

## THE HIGH COURT

Record Number: 2007 No. 1833 SS

BETWEEN

M. M.

APPLICANT

AND

DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

RESPONDENT

**Judgment of Mr Justice Michael Peart delivered on the 1st day of February 2008**

1. This is an application for an order for the release of the applicant from the Central Mental Hospital on the grounds that his detention there is unlawful. The ground on which this application is based is that a consultant psychiatrist other than *"the consultant psychiatrist responsible for the care and treatment of the patient"* has signed the renewal order which forms the basis for his current detention. It is necessary to set out a brief history of the applicant's detention at the Central Mental Hospital.

2. The Applicant is currently 36 years of age and, sadly, suffers from a serious mental disorder within the meaning of the Mental Health Act 2001. There is no dispute about this. There is no need to set out the nature of his illness in any detail. It suffices to say that his illness is such that his detention at the Central Mental Hospital is required both in his own best interests and for the protection of others.

3. Prior to his transfer to the Central Mental Hospital in 1999, the applicant had resided in Cork, and, due to his illness, had come under the care of Dr John Cooney, a consultant psychiatrist at the North Lee Mental Health Services, St Michaels Unit, Mercy Hospital, Glenville Place, Cork. The Applicant's detention at that hospital commenced on the 13th of May 1998 pursuant to the provisions of section 184 of the Mental Treatment Act 1945 ("the 1945 Act"). Dr Cooney was the consultant psychiatrist who certified that detention.

4. On the 16th of November 1998 Dr Cooney authorised the transfer of the applicant to the Central Mental Hospital, Dundrum, and it has been Dr Cooney who, since that date, has signed the various orders renewing the applicant's detention in the Central Mental Hospital, both under the 1945 Act and, more recently under the Mental Health Act, 2001 ("the 2001 Act"), even though he himself is not on the staff of that hospital. He has done so on the basis that both he and the relevant staff at the Central Mental Hospital, and indeed the applicant himself and his family, consider Dr Cooney to be the consultant psychiatrist who is most familiar with the applicant's condition and requirements for treatment and care, and therefore the person best positioned to make decisions in relation to whether the applicant should continue to be detained at the Central Mental Hospital, so that he can receive appropriate care and treatment.

5. Following the transfer of the applicant to the Central Mental Hospital Dr Cooney has for the last eight years remained in regular contact with relevant personnel at that hospital, has corresponded with relevant personnel there at regular and frequent intervals, and has on many occasions attended case conferences at that hospital in relation to the applicant's care and treatment. He still regards the applicant as being "his patient". Indeed, the evidence is that the consultant psychiatrist in charge of the applicant at the Central Mental Hospital at any relevant time will always consult with Dr Cooney, by telephone or otherwise, in relation to the applicant's ongoing care, treatment and management, given the latter's long-standing knowledge of the applicant's illness since 1998.

6. Following the commencement of Part 2 of the Mental Health Act, 2001 on 1st November 2006, a person such as the applicant who was detained under the provisions of the 1945 Act is "regarded" by virtue of the provisions of section 72 of the 2001 Act (the transitional provisions) as having been involuntarily admitted under that Act to the institution in which he was so detained, for the purposes of the 2001 Act. Under those provisions also, the treatment and detention of the applicant is regarded as authorised by virtue of the 2001 Act until the expiration of the period during which he was detained pursuant to section 184 of the 1945 Act, and his detention is required to be referred to a Tribunal by the Mental Health Commission before the expiration of the period of detention previously authorised. The Tribunal is obliged to review the detention as if it had been authorised by a renewal order made under section 15(2) of the 2001 Act.

7. These provisions were complied with in the present case, and in due course on the 22nd February 2007, Dr Cooney signed a Renewal Order which in due course was affirmed by a decision of the Mental Health Tribunal dated 12th March 2007. A further six month Renewal Order was signed by Dr Cooney on the 28th May 2007, which in turn was affirmed by a decision of the Mental Health Tribunal dated the 15th June 2007. The applicant's current detention at the Central Mental Hospital is on foot of a twelve month Renewal Order signed by Dr Cooney on the 27th November 2007. That order was affirmed by a decision of the Mental Health Tribunal dated 12th December 2007.

8. The applicant's solicitor, Peter Connolly, appointed by the Mental Health Commission to represent the interests of the Applicant, has sworn an affidavit to ground the present application for the applicant's release. He states that at the commencement of the hearing before the Tribunal on the 12th November 2007 he informed the Tribunal that he wished to make a submission regarding the appropriateness of Dr Cooney signing the Renewal Order. He states that he submitted that this order was signed by a consultant who was not on the staff of the approved centre in which the applicant is detained, namely the Central mental Hospital, and that in his view, this constituted a fundamental defect in the lawfulness of the applicant's current detention. In making that submission he referred to relevant case law. He states also that at the review hearing before the Tribunal, Dr Dearbhla Duffy, a consultant psychiatrist on the staff of the Central Mental Hospital, gave evidence to the tribunal, and he pointed out also that the independent psychiatrist reporting to the tribunal in relation to the applicant had referred in that report to Dr Duffy being in the consultant psychiatrist responsible for the applicant, rather than Dr Cooney. He states that in her evidence to the tribunal, Dr Duffy had stated that she had had discussions with Dr Cooney regarding the applicant's treatment on an ongoing basis and that there was regular correspondence from Dr Cooney on the applicant's file, and that he had attended case conferences in relation to the applicant. In her evidence, according to this affidavit, it was accepted that Dr Cooney had not attended the most recent case conference held at the Central Mental Hospital on the 23rd October 2007 regarding the applicant and that she considered Dr Cooney to be actively involved in the applicant's treatment even though he is not a member of the staff of the Central Mental Hospital.

9. Mr Connolly states also that Dr Duffy agreed with him that it was she who makes the principal day to day decisions regarding the applicant at that hospital and that the only clinical entry on the notes made by Dr Cooney in the recent past, since the renewal Order in question, was on the day of assessment for the purpose of the 12 month renewal Order. She also stated in her evidence, according to Mr Connolly, that she had been involved in the treatment of the applicant since June 2007, when she was appointed to take over the role of her predecessor, Dr O'Neill, and that Dr Cooney was involved in the management of when it might be appropriate for the

applicant to be transferred back to his local service in Cork and that Dr Cooney's views in that regard will be influential at the appropriate time.

10. In his grounding affidavit, Mr Connolly states that it is clear in his view that a doctor at the Central Mental Hospital where the applicant has now been since 1999 is and was at all material times the consultant psychiatrist who was responsible for the care of the applicant as of the date of the renewal Order on foot of which the applicant is detained, and not Dr Cooney. He goes on to state that it is contrary to the spirit and letter of the 2001 Act for a patient to be the subject of a 12 months detention at the behest of a doctor resident and working in another part of the country and who has not examined the applicant in the entirety of the six-month detention which was the subject of the renewal Order under review by the Tribunal. He also makes the point in his affidavit that Dr Cooney could not be regarded as the consultant psychiatrist responsible for the care of the applicant in circumstances where the independent consultant psychiatrist appointed to provide a report pursuant to section 16 and section 17 of the Act was clearly of the opinion, based on information which had been provided, that Dr Duffy and not Dr Cooney was the consultant psychiatrist responsible for the care of the applicant. It is on this basis that the current detention of the applicant is submitted to be not in accordance with the law.

11. Dr Cooney has sworn a replying affidavit, and on the application before me Dr Cooney was cross examined in relation to this affidavit. In his affidavit he states that since 1999 he has been in regular contact with the staff at the Central Mental Hospital with regard to the applicant, and he has exhibited copies of correspondence from him to staff members of that hospital over the years. He states also that since the transfer of the applicant to the Central Mental Hospital, he has been in regular attendance at their with the applicant and that he has most recently seen the applicant on the 22nd February 2007, 28th May 2007, and 27th November 2007, and he has exhibited file notes in relation to these attendances. He states also that since the transfer of the applicant from Cork to the Central Mental Hospital, he has been in regular attendance at case conferences concerning the applicant, although he has occasionally missed a case conference due to personal difficulties or other engagements, but that he has at all times endeavoured to attend as many such case conferences as he could over the years since 1999. He avers also that at all material times he has kept himself fully informed of all significant developments in relation to the treatment and medication of the applicant and that since the admission of the applicant to his care in 1998, he has been in regular contact with the applicant's family and in particular with his sister. In the course of that contact, he has been able to discuss with the family any developments in relation to the care of the applicant and that since the applicant's transfer to the Central Mental Hospital, he has continued to be in close contact with the family regarding the applicant's care. He also believes that it is envisaged that in due course, and when appropriate, the applicant will be returned to the North Lee Mental Health Services, and that he has been involved in the management of when such a transfer should occur. He states also that he is the consultant psychiatrist who is best placed to make this decision in consultation with the applicant's multidisciplinary team at the Central Mental Hospital on the basis of his ongoing therapeutic relationship with the applicant, his ongoing relationship with the applicant's family, and his knowledge of the available services in Cork. In such circumstances he believes that at all material times he has been the responsible consultant psychiatrist with regard to the applicant within the meaning of the 2001 Act. He concludes his affidavit by stating that on the 27th November 2007 when he signed the 12 month renewal Order in question, he formed the opinion that a further period of detention was necessary for the treatment of the applicant on the basis of his correspondence with members of staff at the Central Mental Hospital, his attendance at case conferences, his contact with family members and his attendants on the applicant on that date, and believes that he had a sufficient familiarity with the applicant's care in order to form that view.

12. Feichin McDonagh SC, on behalf of the applicant, cross-examined Dr Cooney in relation to this affidavit at some length. During that cross-examination Dr Cooney accepted that on a day to day basis he was not responsible for the care and treatment of the applicant but that in a broader sense he still regarded himself. He accepted that on a day to day basis it was the relevant staff of the Central Mental Hospital who cared for and treated the applicant, albeit in consultation with him from time to time. He referred to the fact that he was frequently in correspondence with the Central Mental Hospital in relation to the applicant, and that this correspondence demonstrates that he is available at short notice should there be any dramatic change in the applicant's circumstances. He confirmed that he still regards the applicant as his patient and that he is the best placed consultant psychiatrist in the country to decide matters in relation to the applicant's care and treatment. He stated also that he regards himself as the expert in the applicant's overall well-being and as to what facilities would be available to him in the event that he should be in a position to return to Cork when he no longer needs the secure detention at the Central Mental Hospital. He made the point also that, as I have already stated, the applicant himself also regards Dr Cooney to be his psychiatrist.

13. Dr Cooney accepted under cross-examination that he had not been requested to attend before the Mental Health Tribunal which sat in July 2007, and nor had he been requested to attend that Tribunal on the 12th December 2007. In fact he had not been notified that the tribunal was to sit on that date in order to review the applicant's detention order. He also confirmed that the independent consultant psychiatrist, who reported to the Mental Health Tribunal on that occasion, had not contacted him in order to discuss the reason for the continued detention of the applicant. He stated that if he had been consulted by the independent consultant psychiatrist, he would have been happy to be so consulted and to express his views.

14. Mr McDonagh asked Dr Cooney about a particular letter which he wrote to Dr O'Neill on the 15th of February 2007 and in which he informed Dr O'Neill that he was seeking clarification as to whether he was in fact "the consultant psychiatrist responsible" for the purposes of the 2001 Act. It was suggested to him that this letter indicated that he himself had some concerns that he may not, following the commencement of that Act come within the definition of that term. The letter indicates that Dr Cooney was anxious to find out whether there existed any guidance from the Mental Health Commission about this matter. It would appear from his answers to this questioning that he obtained what he considered to be some clarification both from Dr O'Neill and from the clinical director of the Central Mental Hospital, Dr Harry Kennedy. It is not exactly clear to me precisely what form of clarification was given to him but he certainly remains of the belief that he is the consultant psychiatrist best placed to make decisions with regard to the applicant's ongoing need for detention in psychiatric care, either at the Central Mental Hospital or in Cork. He stated at some point in his cross-examination that he formed his own view in relation to this matter having considered relevant judgements of the High Court. He was unable to agree with the suggestion put to him by Mr McDonagh that in reality it is the doctors at the Central Mental Hospital who are the persons responsible for the care and treatment of the applicant, although he accepted, as I have already stated, that on a day-to-day basis they are the people who actually look after him. He acknowledged that it is Dr Duffy who is the psychiatrist who is caring for the applicant on a day-to-day basis, as I have stated, and that they are caring for him as experts in forensic psychiatry, but that he nevertheless is responsible overall in relation to the applicant and regards him still as being his patient.

15. Dr Duffy also swore a replying affidavit for the purposes of the present application. She states in her affidavit that she took over the care of the applicant at the Central Mental Hospital in May/June 2007 following a re-allocation of staff within that hospital. Her predecessor was Dr Helen O'Neill, a consultant psychiatrist who had previously been looking after the treatment needs of the applicant. She states in that affidavit that since taking over the care of the applicant she has maintained contact with Dr Cooney, and that she is aware that prior to her taking over the case of the applicant, Dr Cooney had, since 1999, been in regular contact with Dr O'Neill and had attended case conferences with regard to the applicant and had corresponded with Dr O'Neill in relation to the

applicant. She stated also that she envisaged that over the coming months and years she would have similar contact with Dr Cooney in relation to the applicant's ongoing care and treatment for so long as he remains a patient at the Central Mental Hospital. She is of the view that the applicant requires ongoing detention at the Central Mental Hospital and that any decision with regard to the applicant's discharge from that hospital and his return to Cork psychiatric services will be made in conjunction with Dr Cooney who, she says, has been and remains involved in decision-making with regard to the applicant's assessment and treatment. She states also that at a hearing before the Mental Health Tribunal, she informed the Tribunal that she had had discussions with Dr Cooney regarding the Applicant's treatment, and that Dr Cooney had remained in both written and spoken communication with Dr O'Neill, her predecessor over the years since the applicant is transferred to the Central Mental Hospital in 1999 and that he had attended case conferences and exchanged views in relation to the applicant's medication and also that he had had an input into any discussions about the question of the applicant's return to the Cork psychiatric services, and that she advised the tribunal that Dr Cooney had remained at all times, and continued to remain involved with the applicant's family in Cork. She states also in her affidavit that she and Dr Cooney had discussed and considered the question as to who was the appropriate person to sign the renewal order in respect of the applicant, and that they had concluded that, given the extent of Dr Cooney's involvement in the applicant's care and treatment, he was the appropriate person.

16. Dr Duffy was also cross-examined by Mr McDonagh. During this cross-examination, she stated that on a day-to-day basis that she was treating the applicant but that in a broader sense, she did not regard herself as the applicant's "overall responsible treating consultant", and that she would regard Dr Cooney as fulfilling that role. She accepted that it was she who was consulted by the independent consultant psychiatrist reporting to the Mental Health Tribunal, because it was she who was the applicant's treating consultant psychiatrist at that time. She accepted that it was appropriate that the independent reporting consultant psychiatrist should contact her, but went on to say that it might have been helpful for that person also to have contacted Dr Cooney. It was suggested to her in cross-examination that she would have no difficulty in acknowledging that in the Central Mental Hospital she is the consultant psychiatrist who is responsible for his care and treatment.

17. For the sake of completeness I should add that both Dr Cooney and Dr Duffy were questioned in relation to their affidavits, and their cross-examination in relation to those affidavits, by Felix McEnroy SC who appeared on behalf of the respondent. Written legal submissions were provided on behalf of the applicant and on behalf of the Notice Party, the Mental Health Tribunal, and oral submissions were made on behalf of all parties.

### **Applicant's legal submissions**

18. Mr McDonagh has submitted that whatever situation may have pertained regarding the status of Dr Cooney in relation to the applicant prior to the 1st November 2006 when Part 2 of the 2001 Act came into operation, the position thereafter is that by virtue of the transitional provisions of s. 72 of the 2001 Act, the detention of the applicant became regarded under the new Act as being a detention at the Central Mental Hospital, and that his continued detention thereafter, and Dr Cooney's role, must be looked at in the light of these provisions.

19. He has made the point that in this case the applicant was not transferred from Cork to the Central Mental Hospital under the provisions of s. 21 of the 2001 Act, and that if it had there may well be an argument that Dr Cooney remained "the clinical psychiatrist responsible .... "; but that in the present case the transfer had occurred in 1999 under the 1945 Act, and that his detention there after November 2006 is deemed by s. 72 of the 2001 Act to be a detention under s. 15 of the Act, and must be considered in the light of this fact. He submits that thereafter, Dr Cooney ceased to be capable of being regarded as "the consultant psychiatrist responsible ... ", and that this fact seems to have been accepted by the Central Mental Hospital itself, since it obviously must have notified the Mental Health Commission that the "the consultant psychiatrist responsible ... ", to be contacted by the independent consultant psychiatrist for the purpose of a report under s. 17 of the Act was Dr Duffy rather than Dr Cooney. He points also to the fact that in correspondence to which I have already referred Dr Cooney himself clearly had doubts also as to whether under the 2001 Act he was still the consultant psychiatrist responsible for the care and treatment of the applicant.

20. Mr McDonagh submits that where a person is detained under s. 15 of the Act (the applicant being such a person by virtue of the provisions of s. 72 thereof) that section mandates that the detention thereafter can be extended only by "the consultant psychiatrist responsible for the care and treatment of the applicant" and by nobody else. In this regard he submits that there can be only one such person under the Act, and that the question of who is that person is a matter of law, and not something which can be decided on the basis of medical practice or agreement between medical personnel involved in the care and management of the patient.

21. In support of this position, Mr McDonagh submits that the new Act has provided a very precise and detailed set of procedures designed to provide safeguards for the patient, and that a departure from the provisions in any fundamental respect must render the detention of the patient unlawful. In the present case, he submits that where the renewal order has been signed by some person who is not authorised by the Act to sign the renewal order, no matter how well-intentioned that person may be, the result must be that the renewal order is invalid. Accordingly, since the very foundation of the detention is so fundamentally flawed, the flaw cannot be simply overlooked on the basis that everybody concerned was acting in what they consider to be the best interests of the applicant. To permit such a situation, in his submission, amounts to a negation of the safeguards specifically provided.

22. I shall for convenience refer to "the consultant psychiatrist responsible for the care and treatment of the applicant" as the "RCP"

23. Mr McDonagh has emphasised the role of the RCP in relation to the review of a patient's detention by the Mental Health Tribunal, which is another of the safeguards built into the statutory scheme for the protection of the patient. In that regard, the Tribunal must receive a report from the independent consultant psychiatrist appointed by the Mental Health Commission, who in turn is required to have interviewed the RCP prior to completion of that report. In the present case, as I have stated, the RCP interviewed for that s. 17 report was Dr Duffy, and it was the latter and not Dr Cooney who attended before the Tribunal when it carried out its review of the applicant's detention. He submits that if Dr Cooney was the RCP it is he who should have been interviewed by the independent consultant psychiatrist, and this did not happen – and nor was Dr Cooney asked to attend before the Tribunal.

24. Mr McDonagh has referred the Court to the judgment of Mr Justice O'Neill in *WQ v. The Director of the Central Mental Hospital*, unreported, High Court, 15th May 2007, and relies upon that judgment in aid of his submissions. That was a case where the applicant had been detained originally under the provisions of s. 184 of the Mental Treatment Act, 1945 ("the 1945 Act"), and had been subsequently transferred from St. Brendan's Hospital to the Central mental Hospital under s. 207 of that Act. Without going into the full history and facts of that case, the position appears to be that the continued detention of that applicant was authorised by a consultant psychiatrist from the South Tipperary Mental Health Services since that is the catchment area in which the applicant had resided prior to the commencement of his detention. Following the commencement of Part 2 of the 2001 Act, that detention was by virtue of the transitional provisions of s. 72 of the 2001 Act regarded as detention under s. 15 of the 2001 Act, but nevertheless the applicant was examined by another consultant from the Tipperary Mental Health Services, and that consultant signed the renewal order which continued the applicant's detention at the Central Mental Hospital, even though that consultant was not a member of the

staff of the Central Mental Hospital, and whose involvement with the applicant was confined to examining the applicant on a couple of occasions and only for the purpose of renewing his detention. A Tribunal in due course affirmed that renewal order.

25. Mr Justice O'Neill concluded as follows:

*"The evidence establishes beyond any doubt that at all material times the applicant was in the Central Mental Hospital and under the care of Dr. Mohan. Dr. O'Leary's involvement with the applicant came about because the applicant was from the South Tipperary region. It is clear that on the two occasions that the applicant was examined by Dr. O'Leary it was solely for the purposes of a review and not for the purposes of care or treatment. It is of course the case that for reasons of practicality more than one psychiatrist would have to be considered as "responsible for the care and treatment of the patient concerned". This would arise as a matter of necessity where for example the psychiatrist primarily responsible for the care and treatment of a person was absent for one reason or another such as holidays or illness at a time when it was necessary to make a Renewal Order pursuant to either s. 15(2) or s. 15(3) of the 2001 Act. Obviously in this situation another psychiatrist who was involved in the care and treatment of the applicant in the approved centre in question could lawfully make a Renewal Order. In my opinion however a psychiatrist not attached to the approved centre where the person was detained, and not involved in the care and treatment of the patient concerned but who was brought in for the purposes of review, could not exercise the power of renewal contained in s. 15(2) and s. 15(3).*

*Thus in my opinion Dr. O'Leary did not have the power to make the Renewal Order on the 2nd January, 2007.*

*The restriction of this power to the "Consultant Psychiatrist responsible for the care and treatment of the patient" is one of the significant safeguards provided by the Oireachtas in this legislation for the benefit of persons suffering from mental disorder within the meaning of s. 3 of the Act of 2001 and in my opinion a failure to comply with this provision vitiates the lawfulness of a detention based upon a Renewal Order signed by someone who lacked the power to make that order." (my emphasis)*

26. I have underlined one sentence in this passage upon which Mr McDonagh particularly relies.

27. In support of his submission that Dr Cooney cannot be regarded as being "responsible" for the care and treatment of the applicant, given that he is not part of the staff at the Central Mental Hospital Mr McDonagh has referred to the definition of the word "responsible" in the New Oxford Dictionary as being "*having an obligation to do something, or having control over or care for someone ...*", and, in the context of a person's job or position as "*involving important duties, independent decision making, or control over others*". He submits that this concept of responsibility means one particular psychiatrist only, who is a consultant, has the responsibility for a patient, even though there may be other personnel who may be concerned in the welfare, care and treatment of the patient, such as Dr Cooney or staff at the Central Mental Hospital. He has also referred the Court to a passage from *The Annotated Mental Health Acts* by Harry Kennedy (who is in fact the respondent in this case), published by Blackhall Publishing, and in which at p. 94 thereof the author states in a footnote to s. 20 of the 2001 Act:

*"At the end of the current detention, the patient may either remain in the second approved centre as an informal patient or a renewal order may be made under s. 15. It would appear that the renewal order must be made by the consultant psychiatrist responsible for the care and treatment of the patient at the first approved centre, where the patient remains detained in accordance with s. 20 (4). However, only one consultant can be the consultant psychiatrist responsible for the care and treatment of the patient, and that must be the consultant at the second approved centre, who ought then to be the one responsible for making the renewal order. It may be that the independent examining psychiatrist must interview both consultant psychiatrists in order to complete his or her report to the tribunal."*

28. This footnote is to s. 20 of the 2001 Act which makes provision for a transfer of a patient at the patient's request to another approved centre, and in s. 20 (4) thereof provides that the detention in the second approved centre shall be deemed to be detention in the centre from which he/she has been transferred. That of course is a different context to the present case, but Mr McDonagh nevertheless submits that it is indicative of what the correct position must be, namely that in the present case Dr Duffy is the correct person to have signed the renewal order, even though it may have been appropriate for the independent psychiatrist reporting to the tribunal to interview both Dr Cooney or Dr Duffy under s. 17 of the Act.

29. Mr McDonagh has also referred the Court to an equivalent section in the Mental Health Act 1983 in England in which in s. 34 thereof "the responsible medical officer" means "the registered medical practitioner in charge of the treatment of the patient", and to a book by Baroness Hale entitled *Mental Health Law*, published by Sweet and Maxwell, 1996 where the learned author refers to this definition and states under the heading "the responsible medical officer" as follows:

*"... This must mean the psychiatrist who is formally and professionally responsible for the patient in the hospital".*

30. Mr McDonagh accepts that while the RCP, namely in this case Dr Duffy according to his submission, may well be on leave or absent through illness, at a moment when a renewal order needed to be signed, the task of signing that renewal order can be taken on by another consultant psychiatrist at the Central Mental Hospital, such as the Clinical Director, since such a person would at the appropriate time at which the renewal order had to be signed that person would fulfil the role of being responsible for the care and treatment of the applicant in the absence of Dr Duffy; but that in no situation could the role be taken on by some consultant such as Dr Cooney who is not at the Central mental Hospital.

31. Mr McDonagh also considered that there could easily be a situation in which two or more consultants at the Central Mental Hospital might attend a case conference where the applicant's treatment was discussed, along with other staff such as junior doctors or other health professionals. He suggests that in such a situation it could not be correct that any of these consultants could be regarded as the appropriate person to sign a renewal order, and that only the consultant who is the RCP could sign it since it is clear under the scheme of the Act that one person be identifiable as the person who is the RCP.

32. He accepts also that while it may well make complete medical sense that a consultant psychiatrist, such as in the present case Dr Cooney, be consulted and kept abreast of the applicant's treatment and care, and to liaise with him in relation to decisions being made, and to invite him to attend case conferences from time to time, this cannot constitute Dr Cooney as the RCP for the purpose of the Act. He submits that it would do violence to the wording of the Act, and would be inconsistent with the purpose of inserting the safeguards contained in the Act.

33. Mr McDonagh has referred to s. 49 of the Act also, which in subsection (2) thereof empowers the Mental Health Tribunal to

"direct in writing the consultant psychiatrist responsible for the care and treatment of a patient the subject of the review to arrange for the patient to attend before the Tribunal on a date and at a time and place specified in the direction". He submits that it is clear from this provision that Dr Cooney, who is in Cork, could not be the person who, under pain of penal sanction, must ensure the applicant's attendance before the Tribunal. He submits that it is clear that the intention of the Oireachtas is that the RCP is a consultant in the place where the patient is detained at the relevant time.

34. In so far as the respondent and the Notice Party have relied upon a judgment of Mr Justice McMenamin in *JB v. Central Mental Hospital*, unreported, High Court, 15th June 2007 for their submissions that the 2001 Act does not preclude Dr Cooney from being the RCP for the purpose of signing the renewal orders in this case, Mr McDonagh submits that this Court should consider that decision to be in error and ought not to follow it. I will come to that case in due course.

### **The respondent's submissions**

35. Mr McEnroy on behalf of the respondent has submitted that it is clear that the applicant has been afforded all the protections and safeguards to which he is entitled under the 2001 Act, and that even if there was some error in the fact that the Mental Health Commission informed the independent consultant psychiatrist under s. 17 of the Act that Dr Duffy was the RCP who should be interviewed for the purpose of the s. 17 report, instead of Dr Cooney who had actually signed the renewal order, that error, if it be such, is not determinative, and cannot be relied upon for the purpose of deciding whether or not Dr Cooney was entitled to sign the renewal order in question.

36. He has referred to a judgment of this Court in *JH v. Lawlor*, unreported, High Court, 25th June 2007, wherein I concluded that in spite of the fact that on a literal interpretation of the Act one of its provisions had not been complied with, the detention was nonetheless in accordance with law, since no fundamental right to which the applicant was entitled had been breached. Mr McEnroy submits that in the present case the applicant has been afforded all of his statutory safeguards, since it is clear and undisputed that, whoever has signed the renewal order, the applicant's best interests are being served by his detention at the Central Mental Hospital. In other words, even if this Court was of the view that Dr Cooney was not the RCP for the purpose of the 2001 Act, and that the renewal order ought to have been signed by Dr Duffy, his release ought not to be ordered, since no fundamental right has been breached, and he has referred to the fact that in *JH*, I referred to the principles in *The State (McDonagh) v. Frawley* [1978] IR. 131, and found no reason not to extend such principles to an application for release in the context of the 2001 Act when the protections afforded by that legislation had been afforded to the applicant without dilution.

37. Mr McEnroy has also highlighted the extensive involvement of Dr Cooney with the applicant since 1999, and contrasts that degree of involvement by him with that of the consultant who signed the order in relation to the applicant in *WQ* which, as found by Mr Justice O'Neill, was confined to two reviews of his mental state. He submits that Dr Cooney could never be seen as simply signing renewal orders in respect of the present applicant, and that from the very outset he has been intimately involved in the applicant's treatment and that this involvement is ongoing, and that the applicant himself and his family regard Dr Cooney as being the applicant's consultant psychiatrist. Mr McEnroy submits that there is nothing in the 2001 Act which states that there can be only one consultant who can be the RCP, and that this term is not specifically defined in the Act, and that there is no specific exclusion of a consultant who is outside the actual hospital where the patient is detained. He submits that this Court must look at all the facts and circumstances of the case and reach a conclusion as to whether the consultant who has signed the renewal order is somebody who can be seen as having responsibility for the care and treatment of the applicant, given his knowledge of and involvement with the applicant over such a lengthy period of time. He refers also to the fact that all the medical relevant personnel at the Central Mental Hospital were in agreement that Dr Cooney was the appropriate person to sign the renewal order. I have set forth the relevant evidence regarding the extent of Dr Cooney's involvement upon which Mr McEnroy is relying in this regard.

### **The Notice Party's legal submissions**

38. Cian Ferriter BL has made submissions on behalf of the Mental Health Tribunal. First of all, he submits that this Court should not decline to follow, on the basis that it is wrongly decided, the judgment of Mr Justice McMenamin in the case of *JB* already referred to, as submitted by Mr McDonagh. He has submitted that the facts in *JB* are very similar to the facts of the present case as far as Dr Cooney's involvement with the applicant is concerned. He submits also that on the facts of the present case the involvement of Dr Cooney with the care of the applicant is far greater than that of the consultant psychiatrist in the *WQ* case which was the subject of Mr Justice O'Neill's judgment already referred to, and on which Mr McDonagh relies.

39. He has submitted also that in any case, a decision has to be taken at some point as to who is the "consultant psychiatrist responsible ..." and that in the present case that decision was arrived at by these persons in a position to make the decision, and that nobody involved in the care and treatment of this applicant has any doubt about Dr Cooney being the appropriate consultant, given his continued involvement. He accepts that if Dr Cooney was the appropriate person to have signed the renewal order, then there may have been a breach of the requirements of s. 17 of the Act, since the independent consultant psychiatrist reporting to the Tribunal did not interview Dr Cooney. But he goes on to submit that even if there was such an error in that regard, no possible prejudice to the applicant has resulted, and that none of the safeguards to which the applicant has been afforded by the legislation have been diluted, since Dr Duffy, who was interviewed was certainly in a position to inform that consultant about all matters relevant to the report.

40. Mr Ferriter has also referred to the provisions of s. 21 of the 2001 Act which provides for a transfer of a patient from an approved centre to, inter alia, the Central Mental Hospital, and in that regard in subsection (4) it is provided that the detention upon such transfer at the Central Mental Hospital "*shall be deemed ... to be detention in the centre from which he/she was transferred.*" Mr Ferriter submits that this provision supports the submission that Dr Cooney in the present case can be regarded as the RCP, since s. 21 of the 2001 Act is the new Act's equivalent of the previous such provision in s. 208 of the 1945 Act, pursuant to which Dr Cooney had transferred the applicant to the Central Mental Hospital in 1999. He refers also to another footnote in the Annotated Mental Health Acts by Harry Kennedy in relation to s. 21 of the 2001 Act. In that regard Kennedy states:

*"... As for section 20(4), this is intended to prevent the loss of contact between the patient and the catchment area service. It follows that the responsibility for making renewal orders remains with the consultant psychiatrist from the first approved centre (the catchment area consultant) as is currently the case for transfers under section 208 of the Mental Health Act 1945."*

41. Given that s. 20(4) is in the same terms as s. 21(4) in the 2001 Act, Mr Ferriter submits that this comment by the author applies with equal force to the latter.

### **Conclusions**

42. The essential issue to be determined in this case is whether Dr Cooney in the circumstances of the present case can be regarded as coming within the meaning of "the consultant responsible for the care and treatment of the patient concerned" in s. 15(2) of the

2001 Act.

43. Having considered the affidavit evidence in this case and the evidence given by Dr Cooney and Dr Duffy during their cross-examinations, I have absolutely no doubt that Dr Cooney's long-standing and continuing involvement in the applicant's welfare, though his attendances at case conferences at the Central Mental Hospital, his regular and welcomed contact with those consultants and other professionals at that hospital through correspondence and discussions, and the uncontested fact that both the applicant and the applicant's close family still regard Dr Cooney as being the applicant's consultant psychiatrist, and his own conviction that the applicant is still "his patient", he is the person with the best knowledge of the applicant's illness and his treatment and care requirements.

44. That finding is not inconsistent or incompatible with either Dr Duffy or even other consultants at the Central Mental Hospital also having a sufficient degree of knowledge of the applicant's illness and care and treatment requirements to be also qualified to have signed the renewal orders made in respect of the applicant. Clearly if Dr Duffy had signed such an order, her capacity to do so as the person in charge of him at the Central Mental Hospital could not be impugned, given her day to day involvement at the hospital.

45. The question really is whether the 2001 Act by referring to "the consultant responsible for the care and treatment of the patient concerned" in s. 15(2) and in other sections, is indicating that only one such consultant can be acting in that capacity, namely in this case Dr Duffy, or some other consultant psychiatrist at that hospital if she is for some reason absent at a relevant time, either through illness, absence on leave or other good reason.

46. Section 15(2) of the Act must be interpreted firstly by reference to the actual words chosen by the Oireachtas to express its intention. In that regard, it is relevant to refer to the fact that the Oireachtas has chosen not to define the term "the consultant responsible for the care and treatment of the patient concerned". It is not by any definition stated that this person must be a consultant attached to the approved centre in which the patient is detained. On the other hand the phrase commences with the words "the consultant ..." and not "a consultant ...". That would indicate that there is but one such possible candidate, and I have already concluded that if Dr Duffy had signed the renewal order she could not have been regarded as not being entitled to do so.

47. In the present case, Dr Duffy herself considers that Dr Cooney is the appropriate person to be considered "the consultant psychiatrist responsible...." for the applicant. That is important, as it indicates that in her view he is better placed than she herself to fulfil that role, given the longevity of his involvement with the applicant. It will be recalled that Dr Duffy took over the applicant's file, so to speak, from her predecessor, and necessarily her involvement with the applicant is of very recent origin. It is perfectly understandable that in such circumstances she would consult frequently with Dr Cooney about the applicant, and even defer to his opinions when necessary.

48. It is true that Dr Cooney's involvement with the applicant is not in the nature of a day to day involvement, and that if for example the applicant's medication is to be altered or he is to be prescribed a particular drug, that sort of day to day decision will be taken by her, and not always after prior consultation with Dr Cooney, albeit that he is always apprised of any changes in this regard. It is beyond doubt that when it comes in due course to any decision as to whether it may be appropriate to transfer the applicant to the day to day care of Dr Cooney in Cork, that will not be done without full consultation, and presumably the agreement of Dr Cooney.

49. It seems to me that in the absence of any express statutory definition of the phrase "the consultant psychiatrist responsible...." in the Act, a measure of discretion can be seen to exist in those involved in the care and treatment of the patient to consider and reach a view on who is the consultant best placed to be considered that person. That is not to say that simply any consultant with a modicum of knowledge about the patient's illness and care and treatment requirements could simply be chosen out of convenience to sign a renewal order. Clearly the consultant concerned must be one who is directly and fully involved in the patient's care and treatment, and if any mere convenient shortcut was made in this regard, which could be seen as having diluted the protections which the Act affords to such a patient, the Court would be bound to reach the obvious conclusion that the consultant who had signed the renewal order was not entitled under the Act to do so, as in fact occurred in the WQ case for the reasons appearing therein. But it is not stated anywhere in the Act that the consultant must be one who is on the permanent staff of the hospital concerned. The Act could easily have so provided if it was the intention that only such a consultant could be regarded as "the consultant psychiatrist responsible....". It would follow in my view that there is a discretion left open by the Act as to who in any particular case can be regarded as the person who is "the consultant psychiatrist responsible....", and that accordingly it is permissible for a responsible and considered decision to be made by those concerned as to who shall sign a renewal order, and that it need not be one who is attached to the hospital in which the patient is detained, provided that the person so considered can be objectively seen to be so placed. Each case will need to be considered on its own facts and circumstances, and the primary concern will always have to be whether the best interests of the patient are protected.

50. The judgment of Mr Justice McMenamin in JB has been referred to. In that case, the applicant had had a very troubled childhood, and had become a danger both to himself and to others. In 2004 he had been detained in St. John of God Hospital in Blackrock, Co. Dublin under the provisions of s. 184 of the 1945 Act then in force. It was considered necessary that he should be transferred to the Central Mental Hospital for further treatment there, and the necessary transfer was effected under s. 208 of the 1945 Act. Some days after his admission to St John of God's Hospital he was duly transferred to the Central Mental Hospital, and his detention there was extended on a number of occasions thereafter. Following the coming into force of the 2001 Act, that applicant's detention at the Central Mental Hospital was by virtue of the transitional provisions of s. 72 of the 2001 Act regarded as being authorised by a renewal order under s. 15 (2) of the 2001 Act, and he was accordingly entitled to a review of that detention by a mental health tribunal as provided. That procedure was followed and the detention was duly affirmed. Thereafter a further renewal order was signed, not by a consultant psychiatrist at the Central Mental Hospital but by a Dr Hearne who was a consultant psychiatrist at St. John of God's Hospital in Blackrock from where he had some years previously been transferred. A review of that detention took place before a Tribunal, and it was contended on behalf of the patient that this renewal order was invalid as it had been signed by Dr Hearne and she was not someone who was at the time that the renewal order was signed the applicant's treating consultant psychiatrist, and that it ought to have been signed by a Dr Linehan, as she was the consultant under whose care he was at the Central Mental Hospital for a number of years.

51. It was contended for that applicant that Dr Hearne's role was limited to attending case conferences and making extensions of the detention under s. 189 of the 1945 Act, and that since April 2006 it was Dr Linehan and not Dr Hearne who alone had been the applicant's psychiatrist. It appears from the judgment that Dr Hearne had first assessed the patient in June 2003 in the Central Mental Hospital at the request of the Clinical Director there, Dr Harry Kennedy. Dr Hearne again examined the patient in January 2004 and informed Dr Kennedy of his findings in writing, and dealt also with the question of treatment options for the patient into the future, and indicated that he was planning to further review him on the 24th February 2004. Dr Kennedy forwarded minutes of case conferences to Dr Hearne, and in due course Dr Hearne communicated again with Dr Kennedy regarding a further review by him. There was apparently further correspondence between Dr Hearne and Dr Kennedy during 2004 and 2005, and in October 2005 Dr Hearne

wrote stating that the patient's needs could not be met at St. John of God's Hospital, and that he would assess him again at St. John of God's Hospital with a view to him being again transferred to the Central Mental Hospital under s. 203 of the 1945 Act. The judgment in that case sets out further communication between these two consultants.

52. Mr Justice McMenamin concluded:

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

53. In that case also, it appears that the affidavit evidence of Dr Linehan was that it was her opinion that the "consultant psychiatrist responsible ..." is not just one particular person, and that he/she can be any one of several consultants, and not confined to those in the detaining hospital, provided that they have a real and continuing role in the care and treatment of the patient. Mr Justice McMenamin concluded that he accepted this proposition as a matter of law as well as a matter of medical practice. He had been referred also to the judgment of O'Neill J. in WQ to which Mr McDonagh has referred, and considered that WQ was based on very different facts to JB.

54. In his judgment in JB, Mr Justice McMenamin referred also to the definition of "treatment" contained in s. 2 of the 2001 Act when he considered the meaning to be given to the term "consultant psychiatrist responsible for the care and treatment of the patient". That section states that "treatment":

*"...in relation to a patient, includes the administration of physical, psychological and other remedies relating to the care and rehabilitation of a patient under medical supervision, intended for the amelioration of a mental disorder."*

55. He states in this regard that this "clearly envisages the involvement of practitioners of more than one discipline. As a matter of fact, Dr Hearne continued to be the consultant psychiatrist responsible for the care and treatment of the applicant, although others too were so responsible." He expressed the view in addition that s. 15(2) of the 2001 Act when read in conjunction with this definition of treatment, and stated:

*"[the Act] does not preclude the possibility, which clearly exists in this case of there being more than one consultant psychiatrist responsible for the care and treatment of the patient any more than there might have been more than one consultant psychiatrist involved or responsible for the care and treatment of the patient within the ambit of and employed by the Central Mental Hospital. However that consultant psychiatrist making an order must be truly engaged in the care and treatment, that is, involved in the administration of physical, psychological and other remedies relating to that patient's care and rehabilitation in accordance with the definition under s. 2 of the Act of 2001."*

56. Mr McDonagh has urged this Court to regard that judgment as having been decided per incuriam due to references made therein to s. 21 of the Act, which section, he states, was not engaged on that application. However, I do not see that even if such be the case that it should prevent this Court from following the overall conclusion reached on facts relevantly similar to the facts in the present application, and with which I respectfully agree.

57. I am of the view that in the present case, Dr Cooney is someone who comes within a reasonable interpretation of "the consultant psychiatrist responsible ..." in relation to the applicant. He has a close and ongoing involvement with the care and treatment of the applicant, which is recognised as such by all professionals involved, as well as by the applicant and the applicant's close family. In my view, as I have stated, the Act does not set out to define precisely who is that consultant, and specifically omits any reference to the consultant having to be on the staff of the detaining hospital. In many, perhaps even the great majority of cases, "the consultant psychiatrist responsible ..." will inevitably be a member of the staff of the detaining hospital, but, as in this case, it will be appropriate not to exclude from that term someone such as Dr Cooney who has a close and recognised ongoing involvement in the care, treatment and management of a patient.

58. This is consistent also with what Mr Ferriter referred to, namely the fact that it seems to be envisaged in s. 20(4) and s. 21(4) of the Act that in relevant circumstances the consultant at an approved centre who transfers his/her patient to another approved centre for necessary treatment may continue to have an involvement in decisions being made for the patient into the future, and thereby continue to be one of those consultants who can be regarded as being still responsible for the care and treatment of that patient.

59. I am certainly not satisfied that the fact that the Mental Health Commission notified the independent psychiatrist that Dr Duffy was the person to be interviewed as the consultant psychiatrist responsible can be determinative of the issue. It may well have been appropriate for that consultant to interview both Dr Cooney and Dr Duffy, but that is neither here nor there in my view. No fundamental protection to which the applicant is entitled by virtue of the Act has been denied him.

60. In my view the renewal order under which the applicant is detained in this case was appropriately signed by Dr Cooney, and accordingly his detention at the Central Mental Hospital under that order is in accordance with law.