remitting the constitutional issue to the High Court

48. If the constitutional issue were to be remitted to the High Court, the question which then immediately arises is the status of the declaration of incompatibility. Some of the parties originally suggested that the declaration should be placed in abeyance by this Court pending the outcome of the fresh High Court hearing on the constitutional issue. Depending on the outcome of that determination and whether in turn it was appealed to this Court, it was submitted that this Court could then re-consider the declaration of incompatibility.

49. Quite apart from the procedural untidiness attendant upon that course of action, there was one even more fundamental objection to that suggestion because it is clear from the language of s. 5 of the 2003 Act that such a declaration of incompatibility could only be granted where no other remedy was available. If the High Court was incorrect in not having adjudicated upon the constitutional merits, it necessarily follows that Binchy J. could not have found that no other remedy was available to the applicant, itself a statutory pre-condition to the grant of any declaration of incompatibility.

50. It follows, therefore, that if the constitutional issue were to be remitted to the High Court, the declaration of incompatibility under s. 5 of the 2003 Act would also have to be set aside, albeit without prejudice to the merits of that particular finding.

Whether this Court should determine the constitutional issue?

51. The alternative option open to the Court is to proceed to determine the merits of the constitutional question even though the High Court had not done so. It was, however, accepted by all the parties that this issue had been argued in the High Court, albeit that in the course of the argument the focus had been on the *locus standi* issue.

52. In any consideration of this question, the starting point must be that any appellate court is reluctant to pronounce on an issue

which was not in fact determined by the court of trial. This reluctance was expressed by Finlay C.J. in *K.D. v. M.C.* [1985] I.R. 697, 701:

> "It is a fundamental principle, arising from the exclusively appellate jurisdiction of this Court in cases such as this that, save in the most exceptional circumstances, the Court should not hear and determine an issue which has not been tried and decided in the High Court. To that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice."

53. *K.D.* was a nullity case which itself turned on whether or not a previous English divorce decree was entitled to recognition in this State. The judgment in the High Court was to the effect that, based on the pre-existing authorities dealing with the domicile of the parties, the English judgment was not entitled to such recognition. On appeal to the Supreme Court the appellant sought to introduce a new argument to the effect that the judgment should be recognised by reason of the different test of real and substantial connection with the judgment rendering state, rather than simply by reference to the traditional domicile based test which had been applied by the High Court. Finlay C.J. noted ([1985] I.R. 697, 700) that it was agreed that:

> "….no submission was made to the learned trial judge that any other principle of law was applicable and that, therefore, no evidence was directed, nor was any finding of fact made in the High Court as to the existence or absence or proof of residence and real and substantial connection between either of the parties to that divorce and England…."

54. In these circumstances it is perhaps not surprising that the Supreme Court would not allow the appellant to advance this entirely new argument. One might observe by way of contrast with the present case that the constitutional issue had been advanced in the High Court and, hence, is not in any sense a new argument. It is also accepted that in contrast to *K.D.*, no new evidence will be led in the event that the matter were to go back to the High Court.

55. The next authority to which the Court was referred is *AA v. Medical Council* [2003] IESC 70, [2003] 4 I.R. 302. In that case the High Court had rejected a constitutional claim advanced by the applicant and in those circumstances the judge did not find it necessary to determine whether relief should also be withheld on discretionary grounds. On appeal to the Supreme Court the applicant relied on the dicta of Finlay C.J. in *K.D.* and contended that the respondents could not now raise the discretionary grounds in the absence of a High Court determination of the issue, arguing that the for the Supreme Court "to embark on a consideration of them would amount to a denial of the applicant's constitutional right of appeal from a decision of the High Court": see [2003] 4 I.R. 302, 306-307, *per* Keane C.J.

56. The Supreme Court rejected that argument, however, distinguishing *K.D.* in the process. As Keane C.J. stated ([2003] 4 I.R. 302, 308:

> "I am satisfied that, in such a case, this court is not deprived of its jurisdiction to consider whether the Applicant should be refused the reliefs sought on discretionary grounds because the High Court has not adjudicated on that issue. It would seem to me unjust that, where a particular ground has been raised and fully argued in the High Court, a party should be precluded from obtaining a decision on that ground in this court through no fault of his own. In the present case, it would mean that the case would have to be remitted to the High Court with an almost inevitable further appeal to this court, resulting in the incurring by a party not in default of significant costs and delay in having the appeal resolved. That does not seem to me to be a just and convenient way of dealing with the appeal."

57. These words have a resonance for the present case as well, because Mr. B., through no fault of his own, failed to secure a determination in the High Court on the merits of his constitutional issue. If the matter were now to be remitted to the High Court, this would entail further significant costs and delay. (It should be recalled that no fewer than five separate parties were represented on this appeal: Mr. B, the Clinical Director and the HSE, Ireland and the Attorney General, the Mental Health Commission and the Irish Human Rights Commission). It would certainly exact a further toll on the family of Mr. B. who, as I have already noted, have been singularly devoted to his welfare, even in the most challenging of circumstances.

58. The final authority is that of *McGowan v. Labour Court* [2013] IESC 21, [2013] 3 I.R. 713. In that case the applicants had challenged the constitutionality of Part III of the Industrial Relations Act 1946. That issue had been fully argued before the High Court, but Hedigan J. held that he should not decide the point by reason of the fact that the claim should not have been litigated in judicial review proceedings.

59. On appeal, the Supreme Court concluded that it could – and should – determine the constitutional issue, the absence of a first instance determination on the constitutional merits notwithstanding. As O'Donnell J. said ([2013] 3 I.R. 718, 731):

> "….In a perfect world it would undoubtedly be preferable to have meticulous and detailed argument in the High Court followed by a comprehensive judgment and a speedy appeal to this court, further comprehensive argument on the issue as addressed in the judgment of the High Court and, a final, as it is to be hoped, conclusive determination of all issues in this court. But the court cannot ignore the reality that the course of litigation is often very far from the ideal, and indeed this case is one example. Here there are a number of factors which suggest that the point should be considered and determined by this court. The issue is one which has been mooted for a considerable time, since at least the judgment in *Burke*. The relevant REA is still in full force and effect. Indeed, the third named appellant has been the subject of a District Court prosecution which was commenced in 2008 and which is awaiting the outcome of this decision. The REA will continue to have effect therefore and the uncertainty over its validity and indeed the validity of the underlying statutory scheme is undesirable. There have been three separate pieces of litigation in relation to this REA alone and a lengthy hearing both in the Labour Court and in the High Court. Considerable costs have been incurred on all sides. The point was fully argued and it was not adjudicated on not because, as sometimes occurs, the trial court had decided the case in the plaintiffs' favour on non-constitutional grounds but rather because the court considered that it was preferable that the case be brought by plenary procedure. It is not at all clear that this is a valid ground for declining to address a point otherwise properly before the court. To decline to hear and determine this issue would mean requiring the parties to incur substantial costs without the issues between the parties being resolved, and exposing the plaintiffs to the possibility of ongoing criminal prosecution and a choice between having to recommence proceedings or submitting themselves to a regime which they consider unconstitutional. Such an outcome would not be consistent with the administration of justice. Accordingly, albeit reluctantly, the court considers it necessary to address the central issue raised in this appeal."

60. While the issues in *McGowan* were different from the present case, it is significant that the Supreme Court adopted what O'Donnell J. described as the "sensible and pragmatic approach" of proceeding to determine the constitutional issue, not least in order to save costs. It should also be recalled that so far as the present case is concerned that there is the complicating factor that the

High Court has also to some degree adjudicated upon the merits of the applicant's claim by granting a declaration of incompatibility under s. 5 of the 2003 Act.

61. Drawing all these threads together, I have concluded that, on balance, the most satisfactory response of the Court is to proceed to determine the constitutional question. While I recognise that none of the possible options available to the Court are in themselves ideal, I think, as in *McGowan*, the better approach is to adopt the pragmatic solution offered by the Supreme Court in that case. I take that view because:

62. First, there are no additional facts which required to be determined.

63. Second, the issue raised is of far-reaching importance for the operation of the 2001 Act and which, once raised, must be confronted and determined. Any determination of the High Court on the constitutional question is itself likely to be appealed.

64. Third, the constitutional issue was raised and argued in the High Court (even if not determined) and many of the questions – such as the scope of Article 40.4.2 proceedings in the mental health field – determined by Binchy J. so far as the 2003 Act are concerned also directly relevant to the constitutional question.

65. Fourth, the costs of a re-hearing in the High Court involving five separate parties would be significant and should be avoided if possible.

66. Fifth, the fact that the High Court granted a declaration of incompatibility under the 2003 Act is also a complicating factor, not least because for the reasons already stated, that declaration would have to be vacated and the matter considered afresh if the case went back to the High Court.

67. Sixth, any remittal to the High Court would take a further toll on the family of Mr. B. who have selflessly devoted themselves to his betterment and welfare.

Whether patients who are subject to six month and twelve month detention orders enjoy sufficient safeguards
68. It is next necessary to consider whether the applicant who is the subject of a medium to longer term renewal order enjoys sufficient safeguards – whether by virtue of the 2001 Act or otherwise – to ensure that he can bring about a review of that detention on the ground that he is no longer suffering from a mental disorder. As I have already made clear it is accepted that patients who are subject to admission orders and any initial renewal order already enjoy sufficient safeguards.

The first potential safeguard: s. 28(1) of the 2001 Act and judicial review proceedings
69. Two particular safeguards were relied upon by the respondents in order to demonstrate that the involuntary patient who is detained pursuant to a renewal order made under s. 15(3) could effectively seek an independent review of his status, namely, the provisions of s. 28 of the 2001 Act and the right of the patient to apply to the High Court under Article 40.4.2 of the Constitution. These safeguards can be considered in turn.

70. Section 28(1) of the 2001 Act provides that:

> "Where the consultant psychiatrist responsible for the care and treatment of a patient becomes of opinion that the patient is no longer suffering from a mental disorder, he or she shall by order in a form specified by the Commission revoke the relevant admission order or renewal order, as the case may be, and discharge the patient."

71. This sub-section clearly imposes a duty upon the responsible consultant psychiatrist to release a patient where he or she is opinion that the patient is no longer suffering from a mental disorder. While this sub-section represents an important safeguard for the involuntary patient, it does not nonetheless in itself provide an independent review such as is required in the case of the making of admission orders or renewal orders. I n particular, the patient cannot *require* the responsible consultant psychiatrist to take this step. If, moreover, the responsible consultant psychiatrist declines to review the patient's status or otherwise upholds the renewal order, then only remedy for the patient is to seek have that decision quashed in judicial review proceedings.

72. It is true that, post-*Meadows*, the High Court's power of review in an application touching on the constitutional right to liberty is more extensive than the rather old-fashioned *O'Keefe* test of "no evidence" (*O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39): see, *e.g.*, *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701, *Efe v. Minister for Justice* [2011] IEHC 214, [2011] 2 I.R. 789, *NM (DRC) v. Minister for Justice* [2016] IECA 217, [2016] 2 I.L.R.M. 369 and *AAA v. Minister for Justice* [2017] IESC 80. It is, accordingly, clear that if the decision of the responsible consultant psychiatrist was to decline to exercise the power to discharge the patient under s. 28(1), this could be challenged in judicial review proceedings and the High Court could subject the reasoning of the psychiatrist in those proceedings to what I described – admittedly in the context of EU law, rather than purely domestic law - in *NM* as a form of "thorough review."

73. But even this form of review is some way off a review on the merits of the decision and still less could the High Court effectively declare in such proceedings that the patient no longer suffered from a mental disorder. It follows, therefore, that judicial review proceedings could not satisfy the requirement that the patient would have to have the opportunity of an independent review of his detention.

The second possible safeguard: the right to apply to the High Court under Article 40.4.2 of the Constitution
74. It is probably fair to say that at the hearing of the appeal the greater emphasis was placed by the respondents on the right of the applicant to apply to the High Court under Article 40.4.2 for an inquiry into his involuntary detention on the ground that he is no longer suffering from a mental disorder. There is no question but that the applicant has the right to seek this remedy himself and the Court is moreover obliged by the very words of the Constitution forthwith to conduct this inquiry into that detention. The critical question is whether the power of the High Court under Article 40.4.2 as judicially interpreted extends as far as to enable that Court to pronounce on what one might term the medical merits of that detention and, specifically, whether the applicant is entitled to be released from that detention on the ground that he is no longer suffering from a mental disorder.

The decision of Binchy J. on the Article 40.4.2 issue
75. It is perhaps convenient to consider next how Binchy J. dealt with this particular point. He noted (at paras. 131 and 132 of the judgment) that the scope of any inquiry under Article 40.4.2 was limited to that identified by Denham C.J. in *Ryan v Governor of Midlands Prison* [2014] IESC 54 at paragraph 18 as follows:

> "18. Thus the general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if

> it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."

76. Binchy J. recalled that the European Court of Human Rights had found in the cases of *X v United Kingdom* (1982) 4 E.H.R.R. 188 and *H.L. v United Kingdom* (2005) 40 E.H.R.R. 32 that the review of a patient's involuntary detention conducted under English law in habeas corpus proceedings was insufficient for the purposes of Article 5(4) ECHR because it was not wide enough to bear on those conditions which were essential for the lawful detention of a person on the basis of unsoundness of mind since it did not allow a determination of the merits of the question as to whether the mental disorder persisted.

77. Binchy J. then stated that (at para. 135) that it was "difficult to see how an application made under Article 40 of the Constitution is in any way materially different to the habeas corpus procedure under discussion in both *H.L. v. United Kingdom* and X. *v. United Kingdom* particularly having regard to the decision of the Supreme Court in *Ryan* which in this context appears to be consistent with the sentiments of the ECtHR as to the scope of a *habeas corpus* application."

78. This reasoning was vigorously challenged by the respondents. It was first submitted that Binchy J. erred in applying the Supreme Court's remarks in *Ryan v Governor of Midlands Prison* [2014] IESC 54 to the issues in this case without due regard for (a) the orders of detention at issue in *Ryan* and (b) the Supreme Court's ruling in *Croke v Smith (No 2)* [1998] 1 IR 101. It was also submitted that Binchy J. erred in treating the scope of Article 40.4.2 as necessarily being the same as the common law *habeas corpus* regime as obtains in England and Wales. These submissions can now be considered in reverse order.

Whether the procedure provided for by Article 40.4.2 is simply equivalent to the habeas corpus regime as it operates in England and Wales

79. There is no doubt but that the Article 40.4.2 procedure has deep roots in the common law of *habeas corpus*. At the same time, however, it must be recognised that because the drafters incorporated a particular version of *habeas corpus* into the Constitution of the Irish Free State of 1922 and again in 1937 with the Constitution and yet again in 1941 with the changes effected by the Second Amendment of the Constitution Act 1941, Article 40.4.2 has, to some extent, slipped its common law moorings.

80. Thus, for example, the very language of Article 40.4.2 confirms that the procedure is, in at least some respects, inquisitorial and not adversarial. The Court is under a particular duty to inquire "forthwith" into the complaint and the right to go from judge to judge following the refusal of an ex parte application is also preserved (see *Joyce v. Governor of the Dóchas Centre* [2012] 2 I.R. 666). The Court also enjoys the far-reaching power – which, of course, is entirely foreign to the purely common law powers of *habeas corpus* - to declare the law by which the detainee is held to be unconstitutional, although in those circumstances with an obligation to state a case on the constitutionality of the law to this Court: see Article 40.4.3.

81. While these and other differences between the common law of *habeas corpus* and the version now contained in Article 40.4.2 are somewhat greater than perhaps Binchy J. allowed, it does not necessarily follow that he was also in error regarding the scope of review provided for by Article 40.4.2 in cases of involuntary detention of patients under the 2001 Act. It is to that issue to which we must now turn.

The scope of Article 40.4.2 in mental health cases

82. In *Ryan* the issue before the Supreme Court was whether a particular prisoner was entitled to claim enhanced remission of his sentence by virtue of the Prison Rules by reason of the fact that he attended certain educational courses while in prison. He claimed that the prison authorities had erred in failing to give him this credit and that if they had had done so, he would have been entitled to be released.

83. The Supreme Court found, therefore, that there was no defect on the face of the order and following its earlier judgment in FX a few months earlier, held that Article 40.4.2 was not the appropriate remedy for the issue of remission. The respondents stress, however, that the judgment in *Ryan* was expressly concerned with the applicability of Article 40.4.2 to "an order of a Court". At a point a little earlier in her judgment in *Ryan* Denham C.J. had said:

> "13. The Court follows and applies the statement of law given in *FX v Clinical Director of the Central Mental Hospital* [2014] IESC 1, where it was stated at paragraphs 65 and 66:-

'65. *In general, if there is an order of any court*, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is *a court of local jurisdiction*, then an application for judicial review may be the appropriate route to take. In such circumstances, where *an order of the court* does not show any invalidity on its face, the route of the constitutional and immediate remedy of habeas corpus is not the appropriate approach.

66*. An order of the High Court* which is good on its face should not be subject to an inquiry under Article 40.4.2 unless there has been some fundamental denial of justice. In principle the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. *Thus*, the remedy under Article 40.4.2 may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in *The State (O.) v. O'Brien* [1973] I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court.'" (emphasis supplied)

84. The respondents accordingly submitted that *Ryan* could not be relied on as an exhaustive statement of the scope of an inquiry under Article 40.4.2 in the case of a person detained under the Act. Their contention was that the more relevant starting point was the Supreme Court decision in *Croke v Smith (No 2)* [1998] 1 I.R. 101. The decision in *Croke* concerned an application for an inquiry pursuant to Article 40.4.2 as to the lawfulness of the applicant's detention in the Central Mental Hospital. The High Court (Budd J.), being satisfied that the applicant's detention was in accordance with the provisions of the Mental Treatment Act 1945, and, in particular, s. 172 thereof, but that such law was invalid, having regard to the provisions of the Constitution, referred to the Supreme Court by way of case stated, pursuant to Article 40.4.3, the question of the constitutionality of that sub-section. (Prior to the 33rd Amendment of the Constitution Act 2013 and the establishment of this Court, Article 40.4.3 provided that the case-stated proceeded from the High Court to the Supreme Court.)

85. In *Croke* Hamilton CJ squarely addressed head-on the jurisdiction of the High Court under Article 40.4.2 as follows to review a detention under the Mental Treatment Act 1945, saying ([1998] 1 I.R. 101, 114):

> "Though the decision made by the registered medical practitioner to make a recommendation for a reception order may, and the decision of the medical superintendent to make a chargeable patient reception order will, result in the deprivation

of the liberty of the person to whom they relate, such decisions cannot be regarded as part of the administration of justice but are decisions entrusted to them by the Oireachtas in its role of providing treatment for those in need, caring for society and its citizens, particularly those suffering from disability, and the protection of the common good. These decisions can only be made when it is established that the person to whom they relate is a person of unsound mind and is a proper person to be taken in charge and detained under care and treatment. *These decisions can be set aside in the appropriate circumstances by the court upon an application for judicial review or upon complaint made to the High Court in accordance with Article 40.4.2 of the Constitution* but this does not mean that the decisions are part of the administration of justice." (emphasis added)

86. Hamilton C.J. then added ([1998] 1 I.R. 101, 124):

> "By virtue of the provisions of Article 40.4.2 of the Constitution, the complaint may be made to the High Court by or on behalf of a patient detained pursuant to the provisions of the Mental Treatment Act 1945, as amended, alleging that he is being unlawfully detained and once such a complaint is made, the High Court is obliged to conduct an inquiry into the lawfulness of the applicant's detention. The onus is on the person in whose custody the applicant is to justify the detention and the High Court must be satisfied that such detention is in accordance with law before permitting the continued detention of the applicant. Upon the hearing of the application *the High Court must be satisfied that*:-
>
> (1) ***the person detained is a person*** *of unsound mind and in need of care and treatment,*
>
> (2) that the procedures outlined in the Act have been complied with,
>
> (3) *the person detained has not recovered*, and
>
> (4) the person detained is not being *unnecessarily deprived* of his liberty.
>
> Unless it is satisfied with regard to each of the foregoing, the High Court must order the discharge or release of the person detained." (emphasis supplied)

87. The Supreme Court – reversing the High Court - accordingly upheld the constitutionality of the section, precisely because it held that the detained patient could seek an independent medical review of the merits of his case in the course of an Article 40.4.2 application. This finding as to the scope of the Article 40.4.2 is clearly part of the *ratio* of the decision.

88. This aspect of the judgment in Croke was applied by Clarke J, with express reference to the requirements of Article 5(4) ECHR (which requires such an express review at regular intervals), in *L.K. v Naas General Hospital* [2007] 2 I.R. 465,469:

> "... it seems to me to be clear that one of the avenues that is open to a detained person is to seek to invoke the jurisdiction of this court under Article 40.4.2, and that is what the applicant has sought to do in this case. Therefore, it would seem to be the case that where there is not, as there is not here, any procedural dispute as to compliance with the statutory requirements of the Act, the law may be briefly stated to be the following, where a person seeks an inquiry under Article 40.4.2 and alleges that they ought not be detained the onus is on the custodian of the person to show that the detainee remains as of the date of the inquiry, in need of care by virtue of being of unsound mind such that deprivation of liberty is necessitated. That is, in effect, a composite of the three non-procedural tests set out at items 1, 3 and 4. It also seems to me that a detainee must, as a consequence of that entitlement, be entitled to a reasonable opportunity to deal, at the hearing of the inquiry, with each of the components of the test." (emphasis supplied)

89. Clarke J. then continued ([2007] 2 I.R. 465, 482):

"I should add that an issue arose as to the scope of the substantive hearing which should be afforded a party on foot of an inquiry under Article 40.4.2 seeking to question the validity of that person's detention under the Acts. It was agreed by both counsel, and I agree, that the passages from the judgment of Hamilton C.J. in *Croke v. Smith (No. 2)* [1998] 1 I.R. 101 *are clear authority for the proposition that such an inquiry includes a substantive inquiry into whether the mental health and other circumstances of the applicant concerned justifies their detention. In those circumstances an inquiry under Article 40.4.2 in relation to a person detained under the provisions of the Acts may well be more extensive than a normal inquiry under the jurisdiction exercised under that Article.* In ordinary circumstances the court is concerned with whether the formal requirements for custody (including fair process requirements) have been complied with. The court is not normally concerned with the substance of the reason for custody in the first place. *It is, however, clear from Croke v. Smith (No. 2) [1998] 1 I.R. 101 that this court is required, on a hearing such as this, to consider the substantive merits of the detention.* It may well be that such an extended jurisdiction was considered necessary in order to ensure that there were appropriate constitutional safeguards. In the same context, in this case, argument was advanced on behalf of the applicant as to her entitlements under Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 which provides that: 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.' It is clear from the jurisprudence of the European Court of Human Rights in cases such as *X. v. United Kingdom* (1981) 4 E.H.R.R. 188 and *Winterwerp v. The Netherlands* (1979) 2 E.H.R.R. 387 that a person such as the applicant is entitled to early and, indeed, regular, access to a body which carries on its business in a manner similar to a court (though not necessarily a court in the full sense of that term, as it would be used in Irish constitutional jurisprudence) for the purposes of contesting the validity of their detention. *It is, however, clear that the type of inquiry identified in Croke v. Smith (No. 2) [1998] 1 I.R. 101 arising under Article 40.4.2 goes even further than the requirements necessary to satisfy Article 5(4) of the Convention*. As indicated in the course of this judgment I have, in fact, conducted a substantive inquiry and have had evidence both from the Lakeview Unit and from the psychiatrist nominated on behalf of the applicant. For the reasons indicated I was satisfied on that evidence that the applicant's continued detention was warranted. *There could not, therefore, be any question of the applicant having been denied access to a court so as to satisfy Article 5(4) of the Convention.*" (emphasis supplied)

90. As counsel for the HSE, Mr. Finlay S.C., stressed, the judgment of Clarke J was concerned with a detention under the Mental Treatment Act 1945 as the 2001 Act had not then come into force and it only did so in November 2006 a few months after the judgment in *L.K.* Clarke J addressed this potential development at the end of his judgment as follows:

> "Finally I should add that the somewhat extensive jurisdiction to review, identified in *Croke v. Smith (No. 2)* [1998] 1 I.R. 101 seems to me to be necessitated by the requirements of the Constitution and might well also have arisen by virtue of the necessity of compliance, where possible, with the Convention. However it does not necessarily follow that that

> extensive jurisdiction would be required in the event that the full provisions of the Mental Health Act 2001 concerning mental health tribunals are implemented. In those circumstances *the question remains open* as to whether it would be necessary, or indeed appropriate, for the court to entertain a full substantive review on foot of an inquiry under Article 40.4.2. That is an issue which may need to be addressed if and when the relevant provisions of the Act of 2001 are commenced."

91. It has to be said, however, that these comments of Clarke J. in *L.K.* were, in strictness, purely *obiter* because it was ultimately not in dispute that the applicant was suffering from a mental condition which required involuntary detention: see [2007] 2 I.R. 465, 475.

92. In perfect fairness to the trial judge in the present case it should, however, be acknowledged that the decision in *L.K.* was not opened to him. In a further Supreme Court decision which post-dated the present judgment under appeal, *Child and Family Agency v McG* [2017] IESC 9, [2017] 1 I.R. 1, 43 Charleton J. commented thus on the scope of review available under Article 40.4.2:-

> "Once *habeas corpus* is properly available, everything in the decided cases indicates the widest amplitude of the remedy in the Constitution. The High Court in *Gallagher v Director of the Central Mental Hospital (No 2)* [1996] 3 I.R. 1 at 6 was surely correct that Article 40.4 implies the 'widest possible powers to be conferred on the judge … conducting the enquiry' since that echoes the statements of Ó Dálaigh C.J. in *Application of Woods* [1970] I.R. 154 at 162 that a judge *must examine any ground that might render detention unlawful* and of Kingsmill Moore J. in *The State (Hully) v Hynes* (1966) 100 I.L.T.R. 145 at 163 that in *habeas corpus* a 'very wide field of enquiry is open to the court'. The High Court can follow any procedures which admit of a correct result and is not bound by adversarial rules as it is the judge himself or herself who is mandated to conduct the enquiry."

93. The respondents point to this case-law and urge that this provides support for the view that the nature of the High Court's jurisdiction under Article 40.4.2 is not uniform, but rather is, if necessary, context dependent so as to ensure that the constitutional rights of a detained person can be vindicated effectively in the different types of cases and contexts which may arise. They also drew attention to the judgment of Kingsmill Moore J. in *The State (Hully) v Hynes* (1966) 100 I.L.T.R. 145, 163 (and, in particular, the underlined passages) when he said that:

> "a very wide field of enquiry is open to the court on an application for habeas corpus and *when the detention is by an act of the executive*, the court can enquire into all of the circumstances. It is concerned not only to see that the documents are in correct form: it can investigate *whether the necessary conditions exist* to justify the execution of such documents, and can enquire whether the necessary conditions exist to justify the execution of such documents, and can enquire whether they have been executed by mistake or whether their execution has been procured by fraud." (emphasis supplied)

94. It seems to me that the essential issue here is whether the decision in *Croke* regarding the scope of review in Article 40.4.2 applications brought by involuntary patients is still good law. In the first place I have to say that, as I read the judgments in both *Ryan* and *FX*, what appears to be critical as a starting point for this purpose is whether the order providing for the detention of the applicant in question is good on its face. While it is true that reference is made in FX to any order of any court, nothing really turns for this purpose on the fact that the order in question was made by a court as distinct, say, from an administrative body – such as a Mental Health Tribunal – exercising statutory powers providing for the detention of the applicant: there is no suggestion in either of these judgments that the very provenance of these orders is in some fashion significant.

95. This was the very point made by MacMenamin J. in *S.McG. v. Child and Family Agency* [2017] IESC 9, [2017] 1 I.R. 1, 21:

> "It is right to say that both judgments [in *FX* and *Ryan*] deprecate the use of the Article 40 in circumstances other that where there is a defect on the face of the order which goes to jurisdiction. But there is an exception to this rule, that is, where there has been some fundamental 'denial of justice' (as Denham C.J. points out in Ryan *v. Governor of Cloverhill Prison*…."

96. The exception to this rule is, of course, reflected in the right of the High Court to go behind the warrant for detention. This issue arose in one of the very first Article 40.4.2 applications to have arisen in the wake of *FX*, namely, *Cirpaci v. Governor of Mountjoy Prison* [2014] IEHC 76, [2014] 2 I.R. 471. In that case the applicant had been convicted of theft in the District Court and sentenced to a period of six months imprisonment. It transpired, however, that the District Court had never informed the applicant of his statutory right to elect for jury trial in respect of this charge and the applicant then sought his release pursuant to Article 40.4.2. The State authorities argued, however, that since the District Court conviction was good on its face, his only remedy was to have gone by way of an application for judicial review to quash the conviction.

97. In my judgment in the High Court I rejected the State's argument, saying the text, history and tradition of Article 40.4.2 was such and the Court's right to go behind a warrant of imprisonment otherwise good on its face was so entrenched that certain passages in FX which had been relied on by the respondents could not be taken to have ousted that wider jurisdiction ([2014] 2 I.R. 471, 482):

> "It follows, therefore, from a consideration of this case-law that the Article 40.4.2 jurisdiction remains a broad and flexible one. It is, however, not as confined as the respondents suggest. It is rather the case that Article 40.4.2 shines as a beacon of liberty which will never deny refuge to an applicant who can show a fundamental breach of constitutional rights or the existence of some other significant defect attaching to the warrant or order providing for his or her detention. It is for these reasons that I accordingly reject the interpretation of FX which counsel for the respondent has so ably urged on this Court."

98. It is accordingly clear that the High Court could direct the release of an involuntary patient by way of an Article 40.4.2 application not only where the order in question was good on its face, but also where there had been a fundamental breach of constitutional rights or the existence of some other material defect in the process leading to the making of the detention order in question. But even no matter how brightly the beacon of liberty has heretofore shined to vindicate the constitutional rights of Article 40.4.2 applicants, an adjudication upon the purely medical merits of the detention of an involuntary patient under the 2001 Act seems to lie just outside the arc of that spotlight of review.

99. This seems to be correct both as a matter of theory and practice. It is true in theory because the right to go behind the warrant has always been confined to those cases of a breach of fundamental rights or other fundamental defect in the making of the order providing for the detention: this has been the law in cases ranging from the classic (and much quoted) judgments of Kingsmill Moore J. in *The State (Hully) v. Hynes* and that of Henchy J. in *The State (Royle) v. Kelly* [1974] I.R. 259 on the one hand to modern decisions

such as *FX, Cirpaci, Ryan* and *SMcG* on the other.

100. This seems to be also true as a matter of practice because although the existence of such a jurisdiction was confirmed in *Croke* as part of the ratio of that decision and acknowledged by Clarke J. by way of *obiter* remarks in *L.K.*, there appears to be no instance of where the High Court has in fact ever exercised this power to release an involuntary patient detained - whether pursuant to the Mental Treatment Act 1945 or under the 2001 Act - on the purely medical merits of that applicant's case. It would have also have to be acknowledged that the exercise of any such power of review in Article 40.4.2 (*i.e.*, a full review of the medical merits of the applicant's case) would be likely to present considerable practical and other problems which is why, perhaps, no such power of review appears ever to have been undertaken by the High Court, although such was admittedly in view, at least, in *L.K.*

101. This was also the view expressed by Barrett J. in *M. v Clinical Director of the Department of Psychiatry, University Hospital Limerick* [2016] IEHC 25 where he pointed to the attenuated power of review articulated in *FX* and in *Ryan*, although as the respondents stressed, there was no discussion of this point in that judgment and no mention was made of either *Croke v Smith (No. 2)* or of *L.K.*.

102. This Court accordingly finds itself in the somewhat unhappy position of being required to choose between diverging ratios of two separate strains of Supreme Court authority, namely, *Croke* on the one hand and *FX, Ryan* and *SMcG* on the other. It is true that *Croke* has never been overruled and that it squarely addresses the scope of review in the case of Article 40.4.2 applications brought by involuntary patients in a way that none of the recent authorities do. On the other hand, it is difficult to avoid the fact that (i) there is now a trilogy of decisions from *FX* onwards which have consistently rejected a full merits review in Article 40 applications; (ii) these decisions are more recent than *Croke* and (iii) the *Croke* doctrine has never actually been applied in practice.

103. Obliged as we are to choose, I feel that for these latter reasons this Court must follow the *FX* line of authority and hold that the jurisdiction of the High Court in Article 40 applications is confined to ensuring that the admission or renewal order is valid on its face and that there was no violation of constitutional rights or other serious legal error in the making of the order.

The conclusions regarding the scope of review in Article 40 applications

104. It is undeniable that this conclusion has serious consequences for the constitutionality of a key part of the 2001 Act, because it means that there is no effective procedure whereby an involuntary patient detained for the longer periods of time up to twelve months envisaged in s. 15(3) of the 2001 Act can seek a review of his or her detention within a reasonable time. It was not, I think, seriously disputed by any of the parties that such a state of affairs would be unconstitutional, although, of course, the respondents defended the present appeal on the basis that there was such an effective procedure.

105. One way or another, once the Court has arrived at the conclusion which it has regarding the scope of review in Article 40 applications, then a finding of unconstitutionality in respect of s. 15(3) was more or less inevitable, since in these circumstances it is plain that the State has clearly failed in its duty to vindicate the right to personal liberty as best it may by failing to provide for an effective opportunity whereby the involuntary patient detained for this period of time can have his or her detention independently reviewed within a reasonable time after the expiration of the other safeguards contained in the 2001 Act and, specifically, the conclusions of the s. 19 appeal. The patient in these circumstances might have the renewal order for, say, twelve months affirmed and lose an appeal to the Circuit Court and yet subsequently recover from his mental disorder well before the remainder of the renewal order expired. All of this amounts to a breach of Article 40.4.1 when read in conjunction with Article 40.3.1 and Article 40.3.2.

106. It is true that the applicant has not in terms sought a declaration to this effect in his grounding statement, since the declarations of unconstitutionality sought related rather to even more fundamental provisions of the 2001 Act, namely, s.3(1) and s. 18. At the same time, however, this precise issue (namely, the absence of any effective means of independent review for patients in longer term involuntary detention and its general implications for the constitutionality of the 2001 Act regime) was squarely before both the High Court and this Court and, indeed, was the subject of the declaration of incompatibility granted by the former Court. In these circumstances, I consider that no prejudice at all would be caused to the respondents if the grounding statement was now to be formally amended in order to allow the applicant to claim this more specific and confined relief.

107. It follows, therefore, that in these circumstances s. 15(3) of the 2001 Act must therefore be adjudged to be unconstitutional.

The nature of the finding of unconstitutionality and its consequences

108. I recognise that such a finding of constitutionality will have very serious implications for the operation of the 2001 Act and the mental health regime generally. It is therefore necessary to ensure that this finding of unconstitutionality is suspended for a period of time for reasons I will presently explain. But it is first necessary to say something more about the nature of the finding of unconstitutionality. Section 15(3) has been adjudged to be unconstitutional because of the fact that, unlike the companion provisions of s. 15(1) and s. 15(2), there is no mechanism – whether by virtue of the 2001 Act or otherwise - whereby the patient can seek an independent review of his mental health status within a reasonable time. The constitutional objection, therefore, is not *as such* to the fact that the renewal orders in question have lasted for six months or even twelve months. It is rather that the renewal order may be renewed for these periods of time *without* the necessary safeguard of the possibility of an independent review within a timely period.

Whether the finding of unconstitutionality should be suspended

109. It is clear from the decision of O'Donnell J. in *NHV v. Minister for Justice* [2017] IESC 40, [2017] 1 I.L.R.M. 69 that a finding of unconstitutionality may be suspended. It is unnecessary here to dwell on the full range of circumstances in which this suspensive power might be exercised, save to observe that this is a case which clearly calls out for this approach. Any other conclusion would have potentially catastrophic consequences within the mental health system, since the legal basis for the detention of many vulnerable patients would otherwise simply collapse. At the resumed hearing on the 28th April 2018 the solicitor for the Mental Health Commission, Ms. Kane, stated in an affidavit that as of that date they were approximately 78 patients who were the subject of such long-term orders in institutions in the State other than the Central Mental Health Commission. The Court was then informed orally by counsel for the Commission, Mr. McDermott S.C., that as of the same date there were some 15 patients in the Central Mental Hospital who were currently also the subject of such orders. In the light of this information helpfully supplied by the Commission it is clear that a total of some 95 patients would be affected.

110. If these patients (or any of them) were suddenly released by a judicial pronouncement of the unconstitutionality of this key sub-section of the 2001 Act, this would be likely to have unfortunate consequences for their personal welfare and might well, in some circumstances at least, to pose a possible risk to the lives and safety of others.

111. The lesson of *NHV* is that the judiciary should not have to watch on helplessly as a finding of unconstitutionality leads on with remorseless logic to invalidate and unravel a large variety of administrative decisions, often in a chaotic and disruptive fashion and with possibly unforeseen consequences for third parties. If that were indeed the law, then there would then be a grave danger that in

the words of Geoghegan J. in *A. v. Governor of Mountjoy Prison* [2006] IESC 45, [2006] 4 I.R. 99 that "judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences."

112. If post-*NHV* the immediate aftershocks of a finding of unconstitutionality can be confined and controlled by a suspension of that declaration, the Court is nonetheless obliged to afford the applicant a real remedy by providing that in due course the unconstitutional law will stand annulled. So it is here. This finding of unconstitutionality in respect of s. 15(3) of the 2001 Act demands an immediate and imperative response on the part of the other branches of government, namely, the Oireachtas and the Government so that fresh legislation which will cure the unconstitutionality identified in this judgment can quickly be enacted within the window of opportunity now afforded by the suspension of the declaration.

113. In these circumstances, I would propose that this declaration of unconstitutionality in respect of s. 15(3) of the 2001 Act should stand suspended for a period of six months until the 8th November 2018when the finding of unconstitutionality will take effect without further order. In these circumstances it is unnecessary to consider the alternative arguments based on the European Convention of Human Rights which found favour with Binchy J. in the High Court.

Conclusions

114. It remains only to summarise my principal conclusions.

115. First, Binchy J.'s finding that the applicant lacked standing to advance the present constitutional challenge cannot be sustained, as Mr. B. clearly fulfils the requisite *Cahill v. Sutton* criteria. For all the reasons canvassed elsewhere in this judgment, I would propose to follow the pragmatic approach outlined by the Supreme Court in cases such as *McGowan* and proceed to determine the merits of the constitutional challenge, the absence of a High Court determination of this issue notwithstanding.

116. Second, in the light of the reasoning of the Supreme Court in the recent trilogy of cases (*FX, Ryan* and *SMcG.*), it must be concluded that in Article 40.4.2 proceedings the High Court does not have jurisdiction to rule on the medical merits of the application, the comments to the contrary in *Croke v. Smith* notwithstanding.

117. Third, the effect of that conclusion is that an involuntary patient detained under s. 15(3) for a period of up to twelve months does not have an effective means of vindicating his right to personal liberty by securing an independent review of that detention following the making of the renewal order and the conclusion of any s. 19 appeal to the Circuit Court. It is accordingly plain that the State has clearly failed in its duty to vindicate the right to personal liberty as best it may by failing to provide for an effective opportunity whereby the involuntary patient detained for this period of time can have his or her detention independently reviewed within a reasonable time. The patient in these circumstances might have the renewal order for, say, six months affirmed and lose an appeal to the Circuit Court and yet subsequently recover from his mental disorder well before the remainder of the renewal order expired. All of this amounts to a breach of Article 40.4.1 when read in conjunction with Article 40.3.1 and Article 40.3.2. It follows, therefore, that the sub-section empowering this involuntary detention without the necessary attendant safeguards, namely, s. 15(3) of the 2001 Act, must be adjudged to be unconstitutional.

118. Fourth, it is unnecessary here to dwell on the full range of circumstances in which this power to suspend a declaration of unconstitutionality recognised in *NHV* might be exercised, save to observe that this is a case which clearly calls out for this approach. Any other conclusion would have potentially chaotic and catastrophic consequences within the mental health system, since the legal basis for the detention of many vulnerable patients would otherwise simply collapse. If they were suddenly released by a judicial pronouncement of the unconstitutionality of this key sub-section of the 2001 Act, this would be likely to have unfortunate consequences for their personal welfare and it would be likely to pose a real risk to the lives and safety of others.

119. Fifth, this finding of unconstitutionality in respect of s. 15(3) of the 2001 Act quite obviously demands an immediate and imperative response on the part of the other branches of government, namely, the Oireachtas and the Government so that fresh legislation which will cure the unconstitutionality identified in this judgment can quickly be enacted within the window of opportunity now afforded by the suspension of the declaration of unconstitutionality.

120. Sixth, in these circumstances, I would propose that this declaration of unconstitutionality in respect of s. 15(3) of the 2001 Act should stand suspended until the 8th November 2018 when the finding of unconstitutionality will take effect without further order.

121. Seventh, in these circumstances it is unnecessary to consider the alternative arguments based on the European Convention of Human Rights which found favour with Binchy J. in the High Court.

122. I would also hear counsel as to the terms of any final order which this Court might make.