THE HIGH COURT

[Record No. 2016/469 JR]

BETWEEN

A.B.

APPLICANT

AND

THE CLINICIAL DIRECTOR OF ST. LOMAN'S HOSPITAL, THE HEALTH SERVICE EXECUTIVE, THE MINISTER FOR HEALTH, THE ATTORNEY GENERAL, IRELAND

RESPONDENTS

AND

THE MENTAL HEALTH COMMISSION

THE IRISH HUMAN RIGHTS EQUALITY COMMSSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Binchy delivered on the 3rd day of May , 2017.

1. The applicant has been the subject of a number of orders made pursuant to s. 15 of the Mental Health Act, 2001 ("the Act of 2001") authorising his detention by the first and second named respondents on the grounds that he has been found to be suffering from a mental disorder as defined in s. 3 of the Act of 2001, and that his detention is necessary. Most recently, the applicant is the subject of an order made by the first named respondent on 13th September, 2016 and affirmed on 28th September, 2016 by a Tribunal established by the first notice party pursuant to s. 17(1) of the Act of 2001, which authorises his further detention, without further review, until 12th September, 2017. By these proceedings, the applicant seeks:

> (i) An order of *certiorari* quashing the twelve month renewal order made on 13th September, 2016 authorising the further detention of the applicant until 12th September, 2017;
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> (ii) If necessary, a declaration that insofar as s. 3(1)(a) and s.18 of the Act of 2001 authorised the applicant's detention up until 13th September, 2016, and s. 3(1)(b) and s.18 of the Act of 2001 continues to authorise his detention up until 12th September, 2017, the said sections are (i) repugnant to Article 40 of the Constitution or (ii) incompatible with Articles 3, 5, 8, 13 and 14 of the European Convention on Human Rights ("the Convention").

Background

2. In her affidavit of 24th June 2016, sworn in support the applicant's application for leave to take proceedings by way of judicial review, the applicant's mother, Mrs B., gives a detailed account of the applicant's background generally, as well as the background to these proceedings. The applicant suffers from an intellectual disability. In his early teens, he was diagnosed with hyperkinetic conduct disorder, specific speech articulation disorder, mild to moderate retardation and ataxia. As a consequence, his behaviour has been, from time to time, marked by aggressive incidents. According to an affidavit sworn by the applicant's mother, Mrs. B., when the applicant was fifteen years of age an incident occurred in which he broke all the windows in her parents' cottage with the consequence that he spent two weeks in the psychiatric unit of St. Loman's hospital. Mrs. B. deposes that she had difficulty securing appropriate therapy for the applicant and that as a result of the failure to provide him with a specifically designated special needs assistant while he was in school, he was effectively precluded from benefiting from education between 1996 and 1999. He also lost out, according to Mrs. B., on speech therapy that would have been available to him in the school environment during those years, although for a period Mrs. B. was successful in providing the applicant with speech therapy on a private basis, until the therapist secured employment elsewhere and Mrs. B. was unable to find a replacement.

3. Mrs. B. deposes that she sought behavioural therapy for the applicant from the State, but that this was not provided. She avers that when the applicant left school at the age of eighteen he had to wait a period of a year in order to secure a place in a resource centre, which was a day centre, in order to further his education. While attending that centre, it was necessary for him to be provided with a personal assistant at all times, but eventually the centre could not cope with the applicant because he did not conform to its routine. He was then transferred to GALRO support services, a private organisation which provides support to people with special needs. When the applicant reached twenty-five years of age, they advised that he should be living independently and not with his family, where he had continued to reside until that time. Supported by GALRO, the applicant moved into a house with two older men for approximately two months before moving back into the family home. He also worked picking up golf balls in a golf club and on a farm but unfortunately this employment came to an end for a variety of reasons.

4. Mrs. B. avers that in recent years the applicant has shown an escalation in violent behaviour towards others, and in particular towards family members. It became impossible for the family to cope with him living at home. The applicant was provided with a house with twenty-four hour care, but after twelve months those support services were withdrawn and he came under a "community care" model. The result of this according to Mrs. B. was that the applicant was given more freedom than he was able to cope with. He secured a job on a farm and was supposed to work from 10am to 1pm but often did not attend. This employment came to an end as a result of an alleged assault by the applicant on the farmer. The applicant has made numerous attempts to take his own life. In 2013, he overdosed three times on his prescribed medication having hoarded the medication in order to do so. On one occasion he was admitted to intensive care for four days. In 2014, the applicant's behaviour deteriorated further and he had what his mother describes as outbursts of unacceptable and violent behaviour, necessitating the applicant's mother to make an application for a safety order against the applicant.

5. In 2015, the applicant was provided with only five hours support a day and Mrs. B. was pressing the third named defendant to provide more. She avers that during 2015 the applicant was the victim of several instances of sexual abuse by a male. She exhibits correspondence from the Muiríosa Foundation (an organisation providing a range of services to persons with intellectual disabilities and their families) dated 7th January, 2015 indicating that from 19th January, 2015, the applicant would have forty-three hours per week support care. Mrs. B. exhibited a letter from the applicant's general practitioner dated 20th January, 2015 which summarised the

applicant's aggressive tendencies, his tendency not to take his medication and states that he is a very real danger to himself and to others. He stated that the applicant's family could no longer cope. He concluded by saying that if the applicant is not placed in long-term residential full-time support, this could result in a fatality.

6. In May 2015, the applicant suffered a serious psychotic episode for the first time. Mrs. B. believes that this was brought about by a combination of factors which could have been avoided if he had been in receipt of proper full-time support in the community. This episode resulted in the applicant's admission to St. Loman's Hospital as a voluntary patient on the 27th May, 2015. He was then detained involuntarily the following day, 28th May, 2015 and has been detained ever since. The applicant came under the care of consultant psychiatrist Dr. Mark Rowe who made an order authorising the applicant's detention for a period of three months, on 17th June 2015, which order was affirmed by the Mental Health Tribunal ("the Tribunal"). A further order authorising the applicant's detention was made by Dr. Rowe on 14th September, 2015, which was affirmed by the Tribunal on 1st October, 2015. On 14th March, 2016, Dr. Rowe made an order authorising the applicant's continued detention up to 13th September, 2016 on which date the current detention order, impugned by these proceedings, was made pursuant to s. 3(1)(a) of the Act of 2001. That section authorises the detention of a person where:-

> *"because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or to other persons."*

7. Mrs. B. relates that following his detention in St. Loman's in May, 2015, the applicant's psychotic symptoms were managed and kept under control and that since November 2015, Dr. Rowe has expressed the view that the applicant has recovered sufficiently to be discharged on the basis that he receives the necessary residential support. Mrs. B. describes this support as comprising:-

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

8. The applicant had been receiving support services from the Muiríosa Foundation for a number of years, and in 2016, following a tender process, the disability services of the third named respondent chose the Muiríosa Foundation as the service provider for the applicant's further care. The Muiríosa Foundation identified suitable accommodation for the applicant at X, Co. Westmeath and subsequently entered into a lease of the property for a period of five years in anticipation of placing the applicant in that property, supported by Muiríosa. The applicant claims that funding for his care by Muiríosa at X was approved at this time, but this is disputed by the respondents. Ms. Maura Morgan, General Manager Disability and Primary Care Services, of the second named respondent deposes that while funding was being sought at this time it was not approved. What is not in doubt, however, is that in May 2016 Mrs. B was advised by the disability services section of the second respondent that there were insufficient funds to provide supervised accommodation at X. She avers that the consequence of the failure to provide accommodation in the community is that the applicant remains detained indefinitely in a psychiatric ward for which there is no clinical justification.

9. The applicant's detention was reviewed by the Tribunal on 30th March, 2016 prior to the making of the impugned order. The applicant's solicitor, Corona Grennan attended before the Tribunal and objected to the continued detention of the applicant on the grounds that the psychiatric unit in which he was detained was not an appropriate place in which to accommodate him. At this hearing, Ms. Grennan referred to letters written by Dr. Rowe as far back as 15th December, 2015 and 25th January, 2016 in which he stated that the applicant's psychiatric illness had resolved "months ago" and that the applicant had remained in the psychiatric ward since his recovery from that condition only because of a lack of suitable residential placement in disability services. Dr. Rowe expressed the view that the applicant was in need of a suitable residential placement and also identified certain risks posed by his continued detention in a psychiatric ward in St. Loman's. In her affidavit grounding the application for leave to bring proceedings by way of judicial review, Ms. Grennan objected to the applicant's continued detention on this basis.

10. Also at the Tribunal hearing on 30th March, 2016, Ms. Grennan claims that Dr. Rowe informed the Tribunal that progress had been made in securing accommodation in the community for the applicant; that he told the Tribunal that a premises had been leased at X, Co. Westmeath and the Muiríosa Foundation was involved in the applicant's care and had made good progress with him. But it was stated that time would be needed to obtain HIQA approval and to recruit staff. Dr. Rowe anticipated that it would take three to six months before the residential placement would be ready.

11. The Tribunal affirmed the order detaining the applicant until September 2016. In its decision it made no reference to the proposed alternative accommodation, although Ms. Grennan expresses the view in an affidavit of 26th June, 2016 that it was on account of the availability of this accommodation that the Tribunal was willing to continue the applicant's detention in what was otherwise unsuitable accommodation for the applicant i.e. an acute psychiatric ward. This is expressly denied in the statement of opposition filed on behalf of the first and second named respondents.

12. Subsequent to the March hearing of the Tribunal, the first and second named respondent had to withdraw the proposed provision of a residential placement in the community because of a lack of funding. This was communicated to the applicant's mother by letter 15th May, 2016. The applicant has instructed Ms. Grennan that he is very unhappy in the psychiatric ward and wishes to leave the ward as soon as possible to live in the accommodation at X, with the support of the Muiríosa Foundation.

13. On 4th May, 2016, Ms. Grennan wrote to the first named respondent drawing attention to correspondence from Dr. Rowe which indicated that the psychiatric unit in which the applicant is detained is neither suitable nor appropriate for the applicant. She said that the correspondence highlighted the urgent need for the disability services to find suitable residential accommodation for the applicant, which according to Dr. Rowe should be his own accommodation with the support of a staff member available on a twenty-four hour basis. Ms. Grennan quoted from Dr. Rowe's letter of 25th January, 2016, referred to above. She said that the applicant remained very vulnerable in the acute psychiatric ward and had been the victim of at least one assault. She asserted that the applicant's statutory and constitutional rights were being breached by his continued detention in the acute psychiatric ward and that his detention in the circumstances was unlawful. She concluded by stating that:-

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

Thus, it is apparent that the initial impetus for the proceedings was to secure alternative suitable accommodation for the applicant.

14. On 4th May, 2016, Ms. Grennan also wrote to Ms. Marian Meany, head of operations and service improvement, disability services of the third named respondent, calling upon Ms. Meany to confirm that the required funding for the provision of alternative suitable accommodation for the applicant would be made available immediately. Ms. Grennan received a reply to each of her letters. The first, an undated letter, from Ms. Angela Walsh, general manager of mental health services with the third named respondent, which Ms. Grennan received on 20th May. Ms. Walsh stated that the estimated cost of the proposed placement of the applicant in alternative accommodation under the supervision of the Muiríosa Foundation is approximately €290,000 per annum. She said that:-

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

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

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

16. On 27th June, 2016, the applicant sought leave for judicial review. The application was grounded on a short affidavit of the applicant himself, and on affidavits of the applicant's mother and Ms. Grennan setting out the applicant's history as outlined above, as well as events following his detention in May, 2015. It was also supported by an affidavit of a consultant psychiatrist, Dr. Moosajee Bhamjee.

17. On 27th June, 2016, the applicant was granted leave to seek by way of judicial review, *inter alia*, an order of *certiorari* quashing the decision of the Mental Health Tribunal of 30th March, 2016 to affirm the order detaining the applicant, and a declaration that insofar as s. 3(1)(a) and s.18 of the Act of 2001 authorised the applicant's detention up until 13th September, 2016, the said sections are (i) repugnant to Article 40 of the Constitution, or (ii) incompatible with Articles 3, 5, 8, 13 and 14 of the Convention.

18. As well as initiating judicial review proceedings, the applicant also appealed the order of the Tribunal of 30th March, 2016, to the Circuit Court. Provision for such an appeal is made in s. 19 of the Act of 2001. The role of the Circuit Court in such an appeal is limited; if the court is satisfied that the appellant has a mental disorder as defined in section 3 the Act of 2001, then the court must affirm the order of the Tribunal. The appeal from the order of 30th March, 2016 was heard before Judge Comerford in the Circuit Court on 28th July, 2016 who was satisfied that the applicant suffers from a mental disorder and accordingly affirmed the order of the Tribunal. The judge noted that he did not have jurisdiction to make any other order, but having regard to the background he made some additional declarations, which are not relevant for present purposes.

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

20. In concluding that the renewal order should be affirmed, the Tribunal found, *inter alia* that the applicant is suffering from a mental disorder, being a severe intellectual disability as defined by the Act of 2001; that the applicant requires ongoing medication to minimise the occurrence of a psychotic illness and also to manage his level of aggression; that he is reluctant to take the depot medication and is likely to be non compliant with his required medication treatment regime if discharged.

21. On 2nd November, 2016, the applicant issued a motion to amend his statement of grounds issued pursuant to the order granting leave of 27th June, 2016. This application was grounded upon a further affidavit of Ms. Grennan sworn on 1st November, 2016. In the penultimate paragraph of her grounding affidavit Ms. Grennan avers that the proposed amendments were required by reason of events which had occurred subsequent to the order granting leave to issue the within proceedings of 27th June, 2016. The principal development in this regard was the renewal order made by Dr. Rowe of 13th September, 2016, as affirmed by the Tribunal on 28th September, 2016. Accordingly, it was necessary for the applicant to apply to amend his statement of grounds to challenge the new renewal order, and to seek an order of *certiorari* quashing the same, and the court granted that application. The court also ordered that the Tribunal should be released as a respondent to the proceedings, and that the Irish Human Rights and Equality Commission be made a notice party to same.

22. In the course of opening the case on behalf of the applicant, counsel for the applicant informed the court that the applicant had recently been informed that funding had now been made available to provide the applicant with supervised accommodation in the community, in the premises leased at X. However, the applicant will continue to be detained in St. Loman's pending the putting in place of all necessary arrangements, including obtaining HIQA approval and staff recruitment. This will take a number of months, during which the applicant continues to be detained in St. Lomans. The estimated annual cost of providing these facilities and attendant care is of the order of €312,000.00 per annum.

The Pleadings

Statement of grounds

23. The applicant in his amended statement of grounds seeks the following relief:

> (i) A declaration that insofar as sections 3(1)(a) and 18 of the Mental Health Act 2001 authorised the applicant's

detention up until 13th September 2016, and sections 3(1)(b) and 18 of the said Act continue to authorise his detention up until 12th September 2017, those sections are repugnant to Article 40 of the Constitution or are incompatible with Articles 3, 5, 8, 13 and 14 of the Convention and

(ii) A declaration that the applicant has a right of access to the court and if incapacitated, the fact of (i) his detention and (ii) a valid concern on the part of the lawyer assigned to represent him by the Mental Health Commission that his detention is unlawful, are together such that the proceedings must be heard and determined; and

(iii) An order of *certiorari* quashing the twelve month renewal order made on 13th September 2016 which purports to authorise the applicant's detention until 12th September 2017.

24. The applicant seeks the reliefs above on seven grounds which may be summarised as follows. He claims that his detention in a psychiatric ward in circumstances where he does not require treatment (having recovered from the psychotic episode that gave rise to his initial admission), but was previously detained therein on the grounds of safety, amounts to preventative detention and breaches his rights under Article 40 of the Constitution and s. 3 of the European Convention on Human Rights Act, 2003 ("the Act of 2003"), as well as Articles 14 and 19 of the Convention on the Rights of Persons with Disabilities ("CRPD"). He pleads that this is especially so having regard to the length of his detention and there being "no end in sight."

25. It is pleaded that, while the applicant requires twenty-four hours supervision, he can be supervised in the community and that his continued detention in the psychiatric ward is causing him extreme frustration and unhappiness; is detrimental to his mental health and wellbeing; and is an arbitrary and disproportionate interference with his right to liberty, his right to respect for his physical and mental integrity, his right to health, his right to respect for his private life and his right not to be discriminated against unlawfully. He claims that where no plan is being effectively pursued to bring about his discharge into a supported community setting, his continuing detention is unlawful and in breach of his rights under Article 40 of the Constitution, Articles 3, 5, 8, 13 and 14 of the Convention, (both of which, it is claimed, fall to be interpreted in light of the CRPD, including Articles 14 and 19 thereof).

26. In order to protect and vindicate the rights of the applicant, and given the exceptional circumstances of this case, the Court should exercise its jurisdiction to declare that the failure to provide the applicant with care and supervision in the community which is appropriate for his needs as a person with disability but to detain him instead in a psychiatric hospital ward for a prolonged period of time, with no right of review for 12 months, is in breach of the applicant's rights under the Constitution and/or section 3 of the European Convention on Human Rights Act 2003 and/or make an appropriate order of mandamus requiring vindication of the applicant's legal rights. Strictly speaking this is not a ground for relief, but a relief in itself and should have been positioned accordingly within paragraph D of the statement of grounds rather than paragraph E. This gave rise to a pleading point which I address later in this decision.

27. The applicant claims that there is no statutory provision under the Mental Health Act 2001, by which he and his legal representative could have applied to have the Tribunal re-convene in order to re-consider the legality of its decision of 30th March 2016, in light of a material change of facts in respect of the transfer of the applicant to supported residential accommodation. It is pleaded that the only effective remedy open to the applicant is judicial review; the limited jurisdiction of the Circuit Court is such that it does not offer an effective remedy to the applicant.

28. The applicant claims that the decision of the third named respondent to discontinue the plan to transfer him to supported residential accommodation, due to a purported lack of funding, was arbitrary and irrational given that (he alleges) the costs of his detention in St. Loman's Hospital are greater than those that would be incurred if the applicant was transferred to supported residential accommodation.

29. It is claimed that by reason of the applicant's detention, on foot of the twelve month renewal order, insofar as sections 3(1)(b) and 18 of the Mental Health Act 2001 authorise his detention until 12th September, 2017, without the possibility of further review, those sections are repugnant to Article 40 of the Constitution and are incompatible with Articles 3, 5, 8, 13 and 14 of the Convention.

Affidavit of Professor Kelly

30. Ms. Grennan, solicitor, procured an independent psychiatric report on the applicant from Professor Brendan Kelly, Department of Psychiatry Trinity Centre for Health Services, Tallaght Hospital, dated 19th January 2017. Professor Kelly was furnished with a very comprehensive suite of documents concerning the applicant, his history and treatment over the years. He consulted with Dr. Rowe for the purpose of the report and met with the applicant in St. Loman's Hospital on 19th January 2017. He has provided a wide ranging and comprehensive report as regards the applicant's condition and needs and Professor Kelly addressed sixteen specific questions put to him by Ms. Grennan. The salient points of this report are as follows: -

(i) The applicant suffers from a significant intellectual disability as defined in s. 3 of the Act of 2001. He:-

> *"has moderate intellectual disability, a psychotic illness, and presents significant risks as an inpatient and as an out-patient, especially if discharged without an appropriate care structure in place. All of these risks are well documented and many are long standing but all could be managed with appropriate planning in an appropriate setting."*

(ii) Professor Kelly agrees with Dr. Rowe that the applicant meets the criteria for involuntary admission and treatment, noting that Dr. Rowe concluded that the applicant fulfilled both the "risk" and "treatment" criteria for involuntary admission as provided for in s. 3(1)(a) and (b) of the Act of 2001. He goes on to say, however, that if the disability services suggested by Dr. Rowe in his report 28th September 2016, as well as in a report of the Muiríosa Foundation of August 2015, were provided then the applicant would no longer fulfil either of these criteria. Accordingly, the applicant's continued involuntary admission and treatment are, in the opinion of Professor Kelly, currently attributable to the absence of the disability based services for him.

(iii) Professor Kelly states that an acute psychiatric ward is a deeply inappropriate environment for the applicant to reside in. He notes that Dr. Rowe previously stated, as far back as 16th November 2015 that the applicant's placement in St. Loman's is "very unsuitable" and he agrees with that assessment.

(iv) He considers that the applicant does not require to be detained in an acute separate ward but this is subject to there being available to the applicant an appropriate care structure. He says that he was informed by Dr. Rowe that unless detained, the applicant would most likely leave the ward and in the opinion of Professor Kelly, this would increase risks substantially unless the applicant was placed in an appropriate care structure. He concludes on this point that, since that

is not available, *"it appears regrettably necessary that detention continue for now".*

(v) That said, Professor Kelly expresses with concern the opinion that the applicant's continued placement in any ward in a psychiatric hospital will likely lead to a deterioration in his mental state and continued risk of further sexual assaults (the applicant had complained of having been subjected to such assaults while in detention) over the coming weeks and months. Furthermore, it is likely to add to the challenge of moving him to an appropriate setting when one becomes available in the future. He does take some comfort from the fact that the staff in St. Loman's are doing the best to minimize this risk by arranging for the applicant to have 43 hours out of the ward, supervised, per week, and at the time of the report that had been increased to 70 hours per week.

(vi) He agrees with the care plan proposed by Dr. Rowe comprising an individualised programme in the applicant's own accommodation in the community, with supervision on a 24-hour basis to help him with his daily activities and to supervise his daily medication. He says the applicant also requires on-going depot anti-psychotic medication and follow-up and support from the relevant mental health services. He notes that there is general agreement amongst all of the professionals responsible for the applicant's care in relation to this plan.

(vii) As to cost, Professor Kelly says the largest cost associated with the present arrangement is the cost in terms of the applicant's well being and that of his family. As to the financial cost, he points out that the present accommodation of the applicant is not unsuitable because of any cost calculation but rather because of how the situation has evolved i.e. he has simply remained in a psychiatric ward following an acute psychiatry admission, the reasons for which have long since been resolved. Moreover, the current arrangements also come at a substantial opportunity cost i.e. an acute psychiatric bed is being used by a person who is not an acutely mentally ill, which is not only to the detriment of the applicant, but is also depriving a person who urgently requires in-patient care of the same.

Statement of Opposition of the first and second named respondents

31. The first and second named respondent filed a full amended statement of opposition dated 19th December, 2016, in which they plead as follows. They deny that the applicant is entitled to the relief sought. They deny that the applicant may, by way of judicial review, circumvent the statutory process and or the appeal mechanism provided to review the renewal order as set down in the Act of 2001.

32. It is pleaded that the jurisdiction to determine whether the applicant's admission and continued treatment as an involuntary patient is warranted is expressly conferred on the Tribunal, and on appeal to the Circuit Court. This is subject only to the on-going power and duty of the responsible consultant psychiatrist under s. 28 of the Act of 2001, to revoke an admission or renewal order and to discharge the patient. The applicant is not entitled to seek a determination of this question from the High Court. It is pleaded that applicant's treatment at the current time is in his best interests and in accordance with the Constitution and the Convention. The applicant should be denied the relief as set out in para 23(i) as the applicant has not exhausted all of the opportunities for appeal provided to him under the Act of 2001.

33. It is denied that the Tribunal was informed at the hearing on 30th March 2016 that plans were in place to transfer the applicant from St. Loman's Hospital to supported residential accommodation and that would take three to six months to complete this. If the tribunal was informed of these matters, it is not admitted that the tribunal's decision was based on this information. It is denied that the applicant does not require treatment in an acute psychiatric ward and has not required treatment there for at least six months. It is also denied that the applicant was detained on the purported ground of safety.

34. It is denied that the applicant was or is subject to preventative detention, or any detention which is in breach of his rights. It is also denied that there is an arbitrary and/or disproportionate interference with the applicant's right to liberty, his right to respect for his private life and/or his right not to be discriminated against unlawfully. It is denied that there is any breach of the applicant's rights under Article 40 of the Constitution or of Articles 3, 5, 8, 13 and 14 of the Convention.

35. It is admitted that there is no statutory provision under the Act of 2001, by which the applicant and his legal representative could have applied to have the Tribunal re-convene in order to re-consider the legality of its decision. It is denied on behalf of the first and second named respondents that there has been a material change of facts since the Tribunal decision was made by the tribunal. The first and second named respondents also deny that the only effective remedy open to the applicant is judicial review and it is denied that an appeal to the Circuit Court under s.19 of the Act did not offer an effective remedy. The first and second named respondents also plead that a challenge to the constitutionality or convention compatibility of the Act, based on the frequency or adequacy of the review or opportunity for reviews provided under the Act of 2001, is inappropriate and artificial in circumstances where it is not disputed by the applicant that he continues to satisfy the conditions specified in the Act for a valid detention under the Act.

Statement of Opposition of the third, fourth, and fifth named respondents

36. The third, fourth, and fifth named respondents deny any liability in relation to the applicant's detention; they also deny that the detention of the applicant is unlawful. It is pleaded that the statement of grounds does not adequately or sufficiently set out the grounds on which it is asserted that s. 3(1)(b) and s. 18 of the Act of 2001 are incompatible with the Constitution and the Convention. The respondents also deny that the appeal to the Circuit Court does not offer an effective remedy to the applicant, or that the applicant has been denied an effective remedy. The respondents claim that the institution of the judicial review proceedings was unwarranted. It is denied that s. 3(1)(b) or s.18 of the Act of 2001 are repugnant to the Constitution or are incompatible with Articles 3, 5, 8, 13 or 14 of the Convention.

Statement of Opposition of the first named notice party

37. The notice party opposes the application for judicial review and claims that the applicant is being appropriately detained and treated in circumstances where he has a mental disorder within the meaning of s. 3 of the Act of 2001. The notice party also denies that the applicant's detention is excessive and/or in breach of his rights to have his detention regularly and speedily reviewed in circumstances where the applicant has had his detention reviewed by five separate Mental Health Tribunals and by virtue of his right of access to an appeal to the Circuit Court and also his rights under s. 28(1) of the Act of 2001.

38. It is admitted that the Tribunal cannot reconvene to consider the legality of its own decision and that once the Tribunals made their respective decisions they became *funtus officio.*

39. The first named notice parties denies that s. 3(1)(a) and s.18 of the Act of 2001 are repugnant to Article 40 of the Constitution and relies on the presumption of constitutionality and the wording and operation of the Act as a whole. It is also denied that the

impugned sections of the Act of 2001 are incompatible with Articles 3, 5, 8, 13 and 14 of the Convention. The notice party also claims that the applicant did not seek leave in respect of the European Convention on Human Rights Act 2003. It is claimed by the notice party that the applicant is only entitled to challenge the validity of the Act of 2001 on his own particular facts and is not entitled to rely on *ius tertii*. It is denied that the applicant is in preventative detention and it is pleaded that he is in fact lawfully detained.

40. In the defence of the constitutionality of the Act of 2001, the notice party relies on the Act as a whole and in particular on the fact that s.19 of the Act of 2001 provides a right of access to the Circuit Court by way of appeal from the decision of the tribunal to affirm the renewal order, and on the fact that s.28 of the Act provides for the revocation of the renewal order if the patient is no longer suffering from a mental disorder. The notice party further claims that the only effective remedy open to the applicant is judicial review and denies that the applicant is entitled to the relief he seeks.

The Mental Health Act, 2001
41. It is necessary to set out in full those provisions of the Act of 2001 that are impugned in the proceedings as well as other relevant provisions of the Act relied upon by the parties. Section 3 of the Act of 2001 contains the definition of a "mental disorder."

> "3(1) In this Act "*mental disorder" means mental illness, severe dementia or significant intellectual disability where –*
>
> *(a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or*
>
> *(b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and*
>
> *(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."*

The Act provides that that the best interests of the person is the primary consideration in respect of decisions relating to care or treatment of that person. Section 4 of the Act of 2001 provides:-

> *"4.—(1) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made.*
>
> *(2) Where it is proposed to make a recommendation or an admission order in respect of a person, or to administer treatment to a person, under this Act, the person shall, so far as is reasonably practicable, be notified of the proposal and be entitled to make representations in relation to it and before deciding the matter due consideration shall be given to any representations duly made under this subsection.*
>
> *(3) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person) due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy."*

42. Section 15 of the Act of 2001 provides for the admission and renewal orders and provides:-

> *"15.—(1) An admission order shall authorise the reception, detention and treatment of the patient concerned and shall remain in force for a period of 21 days from the date of the making of the order and, subject to subsection (2) and section 18 (4), shall then expire.*
>
> *(2) The period referred to in subsection (1) may be extended by order (to be known as and in this Act referred to as "a renewal order") made by the consultant psychiatrist responsible for the care and treatment of the patient concerned for a further period not exceeding 3 months.*
>
> *(3) The period referred to in subsection (1) may be further extended by order made by the consultant psychiatrist concerned for a period not exceeding 6 months beginning on the expiration of the renewal order made by the psychiatrist under subsection (2) and thereafter may be further extended by order made by the psychiatrist for periods each of which does not exceed 12 months (each of which orders is also referred to in this Act as "a renewal order").*
>
> *(4) The period referred to in subsection (1) shall not be extended under subsection (2) or (3) unless the consultant psychiatrist concerned has not more than one week before the making of the order concerned examined the patient concerned and certified in a form specified by the Commission that the patient continues to suffer from a mental disorder."*

Sections 16(1) and 17(1) of the Act of 2001 provides:-

> *"16.—(1) Where a consultant psychiatrist makes an admission order or a renewal order, he or she shall, not later than 24 hours thereafter—*
>
> *i. send a copy of the order to the Commission, and*
>
> *ii. give notice in writing of the making of the order to the patient."*
>
> *…*

17.—(1) Following the receipt by the Commission of a copy of an admission order or a renewal order, the Commission shall, as soon as possible—

> *(a) refer the matter to a tribunal,*

(b) assign a legal representative to represent the patient concerned unless he or she proposes to engage one,

(c) direct in writing (referred to in this section as "a direction") a member of the panel of consultant psychiatrists established under section 33 (3)(b) to—

(i) examine the patient concerned,

(ii) interview the consultant psychiatrist responsible for the care and treatment of the patient, and

(iii) review the records relating to the patient,

in order to determine in the interest of the patient whether the patient is suffering from a mental disorder and to report in writing within 14 days on the results of the examination, interview and review to the tribunal to which the matter has been referred and to provide a copy of the report to the legal representative of the patient."

43. Section 18 of the Act of 2001 provides for the review by a mental health tribunal of an admission and/or renewal order and states:-

"18.—(1) Where an admission order or a renewal order has been referred to a tribunal under section 17 , the tribunal shall review the detention of the patient concerned and shall either—

(a) if satisfied that the patient is suffering from a mental disorder, and

(i) that the provisions of sections 9, 10, 12, 14, 15 and 16, where applicable, have been complied with, or

(ii) 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, affirm the order, or

(b) if not so satisfied, revoke the order and direct that the patient be discharged from the approved centre concerned.

(2) A decision under subsection (1) shall be made as soon as may be but not later than 21 days after the making of the admission order concerned or, as the case may be, the renewal order concerned.

(3) Before making a decision under subsection (1), a tribunal shall have regard to the relevant report under section 17 (1)(c).

(4) The period referred to in subsection (2) may be extended by order by the tribunal concerned (either of its own motion or at the request of the patient concerned) for a further period of 14 days and thereafter may be further extended by it by order for a period of 14 days on the application of the patient if the tribunal is satisfied that it is in the interest of the patient and the relevant admission order, or as the case may be, renewal order shall continue in force until the date of the expiration of the order made under this subsection.

(5) Notice in writing of a decision under subsection (1) and the reasons therefor shall be given to—

(a) the Commission,

(b) the consultant psychiatrist responsible for the care and treatment of the patient concerned,

(c) the patient and his or her legal representative, and

(d) any other person to whom, in the opinion of the tribunal, such notice should be given.

(6) The notice referred to in subsection (5) shall be given as soon as may be after the decision and within the period specified in subsection (2) or, if it be the case that period is extended by order under subsection (4), within the period specified in that order.

(7) In this section references to an admission order shall include references to the relevant recommendation and the relevant application."

44. Section 19 provides the detained persons with a right of appeal to the circuit court as follows:-

"19.—(1) A patient may appeal to the Circuit Court against a decision of a tribunal to affirm an order made in respect of him or her on the grounds that he or she is not suffering from a mental disorder.

(2) An appeal under this section shall be brought by the patient by notice in writing within 14 days of the receipt by him or her or by his or her legal representative of notice under section 18 of the decision concerned.

(3) The jurisdiction conferred on the Circuit Court by this section may be exercised by the judge of the circuit in which the approved centre concerned is situated or, at the option of the patient, in which the patient is ordinarily resident.

(4) On appeal to it under subsection (1), the Circuit Court shall—

(a) unless it is shown by the patient to the satisfaction of the Court that he or she is not suffering from a mental disorder, by order affirm the order, or

(b) if it is so shown as aforesaid, by order revoke the order.

(5) An order under subsection (4) may contain such consequential or supplementary provisions as the Circuit Court considers appropriate."

The discharge of patients is governed by section 28 of the Act 2001:-

"28.—(1) 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.

(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.

(3) Where a consultant psychiatrist discharges a patient under this section, he or she shall give to the patient concerned and his or her legal representative a notice in a form specified by the Commission to the effect that he or she—

(a) is being discharged pursuant to this section,

(b) is entitled to have his or her detention reviewed by a tribunal in accordance with the provisions of section 18 or, where such review has commenced, completed in accordance with that section if he or she so indicates by notice in writing addressed to the Commission within 14 days of the date of his or her discharge.

(4) Where a consultant psychiatrist discharges a patient under this section, he or she shall cause copies of the order made under subsection (1) and the notice referred to in subsection (3) to be given to the Commission and, where appropriate, the relevant health board and housing authority.

(5) Where a patient is discharged under this section—

(a) if a review under section 18 has then commenced, it shall be discontinued unless the patient requests by notice in writing addressed to the Commission within 14 days of his or her discharge that it be completed, or

b) if such a review has not then commenced, it shall not be held unless the patient indicates by notice in writing addressed to the Commission within 14 days of his or her discharge that he or she wishes such a review to be held,

and, if he or she requests that a review under section 18 be completed or held, as the case may be, the provisions of sections 17 to 19 shall apply in relation to the review with any necessary modifications."

Submissions of the parties

Submissions of the applicant

45. Firstly, it should be observed that the applicant does not seek to challenge or impugn either the procedures that were followed by Dr. Rowe in making the renewal order of 13th September, 2016, or any of the conclusions set out by Dr. Rowe in the order itself. Instead the applicant argues that detention of the applicant in a psychiatric unit, despite the fact that he does not require treatment in an acute psychiatric ward, for an indefinite period, is contrary to the applicant's rights under Article 40 of the Constitution and s. 3 of the European Convention on Human Rights Act, 2003 as well as his rights under Articles 3, 5, 8, 13 and 14 of the Convention itself. He claims that the absence of a mechanism whereby he can invoke an independent review of his ongoing detention prior to 12th September, 2017 in circumstances where his continuing detention is likely to cause a deterioration of his condition, denies the applicant access to an effective remedy. While the applicant seeks to quash the renewal order, it is not so much the renewal order itself that is impugned by the proceedings, but rather the absence of any provision in the Act of 2001 to enable the applicant to initiate a review of his detention at any time prior to 12th September 2017.

Constitutional Arguments

46. The applicant argues that the fact that there is no review of his detention available for a period of twelve months from the date on which the renewal was made means that he cannot initiate a review of the lawfulness of his detention even though his circumstances may have changed and there may have been a deterioration or improvement of his condition, either of which may necessitate such a review. The applicant relies upon Article 40.4.1 of Bunreacht na hÉireann which provides that no citizen should be deprived of his liberty save in accordance with law. The applicant also relies upon the authorities of *R.T. v. the Director of the Central Mental Hospital* [1995] 2 I.R. 65, *Croke v. Smith* (No. 2) [1998] 1 I.R. 101 and *M.X. v. Health Services Executive* [2012] 3 I.R. 254. The applicant cites the following passage from the decision of Costello P. in *R.T.:*

"…the State's duty to protect the citizen's rights becomes more exacting in the case of weak and vulnerable citizens, such as those suffering from mental disorder. So, it seems to me that the constitutional imperative to which I have referred requires the Oireachtas to be particularly astute when depriving persons suffering from mental disorder of their liberty and that it should ensure that such legislation should contain adequate safeguards against abuse and error in the interests of those whose welfare the legislation is designed to support. And in considering such safeguards, regard should be had to the standards set by the Recommendations and Conventions of International Organisations of which this country is a member".

47. The applicant also relies on the following passage of Hamilton C.J. in *Croke v. Smith*:-

"The obligation which rested and rests on the Oireachtas is to ensure that a citizen, who is of unsound mind and requiring treatment and care, is not unnecessarily deprived, even for a short period, of his liberty and to ensure that legislation which permits the deprivation of such liberty contains adequate safeguards against abuse and error in the continued detention of such citizens".

48. The applicant relies upon both the decision of Costello P. in *R.T*. and the decision of MacMenamin J. in *M.X. v. Health Services Executive* in support of his argument that, in interpreting the Constitution today, regard should be had to the protections afforded by the Convention and also by instruments such as the recommendations of the Committee of Members of the Council of Europe, CRPD and the standards of the European Committee for the prevention of torture and inhuman and degrading treatment ("CPT") and that the Constitution should be interpreted in light of such instruments.

49. In this regard the applicant refers specifically to Article 14 of the CRPD which provides:

> *"1 States Parties shall ensure that persons with disabilities, on an equal basis with others:*
>
> *(a) Enjoy the right to liberty and security of person;*
>
> *(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*
>
> *2 States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation."*

50. The applicant further relies on guidelines on Article 14 published by the CRPD which stated, *inter alia*:

> *"19. The Committee has stressed the necessity to implement monitoring and review mechanisms in relation to persons with disabilities deprived of their liberty."*

Convention Arguments

51. The Court was referred to a very wide range of authorities of the European Court of Human Rights (ECtHR), in particular cases involving the interpretation and application of Article 5§4 of the Convention. The court was also referred to authorities from the United Kingdom. At hearing, the applicant's counsel confined his Convention arguments to Article 5 thereof.

52. Article 5(1) of the Convention provides:

"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 …"*

53. Article 5§4 of the Convention provides:

> *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

54. As might be expected, the authorities relied upon by the applicant arise out of a diverse range of circumstances in different jurisdictions with varying systems for detention and review of orders detaining persons suffering from mental illnesses or disorders. Of all the decisions relied upon however, it seems to me that amongst the most pertinent is that of *Musial v. Poland* (Application No. 24557/94, 25th March 1999.). In that case, the applicant, prior to being tried for the manslaughter of his wife, was examined and it was found on mental health grounds that he could not be held criminally responsible and he was admitted to a psychiatric institution. The decision to admit him to that institution was made by a regional court and was upheld by the Supreme Court. The court subsequently delivered a number of decisions which continued the applicant's detention on the basis of risk. The Minister for Justice refused leave for an extraordinary appeal against the initial order of admission. The applicant then instituted judicial review proceedings. The applicant's complaint under the Convention related to the length of these proceedings. The ECtHR held that a total time of one year, eight months and eight days which it took for the review of the applicant's detention by way of judicial review, was incompatible with the requirement of speediness as contained in Article 5§4 of the Convention, unless there are exceptional grounds for justifying the same, which the court did not find in the case. The court stated:-

> *"According to the principles which emerged from the court's case-law, a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is entitled under Article 5 § 4 of the Convention to take proceedings at reasonable intervals before a court to put in issue "the lawfulness" – within the meaning of the Convention – of his or her detention, in as much as the reasons initially warranting confinement may cease to exist."*

55. In *Gorshkov v. Ukraine* (Application No. 67531/01) [2006] M.H.L.R. 32, the applicant had been convicted of attempted rape but had been exempted from serving his sentence on the grounds of diminished responsibility and underwent compulsory medical treatment in a psychiatric hospital. The Ukrainian Criminal Code of 2001 provided that:

> (i) persons subjected to compulsory treatment shall be examined by a commission of psychiatrists not less than once every six months in order to decide if there are grounds to apply to a court to terminate the detention or modify the treatment;
>
> (iii) if it is necessary to extend compulsory treatment for more than six months an application must be made to the court;
>
> (iv) thereafter the application of compulsory treatment shall be extended each time for a term not exceeding six months.

56. The domestic court refused an application by the chief psychiatrist to terminate the applicant's compulsory treatment on the basis of his improved health. The applicant appealed that decision to the Supreme Court of Crimea, which court rejected the appeal. The domestic court subsequently rejected further applications by the Chief psychiatrist based on updated medical reports and appeals by the applicant against the findings of the domestic court were rejected. The Chief Psychiatrist initiated judicial review proceedings seeking to quash the compulsory medical treatment order, but this application was rejected. Ultimately an application on behalf of the

hospital, seeking to end the compulsory medical treatment and to transfer the applicant to ordinary supervision was granted.

57. Holding that there had been a breach of Article 5§4 the ECtHR stated:

> *"The court reiterates that a key guarantee under Article 5 § 4 is that a patient compulsorily detained for psychiatric treatment must have a right to seek judicial review on his or her own motion (see Musial v. Poland, judgment of 25th March 1999, reports 1999 – II, 43; the aforementioned Rakevich v. Russia judgment, § 45. Article 5 § 4 therefore requires, in the first place an independent legal device by which the detainee may appear before a judge who will determine the lawfulness of the continued detention. The detainee's access to the judge should not depend on the goodwill of the detaining authority, activated at the discretion of the medical corps or the hospital administration.*
>
> *Whilst the legal mechanisms contained in sections 19 – 22 of the Psychiatric Medical Assistance Act and Chapter 34 of the Code of Criminal Procedure … ensuring that a mental health patient is brought before a judge automatically, constitutes an important safeguard against arbitrary detention, it is insufficient on its own. Such surplus guarantees do not eliminate the need for an independent right of individual application by the patient. The Court concludes that the applicant was not entitled to take proceedings to test the lawfulness of his continued detention for compulsory medical treatment by a court, as required by Article 5 § 4 of the Convention. There has, accordingly, been a violation of this provision."*

58. The case of *Kolanis v. U.K*. (2006) 42 E.H.R.R. 12 has a certain resonance with these proceedings. The applicant was convicted of causing grievous bodily harm and was detained in a psychiatric hospital in February 1998. She applied to the Mental Health Tribunal for her conditional discharge. The Tribunal concluded that the applicant should be conditionally discharged, but deferred her discharge until satisfactory arrangements could be put in place. However, as it transpired it was not possible to meet all of the conditions for the applicant's release, as imposed by the Tribunal – specifically no psychiatrist would supervise the applicant in the community. She was not therefore discharged. The applicant judicially reviewed the decision of the health authority not to provide her with psychiatric supervision in the community. That application was dismissed by the domestic court and the applicant appealed. A differently constituted Tribunal considered the applicant's application for conditional discharge and came to the same finding as the original Tribunal. In June 2000, the applicant failed in her judicial review proceedings before the High Court of England and Wales. She appealed that decision to the Court of Appeal. In the meantime, pending the hearing of her appeal, the applicant was conditionally discharged from hospital at the end of 2000. Her appeal in the judicial review proceedings came on for hearing following her release from hospital, but the appeal was heard by the Court of Appeal in England because of the importance of the issues raised. The appeal was ultimately dismissed and the applicant brought forward her complaint to the ECtHR.

59. In her proceedings before the ECtHR the applicant argued that she had been denied a speedy review of her detention because, once it became apparent that the conditions of discharge imposed would not be fulfilled, she was required to wait until the next annual review, or for the Secretary of State to refer the case back to the Tribunal. The ECtHR held that there had been a violation of Article 5 § 4 of the Convention, because the applicant was unable, for more than a year, to have the issues affecting her detention investigated by a court and the lapse of twelve months before such review was undertaken could not be regarded as sufficiently prompt for the purposes of Article *5§ 4 of the Convention*. The ECtHR stated at para 80:-

> *"Article 5§4 affords a crucial guarantee against arbitrariness of detention, providing for detained persons to obtain a review by a court of the lawfulness of their detention not only at the time of the initial deprivation of liberty, but also where new issues of lawfulness are capable of arising periodically thereafter…….where, as in the present case, the MHRT finds that a patient's detention in hospital is no longer necessary and that she is eligible for release on conditions, the Court considers that new issues of lawfulness may arise where detention nonetheless continues, due, for example, to difficulties in fulfilling the conditions. It follows that such patients are entitled under Article 5 § 4 to have the lawfulness of that continued detention determined by a court with requisite promptness. The Court observes that, since the facts of the present application, the domestic courts have acknowledged in a similar case that there had been a breach of Article 5§4 and that they have overruled previous authority which was perceived to conflict with the requirements of Article 5 and given guidance as to the way in which the authorities should give effect to the legislation to avoid breaches in the future, namely by the MHRT issuing provisional decisions, monitoring progress in the implementation of conditions and varying conditions, or modifying its decision, if necessary".*

60. The conclusion of the ECtHR in *Kolanis* was that there had been a procedural breach of Article 5§ 4 of the Convention, but there "*has been no finding of substantial unlawfulness*". However, it did consider that there was a possibility that the applicant might have been released earlier if procedures in conformity with article 5§ 4 had been available.

61. The applicant also relies on the decision of the Court of Appeal in the United Kingdom in the case of *R (on the application of H) v. Secretary of State for the Home Department & Anor.* [2002] EWCA Civ 646. In that case, the applicant had been suffering from a mental illness but was in remission. The Mental Health Review Tribunal determined that the patient was entitled to a conditional discharge, the condition being that he be provided with supervised psychiatric care in the community. Unfortunately, no psychiatrist was prepared to provide such supervision and the patient remained detained. In an earlier decision, *In Re Campbell*, *R v. Oxford Regional Mental Health Review Tribunal* [1988] A.C. 120, the House of Lords had decided that the MHRT was neither obliged to nor entitled to reconsider its earlier decision in respect of a conditional discharge to accommodate any new facts that might cause it to alter that decision. However, that decision was before the passage into law of the Human Rights Act 1998, in the UK and therefore took no account of the Convention or the jurisprudence of the ECtHR. In *I.H.*, Phillips L.J. stated:-

> *"…the decision in [Campbell] is in potential conflict with the requirements of Article 5(4). If, having made a decision that a patient is entitled to a conditional discharge, subject to specific conditions which necessitate deferral of the discharge, the Tribunal cannot revisit its decision, the patient is liable to find himself 'in limbo' should it prove impossible to put in place the arrangements necessary to enable him comply with the proposed conditions. That period "in limbo" may last too long to be compatible with Article 5(4) and may result in the patient being detained in violation of Article 5(1)."*

62. Phillips L.J. determined that the *Campbell* decision needed to be reviewed in light of the requirements of Article 5 of the Convention and he made recommendations as to how the Tribunal should proceed in such circumstances in order that Tribunals operate in compliance with the rights of patients under the Convention.

63. The decision of the Court of Appeal was appealed to the House of Lords which upheld the decision of the lower court. In this judgment, Lord Bingham stated:-

> *"When, following the tribunal's order of 3 February, 2000, it proved impossible to secure compliance with the conditions*

within a matter of a few months, a violation of the appellant's article 5(4) right did occur. It occurred because the tribunal, having made its order, was precluded by the authority of the Oxford case from reconsidering it. The result was to leave the appellant in limbo for a much longer period than was acceptable or compatible with the Convention. I would, accordingly, endorse the Court of Appeal's decision to set aside the Oxford ruling…"

64. Counsel for the applicant also referred to the court to the recent decision of the European Court of Human Rights in *M.H. v. United Kingdom* [Application No. 11577/06]. At para. 77 of its judgment, the court set out the following principles, derived from the jurisprudence of the ECtHR concerning Article 5§4 of the Convention insofar as it is concerned detention of "persons of unsound mind":-

> (i) an initial period of detention may be authorised by an administrative authority as an emergency measure provided that it is of short duration and the individual is able to bring judicial proceedings "speedily" to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency measure;
>
> (ii) following the expiry of any such initial period of emergency detention, a person thereafter detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;
>
> (iii) Article 5§4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place;
>
> (iv) the judicial proceedings referred to in Article 5§4 need not always be attended by the same guarantees as also required under Article 6(1) for civil or criminal litigation. Nonetheless it is essential that the person concerned should have access to a court and the opportunity to be heard either in person, or where necessary, through some form of representation; and
>
> (v) special procedures and safeguards may be called for in order to protect the interested persons who, on account of their mental disabilities, are not fully capable of acting for themselves.

65. Counsel relies specifically on para. (ii) above which refers to the right to take proceedings at reasonable intervals, where there is no automatic periodic review. While there is, of course, a periodic review in this case, it is not scheduled to take place until twelve months after the renewal order of 13th March, 2016, which it is submitted, is not a "reasonable interval" for the purposes of Article 5§4 of the Convention.

Submissions of the Respondents

Submissions on behalf of the first and second named respondents

Constitutional Arguments
66. The first and second named respondent's note that the applicant has made no case that he does not currently suffer from a "mental disorder" for the purposes of the Act such as would justify terminating his detention as an involuntary patient under the Act of 2001. It is submitted that neither of the affidavits of Dr. Bhamjee or Professor Kelly make such a claim and furthermore the affidavit of Professor Kelly makes it clear that for as long as the disability services recommended by Dr. Rowe are not available, the applicant's detention is necessary, because the applicant fulfils both the "risk" criteria and the "treatment" criteria for admission and treatment. It is submitted that it follows from both the evidence and submissions filed on behalf of the applicant that he is not disputing that he currently suffers from a mental disorder within the meaning of the Act of 2001 and that if a further Tribunal review was to be initiated by the applicant at this time that it would be correct for it to confirm the current renewal order.

67. All of that being the case, it is submitted that the applicant does not have locus standi to challenge the constitutionality of the Act of 2001 by reason of its failure to provide the applicant with an entitlement to initiate a review of his current detention. The first and second named respondents rely upon Cahill v. Sutton [1980] 1 I.R. 269, in this regard wherein Henchy J. stated: -

> *"The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."*

68. As to the substantive case made by the applicant alleging incompatibility of the Act of 2001 with the Constitution, it is submitted that there is nothing in the cases relied upon by the applicant to support the contention that the Act of 2001 does not provide an adequate legislative framework to protect, defend and vindicate the constitutional rights of persons detained by reason of an alleged mental disorder because of the absence of a right on the part of involuntary patients to initiate at their own motion, a review of their detention by a Mental Health Tribunal.

Convention Arguments
69. As to the arguments that the Act of 2001 violates the applicant's rights under the Convention, it is submitted on behalf of the first and second named respondents that the case made ignores the existence of both the judicial review jurisdiction of the High Court and the Article 40.4.2 procedure enshrined in the Constitution. It is submitted that the existence of these two remedies, in addition to the rights and safeguards provided under the Act, clearly distinguish the circumstances of the applicant from the very different situations of applicants in the decisions of the ECtHR relied upon by the applicant. So therefore in the cases of *Rakevich v. Russia* (Application No. 58973/00) [2003] ECHR 558; *Gorshkov v. Ukraine* (Application No. 67531/01) [2006] M.H.L.R. 32; and *X v. Finland* (Application No. 34806/04) [2012] M.H.L.R. 318, the ECtHR found in each case that none of the applicants concerned were entitled themselves to initiate proceedings to test the lawfulness of their continued respective detentions, contrary to Article 5§4 of the Convention.

70. Furthermore, it is submitted that the reliance placed by the applicant upon the UK Court of Appeal decisions in *R(H) v. Home Secretary* and *Kolanis v. United Kingdom* (2006) 42 E.H.R.R. 12 is entirely misconceived. Firstly, it is submitted that there is a significant factual difference between those cases and this case. In that in those cases, each applicant was the subject of a conditional discharge order, the conditions of which could not be met by the Health Authority, while at the same time the Mental Health Review Tribunal in the United Kingdom was precluded from reconsidering the matter, leaving the applicant in each case "in

limbo" for a much longer period than was acceptable for compatibility with the Convention. In this case there was no such conditional order discharging the applicant. But even if the opinion of Dr. Rowe had the same effect as a conditional discharge, the first and second respondents submit that in *R(H)* it was found that no breach of Convention arises where "best endeavours" are made by the relevant health authority to put in place the conditions that will allow the discharge of the applicant to be effected. Where a health authority is simply not in a position to provide the kind of after care that is required as, it is submitted has been the position in this case until relatively recently due solely to constraints on resources, the House of Lords in *R(H)* had no difficulty with a Tribunal revising the conditional discharge order and deciding that it was necessary for the patient to remain in hospital for treatment.

71. As far as *Kolanis* is concerned, it is submitted that similarly, the difficulty arose because there were no review procedures available to the applicant in circumstances where a conditional discharge order had been made, but the conditions proved impossible of fulfilment. Moreover, it is submitted that in *Kolanis*, the applicant argued that if a review of the conditional discharge order had been possible, the MHRT would have varied the conditions so as to overcome the difficulties that had arisen whereas in this case, the applicant is making no argument that there has been any material change in his circumstances that would justify the Tribunal revoking the renewal order of 12th September, 2016, if a review of the applicant's detention was now available.

Submissions on behalf of the Minister for Health, the Attorney General and Ireland ("the State respondents")

Constitutional Arguments
72. The State respondents note at the outset of their submissions that the applicant does not make the case that he does not currently suffer from a "mental disorder" for the purposes of the Act of 2001. The applicant does not disclose what practical benefit he asserts would accrue to him by striking down the provisions of the Act of 2001 which he seeks to impugn. They also point out that the applicant has applied to the Court for leave to institute proceedings pursuant to s. 73 of the Act of 2001, which provides that civil proceedings may not be issued in respect of an act done "in pursuance" of the Act of 2001, which application is on hold pending the provision of community placement facilities for the applicant by the second named respondent.

73. They submit that while the applicant challenges the constitutionality of ss. 3 and 18 of the Act of 2001, on the grounds that he has no legal right to initiate or require a review of a detention order by the Tribunal (other than by way of appeal to the Circuit Court), there is nothing in the Act of 2001 which in any way restricts the applicant's right of access to the courts either by way of judicial review of his detention or by way of an inquiry under Article 40.4.2 of the Constitution. The fact that the applicant brings these proceedings itself demonstrates the difficulty that the he has in contending that he has been denied recourse to the courts.

74. The State respondents argue that where the applicant is lawfully in detention and will continue to be so until his mental disorder abates to the extent that he can be released, the applicant has no *locus standi* to bring a constitutional challenge to the Act of 2001. In this regard the State Respondents also rely upon the authority of Cahill v. Sutton.

75. The State respondents also refer to the decision of Maloney v. Ireland and A.G. and Another [2009] IEHC 291 wherein Laffoy J. quoted with approval the following further passage from the judgment of Henchy J. in *Cahill v Sutton:-*

> *"…in other jurisdictions the widely accepted practice of courts which are invested with comparable powers of reviewing legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming the victim of it. The general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."*

76. Having cited the passage above, Laffoy J. stated in *Maloney*:-

> *"Later Henchy J. pointed to the hazard that, if the courts were to accord citizens unrestricted access, regardless of qualification, for the purpose of getting legislative provisions invalidated on constitutional grounds, this important jurisdiction would be subject to abuse, a point which had been made by O'Higgins C. J. in his judgment at p. 276. Henchy J. observed that the working relationship that must be presumed to exist between parliament and the judiciary in the democratic scheme of things postulated by the Constitution would not be served if no threshold qualification were ever required for an attack in the Courts on the manner in which the Legislature has exercised its law making powers and he presented a picture of the havoc which could be wreaked by opponents of a particular piece of legislation."*

77. The State respondents submit that the applicant is advancing a wholly hypothetical case arising by reason of the fact that he is not entitled to initiate a review by a Mental Health Tribunal within the twelve month renewal period; as if he were a person who could assert by psychiatric evidence that he was not suffering from a mental disorder within the meaning of the Act of 2001, in circumstances where he does not so assert. They further submit that it is a well-established principle deriving from *Cahill* that a plaintiff in a constitutional action cannot invoke *ius tertii* – he or she may only rely on such arguments as bear on his or her own personal circumstances.

78. The State respondents also argue that, following upon the agreement of the first and second named respondents to provide resources for the care of the applicant in the community, arrangements for which are now underway, the applicant's case is moot. They refer to the decision of the Supreme Court in *O'Brien v. The Personal Injuries Assessment Board* (No. 2) [2007] 1 I.R. 328 wherein Murray C.J. said:-

> *"[16] As Hardiman J. observed in Goold v. Collins [2004] IESC 38, (Unreported, Supreme Court, 12th July, 2004), "proceedings may be said to be moot where there is no longer any legal dispute between the parties". He cited with approval from Tribe's American Constitutional Law (3rd ed., New York, 2000):-*
>
> > *"… Mootness doctrine centres on the succession of events themselves to ensure that a person or a group mounting a constitutional challenge confronts continuing harm or significant prospect of future harm. A case is moot, and hence not justiciable if the passage of time has caused it completely to lose 'its character as a present, live controversy of the kind that must exist if the court is to avoid advisory opinions on abstract propositions of law'."*

79. On the basis that the first and second named respondent have now committed to providing the applicant with the resources and facilities the need for which caused him to issue these proceedings, the State respondents submit that the proceedings are now moot and no longer justiciable.

80. As to the applicant's substantive arguments regarding the constitutionality of the impugned sections of the Act of 2001, the State respondents rely on the presumption of constitutionality. They refer to the decision of the Supreme Court in *Croke v. Smith* (No. 2) [1998] 1 I.R. 101. In that case the applicant sought to impugn s. 172 of the Mental Treatment Act, 1945 on the basis that the section authorised the detention of a person for an indefinite period, without a judicial adjudication prior to detention that such a person was a person to whom the section applied, and without conferring any opportunity on the person concerned to challenge before a court or independent Tribunal: the reliability of the diagnosis of mental illness; the legality of the procedures used to commit him or her; the treatment proposed in respect of his or her alleged or actual illness; the necessity for compulsory treatment; and without a right of appeal against such decision to a court or other independent Tribunal and without providing for an automatic independent judicial or other review of the justification for the proposed detention of the person concerned.

81. In his judgment, Hamilton C.J. referred to the presumption of constitutionality and to the decision of the Supreme Court in *East Donegal Co-operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317 wherein Walsh J. stated at p. 341:-

> *"… the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the courts."*

82. Hamilton C.J. concluded that in applying this interpretation to the impugned section in that case there was an obligation placed upon the detaining authority to review a detained patient regularly. He stated:-

> *"Inherent in this section is the obligation placed on the resident medical superintendent to regularly and constantly review a patient in order to ensure that he or she has not recovered and is still a person of unsound mind and is a proper person to be detained under care and treatment. If such review is not regularly carried out, in accordance with fair procedures and rendering justice to the patient then the intervention of the court can be sought because of the obligation placed on the resident medical superintendent to exercise the powers conferred on him by the Act in accordance with the principles of constitutional justice."*

83. Because of this obligation the court concluded that the fact that s. 172 of the Mental Treatment Act, 1945, did not confer upon a patient an explicit and automatic review by an independent Tribunal of his detention, did not render the section unconstitutional.

84. It is submitted that s. 28 of the Act of 2001 affords more protection than the obligatory safeguards identified in *Croke v. Smith*, i.e. that persons authorised to make decisions would act in accordance with constitutional justice, in the manner described by Hamilton C.J. above. It is further submitted that the State has a legitimate policy interest in ensuring that there cannot be repeated, unwarranted or vexatious applications to the Mental Health Tribunal to review a decision taken by the Tribunal.

85. More generally, it is submitted the Act of 2001, in providing for the establishment of a Mental Health Commission, the appointment of Mental Health Tribunals and the independent review of involuntary admission or detention of persons suffering from mental disorders, in approved centres, provides for more than adequate protection of the constitutional rights of persons detained. Reference is made to the decision of Barrett J. in *Ms. F. v Mental Health Tribunal & Ors.* [2016] IEHC 623 wherein he stated at para. 20:-

> *"Ms. F. contends that that the court should have regard to the purpose of the Act of 2001 in approaching its interpretation of same. The overriding purpose of the Act of 2001 is to provide a calibrated system whereby persons may be involuntarily admitted to detention, subject to independent review of every such admission. Ms. F. has pointed to a certain imperfection in the system established by the Act, viz., that it is possible for an appeal to arrive in the Circuit Court against a lapsed admission order and during the currency of an extant renewal order. However, no matter how a statutory scheme is constructed it will always be possible to point to a different way in which it could have been structured. It may even be possible to point to a different way that is consistent with the purpose of the Act. But it is not for an unelected court, in purported observation of the purpose of an Act, to devise alternative processes to such lawful processes as are established by our elected lawmakers through the medium of such Act."*

Convention Arguments

86. By way of preliminary response to the incompatibility with the Convention alleged by the applicant, the State respondents submit that the applicant has failed to particularise adequately the grounds on which it is asserted that the impugned sections of the Act are incompatible with the Convention, and in this regard they refer to the decision of the Supreme Court in *M. D. (a minor) v. Ireland, A.G. & DPP* [2012] 1 I.R. 697. In that case, Denham C.J. stated:-

> *"In reality, the convention claim has been presented as subsidiary to the constitutional claim. The claim, as pleaded, is simply that s. 3 is "in breach of" the Convention. That formulation is not acceptable. It treats the Convention as if it had direct effect and presumes that the court has the power to grant a declaration that a section is in breach of the Convention. It is clear from the judgments of this court in McD. v. P. L. [2009] IESC 81, [2010] 2 I.R. 199 that the European Convention on Human Rights Act 2003 did not give direct effect in Irish law to the European Convention on Human Rights. As Murray C.J. stated at p. 248, "The Convention does not of itself provide a remedy at national level for victims whose rights have been breached by reference to the provisions of the Convention".*
>
> *The plaintiff has not explained how the statutory provisions at issue in this case can be applied by the court, by virtue of the Act of 2003 "in a manner which is compatible with the Convention." Section 2 of the Act places an obligation on the courts in:- "interpreting and applying any statutory provision or rule of law … in so far as is possible, subject to the rules of law relating to such interpretation and application, [to] do so in a manner compatible with the State's obligations under the Convention provisions."*
>
> *Section 5 of the Act could not be interpreted, and counsel for the appellant has not suggested that it could, so as to render a female criminally liable in the same way as a male, thus removing the difference in treatment of which the plaintiff complains.*
>
> *The plaintiff has not, in these proceedings, sought a declaration pursuant to s. 5 of the Act of 2003 that either s. 3 or s. 5 of the Act of 2001 is "incompatible with State's obligations under the Convention provisions."*

87. As regards the ECtHR cases referred to by the applicant, it is submitted that they do not lend support to his case. In general

terms it is submitted that the Tribunal has considered all the evidence as to why the applicant should be detained, as did the Circuit Court when the applicant appealed to that court. The State defendants distinguished the cases of *Rakevich v. Russia* (Application No. 58973/00) [2003] ECHR 558 and *Gorshkov v. Ukraine* (Application No. 67531/01) [2006] M.H.L.R. 32 on the basis that in those cases the applicants did not have a right to apply to the court for a review of their detention. It is submitted that in this case, the applicant's detention is subject not only to the statutory protections provided for by the Act 2001, but the applicant can also make an application to the court for judicial review (as the applicant has done) or pursuant to Article 40.4.2 of the Constitution.

88. It is submitted that the statutory safeguards provided for in the act of 2001 i.e. a right of review twelve months after the renewal order, as well as a right of appeal against the renewal order, to the Circuit Court, coupled with an entitlement to initiate either judicial review proceedings or proceedings under Article 40.4.2 of the Constitution are adequate for the purposes of Article 5 of the Convention.

89. It is also submitted that the case of *R(H.) v. Home Secretary* upon which the applicant relies does not assist the applicant at all, because in that case, the House of Lords found that as long as the detaining authority used its best endeavours to put in place the necessary measures to release the applicant into the community, there would be no violation of Article 5 of the Convention if the authority was unable to secure the necessary measures, and, as a result the applicant's detention continued.

90. The State respondents submit that the UN Convention on the Rights of Persons with Disabilities, also relied upon by the applicant, does not form part of the domestic law of the State and does not confer rights on individuals. The State respondents refer to Article 29.6 of the Constitution which provides that *"no international agreement shall be part of the domestic law of the State save as may be provided by the Oireachtas".* The State respondents also refer to the case of *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97, in which the Supreme Court declined to grant leave to seek judicial review of the applicant's detention on the basis of a breach of Ireland's obligations under the UN International Covenant on Civil and Political Rights.

Submissions of the Mental Health Commission

Constitutional Arguments
91. In general terms, the Commission submits that the structure of the Act of 2001 and the various layers of protection that it offers patients are sufficient vindication of his rights under both the Constitution and the Convention. While it may have been possible to provide for a different scheme, the Act of 2001 reflects policy choices made by the Oireachtas, and the Act of 2001 provides for a fair and robust system of protection.

92. Moreover, the applicant accepts that the renewal order of 13th September, 2016 was validly made under the Act of 2001 and so there is no "stand alone" challenge to the renewal order as opposed to the Act of 2001 itself. Striking down the current scheme and ordering the release of the applicant would not be in his best interests or those of patients generally.

93. It is submitted that, since the purpose of the proceedings originally was to obtain funding so as to enable the provision of care to the applicant in the community, the proceedings are now moot since the HSE has confirmed that it is making such funding available. Insofar as the applicant may wish to address the historical failure to provide funding for his care, he has made an application for leave to issue plenary proceedings under s. 73 of the Act of 2001, against the third named defendant. Accordingly, such proceedings provide the applicant with the appropriate remedy for any outstanding grievances.

94. Reliance is placed upon the case of *E.H. v. St. Vincents Hospital* [2009] 3 I.R. 774 where, Kearns P., giving judgment on behalf of the Supreme Court stated:-

> *"These proceedings were initiated and maintained on purely technical and unmeritorious grounds. It is difficult to see in what way they advanced the interests of the applicant who patently is in need of psychiatric care. The fact that s. 17(1)(b) of the Act of 2001 provides for the assignment by the Commission of a legal representative for a patient following the making of an admission order or a renewal order should not give rise to an assumption that a legal challenge to that patient's detention is warranted unless the best interests of the patient so demand. Mere technical defects, without more, in a patient's detention should not give rise to a rush to court, notably where any such defect can be, or has been, cured - as in the present case. Only in cases where there had been a gross abuse of power or default of fundamental requirements would a defect in an earlier period of detention justify release from a later one."*

95. The Commission points out that when the Court granted leave to issue judicial review proceedings on 28th June, 2016, the applicant sought and received an expedited hearing date of 27th July, 2016, i.e. within one month of leave being granted. However, the applicant subsequently sought to vacate that hearing date for a number of reasons, to include allowing the Circuit Court appeal of the applicant to proceed on 28th July. At the Circuit Court appeal itself, it was conceded by the applicant's counsel that the applicant was suffering from a mental disorder.

96. It is submitted that it is unclear how it can be suggested that the applicant's Convention rights and Constitutional rights can be vindicated by an order of *certiorari* quashing the renewal order with the result that the applicant would be discharged as an inpatient. The Commission points to Professor Kelly's report in which he stated that the applicant meets both the "risk" criteria and the "treatment" criteria for involuntary admission and treatment and that the various Mental Health Tribunals were correct in repeatedly affirming orders for the applicant's detention on the basis that arrangements for the supervised placement of the applicant in the community have yet to be concluded.

97. As with the other respondents, the Commission argues that following upon the provision of funding for the care of the applicant in the community, the proceedings are now moot and the Court should not entertain a case that is moot. The Commission relies upon the case of *G. v. Collins* [2005] 1 I.L.R.M. 1 and referred to the decision of Hardiman J., referred to above, in that case. The Commission also relies upon the decision of the Supreme Court in *J.W. v. Health Service Executive* [2014] IESC 8 wherein the Supreme Court held:-

> *"Courts do not decide hypothetical or moot points of law unless there is a special jurisdiction such as under Article 26 of the Constitution, or in exceptional cases where it appears to the Court that there are compelling reasons why a court would consider hearing an issue that is moot."*

98. It is submitted that the principle of judicial restraint means that the courts will not undertake an assessment of a constitutional issue if the case can be resolved on another basis. Reliance in this regard is placed on the decision of *M. v. An Bord Uchtala* [1977] I.R. 287. As regards the renewal order itself, the Commission submits that it does not appear to be in dispute that the applicant suffers from a mental disorder within the meaning of s. 3 of the Act of 2001. The overwhelming opinion of each and every psychiatrist

or Tribunal throughout the entire period of detention since May 2015, has also been that a failure to admit the applicant to an approved centre will be likely to lead to a serious deterioration in his condition or would prevent the administration of appropriate treatment that could be given only by such admission. The applicant has not furnished any evidence to the contrary, although he does point to the fact that he is recovered, for some considerable time, from the psychotic episode that gave rise to his initial admission.

99. It is submitted that the scheme as a whole, with its various safeguards, checks and balances is a valid scheme affording persons suffering from a mental disorder adequate protection against arbitrary or unlawful detention. This respondent also referred to the decision of *Ms. F. v. Mental Health Tribunal* referred to above. In general terms the Commission makes the point that at every step in the scheme of statutory protections provided in the Act of 2001, since the applicant was detained in May 2015, his best interests have necessarily been at the centre of all decisions being made, having regard to s. 4 of the Act which, as Charleton J. in T. O'D. v. Kennedy [2007] IEHC 129 explained:-

> *"Section 4 of the Mental Health Act 2001 infuses the entire of the legislation with an interpretative purpose as well as requiring the personnel administering the Act of 2001 to put the interests of the person to be treated as being paramount, with due regard to those who may be harmed by a decision not to treat the person …"*

The Commission also refers and relies upon the presumption of constitutionality.

100. It is submitted that the applicant's real complaint in these proceedings is that the impugned sections of the Act of 2001 are unconstitutional and in breach of his Convention rights because they do not allow for his placement in a different setting other than the therapeutic one of the approved centre, but that such a complaint is, in effect, a different scheme to that provided for by the Oireachtas, and the Court has no jurisdiction to impose such a scheme. Even if the applicant succeeds therefore he will achieve no concrete benefit by obtaining the relief that he seeks. The Commission refers to the decision of Keane J. in *Somjee v. Minister for Justice* [1981] ILRM 324.

Convention Arguments
101. The Commission submits that the applicant has not sought relief in respect of any properly constituted claim in respect of the Convention. The Convention does not form part of the law of the State and no leave has been sought or obtained in respect of the European Convention and Human Rights Act, 2003. As with the State respondents, the Commission refers to and relies upon the decision of the Supreme Court in *M.D. (a minor) v. Ireland, AG and DPP.*

102. As to the merits of the claim based on the Convention, the Commission again relies on the decision of Barrett J. in *Ms. F. v. Mental Health Tribunal* [2016] IEHC 623 referred to above. While finding that Article 5 of the Convention was not engaged in those proceedings, Barrett J. said:-

> *"… even if it were, all of the statutory protections and procedures of the Act of 2001 were made available to, and pursued by, Ms F. The fact that the admission order (Order A) had been supplanted by the renewal order (Order B) by the time her appeal came on for hearing before the Circuit Court does not alter that fact."*

103. The Commission further relies upon the decision of McMahon J. in the case of *C.C. v. Clinical Director of St. Patricks Hospital* [2009] IEHC 13 wherein the court stated:-

> *"The reading of the Mental Health Act 2001 in its entirety in my view clearly establishes a procedure for the 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."*

It is submitted that this Court cannot depart from other decisions of the High Court save in exceptional circumstances. The procedure for detention as prescribed by the Act of 2001 has been adhered to in this case and the applicant does not claim otherwise.

104. The Commission also relies upon the case of E.H. v. Clinical Director of St Vincents Hospital [2009] 3 I.R. 774, in which case Kearns J. considered Article 5 of the Convention and concluded that the Act of 2001 provides for a very elaborate scheme of protection in providing, as it does, for continuous automatic review of detention as well as access by a patient who has been detained to an appeal to the Circuit Court.

105. It is submitted that the cases of *Gorshkov v. Ukraine* (Application No. 67531/01) [2006] M.H.L.R. 32 and *X. v. Finland* (Application No. 34806/04) [2012] M.H.L.R. 318, upon which the applicant relies are distinguishable. In the case of *Gorshkov*, the infirmity in the Ukrainian law was the absence of access to the court by the patient, as of right unlike in this jurisdiction, where the patient is entitled to participate with or without the benefit of a legal representative at every stage of the proceedings. As regards *X. v. Finland*, the ECtHR found in favour of the applicant because there was no opportunity for the patient at any stage during detention that allowed the patient to make an application to court to examine the lawfulness of his detention and nor was there any right for the patient to seek an independent examination once he had been detained, consequent upon the opinion of two doctors in the admitting hospital. It is submitted that none of the authorities cited by the applicant involve a system such as that provided for in the Act of 2001, with multiple layers of protections.

Discussion and decision
106. There can hardly be any doubt that the initial impetus and intention of these proceedings was to secure for the applicant the funding for the provision of supervised accommodation for him in the community which the applicant thought had been promised, and subsequently withdrawn. That funding has since been reinstated and that accommodation should be available to the applicant over the coming months. In the meantime however, he protests that his detention in an acute psychiatric ward is wholly unsuitable to his needs and damaging to his health. It is not disputed that it is unsuitable for his needs, but the first and second respondents are doing their best to meet the applicant's needs in the meantime, not least by providing him with up to 70 hours per week outside the hospital environment under the care of the Muríosa foundation.

107. While the applicant has not expressly admitted in these proceedings that he suffers from a mental disorder, he has not denied it either and nor has he put it in issue in the proceedings. It is expressly acknowledged by the applicant in the proceedings that he suffers from an intellectual disability and that he requires to be in 24 hour supervised care. His complaint is that his care should be provided in the community and not in a psychiatric unit.

108. It has to be said that there is something of a contradiction in acknowledging that 24 hour supervision is required, but at the same time requesting the quashing of a detention order until such supervision is available in the community (as distinct from in St.

Loman's Hospital itself). While there appears to be agreement amongst all of the psychiatrists who have attended the applicant that his detention in an acute psychiatric ward in St. Loman's Hospital is unsuitable (ever since he recovered from the initial psychotic incident that resulted in his detention in May 2015), there is also agreement that this is better than the alternative of releasing him into the community having regard in particular to the likelihood (as found by the Tribunal) that he would not take the depot medication that he requires to take in his own interests and in the interests of others.

109. While it is stated in the statement of grounds that the detention of the applicant is arbitrary and disproportionate, it is not explained how this can be so in circumstances where (as it was at the time of the preparation of the amended statement of grounds) there are no facilities available for the provision of accommodation in the community for the applicant with 24 hour supervision. It is acknowledged by the applicant that 24 hour supervision is required, but nonetheless it is argued that until that it is available in the community (as distinct from in the hospital environment) he should be released back into the community, unsupervised.

110. There is no criticism of the procedures followed leading up to the making of any of the detention orders to which the applicant is subject, including the order of September 2016. No argument is made that the prescribed procedures were not followed or that the procedures themselves operate in any way unfairly.

111. While the applicant seeks to impugn s. 3 of the Act of 2001, no arguments were advanced as to why that section, which sets out the definition of "mental disorder" for the purposes of the Act is in itself, or operates in any way contrary to Article 40 of the Constitution or the provisions of the Convention relied upon by the applicant.

112. The applicant also impugns s. 18 of the Act of 2001, which is the section under which the Tribunal is required to consider the detention of a patient and either to revoke or affirm the same. No argument is advanced to explain why this section is, or operates in any way, contrary to the Constitution or the Convention. It might also be observed that if this section was declared to be unconstitutional in isolation, that would not affect an admission order made and renewed under ss. 14 and 15 of the Act of 2001; there would simply not be a review by a Tribunal.

113. As regards his Convention arguments, counsel for the applicant argued that the applicant's rights under Article 5§4 of the Convention have been violated because of the absence of any mechanism of review of his detention for the duration of the renewal order of 13th September, 2016. No arguments were advanced as regards any violation of the applicant's rights under 3, 8, 13 and 14 of the Convention.

114. It may be seen from this analysis that the applicant is not so much complaining about what the Act provides for, but rather what the Act does not provide for i.e. any review (whether initiated by the applicant himself or not) of the applicant's detention for a twelve month period. However, it is argued on behalf of the state respondents and also on behalf of the first and second named respondent that this is an entirely academic argument in circumstances where the applicant acknowledges that he has a mental disorder and does not advance any arguments that he has been improperly detained pursuant to the provisions of the Act of 2001. In these circumstances, it is argued, that even if he could invoke a review of his detention by a tribunal now, he could not benefit from such a review (since he does not dispute that he suffers from a mental disorder) and for this reason, it is submitted, the applicant has no *locus standi* to challenge the constitutionality of the Act of 2001. There is much force in this argument. In circumstances where it is not disputed that the applicant suffers from a mental disorder, and does not argue that the procedures set out by the Act have not been complied with, then the Tribunal must affirm the order detaining the applicant. The absence of a review of his detention until September 2017 makes no difference to the circumstances in which the applicant finds himself, because even if such a review were available, the Tribunal would have to affirm the order for his detention, and the applicant makes no complaint about the obligations of the Tribunal in this regard as set out in s. 18.

115. Accordingly, the applicant is unable to meet the threshold set in *Cahill v. Sutton* in that he cannot assert that, because of the alleged unconstitutionality of ss. 3 and 18, his interests are adversely affected, or stand in real or imminent danger of being adversely affected by the operation of the statute. In my view therefore, the applicant does not have *locus standi* to challenge the constitutionality of the Act of 2001, on the grounds advanced in these proceedings.

Convention arguments

116. It is necessary next to consider the case made that the impugned provisions are incompatible with the Convention. The case as pleaded is that ss. 3 and 18 of the Act of 2001 are incompatible with Articles 3, 5, 8, 13 and 14 of the Convention, and that there has been a breach of the applicant's rights under s.3 of the Act of 2003, which provides:-

> *3.— (1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.*
>
> *(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.*
>
> *(3) The damages recoverable under this section in the Circuit Court shall not exceed the amount standing prescribed, for the time being by law, as the limit of that Court's jurisdiction in tort.*
>
> *(4) Nothing in this section shall be construed as creating a criminal offence.*
>
> *(5) (a) Proceedings under this section shall not be brought in respect of any contravention of subsection (1) which arose more than 1 year before the commencement of the proceedings.*
>
> *(b) The period referred to in paragraph (a) may be extended by order made by the Court if it considers it appropriate to do so in the interests of justice.*

117. As mentioned earlier, at hearing, counsel for the applicant confined his arguments to Article 5 of the Convention, and in particular Article 5§4 thereof. Counsel for the respondents expressed some dissatisfaction as to the manner in which this aspect of the case was pleaded and complained that the case which they have to meet in this regard was unclear. Additionally, it is submitted on behalf of the State respondents that the applicant has failed to state with sufficient particularity the grounds upon which the impugned sections are claimed to be incompatible with the Convention; and on behalf of the Commission it is argued that the applicant did not seek or obtain relief in respect of any properly constituted claim in respect of the Convention; that the Convention does not form part of the law of the state and that no leave has been sought or obtained in respect of the European Convention on

Human Rights Act 2003. Each of the State respondents and the Commission rely upon the decision of the Supreme Court in M.D. (a minor) v. Ireland, A.G. & D.P.P. [2012] 1 I.R. 697.

118. It is true that the reliefs sought in paragraph D of the amended statement of grounds make no reference to the Act of 2003 and instead a declaration is sought that the impugned sections are incompatible with the Articles of the Convention referred to above. It might well have been better to seek a declaration of incompatibility pursuant to s. 5 of the Act of 2003. However, in paragraph E of the amended statement of grounds, wherein the grounds upon which the reliefs claimed are set out, it is specifically alleged at paragraph E.6 that:-

> *"the failure to provide the applicant with care and supervision in the community which is appropriate for his needs as a person with a disability but to instead to detain him in a psychiatric hospital ward for a prolonged period of time, with no right of review for twelve months, is in breach of the applicant's rights under the Constitution and/or s. 3 of the European Convention on Human Rights Act 2003 …"*

On this basis the applicant seeks declaratory relief to this effect and/or an appropriate order of *mandamus* requiring vindication of the applicant's legal rights.

119. Later, at paragraph E.7 of the amended statement of grounds, the applicant specifically complains that the absence of a mechanism whereby he can invoke an independent review of his ongoing detention is incompatible with Articles 3, 5, 8, 13 and 14 of the Convention. It is apparent from the above that the applicant sets out in his statement of grounds his complaint that he is being detained for a period of twelve months without any right to further review during that period and that he claims that this is contrary to s. 3 of the Act of 2003, as well as being incompatible with the specified Articles of the Convention. Even if this allegation could have been better particularised, I think that the case being made in this regard is sufficiently clear from the pleadings and indeed it is addressed by the respondents in their submissions. I therefore hold that the applicant's case in this regard is adequately made out, having due regard for the decision of the Supreme Court in M.D.

120. I have already set out above in the summary of the applicant's submissions some of the ECtHR authorities upon which the applicant relies. While the precise details of the various regimes (as described in those authorities) giving rise to the detention of a person on grounds of mental disorder are not always clear, and are not therefore amenable to direct comparison with the regime established by the Act of 2001, what is abundantly clear is that a person who is detained for an indefinite or lengthy period by reason of being of unsound mind, is entitled under Article 5§4 of the Convention to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" – within the meaning of the convention – of his or her detention (see the quotation from *Musial v. Poland* referred to para. 54 above). This principle is repeated again and again in the authorities to which this Court was referred.

121. Moreover, the ECtHR has also made it clear that reviews of detention which are otherwise provided to a detained person as part of the regime, do not meet the requirement of providing a detained person with a right of review on his or her own initiative. As the ECtHR said in *Gorshkov v. Ukraine* (Application No. 67531/01) [2006] M.H.L.R. 32: *"such surplus guarantees do not eliminate the need for an independent right of individual application by the patient".*

122. The respondents between them argue that there are a number of options open to the applicant by which he can bring about a review of his detention, any one of which meets his entitlements under Article 5§4 of the Convention :-

> (i) by way of appeal of the order of the Tribunal to the Circuit Court, a route which the applicant pursued but then abandoned;
>
> (ii) by way of judicial review, such as the applicant is now pursuing;
>
> (iii) by way of application under Article 40 of the Constitution.

123. Counsel for the commission argues that in considering the applicant's Convention rights, the correct approach is to look at the entirety of the procedures and safeguards put in place by the Act of 2001 which may be summarised as follows:

> (i) a patient is afforded a review of his/her detention by the Tribunal, whether or not the patient requires such review;
>
> (ii) for this purpose, the patient is assigned a publicly funded legal representative;
>
> (iii) the patient is also assigned an independent consultant psychiatrist;
>
> (iv) the patient has a right of appeal from the decision of the Tribunal to the Circuit Court. The right to appeal from the decision of the Tribunal is conferred on the patient only and is therefore initiated and controlled by the patient; and
>
> (v) the patient has a further right of appeal to the High Court on a point of law."

124. The respondents also rely upon ss.4 and 28 of the Act of 2001. It will be recalled that s. 4(1) provides that the best interests of the person is the principal consideration in making a decision as to whether or not to make an admission order in relation to that person, and s. 28 imposes an obligation upon the consultant psychiatrist responsible for the care and treatment of the applicant to discharge a patient in the event that he or she becomes of the opinion that the patient is no longer suffering from a mental disorder.

125. It is also submitted that in considering the current detention period of twelve months, it should be borne in mind that this includes the period during which the applicant may lodge and prosecute an appeal to the Circuit Court, so that during that twelve month period during which he is currently detained, the appellant does have a right to initiate a review of his detention.

126. It is submitted that it is difficult to know from the ECtHR cases relied upon by the applicant whether or not the legislation of countries in which the regime has been found to be in violation of Article 5§4 of the Convention provided for such an expansive range of remedies. I will address each of these arguments in turn.

The Appeal to the Circuit Court

127. The right of appeal to the Circuit Court certainly allows a detained person to challenge the lawfulness of his or her detention immediately following upon the making of an admission or renewal order. The applicant in this case exercised that right on two occasions, firstly following upon the decision of the Tribunal to affirm the renewal order of March 2016, and secondly upon the decision of the Tribunal to affirm the renewal order of September 2016. He was unsuccessful with the former appeal, and withdrew

the latter. The applicant apparently withdrew his second appeal because he felt it could not benefit him in any way, because of the restricted nature of the appeal.

128. The right of appeal is a right exercisable exclusively by the detained person, on his or her own initiative. It may be brought only on the grounds that the detained person claims that he or she is not suffering from a mental disorder. If the patient concerned can satisfy the court that he or she is not suffering from a mental disorder, the court must revoke the order under appeal.

129. It could hardly be doubted that the right of appeal, coupled with the review undertaken by the Tribunal under s. 18 of the Act of 2001, in which review the person concerned is afforded full legal representation as well as an independent review of his or her condition by a consultant psychiatrist constitutes a full vindication of a detained person's rights under Article 5§4 of the Convention, at the time of the initial admission order, or any subsequent renewal order. However, the ECtHR has recognised that persons who have been found to be of unsound mind and who have been detained for that reason, are entitled to initiate a review of their ongoing detention in the event that they consider that they have recovered fully or have recovered sufficiently from the condition giving rise to their initial detention to merit release from detention. See, for example, citations from *Musial*, *Gorshkov* and *Kolanis* above. It is difficult to see how the right of appeal, limited as it is in time, could be an answer to a complaint under Article 5§4 of the Convention in circumstances where the applicant is to be detained for 12 months. In considering this aspect of the issue, it should be assumed that an appeal will be heard promptly, consistent with the other stringent time limits imposed in the Act of 2001 as regards admission and renewal orders. If an appeal is delayed there could hardly be any doubt that this could result in violation of a persons rights. So on that assumption, if the Circuit Court affirms the decision of the Tribunal a person would remain detained for a significant period until the expiration of the renewal order.

The Article 40 and Judicial Review Arguments

130. The respondents urge that such lacuna as there may be in the statutory framework (which are denied) are effectively closed out by the entitlement of the applicant to bring either an application under Article 40 of the Constitution or proceedings by way of judicial review. Counsel on behalf of the first and second named respondents submitted very strongly that an application under Article 40.4.2 of the Constitution can be brought before the High Court at any time, either on behalf of the applicant, or on behalf of another person; that Article 40 is used by vulnerable people all the time and that it mandates a judge to conduct an inquiry into the lawfulness of the detention of the person concerned and furthermore that the Court has almost unlimited powers to make whatever orders it considers appropriate.

131. However, I am not persuaded by these arguments. In the case of *Ryan v. Governor of Midlands Prison* [2014] IESC 54, the Supreme Court stated:-

> *"Thus the general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."*

132. While this clearly does not rule out an Article 40 review of the detention of a person under the Act of 2001, it is clear that it would only be considered appropriate in cases where there has been "an absence of jurisdiction, a fundamental denial of justice or a fundamental flaw". It could hardly be considered an appropriate mechanism for undertaking a review of the mental health of a person such as the applicant.

133. That this is so was, in effect, recognised by the ECtHR in the cases of *X. v. United Kingdom* (Application No. 6998/75) (1982) 4 E.H.R.R. 188 and *H.L. v. United Kingdom* (2005) 40 E.H.R.R. 32. In the latter case, the ECtHR held, at para. 135:-

> *"Article 5(4) provides the right of an individual deprived of his liberty to have the lawfulness of that detention reviewed by a court in the light, not only of domestic law requirements, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by para. (1): the scheme of Art. 5 implies that the notion of "lawfulness" should have the same significance in paras. 1(e) and 4 in relation to the same deprivation of liberty. This does not guarantee a right to review of such scope as to empower the court, on all aspects of the case or to substitute its own discretion for that of the decision making authority. The review should, however, be wide enough to bear on those conditions which are essential for the lawful detention of a person, in this case, on the ground of unsoundness of mind."*

And at para. 137:-

> *"The Court considers that the starting point must be X v. United Kingdom … where the Court found that the review conducted in habeas corpus proceedings was insufficient for the purposes of Art. 5(4) as not being wide enough to bear on those conditions which were essential for the "lawful" detention of a person on the basis of unsoundness of mind since it did not allow a determination of the merits of the question as to whether the mental disorder persisted."*

134. In X. *v. United Kingdom* (Application No. 6998/75) (1982) 4 E.H.R.R 188 the ECtHR had this to say, at para. 57, following:-

> *"Although X had access to a court which ruled that his detention was "lawful" in terms of English law, this cannot of itself be decisive as to whether there was a sufficient review of "lawfulness" for the purposes of Article 5(4) …*
>
> *Notwithstanding the limited nature of the review possible in relation to decisions taken under s. 66(3) of the 1959 Act, the remedy of habeas corpus can on occasions constitute an effective check against arbitrariness in this sphere. It may be regarded as adequate, for the purposes of Article 5(4), for emergency measures for the detention of persons on the ground of unsoundness of mind …*
>
> *On the other hand, in the court's opinion, a judicial review as limited as that available in the habeas corpus procedure in the present case is not sufficient for a continuing confinement such as the one undergone by X. Article 5(4), the Government are quite right to affirm, does not embody a right to judicial control of such scope as to empower the court, on all aspects of the case, to substitute its own discretion for that of the decision making authority …*
>
> *This means that in the instant case, Article 5(4) required an appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interest of public safety …"*

135. Counsel for the State respondents submit that the applicant's reliance upon the decision of the ECtHR in the case of *H.L. v. United Kingdom* (2005) 40 E.H.R.R. 32 is misplaced because the factual background to that case was very significantly different to that obtained in this case. That case did not involve a detailed statutory framework for examination, detention and review such as is provided for in the Act of 2001 and also the procedures in the United Kingdom in relation to judicial review and habeas corpus are different. However, I do not believe that the conclusion of the court in that case should be disregarded on this basis. It is difficult to see how an application made under Article 40 of the Constitution is in any way materially different to the habeas corpus procedure under discussion in both *H.L. v. United Kingdom* and *X. v. United Kingdom*, particularly having regard to the decision of the Supreme Court in Ryan which in this context appears to be consistent with the sentiments of the ECtHR as to the scope of a habeas corpus application.

136. Furthermore, it seems to me that a judicial review suffers from the similar infirmities. In a Judicial Review, the Court is unlikely to embark upon a consideration as to whether or not a detained person is suffering from a mental disorder. For these reasons, I do not believe that either the availability of an application under Article 40 of the Constitution or an application by way of Judicial review provide an answer to the applicant's complaint under Article 5§4 of the Convention.

Section 4 and 28 of the Act of 2001
137. While section 4 of the Act of 2001 imposes a very important obligation on the health authorities in the consideration as to whether or not a person should be detained, it is very far removed from conferring on a detained person a right to have his or her detention reviewed. Similarly, while Section 28 of the Act of 2001 constitutes an important safeguard for patients detained on account of mental disorder, is in no way comparable to the right of a patient to bring proceedings to challenge the lawfulness of his or her detention. In my view these sections cannot be relied upon to answer a complaint that the provisions of the Act are not compatible with Article 5§4 of the Convention.

Conclusion on Convention Complaint
138. The Act of 2001 has withstood a number of challenges both as to its constitutionality and as to its compliance with the Convention. On each occasion to date, it has withstood those challenges, which is unsurprising because there can be no doubt but that the Act contains very comprehensive safeguards to prevent the unjustified detention of persons on grounds that they suffer from a mental disorder. But the specific point that has been raised in these proceedings does not appear to have been raised before. Simply put, that point is that a person such as the applicant who is detained by way of a renewal order for a period of twelve months, has no entitlement during that period to initiate a review of his detention (other than by way of an appeal to the Circuit Court immediately following the making of the renewal order) and that the absence of such an entitlement within the framework of the Act is a violation of his rights under Article 5§4 of the Convention.

139. I have already stated above that it is clear from the jurisprudence of the ECtHR that a person who is detained for an indefinite or lengthy period by reason of being of unsound mind is entitled under Article 5§4 of the Convention to take proceedings at reasonable intervals, before a court, to put in issue "the lawfulness" of his or her detention. In the context of a renewal order of twelve months' duration, a person detained under the Act of 2001, has no opportunity to exercise that right otherwise than in the context of appeal to the Circuit Court, following upon the affirmation of a renewal order by the Tribunal. As I have said above, it must be assumed that an appeal to the Circuit Court will be dealt with expeditiously. On that assumption, a detained person could find him/herself without an opportunity to put in issue the lawfulness of his/her detention of a period of nine or ten months.

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

141. Concern has been expressed that if it is open to persons detained under the Act of 2001 to request a review of their detention at any time, this could have a chaotic consequence, exposing the health authorities to endless reviews. There are two points to be made in response to this concern. Firstly, the jurisprudence of the ECtHR does not suggest that a person, whose initial detention is lawful, and who continues to be detained for treatment of a mental disorder, is entitled to have the lawfulness of his/her ongoing detention reviewed at any time. It is clear from the summary of the principles of the ECtHR as set out in *M.H.* that the entitlement of a person in such circumstances is to be able take proceedings "at reasonable intervals". The jurisprudence of the ECtHR stops short of defining "reasonable intervals".

142. The Act of 2001 has been the subject of two reviews to which counsel for the applicant has referred the court. The first named notice party itself reviewed the operation of Part 2 of the Act in 2008, in which it stated in its report at p.88, para. 17:-

> *"In response to concerns expressed that twelve month orders are an overly long period, for which there is only one review in each period, the Commission will monitor the extent of use of these orders as to date there have been a relatively small number. The Commission will further examine if it would be appropriate to recommend that the patient have a right to a further review within the twelve month period of the order, either automatically or by request."*

143. It is clear from this passage that the Commission felt there should be an opportunity to review a twelve month order, within the period of such an order. It is also of some comfort that the Commission notes that such orders have been relatively few in number, which puts at rest a concern that health authorities might be exposed to an overwhelming number of reviews by any finding that the Act of 2001, in its present form, is contrary to Article 5§4 of the Convention, although it must be said that in any event, such a concern could operate so as to diminish Convention rights in any way

144. Secondly, in 2014, an expert group produced a report following a review of the Act of 2001. In its report, it concluded, at para. 67, that a "renewal order of up to twelve months is too long and should be reduced to a period not exceeding six months".

145. Whatever may be considered "reasonable intervals" in the context of Convention law, in my view it is clear that the structure of the Act of 2001, in its present form, in permitting the detention of a person suffering from a mental disorder for a period of twelve months, without any opportunity to test the lawfulness of that detention (other than through an appeal to the Circuit Court at the very beginning of the period) is not, in my view, compatible with Article 5§4 of the Convention.

146. The applicant seeks a declaration under s.3 of the Act of 2003. That section provides:-

> *"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its*

functions in a manner compatible with the State's obligations under the Convention provisions."

The applicant did not pursue a claim that the standard of care afforded to him is contrary to any of the provisions of the Convention upon which he relies. He confined his convention arguments to breach of Article 5§4 of the Convention. However, paragraph E6 of the statement of grounds it is claimed that:-

> *"the failure to provide the applicant with care and supervision in the community which is appropriate for his needs as a person with a disability but to instead detain him in a psychiatric hospital ward for a prolonged period of time, with no right of review for 12 months, is in breach of his rights under s. 3[of the Act of 2003]."*

And the applicant seeks a declaration to this effect.

147. In circumstances where the applicant's principal complaint is about where his care should be provided, i.e. in a supervised environment in the community, rather than in a hospital environment, and where the solution to that problem is largely driven by decisions made by the respondents as to how to distribute public resources, and against the background whereby the resources for care in the community are now to be provided (at very considerable cost), I do not consider that relief under s.3 of the Act of 2003, is appropriate.

148. Some redress is required, however, to deal with the absence of any mechanism to review the applicant's detention (other than by way of appeal to the Circuit Court) for a period that is likely to be of the order of nine or ten months. While the applicant did not expressly seek a declaration of incompatibility under section 5 of the Act of 2003, it is clear from section 5 itself that the Court may issue such a declaration of its own motion, and I propose to do so, I will discuss with counsel the appropriate form of such declaration.

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