THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 29

Record No. 2014/881

[Article 64 Transfer]

Ryan P.
Irvine J.
Hogan J.

BETWEEN/

PL

APPELLANT

- AND -

THE CLINICAL DIRECTOR OF ST. PATRICK'S UNIVERSITY HOSPITAL

AND DR. SEAMUS O'CEALLAIGH

RESPONDENTS

- AND -

THE ATTORNEY GENERAL

NOTICE PARTY

- AND -

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 14th day of February 2018

1. This appeal against the decision of the High Court (Peart J.) raises the difficult question as to when a voluntary patient may leave a psychiatric institution having regard to the provisions of s. 23 of the Mental Health Act 2001 ("the 2001 Act"). In these judicial review proceedings the applicant, P.L., who was a voluntary patient in the respondent hospital, had sought a declaration that the refusal of the respondent hospital to permit him to leave was unlawful. These circumstances will be described in greater detail at a later stage in this judgment. The respondent hospital is an "approved centre" for the purposes of the 2001 Act.

2. Peart J. refused to grant this relief for reasons I will also presently set out: see *PL v. Clinical Director of St. Patrick's University Hospital* [2012] IEHC 15, [2014] 4 I.R. 385. The applicant now appeals to this Court against that decision.

3. I should also record at the outset that Peart J. also delivered a second judgment in this matter on the 14th December 2012 which was consequent upon his first judgment: see [2012] IEHC 547, [2014] 1 I.R. 419. In that second judgment Peart J. refused to grant a declaration pursuant to s. 5(1) of the European Convention of Human Rights Act 2003 that certain "rules of law" emanating from his second judgment were incompatible with the ECHR. While the applicant has also appealed against that second judgment, at the hearing of this appeal it was agreed between the parties that these issues would only arise in the event that the first appeal was to be unsuccessful. The present judgment, therefore, addresses only the issues arising from the first judgment.

4. Before considering these issues it necessary first to set out the background to this appeal.

The background to the appeal

5. Our narrative commences on the 26th August 2011 when the applicant became a voluntary patient at St. Patrick's University Hospital ("the hospital") following a psychotic episode at home. The applicant's general practitioner had made the necessary arrangements for this purpose. On arrival he was admitted to the Special Care Unit ("SCU"), where he was seen to display aggressive, violent and, at times, inappropriate behaviour. Mr. L. nevertheless accepted medication, and he appears to have settled somewhat. On the following day he was examined by a consultant psychiatrist. A care plan was then devised which involved close observation and a continuation of certain medication. Mr. L. also consented to histories being taken from family members and from his general practitioner.

6. The applicant remained in the SCU where he was treated as a voluntary patient until the 13th September 2011. On that day he expressed a desire to leave the hospital, but the provisions of s. 23 of the 2001 Act were then invoked, so that he was not then legally free to leave the hospital. (Since these provisions are at the heart of the appeal I will later set them out following the conclusion of the narrative). Immediately following the request to leave the hospital Mr. L. was then examined by a Dr. Ó Ceallaigh as required by s. 24 of the 2001 Act. As the latter had formed the opinion that the applicant was suffering from a mental disorder within the meaning of s. 3 of the 2001 Act, the applicant was then detained pursuant to s. 24(1) of the Act.

7. Section 24 of the 2001 Act then provides for an examination of the patient by a second consultant psychiatrist who also formed the view that the applicant should be detained. An admission order was then signed by Dr. Ó Ceallaigh for that purpose on the 14th September 2011. This admission order was reviewed by a Mental Health Tribunal on the 27th September 2011 when that order was affirmed.

8. A renewal order was signed by Dr. Ó Ceallaigh on the 27th September 2011, which order authorised the applicant's detention until the 26th December 2011. On the 11th October 2011 the renewal order was affirmed by a Mental Health Tribunal. The Tribunal's

decision recorded that while Dr. Ó Ceallaigh accepted that the applicant was making progress and taking his medication, Mr. L. had nevertheless indicated that he would prefer not to be in the hospital. The Tribunal further recorded that on the previous day Mr. L. had expressed a wish to leave. Dr. Ó Ceallaigh is noted as having given his opinion that the applicant's judgment and capacity "remain significantly impaired"; that the applicant required a further period in hospital for treatment and that he could not be treated in a less secure environment.

9. At that point there was a somewhat unusual development in that on the following day, namely, the 12th October 2011, Dr. Ó Ceallaigh revoked the renewal order. On that date Dr. Ó Ceallaigh had examined the applicant and expressed the opinion on Form 14 pursuant to s. 28 of the 2011 Act that he was no longer suffering from a "mental disorder" as defined in the Act. The applicant was then discharged pursuant to the provisions of that section. Section 28(1) of the 2001 Act provides:

> "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."

10. The applicant was not, however, discharged in the ordinary sense of that term. He did not, for example, leave the hospital and neither was he invited or even allowed to leave. He remained as previously in the SCU, which is a locked ward, and even though then a "voluntary patient" as defined, he was nevertheless not free to leave. As Peart J. put it in the judgment under appeal ([2014] 1 I.R. 385, 389):

> "So, in reality he was simply discharged from his status as a detained patient under a renewal order, rather than being actually discharged from hospital as such. He subsequently expressed an intention to leave, but was not permitted to do so, and no order to detain him under s. 24 of the Act has been made to again detain him."

11. In an affidavit filed in these proceedings Dr. Ó Ceallaigh explained his decision to revoke the renewal order on the 12th October 2011. He stated that following the making of the earlier renewal order on the 27th September 2011 he had sought the views of Dr. Mohan, a Consultant Forensic Psychiatrist attached to the Central Mental Hospital. Dr. Mohan's advice had not been received by the 11th October 2011

12. In the period leading up to the Tribunal hearing on the 11th October 2011 Dr. Ó Ceallaigh had conducted an ongoing assessment of the applicant's condition and had engaged with him both on a one to one basis as well as part of a multi-disciplinary review process. He was then of the view that the applicant had limited insight in relation to his illness and continued to require inpatient treatment. The applicant's need for continuing care in the Special Care Unit was accordingly kept under ongoing review and he considered that the effective management of the psychosis required the maintenance of a safe, stable environment with the reduction of exposure to stressors and stimuli which have been associated with previous relapses into psychotic symptoms.

13. Dr. Ó Ceallaigh further explained that on that date he had a lengthy consultation with the applicant who had expressed disappointment and frustration at the outcome of the Tribunal's decision to affirm the renewal order. Mr. L. was nonetheless apparently forthcoming enough to accept that he was delusional during the earlier part of his admission. The applicant apparently displayed no aggression and was warm and appropriate at the interview. He also denied any thoughts of deliberate self harm or suicidal ideation. Dr. Ó Ceallaigh stated that by the 12th October 2011 he had formed the opinion that, given the improvement in the applicant's mental state, the applicant was able to balance the benefits and the disadvantages of remaining in hospital on a voluntary basis, and that he was capable of choosing to remain in hospital and had, in fact, elected to do so. As Peart J. explained ([2014] 4 I.R. 385, 391):

> "He informed the applicant of his decision that he should remain in the Special Care Unit, and the applicant apparently expressed his happiness with his change in status. It was following this consultation that Dr. Ó Ceallaigh revoked the renewal order, whereby the applicant reverted to being a voluntary patient in the hospital and in the Special Care Unit there, a unit which Dr. Ó Ceallaigh considers to be the appropriate clinical setting for the applicant's care."

14. The applicant's solicitor, Ms. Hynes, became aware of the revocation of the renewal order on the 18th October 2011 following receipt of correspondence from Messrs. Arthur Cox, solicitors for the Mental Health Tribunal. She visited the applicant in hospital on the 21st October 2011 and she noted that he was then still within the locked Special Care Unit. The applicant asked to leave that unit so that he could go to the coffee shop with Ms. Hynes, but he was told that his consultant would have to be contacted for such permission. That permission was refused and Ms. Hynes was apparently informed that Mr. L. could not be permitted to leave the Unit until such time as a risk assessment sought by Dr. Ó Ceallaigh from Dr. Mohan had been carried out.

15. There was some delay in having that assessment carried out by Dr. Mohan so that it was not in fact carried out until the 21st November 2011. Ms. Hynes has stated that she was informed by the applicant that he had on many occasions asked to leave the SCU but had been refused permission. During this period Dr. Ó Ceallaigh had given the applicant permission to leave the SCU and go under supervision to the hospital garden. He was, however, unwilling to permit the applicant to venture further, since he might have been thereby exposed to stresses which could have led to a relapse. This was the basis, for example, on which the applicant had been refused permission to accompany Ms. Hynes to the coffee shop on the 21st October 2011.

16. On the 11th November 2011 Dr. Ó Ceallaigh had a discussion with the applicant and told him on that occasion that he was seeking his transfer back to Sligo Mental Health Services. The applicant agreed to this and to continue his current treatment in Sligo. On the 15th November 2011 Dr. Ó Ceallaigh wrote to a Dr. Adam, a consultant psychiatrist at Sligo, stating that the applicant was fit for such a transfer but that a report from Dr. Mohan was awaited and would be forwarded in due course when received. It seems that Mr. L. remained anxious and frustrated about the completion of the risk assessment and was, on occasion, non-compliant about taking his medication. Although he was irritable he denied thoughts of self harm or suicidal ideation. Mr. L. was encouraged to continue his medication and to remain in the SCU.

The events of the 21st November 2011

17. Before setting forth the events of the 21st November 2011, I should state that on that date an application for leave to seek reliefs by way of judicial review was originally made and granted by the High Court based on events up to that point in time. Following, however, the grant of leave by the High Court on the 21st November 2011 she telephoned the hospital at 1.50pm but she was informed that the applicant had become violent that morning and that he had to be restrained and sedated, hence he was asleep. Ms. Hynes was also informed also that his status as a voluntary patient remained unchanged.

18. It seems that the psychiatric assessment was that Mr. L.'s condition had deteriorated by reason of the fact that he had failed to take his medication. It is accepted that on that day the applicant had attempted to jump over the garden wall on three separate

occasions. He was also reported as having been aggressive with staff, but when encouraged by them, had agreed to return to the ward. This was followed by further aggressive and threatening behaviour requiring the use of approved CPI (Crisis Prevention Institution) techniques, which resulted in the applicant agreeing to remain in the SCU.

19. On the 22nd November 2011, Dr. Ó Ceallaigh again saw the applicant and discussed the previous day's attempts to jump the garden wall with him. The applicant apparently explained that he had been concerned that he had contracted a disease and wanted to leave hospital to see his GP. According to Dr. Ó Ceallaigh, however, he had agreed to resume his medication and to remain in the unit under restraints. He appears to have again expressed a wish to leave, but Dr. Ó Ceallaigh explained to the applicant that it was his opinion that his treatment should continue in the unit. Mr. L. again agreed to this and further agreed to take his medication.

20. Mr. L. again stated that he wished to leave the hospital that day. At that point Dr Ó Ceallaigh believed that, following a period of not taking his medication, acute symptoms of psychoses were re-emerging. The applicant indicated that he was withdrawing his consent to remaining on a voluntary basis and it appears that at 10.10 a.m. Dr Ó Ceallaigh decided to make an order under s. 23 of the 2001 Act detaining Mr. L. in order to allow an assessment to be made for the purposes of s. 24 of the Act.

21. Dr. Ó Ceallaigh then completed Part 1 of the Admission Order form pursuant to s. 24 noting that the applicant was expressing a wish to leave the hospital that day without any established support, and that he continues to require the therapeutic environment of the Special Care Unit. The required second assessment was carried out by Dr. Power, but it is accepted that he did not form the view that the applicant required to be admitted pursuant to s. 24 of the 2001 Act.

22. Dr. Ó Ceallaigh then discussed the matter with Dr. Power, who told him that the applicant was agreeing to take his medication and also to remaining on the Special Care Unit with a view to a gradual process of moving to another ward and an eventual discharge from the hospital, and that the applicant wanted to be given a chance to engage further in treatment as a voluntary patient. Dr Ó Ceallaigh formed the opinion that the applicant had capacity to give his consent to his treatment continuing in the Special Care Unit as a voluntary patient. He also considered that the nature of the applicant's illness was such that treatment in the Special Care Unit was necessary in order to provide a safe environment for his treatment, given that his illness is associated with significant harm to others.

Whether the Hospital acted lawfully in restraining the applicant from leaving on the 21st November 2011

23. The question, therefore, which confronts this Court is whether there was a legal basis for the decision to restrain the applicant from leaving the hospital on the 21st November 2011 in circumstances where s. 23 of the 2001 Act was not invoked on that day. I stress this because there is no doubt at all but that the actions of the entire clinical and nursing staff - and Dr. Ó Ceallaigh in particular -were entirely actuated by the best considerations and by an understandable desire to ensure that a vulnerable and ill patient received the best and most appropriate treatment. One may likewise agree with the comments made by Peart J. in his first judgment that in many respects the applicant's best overall interests were quite probably best served by remaining within the confines of the SCU.

24. This Court is, however, concerned with the rather different question of whether Mr. L. as a voluntary patient was free in law to leave the secure unit in the hospital when he attempted to do so on 21st November 2011. This in turn raises the question of what is meant by the notion of a "voluntary patient" and whether the procedures provided for by ss. 23 and 24 of the 2001 Act in respect of the detention of a voluntary patient who has expressed a wish to leave the hospital provide in themselves an exclusive procedure governing the detention or potential detention of a voluntary patient such as Mr. L. These are vitally important legal questions which go to the heart of the regime created by the 2001 Act.

25. There is no doubt at all but that on the 21st November 2011 (and perhaps at other times as well) the applicant was prevented from leaving the hospital and, indeed, on the latter occasion was physically restrained from doing so. As this was clearly an interference with his personal liberty, any such interference with liberty would be unlawful unless there was a legal basis for this: see Article 40.4.1 of the Constitution. Accordingly, as the subject-matter of this appeal concerns the liberty of the individual, it follows that, in the words of *O'Daly J. in The State (O'Flaherty) v. O'Floinn* [1954] I.R. 295, 313:

> "I must begin by regarding any curtailment of that liberty as serious. That is not merely a personal view: it is one which the Constitution enjoins."

26. At the core of this appeal lies the question of whether the 2001 Act provides a legal basis for the detention in question. Here it may be pertinent to observe that the 2001 Act is fundamentally not concerned with voluntary patients as such. After all, the Long Title to the 2001 Act recites that it is an Act "to provide for the involuntary admission to approved centres of persons suffering from mental disorders…." It is true, of course, that the 2001 Act does make reference to voluntary patients, but, with the exception of the provisions of ss. 23 and 24, it largely does so in an incidental way.

27. The term "voluntary patient" is defined by s. 2(1) of the 2001 Act as meaning "a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order." It is clear that from at least the 12th October 2011 when the renewal order was revoked that Mr. L. was a voluntary patient in this sense. What, then, are the powers of an approved centre to deal on a compulsory basis with such voluntary patients?

28. Counsel for the applicant, Mr. McDonagh S.C., submitted that there was no lawful basis for his detention in this manner on that day and that the net result was that the applicant was being detained without the benefit of the panoply of protections afforded to detained persons by the 2001 Act. Counsel for the Hospital, Ms. Barrington S.C., submitted on the other hand that it was necessarily implicit in s. 23 of the 2001 Act that the hospital personnel could refuse to permit a voluntary patient to leave in order to persuade them to stay or to obtain an initial assessment that they are suffering from a mental disorder and that it could do so without having to invoke the provisions of that section.

The provisions of sections 23 and 24 of the 2001 Act

29. Section 23(1) of the 2001 Act provides:

> "Where a person (other than a child) who is being treated in an approved centre as a voluntary patient indicates at any time that he or she wishes to leave the approved centre, then, if a consultant psychiatrist, registered medical practitioner or registered nurse on the staff of the approved centre is of opinion that the person is suffering from a mental disorder, he or she may detain the person for a period not exceeding 24 hours or such shorter period as may be prescribed, beginning at the time aforesaid."

30. Section 24 is the companion section to s. 23 and it provides in relevant part:

"(1) Where a person …..is detained pursuant to section 23, the consultant psychiatrist responsible for the care and treatment of the person prior to his or her detention shall either discharge the person or arrange for him or her to be examined by another consultant psychiatrist who is not a spouse, [civil partner]or relative of the person.

(2) If, following such an examination, the second-mentioned consultant psychiatrist:-

(a) is satisfied that the person is suffering from a mental disorder, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that because of such mental disorder the person should be detained in the approved centre, or

(b) is not so satisfied, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that the person should not be detained and the person shall thereupon be discharged.

(3) Where a certificate is issued under subsection (2)(a), the consultant psychiatrist responsible for the care and treatment of the person immediately before his or her detention under section 23 shall make an admission order in a form specified by the Commission for the reception, detention and treatment of the person in the approved centre…."

31. These two sections thus give the hospital's medical and nursing personnel the power to effect a short term detention of a voluntary patient who expresses a desire to leave the hospital for a period not exceeding 24 hours. The patient so detained under s. 23(1) must then be examined by a consultant psychiatrist within that period who may direct his detention by means of an admission order if the psychiatrist is "satisfied" that the patient is suffering from a mental disorder. The language of s. 23 may usefully be contrasted with that of s. 24 in a number of important respects.

32. First, the power to detain for a short term period is given to a range of medical and nursing personnel. Thus, the voluntary patient who wishes to leave may be detained under s. 23(1) by a registered medical practitioner or by a registered nurse on the staff of the approved centre and not simply by a consultant psychiatrist.

33. Second, it may also be noted that the power to effect the 24 hour detention under s. 23 is given where the psychiatrist, general practitioner or nurse is "of opinion" that the person is suffering from a mental disorder, whereas the power to detain under s. 24 is confined to those instances where, following an examination by a consultant psychiatrist, the latter is "satisfied" that the person is suffering from a mental disorder. In contrast to s. 24, s. 23 does not stipulate that a prior examination is necessary in the case of the exercise of this short-term detention power.

34. Third, the statutory predicate for the exercise of each power is different. In the case of s. 23 the psychiatrist or general practitioner or nurse (as the case may be) is only required to be "of opinion" that the voluntary patient is suffering from a mental disorder, whereas in the case of s. 24 the relevant consultant psychiatrist must be "satisfied" following such an examination that the patient is suffering from a mental disorder.

35. In this context one must assume that in distinguishing between the use of the phrase being of "of opinion" in s. 23 and being "satisfied" in s. 24 the Oireachtas chose its words with some care. Any opinion formed pursuant to the exercise of a statutory power must be "bona fide held and factually sustainable and not unreasonable" and this phrase connotes "a laxer and more arbitrary level of…assessment" as compared with a statutory test which requires the decision maker to be "satisfied": see *The State (Lynch) v. Cooney* [1982] I.R. 337, 361, 378 *per* O'Higgins C.J. and Henchy J. respectively.

The scope of the s. 23 detention power

36. All of this has implications for the scope of the s. 23 detention power. As I have already noted, counsel for the Hospital, Ms. Barrington S.C., contended that it was necessarily implicit in the s. 23 power that an approved centre had the power to detain the voluntary patient for the purpose of assessing of whether he was or might be suffering from a mental disorder before considering whether the s. 23 power should be exercised at all. In practical terms, this meant, she submitted, that the voluntary patient might be lawfully refused permission to leave until an assessment of their mental health status could first be made.

37. It should be first observed, however, that s. 23 does not contain a provision for the interim detention of a patient pending an examination as to whether he was suffering from a mental disorder. This is in contrast to the provisions of s. 14(2) of the 2001 Act dealing with an admission order which does so provide:

"A consultant psychiatrist, a medical practitioner or a registered nurse on the staff of the approved *centre shall be entitled to take charge of the person concerned and detain him for a period not exceeding 24 hours…for the purpose of carrying out an examination under subsection (1)* or, if an admission order is made or refused in relation to the person during that period, until it is granted or refused." (emphasis supplied)

38. The language of s. 23, moreover, is deliberately broader and more extensive that that of s. 24. It is designed to deal with a short term exigency and it is striking that in contrast to s. 24 the power of detention may be exercised by a broader range of medical and nursing personnel and without the need for a prior examination of the voluntary patient's mental health status. It is sufficient that members of the medical and nursing staff form the "opinion" that the voluntary patient "is suffering from a mental disorder." Provided that the opinion is formed *bona fide*, is not unreasonable and is factually sustainable, then the power of detention under s.23 will have been lawfully exercised

39. It follows, therefore, that, I cannot agree that, absent the exercise of the s. 23 power, the decision to restrain the applicant from leaving the hospital on the 21st November 2011 was a lawful one. While I do not doubt that hospital personnel could lawfully attempt to persuade a patient not to leave, this must involve persuasion and not restraint. Just as a host might lawfully attempt to persuade a reluctant guest to stay for dinner, he could not lawfully restrain the guest from leaving. The same holds true in the present case: the applicant was a voluntary patient and he was therefore free in principle to leave at any time.

40. There are, admittedly, cases where it has been held that there is no denial of liberty even though the plaintiff might not enjoy perfect freedom to move as he or she pleased. There are, for example, some old cases which hold, for instance, that a mine operator is not guilty of false imprisonment where he fails to release a miner from a mine before his shift is completed and allows him to reach the surface a time earlier than when the lift would normally be available: see, *e.g., Herd v. Weardale Steel Co.* [1915] A.C. 67. There are other decisions to the effect that an employer is not obliged to release workers from a factory by opening a factory gate earlier than a stipulated time: see Burns v. Johnston [1916] 2 I.R. 444. The thinking in both cases was that the employees had consented to

working in these conditions and that the employer was not obliged to provide facilities to permit them to leave early: see generally McMahon and Binchy, *Law of Torts* (Dublin 2013) at 917-919.

41. While the socio-economic conditions of the age probably coloured the reasoning of the courts in those cases, they nonetheless make the point that there may well be ordinary circumstances in which it would be unreasonable for an individual to insist on his or her right to leave a particular place and situation absolutely as they please. The train passenger who has bought a ticket for Station B cannot, for example, reasonably insist that the train should stop at Station A and that the failure to permit her to alight at that latter station amounts to false imprisonment. By the same token a concert patron cannot reasonably demand that the doors of the concert hall be opened to facilitate his unplanned and abrupt exit before the performance finishes.

42. A school might likewise, for example, be entitled to insist for reasons of safety that the pupil remain within the school precincts until he or she was collected by an adult. This particular example was given by Peart J. in his judgment in another case concerning the scope of the s. 23 power, *McN. v. Health Service Executive* [2009] IEHC 236:

> "One can think of other situations in which vulnerable persons are kept inside a locked door environment without that situation amounting to a 'detention'. For example, there can be some schools where children cannot exit the school because the exit doors are locked. That is something which occurs for the protection and safety of the children. It prevents a young child exiting unnoticed and being put at risk, and it prevents undesirable outsiders from gaining entry to the school thereby endangering the safety of children. The locking of doors in such circumstances is pursuant to a duty of care owed to the children."

43. In some respects it is all a matter of degree. One might say that the parents in that example have at least implicitly consented that the children would remain in school subject to these terms. It would, however, be quite a different matter if the pupil was kept in over night as a punishment.

44. In *Burns*, Gibson J. gave a homely example ([1916] 2 I.R. 444, 454) which, while again redolent of the social conventions and class stratifications of the age, is nonetheless illustrative of this wider point:

> "Suppose a cook in the middle of the night – the door being locked and her employer in bed – wished on a sudden nocturnal caprice to get away, could she sue for false imprisonment if her master declined to get up and open the door to enable her to carry out her breach of contract?"

45. That principle might well apply in the context of the present case had, for example, Mr. L. awoken in the middle of the night and determined that he would leave the SCU that very instant. He could not, I think, have insisted that the hospital staff be roused from their slumbers to open the doors forthwith. The hospital staff would likewise have been entitled to place reasonable restraints on Mr. L.'s movements within the hospital grounds, such, as for example, restraining him from climbing over the garden wall on the basis that this was not a safe or appropriate means of egress from the hospital. But, absent the use of the s. 23 detention power, what the hospital could not lawfully do was to prevent a voluntary patient such as Mr. L. from leaving at any appropriate time and by an appropriate means of exit once he determined to leave.

46. Any other conclusion would, I think, empty s. 23 of all real meaning and undermine a careful and vital safeguard designed to protect the personal liberty of the voluntary patient. Had the Oireachtas intended that a hospital could restrain a voluntary patient from leaving by first insisting on conducting an examination as to whether they were suffering from a mental disorder prior to exercising the s. 23 power, one imagines that the it would have expressly so provided, just as was done in the case of s. 14(2) of the 2001 Act. If the law were otherwise, it would also lead to a state of affairs which the Oireachtas could scarcely have contemplated, since it would mean that a voluntary patient could effectively be detained within an approved centre without any of the protections provided for by the 2001 Act for persons detained under that Act.

47. This conclusion is also underscored by a consideration of the provisions of s. 29 of the 2001 Act which provides:

> "Nothing in this Act shall be construed as preventing a person from being admitted voluntarily to an approved centre for treatment without any application, recommendation or admission order rendering him or her liable to be detained under this Act, or from remaining in an approved centre after he or she has ceased to be so liable to be detained."

48. This section clearly envisages that where an admission order no longer provides for the detention of a particular patient, that patient is nonetheless to remain in an approved centre, but as a voluntary basis. The entire premise of this section is that such a patient is free to leave at any time, subject only to the provisions of s. 23 itself.

The potential impact of s. 28 of the 2001 Act

49. It is next necessary to consider the potential impact of s. 28 of the 2001 Act. Section 28(1) 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."

50. The effect of this sub-section appears to be that where the consultant psychiatrist considers that the patient is no longer suffering from a mental illness, he or she is required to revoke the admission order and discharge the patient. Section 28(2) provides however:

> "(2) In deciding whether and when to discharge *a patient under this section*, the consultant psychiatrist responsible for his or her care and treatment shall have regard to the need to ensure:
>
> (a) that the patient is not *inappropriately discharged*, and
>
> (b) that the patient is detained pursuant to an admission order or a renewal order only for so long as is reasonably necessary for his or her proper care and treatment." (emphasis added)

51. There was much debate at the hearing regarding the meaning and effect of this section and the extent to which it might cast light on the issue in the present appeal. Specifically, what precisely does the reference to "inappropriate discharge" in s. 28(2) actually mean? Is this a reference to a clinical judgment on the part of the psychiatrist, i.e., to ensure that persons actually suffering a mental disorder were not discharged as it would be inappropriate in that sense to do so? Or does it refer to the physical

circumstances in which the discharge of a patient no longer suffering from a mental disorder might take place, such as where a vulnerable patient was discharged and obliged to leave the hospital on a cold winter's night in circumstances where they were otherwise effectively homeless?

52. In his judgment in the High Court Peart J. relied on the provisions of s. 28 in support of his conclusion that the failure to allow the applicant to leave the hospital was not unlawful, saying ([2014] 4 I.R. 385, 411):

> "It will be evident that the revocation of the admission order or renewal order by the consultant psychiatrist once he/she has formed the opinion that the patient no longer suffers from a mental disorder is the first step in a two step process, that second step being the discharge of the patient. It follows that a detention order may be revoked, yet the consultant may decide not to discharge the patient forthwith (in the sense of allowing him/her to leave), in favour of ensuring that even though the detention order has been revoked the patient remains in the approved centre, even against his wishes, until he/she is satisfied that his discharge is not inappropriate. There is no guidance in the Act as to what would constitute an inappropriate discharge, but I presume that it at least encompasses a situation where a patient has no accommodation available to him at the point in time when the detention order is revoked. The section empowers the hospital not to discharge the patient until such time as it is appropriate that he be discharged in the sense of being allowed to leave the hospital. The patient may very well in such circumstances wish to be allowed leave, and indeed attempt to leave. He is at that point in time a voluntary patient as defined under the Act, but yet is unable to actually leave. There is no order detaining him at that point in time, and neither could he be detained at that point in time under the provisions of ss. 23 and 24 of the Act, because the opinion has been formed by the consultant psychiatrist that he no longer suffers from a mental disorder. It may take some time for circumstances to exist whereby a discharge from the hospital would be appropriate. A wide discretion seems to be given to the consultant psychiatrist. Presumably it could take even some weeks to ensure that arrangements are made for a patient's accommodation or other necessary arrangements are put in place, even though there is no detention order in place. In such a situation, as I have said, the patient is a voluntary patient, as defined, even though he may not be expressing consent and may in fact be expressing objection to not being discharged in the strongest possible terms. As a voluntary patient in such circumstances the patient, just as the applicant, has no protections or safeguards available to him under the Act. Yet it could not be said that he is being unlawfully detained given the clear paternalistic and protective intention of the section. As I have referred to already at para 50 above, the Courts have on occasions declared a patient's detention to be unlawful, yet in the exceptional context of this Act, have delayed making an order for the release of the patient, even though in other contexts release would be mandated following a finding of unlawful detention. That delay is for the very same reason as a consultant psychiatrist may, if appropriate, delay the discharge of the patient even though he/she has revoked the admission order or renewal order having formed the requisite opinion for the purpose of s. 28 (1) of the Act."

53. This issue which was also before Peart J. in *McN.*, another s. 23 case to which I have already made passing reference. In that case the applicants suffered from advanced dementia and had originally been detained in an approved centre as involuntary patients. Their respective admissions orders were then subsequently revoked, but both remained in a locked hospital ward, the departure from which was controlled by staff. Both applicants lacked the mental capacity to make a decision to remain in the locked unit on a voluntary basis and it was said that they were in involuntary detention.

54. Peart J., however, rejected the applications which were brought on their behalf for their release pursuant to Article 40.4.2 of the Constitution, saying:

> "In my view the mere fact that the unit in which the applicants are is locked and secure should not be seen in the context of forced restraint amounting to a false imprisonment or other unlawful detention. The respondent owes a duty of care to these vulnerable applicants. It is not disputed that they are suffering from both mental and general medical illness. They cannot look after themselves unaided by others. It is reasonable therefore that they should be in a part of the hospital from where they cannot leave unnoticed. Also, it would be grossly negligent for the hospital, following the required revocation of the admission/renewal order, to immediately bring these vulnerable patients to the front door of the hospital, lead them down the steps and to pavement and say to them "we no longer have any legal basis for keeping you in hospital, so off you go – home or wherever you can". How could such an appalling vista be within the contemplation of an Act such as this which has at its heart the best interests of vulnerable patients? "

55. Peart J. later continued by stating:

> "When considering whether keeping these patients in the same Unit 5 as before amounts of itself to an unlawful detention, one must bear in mind the overall context in which they are in that unit, and not simply the physical geography of the unit. Yes, it is a secure unit, with staff who monitor the patients and ensure that they cannot leave it. But visitors are allowed, and indeed it has been quite clearly stated that these applicants are free to leave but only where they are safe when leaving, such as in the company of a family member. The reality for these applicants is that if a responsible adult family member of one came to the hospital and indicated that he or she wished to take either applicant him or her home and look after him/her, the applicant in question would not be prevented from leaving. That presupposes of course that by that time the condition of the patient in question had not once again deteriorated to a point within the s. 3 definition. So the fact that Unit 5 is a secure unit cannot of itself mean that the applicants are detained in any technical sense. Rather it can be seen as a safe environment for the applicants to be, given their illnesses, but one which they may leave if appropriately accompanied as I have said."

56. One may understand, sympathise with and appreciate the sentiments which Peart J. expressed in these passages and, indeed, in the earlier passage which I have just quoted from the judgment under appeal. These passages argue for a broader interpretation of the reference to "inappropriate discharge" in s. 28(2) and this was at the heart of the reasons why the judge concluded that the restraints placed on Mr. L. leaving the approved centre on 21st November 2011 were not unlawful. But one might ask with regard to the question which hovers over the judgment in *McN.*: what is to happen where there is no responsible family member who will take home from the approved centre the elderly patient who is suffering from dementia – but not from mental illness? The answer seems to be that such patients are doomed to a life of *de facto* confinement in an approved centre as voluntary patients who, while voluntary in theory, are in fact detained involuntarily, but without the protections provided for detained patients for in the 2001 Act.

57. I cannot believe that the Oireachtas ever intended such a result. There is nothing at all in the 2001 Act to suggest that voluntary patients could be detained in this manner. Rather, s. 29 envisages that such persons can remain for treatment in an acute hospital if they choose to do so, but that has to be on a purely voluntary basis, subject, of course, to the provisions of s. 23. It must be recalled that voluntarism remains a cornerstone of our system of medical treatment, for all the reasons so eloquently stressed by Hardiman J. in *North Western Health Board v. H.W.* [2001] IESC 90, [2001] 3 I.R. 622, 746-750.

58. There are, of course, exceptions provided for by statute and, indeed, the 2001 Act is itself one of the principal exceptions to that rule. But the legislative *quid pro quo* is always that compulsory medical treatment and detention is attended by appropriate safeguards. Where I respectfully part company with the judgment under appeal is that its net effect is that voluntary patients may, at least in some circumstances, be prevented from leaving an approved centre otherwise than in accordance with s. 23 and thereby left in a form of detention without the safeguards otherwise carefully provided for by the 2001 Act for detained patients who are subject to an admission or renewal order.

59. Any other conclusion would not only be entirely at odds with the rule of law based-democracy envisaged by Article 5 of the Constitution, it would also contradict the fundamental constitutional premise of Article 40.4.1 of the Constitution, namely, that the deprivation of personal liberty must be "in accordance with law." To that extent, therefore, I consider that, with respect, McN. was wrongly decided and should not be followed. In arriving at this conclusion, I do not think it necessary to arrive at a final view on the proper interpretation of s. 28(2), save to draw attention to the range of possible interpretations of this provision and to observe that these general words cannot be interpreted as derogating from the clear language and intent of s. 23 and, by extension, s. 24.

Conclusions

60. It follows, therefore, that I am of the view that a voluntary patient who expresses a desire to leave a secure unit at an approved centre remains free in principle to do so at any convenient time and may not be restrained by the hospital from leaving save in accordance with the provisions of s. 23 of the 2001 Act.

61. It follows, therefore, that I would allow the appeal. I would also hear submissions from counsel as to the precise form of order which the Court should now make in the light of this judgment.