Neutral Citation Number: [2009] IEHC 13

THE HIGH COURT

2008 2034 SS

BETWEEN

C. C.

PLAINTIFF

AND

CLINICAL DIRECTOR OF ST. PATRICK'S HOSPITAL AND

THE MENTAL HEALTH COMMISSION

DEFENDANTS

JUDGMENT delivered by Mr. Justice McMahon on the 20th day of January, 2009

This is an application on behalf of the applicant for a declaration that the applicant is unlawfully detained by the first respondent contrary to Article 40.4 of the Constitution. The essence of the applicant's case is that prior to her arrival at the respondent's hospital, she was initially detained by the gardaí and unlawfully removed to the hospital by them. The applicant argues that this alleged unlawful detention by the gardaí, has tainted the subsequent detention by the respondents even though, by and large, apart from this initial reception the respondents have meticulously followed the proper procedures for dealing with such persons as set out in the legislation and the Mental Health Act 2001 in particular.

The facts
The essential facts are not in dispute, they are set out in the affidavit of Dr. Seamus O'Cealleagh, (the Consultant Psychiatrist, but not the Clinical Director) the relevant portion of which I now reproduce:-

> "3. The applicant is a 69 year old woman who suffers from bi-polar affective disorder which was diagnosed in 1984. She has had eight previous admissions to St. Patrick's hospital and at least two previous admissions to St. John of God's Hospital. She also suffers from diabetes and is taking regular required medications in respect of her bi-polar affective disorder and her diabetes.
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> 4. The applicant's husband, Mr. F. C., made an application pursuant to s. 9 of the 2001 Act, at 21.24 pm on the 8th December. The applicant had stated that the Holy Spirit and Our Lady had directed her to stop taking her medication.
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> 5. The applicant's GP, Dr. Patrick Feeney, made a recommendation on the 8th December, at 21.26 pm. Sometime thereafter she was brought by the gardaí to the hospital and arrived and was admitted at 00.45 on the 9th December. I do not know who contacted the gardaí. I and other members of the staff at the hospital have made inquiries and, to my best knowledge and belief, the gardaí were not requested or instructed to remove the applicant to the hospital by any members of the hospital staff. Further, to my best knowledge and belief, Dr. Feeney did not make any request of any member of the hospital staff to involve the gardaí.
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> 6. I made the admission order pursuant to s. 14 of the Mental Health Act 2001, in respect of Mrs. C. on the 9th December, 2008, at 17.30 pm. It was made on the basis that the applicant was suffering from mania and with psychotic features, a mental disorder within the meaning of the 2001 Act, and because of the severity of the illness and as her judgment was so impaired that a failure to admit her to an approved centre would be likely to result in a deterioration in her condition and would prevent the administration of appropriate treatment that could be given only by such admission and because her reception, detention and treatment at an approved centre would be likely to be of benefit to her and/or would alleviate her condition to a material extent. The applicant was and is acutely psychiatrically unwell and required at the time and continues to require inpatient treatment at an approved centre in her best interests. It would not be in the applicant's best interests for her to be discharged from an approved centre at this point in time. An independent medical examination took place by Dr. Raju Bangaru, on the 12th and 15th December, 2008. He was of the view that the applicant was manic, was non compliant with her medications and had limited insight and required further inpatient treatment. I refer to the relevant medical records related to the applicant's current admission stapled together and upon which I have marked my initials J.L.
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> 7. The Mental Health Tribunal had affirmed this order pursuant to s. 18 of the 2001 Act, on the 19th December, 2008. The Tribunal considered a preliminary issue raised by the applicant's solicitor, Mr. Fay, and gave a preliminary ruling stating that *'an apparent breach of s. 13 during the admission procedure did not render the admission void'*.
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> 8. A renewal order pursuant to s. 15 of the 2001 Act was made by Dr. O'Cealleagh at 16.45 on the 19th December, 2008, for a period of four weeks. This renewal order expires on the 16th January, 2009. An independent medical examination took place by Dr. Raju Bangaru late yesterday evening, 29th December, 2008.
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> 9. I am fully mindful and caring of the best interest of the applicant. I and all of my colleagues who have treated her remain convinced that it is in the best interest of the applicant to detain her in the current hospital environment."

From this affidavit it is clear that the respondents are strangers to what went on immediately before the applicant was brought to the hospital. All that is known is that the applicant was brought to the hospital by the gardaí and was

admitted at 00.45 on the 9th December, 2008. (There is a note to that effect in the hospital records).

The applicant's solicitor states in an affidavit, made on behalf of the applicant that she was "stopped by gardaí whilst out walking near her home with her [husband and] son and was detained by gardaí and taken by gardaí to St. Patrick's Hospital". The court was informed subsequently at the hearing that the reference to the applicant's husband was an error.

The applicant's solicitor also stated that he raised the matter that the applicant was unlawfully detained by gardaí, by way of preliminary issue when the Mental Health Tribunal met, ten days later on the 19th December, 2008. The Tribunal considered this submission and having adjourned for approximately 20 to 30 minutes, returned and stated that whilst there may have been a breach of s. 13 of the Mental Health Act 2001, the Tribunal did not have jurisdiction to revoke the order on this basis. Having given the applicant's solicitor time to take instructions from the applicant, the Tribunal was informed that the applicant wished to proceed with the hearing. She did not want to delay the Tribunal's consideration. The reasons given by the Tribunal for affirming the admission order were as follows:-

> "A preliminary ruling was made, on a point raised on behalf of the patient, that an apparent breach of s. 13, during the admission procedure did not render the admission order void.
>
> There was evidence in the longstanding diagnosis of bi-polar affective disorder. At the time of the recent admission, the patient was quite seriously unwell. She had responded quickly to treatment, but clearly was lacking insight into her illness. We took the view that the rate of her improvement was likely to lead to an early discharge but were very concerned about the potential for early relapse at this stage, hence we affirmed the order."

The applicant's argument
The fundamental basis of the applicant's argument is that because the applicant was unlawfully detained and delivered to the hospital by the gardaí, the whole process that followed (although properly carried out) was tainted and infected by the initial illegality which must lead to the conclusion that the applicant is now and has been since that date wrongfully detained.

Taking the applicant's case at its highest, and assuming for the purposes of these proceedings only, that the gardaí did unlawfully detain the applicant (bearing in mind that the court has no details whatsoever of how the gardaí became involved) before she was presented to the hospital, I am willing to entertain the applicant's legal submissions in support of her argument at this juncture.

Counsel for the applicant states that, in respect of a case like the present one, the legislative powers given to the gardaí under the Mental Health Act 2001, are limited to those conferred on them by ss. 12 and 13 of that Act. Section 12 of the Act gives powers to the Garda Síochána to take into custody a person whom the Garda Síochána has reasonable grounds to believe is suffering from a mental disorder which creates serious likelihood of the person causing immediate and serious harm to himself or herself or other persons. There is no suggestion in this case that this is how the gardaí became involved and no one has suggested that the applicant is suffering from a mental disorder which poses an immediate and serious threat of harm to herself or to others.

Section 13 makes provision for garda involvement where a registered medical practitioner has made a recommendation that a person should be involuntarily admitted to an approved centre, but there are difficulties in arranging for such removal. In that event, where the clinical director of the approved centre or a consultant psychiatrist acting on his or her behalf, and the registered medical practitioner who made the recommendation, are of the view that there is a serious likelihood of the person causing immediate and serious harm to himself or others, the clinical director or consultant psychiatrist may request the assistance of the Garda Síochána to remove a person to the relevant centre. It is agreed that no such request was made by the clinical director or the consultant psychiatrist under s. 13, and therefore the powers given to the gardaí under this section cannot come into play.

It would appear therefore that the applicant is correct in saying that neither of these sections would appear to justify the garda intervention in detaining the applicant. If the gardaí have exceeded their powers in this regard they may of course have to answer for this excess to the applicant in another forum. As I do not have any details of the circumstances in which the gardaí purported to act, I will refrain from further comment on that issue.

Counsel for the applicant however, argues that the applicant continues to be detained unlawfully and that, therefore, this Court should intervene to rectify that situation.

There can be no question, however, of the respondents being responsible for the wrongful conduct of third parties over whom they have had no control and whom they did not instruct at the time the applicant was detained by the gardaí. Furthermore, although the hospital was aware that the applicant was delivered to the hospital by the gardaí, they were unaware of any historical wrong committed by the gardaí prior to that presentation. Nor were there any special circumstances which would have alerted the respondents that anything was amiss. It must be emphasised that the applicant was known to the hospital. She had a long history of medical illness and had been admitted to the hospital on many previous occasions. She was the subject of an application properly made by her husband and there was a recommendation from her GP for involuntary admission in accordance with s. 10 of the Act of 2001. In normal circumstances once such a recommendation is received by the clinical director, the actual procedures set out in the Act kick in, commencing with an examination followed by an admission order.

This is what happened here. The clinical director, Dr. O'Cealleagh, examined the applicant and made an admission order at 16.45 on the 9th December, 2008. This was followed by an independent psychiatric examination, a renewal order and a subsequent hearing by the Tribunal. The Act of 2001 sets out the detailed procedures to be put in motion, procedures which it must be said, were established by the legislation to ensure that the patient is properly looked after and with all possible and appropriate safeguards in place.

The respondents argue that the doctor's duty once a patient arrives at the hospital is to assess and treat the patient promptly and in a manner which observes and respects the procedural framework set out in the Act. All these procedures were properly observed in this instance. Furthermore, there is no dispute, nor is it contested by the applicant's counsel

that the applicant was suffering from a mental disorder as defined in s. 3 of the Act. The applicant required medical treatment at that time.

Nevertheless, counsel for the applicant argues that the good intentions or the bona fides of the doctors cannot make an illegal detention lawful in the circumstances. When a person is presented to the hospital by the gardaí, the applicant argues that in addition to medical assessment and treatment, the doctors have a duty to ensure that the gardaí have acted in accordance with the provisions of s. 12 or s. 13 of the Act. In such circumstances, bearing in mind their statutory obligations, the clinical director or the consultant psychiatrist must first investigate the history of the applicant's detention and presentation to the hospital, extending to events that occurred even before her arrival and events which occurred in places outside the hospital.

In the present case there is no question of *mala fides* or conscious breach of the applicant's rights by the respondents. The fact remains, however, according to the applicant, that the gardaí detained her unlawfully and presented her unlawfully to the hospital, where, because of subsequent procedures and orders she has remained since. The only question for the court, according to the applicant is whether she is being lawfully detained now because of the prior illegality which was unknown to the clinical director on the first date, but which was brought to the attention of the Mental Health Tribunal when it assembled on the 19th day of December, 2008.

The applicant also argues that the court should not be moved by the impracticalities of the decision which a doctor must make in such circumstances. First, the applicant argues that there is a distinction between the medical functions which a doctor must discharge in these circumstances by assessing and treating the patient for a medical condition on the one hand, and the statutory obligations the doctor may have in administering the Act and ensuring that certain safeguards are maintained on the other hand. Secondly, the applicant argues that the doctor's appreciation at the time is not relevant. Clearly there may be situations where a doctor may be put on notice when a patient is presented to the designated centre so that inquiries ought to be made at that time. Failure to do so may attract liability for the doctor in that case. The applicant's argument continues that even if the doctor has no notice at the admission stage, once he gets notice or the authorities get notice that there was a problem initially, as we have here, then it is incumbent upon the detainors to immediately release the applicant.

The difficulty with the applicant's argument is that there is no obvious connection between the garda action and the decision of the clinical director and the hospital authorities. The only connection would appear to be a temporal one: the hospital's action followed (was after) the garda action. But it is important to note that the hospital did not authorise the garda action (as it did in *R.L. v. The Clinical Director of St. Brendan's Hospital, Dr. Haseeb Khan Rohill and the Mental Health Commission* (Unreported, High Court, Feeney J., 17th January, 2008)), the gardaí were not the hospital's agents, the garda action did not take place on or in the precincts of the hospital and the hospital authorities were not on notice that anything was amiss when the patient was handed over to the hospital. The patient was presented to the hospital at 00.44 on the 9th December, 2008, apparently by gardaí and in possession of a recommendation from a GP and an application for a recommendation by the patient's husband in accordance with s. 9 of the Mental Health Act 2001. She was examined at 16.45 the same day after which the admission order was made. The patient had been admitted to the centre on several previous occasions and she was known to the hospital authorities who had her medical history and her records. The clinical director acted in a wholly proper manner in making the order. This was followed as mandated by the legislation by an examination by an independent psychiatrist on the 12th and the 15th December and by a hearing before the Medical Health Tribunal on the 19th December. It is my view that without any knowledge or intimation by the clinical director or other hospital personnel of any irregularity in the history of how the applicant came to be presented to the hospital, the clinical director acted as he was obliged to do under the legislation. Indeed, failure to act as he did in the circumstances would, in my view, have exposed him to the charge of breach of his statutory duties. It is my view therefore that the admission order was valid and that its continuance or survival is to be assessed, not by the possibility of some historical frailty causally unconnected with the director's determination, but on its own terms and in its own context, in this instance the context of the Mental Health Act 2001. Its legitimacy and its validity is determined not by something totally unconnected (*i.e.* the garda's actions) but by reference to its own legal basis in the Act.

This analysis of the problem is supported by the decision of Feeney J. in *R.L. v. The Clinical Director of St. Brendan's Hospital, Dr. Haseeb Khan Rohill and the Mental Health Commission* (Unreported, High Court, Feeney J., 17th January, 2008), a case which was affirmed later by the Supreme Court. In R.L. there was a clear breach of s. 13 of the Mental Health Act 2001. Section 13 makes provision for delivering the person to the hospital in certain circumstances. Under subs. (2) of s. 13, where the applicant is unable to arrange for the removal of the patient to the approved centre, the clinical director or the consultant psychiatrist acting on his behalf, may, if the patient represents a danger to him or herself or others, arrange for the removal of the patient "by members of the staff of the approved centre". The hospital in that case was short staffed and arranged for a private company called something like "Assisted Removals" to bring the patient to the centre, which they did as independent contractors. Orders were subsequently made under s. 14 and the detention was challenged on this irregularity. Feeney J. in the High Court held that even though there was an irregularity in s. 13, this did not infect or contaminate orders subsequently made under section 14. "Removal [under s. 13] or means of removal is not and cannot be read as *a sine qua non* to an admission order. An admission order is a separate and stand alone matter." (at p. 2 of judgment). Feeney J. also draws attention to the provisions of s. 18 of the Act of 2001, which, when adverting to the review process to be undertaken by the Review Tribunal, specifically omits s. 13 as being a section to be reviewed by the Tribunal. He makes this point in the following language:-

> "The Complainant makes complaint of non-compliance with s. 13, and even if it was established the Court is satisfied that that does not vitiate or relate to a valid Admission Order made under s. 14. This view is significantly reinforced having regard to s. 18 of the Act of 2001, where in s. 18(1)(a)(1) it is indicated that the provisions of ss. 9, 10, 12, 14, 15 and 16 have been complied with is a matter which require consideration by the Review Tribunal, that is not so in relation to s. 13. When one looks at the scheme of the Act that is not surprising because s. 13 relates to the manner in which somebody is brought to the institution and received and not detained." (at p. 2 of 5)

Taking this stance Feeney J. also relies on dicta of Peart J. in *J.H. v. Brian Lawlor, Clinical Director of the Jonathon Swift Clinic, St James's Hospital, Dublin* (Unreported, High Court, Peart J., 25 June, 2007). This was also an application for an inquiry pursuant to Article 40.4.2 of the Constitution and also relates to the provisions of the Mental Health Act 2001. In the course of his judgment, Peart J. stated at p. 12 of his judgment:-

> "The Court must have regard to the best interests of the applicant when balancing the nature of the failure to

adhere strictly to the procedures and time-limits referred to in the Act, against the need, in the applicant's own best interests, to be detained for care and treatment. It is therefore not every incident of non-compliance which will render the detention of a person to be unlawful, particularly where no injustice has occurred, and where no protection which the applicant is entitled to under the statutory scheme has been denied to him."

Later at p. 14 of his judgment, Peart J. elaborated:-

> "I believe that my conclusion that on the facts of this case the applicant's detention is in accordance with law, despite the fact that on a very literal reading of one section of the Act, rather than reading the scheme as a whole, the order made which first admitted him under s. 24 of the Act was made a very short time later than it should have been, is consistent with what the position has been in the context of the legality of detention in prison following conviction for an offence. In that context the lawfulness of detention has not been successfully impugned unless there has been a default in some fundamental requirement. In this regard I can usefully refer to a passage in the judgment of O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131 at p.136."

The quotation from the Chief Justice which he relies on reads as follows:-

> "The stipulation in Article 40.4.1° of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attaches to his detention. The phrase seems to mean that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For habeas corpus, therefore, it is insufficient for the prisoner to show that there has been a legal error, impropriety, or even that jurisdiction has been inadvertently exceeded."

Peart J. had no difficulty in extending this reasoning to a similar application made by a person under the Mental Health Act 2001.

In upholding the decision of Feeney J., Hardiman J. in the Supreme Court poses the legal question in the following way:-

> "But the question, the legal question has to be isolated. This is . . . do those breaches of s. 13 operate to prevent the making of an admission order under s. 14 and if it did that, would it logically also prevent the making of further orders under the Act?
>
> The court can simply see no reason whatever to believe that an irregularity or a direct breach of s. 13 would render what is on the face of it a lawful detention on foot of an admission order invalid. Section 14 provides that:-
>
> > '(1) Where a recommendation in relation to a person the subject of an application is received by the clinical director of an approved centre, a consultant psychiatrist on the staff of the approved centre shall, as soon as may be, carry out an examination of the person and shall thereupon either –
> >
> > (a) if he or she is satisfied that the person is suffering from a mental disorder, make an order to be known as an involuntary admission order and referred to in this Act as 'an admission order' in a form specified by the Commission for the reception, detention and treatment of the person and a person to whom an admission order relates is referred to in this Act as 'a patient', or
> >
> > (b) if he or she is not so satisfied, refuse to make such order.'
>
> The court cannot see and it does not believe that there is any authority for the proposition that s. 14 cannot work at all, simply cannot be operated, if there is a defect in the execution of the removal under s. 13. There was no argument advanced as to why that proposition is true and it would appear to be contrary to the scheme and spirit of the Act."

It must be noted also that, as in the case in *R.L.* the applicant suffers from a mental disorder and this is not disputed by the applicant's legal team. Furthermore, again like the facts in *R.L.,* Professor James Lucey, the Clinical Director of St. Patrick's Hospital had certified on the 30th December, 2008, that the applicant was being lawfully detained, originally on foot of an admission order dated the 9th December, 2008, subsequently affirmed by the Mental Health Tribunal on the 19th December, 2008, and on foot of a renewal order of a similar date. In such a situation the function of the court is to order the release of such person from detention unless satisfied that he or she is being detained in accordance with law.

In relation to the *R.L.* case it should be noted that failure to observe the legislative requirements involved an act of the hospital authorities themselves and was something consciously done because of lack of resources. The courts, nevertheless, were prepared to hold that orders subsequently made were not contaminated by this irregularity. In the case before this Court, the act complained of was not carried out by the hospital authorities but rather by a third party. Furthermore, when the admission order was made, the clinical director had no knowledge or suspicion regarding the removal of the patient to the centre and at all times acted in a bona fide manner. In fact, on the case before the court it can be additionally advanced that the action of the gardaí complained of were in any event not the acts of the hospital authorities or of persons for whom they were vicariously liable.

The facts in the present case are that once the patient was properly before the clinical director, she was examined and the clinical director made a professional assessment as to her mental condition and as a result determined that it was appropriate to make an admission order. This decision was based on the examination and the other information which the clinical director had properly before him. The order was in every way a valid one when it was made and its validity could not be rendered unlawful by virtue of unrelated garda actions which were by that time history and which were unknown to the clinical director. The subsequent procedural steps undertaken, *i.e.* the independent psychiatric assessment and the convening of the Mental Health Tribunal were all predicated on a lawful admission order and they were also lawful procedures at that time. For this reason it is my view that the detention of the applicant up to the Tribunal hearing on the 19th December, 2008, was lawful. It must be recalled also that once the clinical director had established to his own satisfaction after a lawful examination that the applicant suffered from a mental disorder, the authority for his admission order and for the other orders which followed was based on that finding alone.

The next question that arises is whether that position changed when the applicant's solicitor raised the issue for the first time before the Tribunal on the 19th December.

As I have already found, up to that time all decisions made by the clinical director and others involved in the process were lawfully made as a result of which there can be no question of the applicant being detained unlawfully up to that point. When the issue was raised, the Tribunal retired and considered the matter, but held that they had no jurisdiction to act otherwise than to proceed with the hearing. The Tribunal then asked the applicant's solicitor what he wished to do. Having consulted with his client, the applicant's solicitor went ahead with the hearing, reserving his position on the complaint. The applicant had other options at that point, but chose not to avail of them. She participated in the process. This, in my view also legitimated the deliberations of the Tribunal. It must be recalled that at that time the Tribunal only had the most general information about the garda participation in the operation. The applicant had not complained to the clinical director during his examination, or when he made the admission order. Neither had the applicant made any complaints to the independent psychiatrist who subsequently examined her. In view of these facts and also because whatever was alleged against the garda, had occurred before the applicant came to the hospital and was not authorised or known to the hospital until then, the decision of the Tribunal cannot be faulted. Indeed, the Tribunal might have been open to criticism had it acted otherwise, bearing in mind its obligations and powers under the Mental Health Act 2001. It follows that the detention of the applicant because of the Tribunal's decision was not unlawful.

I would like to emphasise that I am not holding that there can never be a situation where persons in authority under the Mental Health Act 2001, have an obligation to fully investigate allegations of improper arrival to the designated centre and to release the person if necessary, observing appropriate safeguards in the circumstances. Before such a situation arises, however, the factual situation would have to be considerably stronger than what is before the court in this case. I accept also the applicant's argument that because the applicant might have a remedy for compensation against the third party, something clearly acknowledged by Hardiman J. in *R.L.,* that the persons in authority never have an additional duty in respect of the detention of the applicant. In relation to its obligation on arrival at the hospital, the authorities may well have to assess the circumstances and even perhaps the history of the presentation, if the particular circumstances involved their own actions or if they are on notice of peculiar and suspicious circumstances surrounding the conduct of others when the patient is first presented at the centre.

In *F.W. v. The Department of Psychiatry James Memorial Connolly Hospital* (Unreported, High Court, Hedigan J., 18th August, 2008) the facts were similar to those before this Court. There, the applicant was originally admitted as an involuntary patient under an application made by her husband, who at the time was a disqualified person under the Act of 2001 since the applicant had commenced proceedings under the Domestic Violence Act against him previously. Once this fact became known to the clinical director, she unsuccessfully tried to persuade the applicant to commit herself as a voluntary patient. After some hesitation by the applicant and consultation with her solicitor, the applicant proceeded to discharge herself from the centre. In the meantime the clinical director had contacted the gardaí and commenced proceedings under s. 12 of the Mental Health Act 2001. The applicant, on leaving the centre was then taken by the gardaí to Blanchardstown Garda Station and was examined there by an independent psychiatrist, Dr. Kahn who gave evidence that the applicant suffered from a mental disorder and was a danger to herself. The detention was challenged.

When a person is in custody or is being detained by another person and it transpires that the original custody was unlawful, it is frequently said that the person detained must be released forthwith. This is undoubtedly the general rule. But where the person detained is under an incapacity (being a child or a person suffering from a mental disorder, for example) or is vulnerable in some other way, the duty to immediately release the person must be modified in the circumstances. A delay may be justified in such a case so as to notify the relatives or to arrange for transport or as Hedigan J. said in *F.W.,* to ensure that "she did not depart into the night with no arrangements to ensure her safety and wellbeing" (at p. 5). In my view, to release a person suffering from an incapacity or a vulnerable person from unlawful detention without first considering the personal circumstances, including the time and the location of the release is a breach of duty to such a person which may attract liability under the neighbour principle at common law if foreseeable damage ensues. This latter duty must therefore be balanced with the undoubted duty to release the wrongfully detained person immediately and may result in detention for a further short period to ensure a safe and reasonable release.

This is exactly what Hedigan J. did in F.W. Again quoting from his judgment at p. 3 his finding becomes clear:-

> "In my view the applicant was free to leave from 8 p.m. on 8th August. Her solicitor's evidence on affidavit at para. 4, is that she had been told she was free to leave, albeit the process of recommitting her would probably start again; (sic) if she did leave. The fact that she was told there would be likely to be a recommital process does not invalidate her release. She ultimately did leave and the process did in fact recommence at Dr. Benbow's request because she was of the view that the applicant was in need of care. I consider the action of Dr. Benbow and her staff to be highly creditable in the circumstances. Dealing with a very difficult situation, their predominant interest was the care and safety of the applicant. Their action ensured as best they could that when the applicant did leave their care, she did not depart into the night with no arrangements to ensure her safety and well-being. The actions of Dr. Benbow and her staff and those of the Gardaí at Blanchardstown Garda Station may well have prevented a tragic outcome to the day's event…
>
> In this case the Gardaí were informed by the Clinical Director of the Psychiatry Department of Connolly Hospital, who was a Consultant Psychiatrist and under whose care the applicant was that she was suffering from a mental disorder and might come to harm. It is hard to imagine more compelling information than this upon which to base a reasonable belief. The fact that the department itself is precluded under s. 9(2)(c) of the Mental Health Act from making an application for involuntary admission to their own centre, does not in my view preclude them from being an informant. In certain circumstances, notably present in this case, they may well be the very body with the greatest responsibility to do so. Because they act on information of great weight does not mean that the belief of the Gardaí is ipso facto not an independent one, no other evidence or submission being made against the belief of the Gardaí in this case, I consider their taking the applicant into custody at Connolly Hospital was in accordance with law. As to Dr. Kahn's role in this matter, the criticism made of him is that he acted at Dr. Benbow's behest and did not exercise an independent judgment. It is further argued that he did not fill out the form properly." (At p. 7 of the judgment)

Subsequently Hedigan J. found that there was no evidence that Dr. Kahn failed to exercise an independent judgment and

that the irregularities relating to the completion of the documentation did not affect the substance of the order and no injustice was caused because Dr. Kahn ticked the wrong box. In the judge's view, it was open to Dr. Kahn to tick any of the boxes in the circumstances of the diagnosis.

For reasons stated above I have concluded in the case before this Court that the applicant was not wrongfully detained when she first came into the respondent's care and the contact the clinical director made with the gardaí, once he diagnosed that the applicant was suffering from a mental disorder under s. 3 of the Act of 2001 and was a danger to herself, was a responsible act on his part and was not such as to taint the process which he then put into motion at that time.

To summarise, the legal issue which the court must consider in this case primarily concerns the duty of the clinical director to release a patient once it is established that the patient was unlawfully committed at the outset. In the circumstances of this case:-

(1) I hold that the clinical director acted reasonably in the circumstances and in accordance with the law.

(2) I hold that the historic illegal detention by the gardaí does not affect the subsequent process put in motion by the clinical director which resulted in the applicant being detained by the gardaí and examined by an independent psychiatrist before being returned to the approved centre where a further admission order was properly made.

(3) On the facts of this case the court finds that there was no wrongful detention within the meaning of Article 40 of the Constitution and that the present detention of the applicant is made in accordance with the law.

(4) This finding of the court does not in any way prevent the applicant from bringing separate legal proceedings either in tort or for breach of contract or for breach of constitutional duty for the historic wrong involved in the initial wrongful detention by the gardaí. This Court has no comment to make on the likely prospects of success in such action(s). The merits of any such action would be determined by the trial judge.

Counsel for the applicant further advances the argument that once the matter was drawn to the Tribunal's attention, the Tribunal should have ordered the person's release. In relation to this argument, I emphasise once more that this Court is concerned with the present detention of the applicant and the lawfulness or otherwise thereof. It should, however, be pointed out that the Tribunal is a statutory creature and has only such powers as have been given to it under the Mental Health Act 2001. No statutory power has been given to it to make such an order and in my view it would be wrong of this Court, in purporting to advance this argument, to order a statutory body which has no powers under the legislation to have ordered the applicant's release. Moreover, it is somewhat anomalous for the applicant to argue that while the gardaí have no powers under the legislation (except as set out in ss. 12 and 13 of the Mental Health Act 2001) to become involved in such matters, on the one hand, and that they should stand condemned for this *ultra vires* conduct, while at the same time suggesting that this Court should recognise an obligation on the Tribunal to act in an *ultra vires* fashion by ordering the release of the applicant. The Tribunal has no more power to do so than the applicant's own solicitor who is not given any such power under the Act. Would it be logical to argue that the applicant's own solicitor, under the Act, should have taken it upon himself to walk the applicant out of the hospital on the grounds that she was being wrongfully detained? Where would such authority come from?

In the event as already noted when this matter was first raised with the Tribunal, it made a determination and asked the applicant's solicitor whether he wished to have an adjournment, the applicant in the circumstances decided to continue with the hearing and in these circumstances it is difficult to argue that the Tribunal acted unfairly. The applicant could have sought an adjournment and sought an immediate meeting with the clinical director who was the person with powers to release the patient in these circumstances. It is true that this is unlikely to have yielded a different result as the clinical director had already examined the patient and had made a clinical decision that the applicant was suffering from a mental disorder and was capable of doing harm to herself. But in failing to direct its complaint to the person who had authority over the detention, the applicant cannot complain that the Tribunal, which did not have authority under the Act, failed to order her release.

The applicant also relies on *Storck v. Germany* (2006) 43 E.H.R.R. 6, a decision of the European Court of Human Rights, to support her application.

The facts in *Storck* were as follows. When the applicant was 15 and 16 years of age she was placed in the Children and Young People Psychiatric Department at Frankfurt am Main University Clinic for seven months at her father's request. In July 1977, on reaching her majority, until 5th April, 1979, she was placed in a locked ward at a private psychiatric institution, the clinic of Dr. Heines in Bremen, at her father's request. The applicant, who at that time had attained the age of majority, had not been placed under guardianship, had never signed a declaration that she had consented to her placement in the institution, and there had been no judicial decision authorising her detention in a psychiatric hospital. As a result of these irregularities, Dr. Heines was not entitled to detain the applicant at his private psychiatric clinic. On 4th March, 1979, the police brought the applicant back to the clinic by force after she attempted to escape.

In 1997, the applicant commenced a succession of legal actions in various courts for damages for tortious wrongs against her, for breach of contract and for unlawful detention. She lost all of these actions for various reasons, including being time barred, failure to establish lack of consent and insufficient evidence, etc. Some of these she appealed on points of law to the Federal Court of Justice in Germany and eventually to the Federal Constitution Court claiming that her rights to liberty, human dignity and to a fair trial had been violated. In March, 2002, the Federal Constitutional Court refused to allow the applicant's complaints stating that the question raised had already been resolved in its case law. Further, it stated that the Constitutional Court did not have a function to deal with errors of law allegedly committed by these courts and that the applicant's complaints did not disclose a violation of her constitutional rights.

On 15th May, 2000, the applicant brought an action against the Federal Republic of Germany in the European Court of Human Rights alleging, inter alia, that her confinement in different psychiatric hospitals and the medical treatment she had received had violated, inter alia, Articles 5 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The relevant portion of Article 5(1) provides:-

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:…
> (e) the lawful detention…of persons of unsound mind…"

The court identified the questions to be determined at para. 89 of its decision which reads as follows:-

> "89. The court reiterates that the question whether a deprivation of liberty is imputable to the State relates to the interpretation and application of Article 5(1) of the Convention and raises issues going to the merits of the case, which cannot be regarded merely as preliminary issues…It agrees with the party that in the present case there are three aspects that could engage Germany's responsibility under the Convention for the applicant's detention in the private clinic in Bremen. Firstly, her deprivation of liberty could be imputable to the State owing to the direct involvement of public authorities in the applicant's detention. Secondly, the State could be found to have violated Article 5(1) in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in spirit of Article 5. Thirdly, the State could have breached its positive obligation to protect the applicant against interferences with her liberty by private persons."

The court went on to answer the three questions in the following manner:-

> (1) When the applicant escaped from her detention in the private clinic, she was recaptured by the police who returned her to the clinic without entering into any inquiry as to the circumstances of the applicant's detention. The state authority was therefore involved in the continuation of her detention and this was sufficient to attract responsibility under that heading.
>
> (2) The court also found that the Bremen Court of Appeal failed to interpret the provisions of German civil law relating to the applicant's compensation claims in contract and tort in the spirit of Article 5. [This is not relied on by the counsel for the applicant in the case before this Court].
>
> (3) Article 5(1) of the Convention must be construed (like Article 3 of the Convention) as laying down a positive obligation on the State to protect the liberty of its citizens. In the German domestic law applicable, the State required private psychiatric institutions to be licensed but the State cannot absolve itself from responsibility by delegating its obligations in such matters to private bodies or institutions. On this its conclusion was:-
>
> > "the court finds that, similarly, in the present case the State remained under a duty to exercise supervision and control over private psychiatric institutions. Such institutions, in particular those where persons are held without a court order, need not only a license, but also competent supervision on a regular basis of whether the confinement and medical treatment is justified."

The court also noted that in the *Storck* case the necessary court order required to justify Ms. Storck's detention under the legislation was never obtained and this too was not detected by the competent health authority at the time. At para. 106 of its decision it states:-

> "The court is therefore not convinced that the supervision exercised by the State authorities merely in connection with the issuing of a license for the running of a private clinic pursuant to section 30 of the Conduct of Trade Act sufficed to ensure competent and regular supervisory control in respect of a deprivation of liberty in such a clinic. Moreover, section 30 of the Conduct of Trade Act was not in force as such at the start of the applicant's detention in the clinic."

Furthermore, at para. 105 of the judgment it is stated that:-

> "The Court, having regard to the importance of the right to liberty, does not consider that such retrospective measures [including the liability to civil actions for compensation in tort] alone provide effective protection for individuals in such a vulnerable position as the applicant."

The court concluded that there had been a violation of Article 5(1).

For similar reasons, the court also held that there had been a violation of Article 8, which provides for the right to respect for private life, and I do not need, for these reasons to elaborate on this aspect of the decision. The reasoning of the court, and the facts established, were largely the same in both instances.

Counsel for the applicant relies on this case in making its submissions for the applicant here, emphasising the positive obligation on the State to protect the applicant against interference with her liberty. In particular, counsel argues that the Mental Health Tribunal on 19th December, 2008 had a positive obligation to honour the applicant's release. I disagree with this submission. First of all as held by the court at para. 105 of its decision, quoted above, the facts of the applicant in the *Storck* case were very relevant to the determination of the court. Without labouring the point here the facts of the *Storck* case were also very different and clearly distinguishable from the facts in the case before this court. Second, the Tribunal is a statutory creation with limited powers given to it under the Mental Health Act 2001. It has no power to order the applicant's release under the Act no more than the applicant's solicitor who is also appointed under the legislation with limited functions. When the issue was first raised by the applicant's solicitor on 19th December before the Tribunal, the Tribunal considered the matter, and held that it did not have jurisdiction to make the order requested and offered the applicant an adjournment. Had the applicant availed of the adjournment it would have given the applicant's solicitor the opportunity of making the same request to those who had power of release including presumably the clinical director. If the applicant got no satisfaction from the clinical director then the applicant could have commenced proceedings against the clinical director's refusal under Article 44 of the Constitution. A claim, however, that the State failed under the Convention to protect the applicant's right to liberty, because the Tribunal did not have the power under the Act, is not sustainable for the simple reason that the applicant did not have the correct target for his complaint. In any event, for reasons I have already given I believe that the applicant would have been unsuccessful in this application as I have taken the view that the clinical director acted properly in the circumstances.

The positive obligation on the State to protect the applicant's liberty, which the court in the *Storck* case refers to, does not mean that any part of the State's apparatus must intervene to secure the release. The State had a mechanism which, if addressed would have been obliged to consider such a request immediately. The protections under the Mental Health Act 2001, moreover, are continuous and adequate in this regard. To request someone in the State apparatus to make an order which it has no authority to make does not mean that the State is in breach of Article 5(1). It is only if, there is no authority in the State to make such a decision or if a person who has the authority wrongfully refuses such a request that the State can be held to be in breach. The reading of the Mental Health Act 2001, in its entirety in my view clearly establishes a procedure for continuous and regular assessment and supervision of the detention of a person under that legislation in a manner which wholly conforms to the requirements of Article 5(1) of the Convention as set out in the *Storck* case.

While this judgment was being typed up it was brought to my attention that the reconvened Mental Health Tribunal had revoked its earlier order and that the applicant was no longer detained. No order is required therefore from this Court. Since, however, the argument was argued in some length over two days, I am furnishing the parties with a copy of my judgment in the matter.