

THE HIGH COURT**2007 No. 434 SS****IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND 1937****BETWEEN****J. B.****APPLICANT****AND****THE DIRECTOR OF THE CENTRAL MENTAL
HOSPITAL AND DR. RONAN HEARNE****RESPONDENTS****AND****THE MENTAL HEALTH COMMISSION****NOTICE PARTY****AND****THE MENTAL HEALTH TRIBUNAL****NOTICE PARTY****Judgment of Mr. Justice John McMenamin dated 15th June, 2007.**

1. On 23rd May, 2007, I delivered a decision in this inquiry under Art. 40.4 of the Constitution. In that judgment I held that the detention of the applicant J. B. was lawful. In view of the importance of the issues which arose from the inquiry, I indicated that I would furnish a judgment setting out the reasons for my decision in more detail. I now do so. In order to place the present application in its legal context it will be necessary to consider certain provisions of the Mental Treatment Acts 1945 and 1961 ("the Acts of 1945 and 1961") insofar as they relate to the issue of care and responsibility for such patients and the procedure applicable under those provisions for the renewal of orders for their detention. The judgment will turn then to the provisions of the Mental Health Act, 2001 which must be considered in this application.

Background facts

2. This is a second application for an inquiry pursuant to Article 40.4 within a month in relation to the applicant. On 5th April, 2007 a similar inquiry was held. At issue there were the provisions of ss. 184 and 189 of the Mental Treatment Act 1945. On 4th May, 2007 McGovern J. delivered a judgment deeming such detention lawful, wherein he set out general background facts to the case. As these facts are of ongoing relevance, this recital of the applicant's unfortunate background will be adopted as part of this judgment:

"The applicant was born on 20th June, 1980 and came from a troubled family background. He is one of eight children. His family came to the attention of the relevant Area Health Board in 1985, as there were concerns of domestic violence and physical abuse by the applicant's father. An inquiry established that one of the applicant's sisters had been repeatedly sexually abused by the applicant and another sibling and there is evidence to suggest that the applicant himself had been sexually abused between the ages of eight and eleven by a teenage male neighbour. The applicant was expelled from school and began stealing from shops, drinking and smoking cannabis from the age of thirteen. He also experimented with other drugs. In 1996, J. B. was convicted of stealing a motor vehicle and spent four years in St. Patrick's Institution. In 1998, he was again charged with stealing a vehicle and remanded in St. Patrick's Institution. On the 7th December, 2000, he was charged with criminal damage and received a sentence of sixteen months. He also received a sentence for sexual abuse and for unlawful carnal knowledge of a thirteen year old female. On 28th January, 2002 after completing his sentence he was re-arrested on a charge of sexual abuse of one of his sisters. Sadly he has had a very troubled background indeed.

J. B.'s first contact with the psychiatric services was in January, 1988 when he was seven years old. He was referred due to behaviour problems which were understood to originate from his parents marital disharmony and family violence. At the age of sixteen he harmed himself by cutting his elbow while smashing it into a window. At the age of nineteen he took overdoses of drugs on two occasions. While in prison in 2000, J. B was assessed by a consultant forensic psychiatrist. At this time he had been reporting strange bodily experiences and exhibited signs of psychotic behaviour and paranoia. He has since been diagnosed with schizophrenia, alcohol dependence syndrome, harmful cannabis use and paraphilia (a preference for adolescent girls)".

3. McGovern J. continued:

"There is no doubt that he has been a danger to himself and to others, particularly adolescent girls and that he required treatment as an involuntary patient in psychiatric institutions. Between April, 2004 and April, 2007, he has been detained as a temporary chargeable patient under the provisions of s. 184 of the Mental Treatment Acts 1945 to 1961..."

The issues raised in that case and the legislation in issue are of contextual importance to this application and should now be considered.

The Acts of 1945 and 1961

4. Before McGovern J., it was contended on behalf of the applicant that his detention was unlawful because, in effect, he had been detained under the provisions of s. 184 of the 1945 Act from 28th October, 2004 until 16th April, 2007. It was submitted that this frustrated the purpose of s. 184 of the 1945 Act, and transitional provisions made for the purposes of introducing the Mental Health Act 2001. The issue in that case was distinct from, and not directly relevant to that in the instant application. But their provisions are nonetheless helpful in order to explain the reasons for this judgment.

Reception Order

5. Section 184 of the Act of 1945, (insofar as relevant) identified the procedure then applicable for the application in making of a temporary chargeable patient reception order in an approved institution maintained by what was then a Mental Hospital Authority for a Mental Hospital District, where such person ordinarily resided. It provided that an application might be made either by the husband, wife or relative of the person to whom the application related, at the request of such person, or (subject to certain provisions) by any other person. That section also provided for a certification procedure whereby in a prescribed form an authorised medical officer certified that he had examined the person to whom the application related and outlining the opinion of such medical officer that the person was suffering from mental illness, required not more than six months suitable treatment for his recovery, and that he was unfit on account of his mental state for treatment as a voluntary patient.

Extension or renewal of order

6. Section 189 of the Act of 1945, as amended by the Mental Treatment Act, 1961 provided a procedure whereby the period of detention of a temporary patient might be extended on the opinion of the chief medical officer of an approved institution, in circumstances where that officer was of the opinion that the patient would not have recovered during the initial period of six months. It included a power for the chief medical officer to make such order in relation to a patient who would have been detained in an institution under his control, but for such patient being "absent, removed or boarded out" under s. 203, 204, 208 or 209 of the Act of 1945.

7. Under s. 208 of the Act, of 1945 it was provided that where a mental hospital authority, acting on the advice of the other resident medical superintendent of their district mental hospital was of opinion that a person detained in a hospital or institution maintained by them required treatment (including surgical treatment), not available otherwise than pursuant to that section, such authority might direct and authorise the removal of such person to any hospital or other place where the treatment was obtainable, and in which the detained person might be received in pursuance of an arrangement under that section. That provision also permitted a medical attendant of a person detained in a mental institution, not maintained by a mental hospital authority to direct and authorise the removal of such a person to any hospital or other place where necessary medical treatment was obtainable and which had agreed to receive him.

8. Under s. 208 (5) of the Act, 1945 it was provided:

"A person removed under this section to a hospital or other place may be kept there so long as is necessary for the purpose of his treatment and shall then be taken back to the place from which he was removed, unless it is certified by a registered medical practitioner, that his detention is no longer necessary."

9. Thus, to summarise, under the Act of 1945, there obtained a regime whereby a patient might be transferred to an institution where particular medical treatment might be available, while at the same time, the care and supervision of such a patient might be maintained by the chief medical officer of the area where a patient had originally been detained, and from which he was transferred, usually, to the Central Mental Hospital.

Further factual background of particular relevance to this application

10. On 22nd April, 2004, the applicant, further to the completion of a necessary application certificate, was made the subject of a "reception and detention order" pursuant to s. 184 of the Mental Treatment Act, 1945, usually referred to as a temporary involuntary patient order. On 28th April, 2004 he was admitted to St. John of God Hospital, Blackrock, pursuant to the said order. He was transferred that evening to the Central Mental Hospital. There were two extensions made to the temporary reception order of 22nd April, 2004, namely, 28th October, 2004 and the 21st April, 2005. I will return to these later.

11. On 18th October, 2005 the applicant, further to the completion of a necessary application certificate was made the subject of a "reception and detention order" pursuant to s. 184 of the Mental Treatment Act, 1945. On 18th October, 2005 the applicant was admitted to St. John of God Hospital pursuant to that order. On that date he was transferred to the Central Mental Hospital pursuant to s. 208 of the Act of 1945. There have been two extensions to the temporary reception order of 18th October, 2005, namely on the 21st April, 2006 and 17th October, 2006. These too are of particular relevance.

The Mental Health Act 2001

12. As of 1st November, 2006 the applicant's detention was treated by the respondents and the notice party as coming within the terms of application of the transitional provisions of the Mental Health Act, 2001 (hereinafter referred to as the "Act of 2001") as contained in s. 72 of that Act. This was the date upon which key provisions, including the transitional provisions concerning the review regime to be applied in relation to persons, the subject of detention orders under the Act of 2001, came into force.

13. Pursuant to these transitional provisions a Mental Health Tribunal, established under the Act of 2001, was required to review the applicant's detention prior to the expiry of the temporary reception order. A Mental Health Tribunal hearing was held on 2nd April, 2007 for the purposes of reviewing the applicant's detention, but adjourned to allow for the application to be made as to the unlawfulness of the applicant's detention pursuant to the provisions of the Act of 1945, that was dealt with by McGovern J.

14. The applicant's detention was subsequently extended by the tribunal pursuant to s. 18(4) of the Mental Health Act, 2001 for a further fourteen days from 12th April, 2007.

15. On 24th April, 2007 a "renewal order" was made by Dr. Ronan Hearne, consultant psychiatrist of St. John of God Centre Blackrock, which order was stated to renew the applicant's detention from that date for a period of three months. This order was entitled "Renewal Order by Responsible Consultant Psychiatrist Form 7".

16. Pursuant to the provisions of s. 18 of the Act of 2001, a tribunal hearing was fixed for 14th May, 2001 for the purposes of reviewing the aforesaid renewal order. On the morning of the hearing the solicitor acting for the applicant, Ms. Áine Hynes, was informed by the applicant that a further and subsequent renewal order had been made by Dr. Sally Linehan in respect of his detention. This had been made on 1st May, 2006. J.B. was provided with a copy of a patient notification form which referred to this order. Ms. Hynes states in the grounding affidavit sworn herein that she checked the psychiatric case notes for 1st May, 2007 and that they contained an entry from Dr. Linehan confirming this was so. Ms Hynes stated that she checked the applicant's legal file but could not locate a copy of any renewal order dated 1st May, 2007.

17. At the commencement of the Tribunal hearing, Ms. Hynes informed the Tribunal that the renewal order of 24th April, 2007, for a period of three months was invalid as it had been made by Dr. Ronan Hearne, whom it was contended was a person who was not the applicant's treating consultant psychiatrist. Ms. Hynes stated to the Tribunal that the Act of 2001 required that such renewal orders be made by "the consultant psychiatrist responsible for the care and treatment of the patient concerned". That she submitted was Dr. Linehan and not Dr. Hearne.

The role of Dr. Ronan Hearne – The applicant's essential point

18. An essential point of the claim made on behalf the applicant in this inquiry is that Dr. Hearne is not the applicant's "consultant psychiatrist responsible for his care and treatment". The applicant's case is that a renewal order may be made only pursuant to s. 15(2) of the Mental Health, Act, 2001. This provides that such order may be made:-

"By the consultant psychiatrist responsible for the care and treatment of the patient concerned for a further period not exceeding three months".

Dr. Ronan Hearne is not on the staff of the Central Mental Hospital. He is a consultant psychiatrist attached to Cluain Mhuire

Services, St. John of God Hospital in Blackrock. But as the facts show, his role was essential to the applicant's case.

19. As recited earlier, the initial admissions of the applicant were to St. John of God Hospital. Thereafter he was transferred pursuant to the provisions of s. 208 of the Medical Treatment Act 1945 as amended, to the Central Mental Hospital. The applicant states that he has not been treated at St. John of God Hospital, that he has not been a patient at the Cluain Mhuire unit for over nine years, and that Dr. Hearne is not involved in his treatment. It is asserted that Dr. Hearne's involvement with the applicant was limited to attending case conferences and attending for the purpose of making extensions to the temporary involuntary patient orders under s. 189 of the Act of 1945.

20. The applicant's case is that since the 1st April, 2006, Dr. Sally Linehan *alone* has been *the* applicant's consultant psychiatrist. It is stated that in an affidavit sworn in the earlier proceedings she had deposed to this and also that it had been recognised in an independent medical examination report prepared for the Tribunal of the 14th May, 2007, by Dr. Alan Byrne. The Tribunal (and this Court) were informed that while Dr. Linehan had actually herself signed an additional Renewal Order "form 7" on the 1st May, 2007, she had destroyed this on receiving legal advice that the order of the 24th April, 2007, signed by Dr. Hearne was valid and that this latter order was superfluous.

21. Dr. Linehan was unable to attend at the Tribunal hearing on the 14th May, 2007, due to a family bereavement. The Tribunal by decision of that date decided to adjourn the hearing to allow for direct evidence on the issue of the order of the 1st May, 2006, be taken from Dr. Linehan. Thereafter this Inquiry was initiated before O'Neill J.

22. The applicant now contends that Dr. Hearne was not empowered under the Act of 2001, to make the renewal order of the 24th April, 2007. It is claimed that the applicant was in the Central Mental Hospital under the care and treatment of Dr. Linehan. Dr. Hearne is not employed in the Central Mental Hospital. His only involvement has been outlined earlier. Mr. John Rogers S.C. submitted on behalf of the applicant that renewal orders under s. 15(2) or s. 15(3) of the Act of 2001 (which provide for further renewals) may be made only by Dr. Linehan.

23. However counsel on behalf of the respondents and notice parties point out nowhere in the Act is it provided that the consultant psychiatrist signing such renewal or extension must, necessarily, be a member of the staff of the institution wherein the patient is detained.

The Form 7

24. In the form 7 signed by Dr. Ronan Hearne on the 24th April, 2007, he stated as his opinion of the applicant's mental condition that he suffered from paranoid schizophrenia complicated by borderline I.Q., paraphilia and poly substance misuse. He stated that the applicant has limited insight and was at risk of non-compliance with treatment with serious consequences. He added that the applicant was commencing specialised sex offender treatment.

Dr. Hearne's affidavit

25. The contents of Dr. Hearne's affidavit are not essentially disputed. He has held his post since 2002. The Cluain Mhuire Service, rather infelicitously, is stated to be "a generic catchment area community based public mental health service operated by the St. John of God Order on behalf of the HSE". The service is responsible for providing psychiatric care to adults residing in the catchment area. It is a community based service and maintains a number of beds in St. John of God Hospital, Stillorgan.

26. The Central Mental Hospital in addition to its role within the Prison Service provides a specialist tertiary referral service for patients of the catchment area mental health services who require for their treatment a period of time in a secure therapeutic environment under the supervision of specialists in forensic psychiatry. When this intervention is complete, such patients then return to their local catchment area mental health service for continuing treatment and support if necessary. The applicant J.B. previously lived within the catchment area of the Cluain Mhuire Mental Health Services. The applicant was first treated for psychosis by the forensic services in prison in the year 1999. In the year 2000, he attended Cluain Mhuire Adult Mental Health Services under the care of Dr. Donald Draper consultant psychiatrist.

27. Dr. Hearne was appointed consultant psychiatrist with Cluain Mhuire Service and at St. John of God Hospital and took over the care of patients, including the applicant, from his predecessor Dr. Draper. From 2002 to 2004, during which time the applicant was a patient in the Central Mental Hospital, Dr. Hearne was invited to attend case conferences in relation to the application in anticipation that J.B. would continue to require mental health services on his release from prison.

28. Dr. Hearne first assessed the applicant on the 17th June, 2003, in the Central Mental Hospital at the request of Dr. Harry Kennedy the clinical director of that hospital. Dr. Kennedy wished to place the applicant on a waiting list for appropriate community treatment and rehabilitation from the date of his discharge on the 28th April, 2004. On the 27th January, 2004, Dr. Hearne again examined the applicant. In a letter dated the 5th February of that year he informed Dr. Kennedy of his findings, at an examination which had taken place in the Central Mental Hospital. In the course of his letter, addressed to Dr. Kennedy, Dr. Hearne sets out his findings in relation to the applicant in some detail and also deals with a question of treatment options for the applicant in the future. He sought copies of any risk assessment that had been carried out on the applicant, detailed assessment of his daily living activities, and details of his release date. Dr. Hearne also indicated "I have planned to review J. at the Central Mental Hospital on the 24th February, at 3.30 p.m."

29. On the 10th February, 2004, Dr. Kennedy wrote to Dr. Hearne:

"I understand from staff that you came to see J. recently. You are always welcome to come and see him, but it is helpful to discuss our *mutual cases*." (emphasis added)

There is no suggestion here that the psychiatric care of J.B. fell to any one consultant alone.

30. On the 12th February, 2004, Dr. Kennedy wrote a further letter to Dr. Hearne enclosing minutes of case conferences and formal risk assessments. Dr. Hearne furnished a further written review of the applicant on the 15th February, 2004. This resulted in further contact with Dr. Kennedy. Further correspondence took place discussing J.B.'s future in some detail in October, 2004 and April, 2005, following a review by Dr. Hearne of the applicant on the 21st April, 2005.

31. Dr. Hearne carried out a further review of the applicant on the 12th October, 2005. The contents of this review were reflected in a detailed letter which he sent to Dr. Kennedy on the 12th October, of that year. At the conclusion of his letter he stated:

"It is my opinion that J. currently requires inpatient treatment for his psychotic illness. Given the vulnerability and mixed

gender of the patients in St. John of God Hospital I do not believe he could be managed in that setting. It is my view that his medium term rehabilitation needs could not be met within the existing community psychiatric services. I will arrange to assess J. – at St. John of God Hospital on Tuesday 18th October (p.m.) with a view to detaining him under the Mental Treatment Act (1945) and transferring him under s. 203 to the Central Mental Hospital.”

32. On the 27th March, 2006, Dr. Kennedy sent a further letter to Dr. Hearne reminding him that the most recent temporary certificate in relation to his detention was initiated on the 18th October, 2005 and was due to be extended during the seven days up to and including the 18th April, 2006. On the 30th May, 2006, Dr. Hearne wrote to Dr. Kennedy indicating that the Cluain Mhuire Service had been giving thought to an individualised programme which might facilitate the applicant’s attendance at another unit in Burton Hall. He requested an up-to-date assessment and a copy of the proceedings at the last case conference that was held in relation to the applicant. Dr. Hearne was reminded as to the notice of extension of an order regarding J.B. by way of letter on the 27th September, 2006, resulting in the renewal order made by Dr. Hearne to which reference has been made earlier.

33. As can be seen therefore from this correspondence the relationship between Dr. Hearne and the applicant was an ongoing one. His involvement in the applicant’s case did not cease in 2004. He was directly concerned and engaged in the treatment regime of the applicant in October, 2006. His role was in no way confined to the furnishing of renewal orders. The fulfilment of this role did not exclude other consultant psychiatrists treating the applicant.

Dr. Kennedy’s affidavit

34. Dr. Harry Kennedy is a consultant psychiatrist and clinical director of the Central Mental Hospital. He deposed to the need for contact between the Central Mental Hospital and the community psychiatric hospital whilst a patient is in the Central Mental Hospital. This contributed to open decision making and assists for patient welfare. He stated that Dr. Ronan Hearne actively remains involved in the applicant’s care and treatment.

Dr. Linehan’s affidavit

35. The affidavit of Dr. Sally Linehan consultant forensic psychiatrist completes the background.

36. She says that the Central Mental Hospital notified the Mental Health Commission of the applicant’s detention in the Central Mental Hospital pursuant to the transitional provisions of s. 72 of the Act of 2001. The applicant was reviewed by the Mental Health Commission on the 2nd April, 2001 and they decided to adjourn their hearing in order that the parties might initiate proceedings by way of *habeas corpus* to determine the validity of the detention order under the Mental Treatment Act 1945.

37. This resulted in the judgment of McGovern J. on the 21st April, 2007, holding that the applicant was lawfully detained and reflected in the written judgment on the 4th May, 2007. The Director of the Central Mental and Dr. Ronan Hearne were served with a notice of appeal of this judgment on the 18th May, 2007, indicating the applicant’s intention to appeal McGovern J.’s judgment to the Supreme Court. The applicant’s detention was thus extended by the Mental Health Tribunal pursuant to s. 18(4) of the Act of 2001 for fourteen days from the 12th April, 2007, while the decision of the High Court was awaited.

38. Dr. Linehan explained that, because of confusion in relation to the correct date of renewal of J.B.’s detention, she completed a second renewal order pending receipt of clarification on this issue from the Mental Health Commission or from their solicitors. She was subsequently informed that the renewal order signed by Dr. Hearne was valid and as a result she deemed the renewal order that she had completed on the 1st May, 2007, to have no effect and therefore did not forward a copy of that order to the Mental Health Commission.

39. The contents of her letter of the 21st May, 2007, in a report to the Mental Health Tribunal contain a history of the applicant suffering from continuing psychosis, but also stating that the applicant had recently commenced individual offence focused psychological intervention which will aim to address risk factors which maintain the applicant’s high risk of re-offending sexually against children. Dr. Linehan states that the applicant continues to suffer from a mental disorder as defined by s. 3 of the Mental Health Act 2001 and that the severity of his illness is such that his judgment is so impaired that failure to continue his treatment in an approved centre would be likely to lead to serious deterioration in his condition and would prevent the administration of appropriate treatment that could only be given in an approved centre. She also stated that his risk of sexual offending is exacerbated by his mental illness and by substance misuse. These views are entirely *ad idem* with those expressed by Dr. Hearne. There is no conflict on any of the evidence in this or indeed any issue.

40. Dr. Linehan draws attention to the fact that apparently no notice was given by the applicant that there was an intention to bring this inquiry. The matter remained and remains pending before the Mental Health Tribunal which was due to reconvene shortly afterwards in order to allow her direct evidence to be heard. Dr. Linehan states that the principal factual issues giving rise to this application pursuant to Article 40 are in all material aspects essentially the same as advanced by the applicant and being dealt with simultaneously by the second named notice party, that is, the Mental Health Tribunal at the adjourned hearing.

41. Dr. Linehan states categorically that the second named respondent (that is Dr. Hearne) is the treating consultant psychiatrist for the applicant in accordance with s. 21(4) of the Mental Health Act 2001. She refers back to the system which obtained under the Mental Treatment Act 1945. (See paras. 5 to 9 of this judgment).

42. When a patient was transferred to the Central Mental Hospital he retained his original doctor and the doctor in the Central Mental Hospital was a specialist dealing with his care in accordance with s. 208 of the Mental Treatment Act 1945. This regime ensured continuity of care. Under the Act of 2001 a patient cannot be admitted directly to the Central Mental Hospital and must be transferred there from another hospital. It is the opinion of Dr. Linehan, and all the other consultant psychiatrists, that a responsible practitioner referred to in the Act is not simply one person but is rather the psychiatrists, not only within the hospital itself, but may include consultant psychiatrists outside the hospital, provided they have a real and continuing part in the care and treatment of the patient. In her view Dr. Hearne comes within this definition.

43. I accept this proposition as a matter of law as well as medical practice for reasons outlined later.

Ms. O’Doherty’s affidavit

44. Ms. Margaret O’Doherty, barrister at law, is a practising barrister and was chairperson of the Mental Health Tribunal that sat on the 14th May, 2007. She exhibits a note of the decision made by the Tribunal at the hearing on the 14th May, 2007, which was read out to Ms. Hynes, which note it was intended to incorporate in the record of proceedings when the Tribunal had completed its review of the applicant’s detention pursuant to s. 18 of the Act of 2001.

45. Ms. O’Doherty also outlines the evidence adduced before the Tribunal in relation to the second certificate signed by Dr. Sally

Linehan and also refers to evidence given by Geraldine Burke the Mental Health Administrator in the Central Mental Hospital that she had destroyed the order made by Dr. Linehan consequent on receiving advice that the first renewal order of the 24th April, 2007, was still valid. As Dr. Linehan was not available to give direct evidence in relation to the matter due to a family bereavement the Tribunal decided that it was appropriate to adjourn the review of the applicant's detention in order that Dr. Linehan could attend.

46. Ms. O'Doherty states that the Tribunal had the power to adjourn the review of the applicant's detention pursuant to s. 18(4) of the Act of 2001, and extended the term of the renewal order for a period of fourteen days so as to allow the further taking of evidence. No objections were raised in relation to that adjournment.

47. The Tribunal had thus adjourned its proceedings and was rescheduled by the Commission to sit again on the 22nd May, 2007. The Tribunal resumed its hearing on that date and decided to adjourn final determination of its review of the renewal order until 1 p.m. on the 24th May, 2007, one day prior to this hearing. Thus the application for the inquiry was made while the hearing before the Mental Health Tribunal was continuing.

The Tribunal decision of 14th May, 2007

48. The decision of the Tribunal made on the 14th May, 2007, states that the applicant was legally detained under the Act of 2001, pursuant to the form 7 signed by Dr. Hearne and as it is provided in s. 21(4) of the said Act related to:

"... the detention of a patient in another approved centre from which he was transferred."

To this Ms. O'Doherty added:

"The Tribunal is therefore satisfied that under s. 21(4) of the Act of 2001 that Dr. Hearne was authorised to sign the F7."

That is the form 7 of renewal.

Section 21(4) of the Act of 2001

49. Section 21(4) of the Act of 2001 deals with the transfer of patients. It reflects closely the provisions of s. 189 of the Act of 1945. It empowers the clinical director of an approved centre to arrange for the transfer of a patient to another centre with the consent of the clinical director of that centre. It mandates the clinical director of an approved centre to notify the Mental Health Commission of its intention to do so and states that where a proposal is referred to a Tribunal under this section such proposal will be reviewed by the Tribunal subject to appeal to the Circuit Court.

50. However the subsection specifically provides that the detention in another approved centre is to *be deemed for the purposes of the Act as detention in the centre from which the patient was transferred*. (emphasis added).

51. *Per contra* the other sections of the Act, ss. 21 and 22 are carefully framed so as not to preclude the role of the treating psychiatrist who is *not* a member of the staff of the approved centre to which the patient is transferred.

52. By way of contrast, s. 23 of the Act deals with a power to prevent a voluntary patient from leaving an approved centre. It empowers a consultant psychiatrist, registered medical practitioner or registered nurse "*on the staff of the approved centre*" to detain such person for a period not exceeding 24 hours. (emphasis added) Such power therefore resides only in a person who is on the staff of the approved centre. No such limitation is contained in s. 15(2) of the Act which refers merely to

"*the consultant psychiatrist responsible for the care and treatment of the patient.*"

53. Counsel on behalf of the applicant relied strongly on the decision of O'Neill J. in the case of *W.Q. v. The Mental Health Commission and Others* (Unreported, High Court, O'Neill J., 15th May, 2007).

54. In that case a consultant psychiatrist from the South Tipperary Mental Health Services being the catchment area where the patient resided was requested to attend at the Central Mental Hospital to review the applicant. That consultant psychiatrist, a Dr. O'Leary examined the applicant and reached the conclusion that he was suffering from a very serious mental illness.

55. But at p. 11 of the judgment O'Neill J. pointed out:

"The evidence establishes beyond any doubt that at all material times the applicant was in the Central Mental Hospital under the care of Dr. Mohan. Dr. O'Leary's involvement with the applicant came about because the applicant was from the South Tipperary region. *It is clear that on the two occasions that the applicant was examined by Dr. O'Leary it was solely for the purposes of a review and not for the purposes of care or treatment.*" (emphasis added)

O'Neill J. added:

"It is of course the case that for reasons of practicality *more than one psychiatrist would have to be considered as 'responsible for the care and treatment of the patient concerned'*. This would arise as a matter of necessity where for example the psychiatrist primarily responsible for the care and treatment of a person was absent for one reason or another such as holidays or illness at a time when it was necessary to make a Renewal Order pursuant to either s. 15(2) or s. 15(3) of the 2001 Act. Obviously in this situation another psychiatrist *who was involved in the care and treatment of the applicant in the approved centre in question could lawfully make a Renewal Order. In my opinion however a psychiatrist not attached to the approved centre where the person was detained, and not involved in the care and treatment of the patient concerned but who was brought in for the purposes of review, could not exercise the power of renewal contained in s. 15(2) and s. 15(3).*" (emphasis and underlining added)

56. The proviso, underlined in that quotation is the vital distinction between the cases. The facts are distinguishable from *W.Q.* There, Dr. O'Leary had played no other role in the care and treatment of the applicant other than being brought in for the purposes of review. She had not been involved in the "care and treatment" of the applicant. This is quite distinct from the position obtaining in the instant case, where, as can be seen earlier Dr. Hearne had been, on an ongoing basis, actually involved in the care and treatment of the applicant from 2002. He had been the psychiatrist who was engaged in the transfer of the applicant to the Central Mental Hospital. He was involved in the process of reviewing the applicant on an ongoing basis between 2004 and 2006. He had made recommendations in relation to the care and treatment of the applicant. He corresponded with Dr. Kennedy as to his care, treatment and welfare. He was the person who had previously furnished the renewal orders justifying the detention of the applicant.

57. This situation is not in any way affected by the fact that he was not, in fact, a member of the staff of the Central Mental Hospital. It is clear that the decision of O'Neill J. in *W.Q.* was made on the basis of an entirely different set of facts. I do not consider it apposite in the instant case where quite different considerations obtain in an ongoing relationship of doctor and patient.
58. This conclusion is reinforced by the definition of "treatment" contained in s. 2 of the Act of 2001 which in relation to a patient,
- "Includes the administration of physical, psychological and other remedies relating to the care and rehabilitation of a patient under medical supervision, intended for the purposes of ameliorating a mental disorder." (emphasis added)
59. This clearly envisages the involvement of practitioners of more than one discipline. As a matter of fact, Dr. Hearne, continued to be the consultant psychiatrist responsible for the care and treatment of the applicant, although others too were so responsible.
60. Secondly, s. 15(2) of the Act of 2001 when read in conjunction with the definition of treatment does not preclude the possibility, which clearly exists in this case of there being more than one consultant psychiatrist responsible for the care and treatment of the patient any more than there might have been more than one consultant psychiatrist involved or responsible for the care and treatment of the patient within the ambit of and employed by the Central Mental Hospital. However that consultant psychiatrist making an order must truly be engaged in the care and treatment of the patient, that is involved in the administration of physical, psychological and other remedies relating to that patient's care and rehabilitation in accordance with the definition under s. 2 of the Act of 2001.
61. O'Neill J.'s decision in *W.Q.* shows that the restriction of this power of renewal to the "consultant psychiatrist responsible for the care and treatment of the patient" is one of the significant safeguards provided by the Oireachtas in this legislation for the benefit of persons suffering from mental disorder within the meaning of s. 3 of the Act of 2001. A failure to comply with this provision will vitiate the lawfulness of the detention if for example based upon a renewal order signed by a person who lacks the power to make that order. Such is not the position in the instant case.
62. This court having held that the detention of the applicant is in any case lawful it is unnecessary to consider the meaning and effect of s. 18(1)(a)(ii) which states that the Tribunal reviewing the detention of a patient may affirm the order if satisfied that the patient is suffering from a mental disorder and that the provisions of ss. 9, 10, 12, 14, 15 and 16 where applicable, had been complied with, or, if there has been a failure to comply with any such provision that the *failure does not affect the substance of the order and does not cause an injustice*.
63. It is clear that statutory provisions of this general type should be the subject of the purpose of interpretation, see *In Re Philip Clarke* [1950] I.R. 235; *Gooden v. St. Otteran's Hospital* [2005] 3 I.R. 617. I would apply that observation to the instant case if necessary in this interpretation of s. 15(2) of the Act of 2001.
64. However I would reserve for an appropriate case question as to how, and in what manner the requirements of the "substance of the order" and the term "injustice" are to be reconciled, particularly having regard to the jurisdiction of the Superior Courts to ensure that rights of patients are protected and safeguarded by way of enquiry under Article 40.4. One could not disagree with the views of O'Neill J. in *W.Q.* that the best interests of a person suffering from a mental disorder are secured by a faithful observance of and compliance with the statutory safeguards put into the Act of 2001 by the Oireachtas and that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by such a Tribunal.
65. It is important too, to recollect the statement of McGuinness J. in *Gooden (supra)* that the sole issue before the courts in an application of this kind is whether or not the applicant is detained in accordance with law.
66. As pointed out by Peart J. in *A.M. v. Kennedy and Others*, 24th April, 2007, a purposive interpretation as to the meaning of orders depriving a person of his or her liberty could not be correct as it would nullify the very purpose of inserting safeguards in the statutory procedures put in place.
67. I will allow the cause shown and discharge the conditional order made herein.