Neutral Citation Number: [2009] IEHC 143

THE HIGH COURT

2008 2033 SS

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION

BETWEEN

A. R.

APPLICANT

AND

THE CLINICAL DIRECTOR OF ST. BRENDAN'S HOSPITAL

AND

THE MENTAL HEALTH TRIBUNAL

RESPONDENTS

AND

THE MENTAL HEALTH COMMISSION

NOTICE PARTY

JUDGMENT delivered by Mr. Justice O'Keeffe on the 24th day of March, 2009

This is an application by the Applicant seeking an inquiry under Article 40.4 of the Constitution of Ireland into his custody. The Applicant is currently detained under a Certificate and Renewal Order dated 10th December, 2008 signed by his Responsible Consultant Psychiatrist, Dr. Kevin Kilbride on 10th December, 2008. It is claimed that in respect of the said Certificate and Renewal Order (known as Form 7) no opinion is expressed by Dr. Kilbride as to whether, or on what basis, the Applicant may be suffering from a mental disorder.

Keith Walsh, Solicitor was instructed by the Mental Health Commission ("the Commission") to act on behalf of the Applicant. The Commission appointed a Mental Health Tribunal ("the Tribunal") to review the said Renewal Order which sat on 22nd December, 2008. Mr. Walsh appeared on the Applicant's behalf.

Paragraph 8 of the Renewal Order requires the Responsible Consultant Psychiatrist to tick the appropriate box which is set out in the following terms:-

In my opinion, this patient continues to suffer from a mental disorder 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

(b)(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.

OR

> (a) (as above) and (b) (as above).

Paragraph (9) required a clinical description of the person's mental condition to be given. The Responsible Consultant Psychiatrist stated:-

> "My opinion above is based on the following reasons:-
> He has not yet fully treated psychotic illness and impaired insight: community treatment is likely to be unsuccessful."

The form is signed by Dr. Kilbride and dated 10th December, 2008. At the Tribunal, Mr. Walsh submitted that Dr. Kilbride's failure to indicate in the Renewal Order that in his opinion the Applicant was suffering from a mental disorder and, if so, the basis of his opinion, meant that the Tribunal had no jurisdiction to affirm the Order because it was clearly flawed and void. He submitted that the Order could not be permitted to stand even allowing for the Tribunal's power under section 18 of the Mental Health Act 2001, because the order was defective. He referred to a previous decision of the Mental Health

Tribunal dated 2nd December, 2008 where the particular Tribunal had held that an involuntary admission order was void because the General Practitioner who had signed the recommendation that the patient in that case should be involuntarily admitted, had failed to indicate that in his opinion the patient suffered from a mental disorder.

In response to his submission, the Chairperson of the Tribunal stated that paragraph 9 of the Renewal Order appeared to indicate that the Applicant was suffering from a mental illness. Mr. Walsh submitted that paragraph 9 did not state that the Applicant reached the criteria of mental disorder as defined by section 3 of the Mental Health Act 2001. He submitted that the Renewal Order could not be corrected retrospectively by the Tribunal and objected to any action that would attempt to do so, as the order was a defective order. He stated that the Tribunal retired to consider his submission and when it resumed it stated it was satisfied that the doctor who signed the Order was clearly of the view that the Applicant was suffering from a mental disorder and that at paragraph 9 of the Renewal Order, the doctor clearly referred to the Applicant suffering from a mental disorder. He stated that this finding was made despite the fact that the Tribunal had heard no evidence from Dr. Kilbride at that point.

Mr. Walsh reserved the Applicant's position to take whatever steps as may be appropriate and the hearing continued. Mr. Walsh in his affidavit states Dr. Kilbride then gave evidence and stated that he would have ticked the box on the Renewal Order at paragraph 8(b) and described the Applicant's history and stated there was a detailed history on the file. Mr. Walsh said that Dr. Kilbride gave evidence that in his opinion the Applicant was suffering from a mental disorder on the basis of section 3(1)(b) of the Mental Health Act 2001, and asked the Tribunal to affirm the Order on that basis. The Applicant then gave evidence, he said and the Tribunal retired to make its decision. The Tribunal also had the report of Dr. Brendan Cassidy dated 19th December, 2008 who had been commissioned by the Commission pursuant to section 17 of the Mental Health Act 2001.

The decision of the Tribunal is contained in Form 8. Paragraph 6 deals with section 18(1). The Tribunal ticked the box which stated that the patient **is suffering** from a mental disorder. The Tribunal then ticked the box which states:-

> "The provisions of ss. 9, 10, 14, 15 and 16 where applicable had been complied with."

The decision of the Tribunal does not tick either of the next two boxes which provide as follows:-

> "The provisions of ss. 9, 10, 12, 14, 15 and 16 where applicable **have not been complied with** but the failure **does not** affect the substance of the order or cause an injustice."

Or

> "The provisions of ss. 9, 10, 12, 14, 15 and 16 where applicable **have not been complied with** but the failure **does** affect the substance of the Order and does cause an injustice.'"

At paragraph 7 the decision of the Mental Health Tribunal is set out. It states:-

> "Affirm the Order pursuant to section 18(1) Mental Health Act 2001."

The document entitled Record of Mental Health Tribunal proceedings provides the reasons for the decision of the Tribunal. It states, *inter alia*:-

> "1. M.H.T. is satisfied that the patient is suffering from a mental illness, requiring inpatient care and treatment within the meaning of section 3(1)(b)(i) and (ii) M.H.A. 2001.
>
> 2. On his own presentation, he clearly lacks insight and understanding of his illness or the requirement for medication or hospitalisation.
>
> 3. M.H.T. is satisfied on the evidence of Dr. Kilbride that he intended to mark paragraph 8(B)(i) and (ii) on Form 7 as he had clearly formed an opinion that the patient was suffering from a mental disorder. The failure to tick the box does not cause an injustice or affect the substance of the Order. M.H.T. relies on section 18(1)(a)(ii) and;
>
> 6. M.H.T. considered the submission that it did not have jurisdiction because of oversight on the part of Dr. Kilbride 'to tick the box' in paragraph 8 in Form 7 and found there was a sufficient indicator that the doctor believed in paragraph 9 that the patient had a mental disorder so as to confirm that we the M.H.T. had jurisdiction to consider the Order."

In his affidavit, Dr. Kevin Kilbride states that he was a Consultant Psychiatrist at St. Brendan's Hospital and was responsible for the care of the Applicant and stated that the Applicant was 23 years of age. He arrived in Ireland in January 2007 with his father with whom he had a very close relationship. They had been granted asylum status in Italy where they remained for 6 years, both parties having come from Kosovo. He says that when the Applicant arrived in Ireland in January 2007 he appeared to be mentally ill and within a few weeks was admitted to St. Brendan's Hospital in February 2007. Various orders were made securing his detention in St. Brendan's Hospital. A Replacement Renewal Order pursuant to the Mental Health Act 2008 was made on 3rd November, 2008. The Applicant unsuccessfully challenged the legality of his detention on foot of this order by proceedings under Article 40.4 of the Constitution. That Order and the detention on foot thereof was valid until the 12th December, 2008. He made a further Renewal Order of 10th December, 2008 which was to continue the Applicant's detention for a further period of 12 months. It is this Renewal Order and Certificate which is the subject of these proceedings.

He said that the Applicant has been diagnosed with paranoid schizophrenia. His illness has been characterised during his stay in hospital by delusions, hallucinations, thought disorder, markedly raised libido and hostility. His hostility and aggression required numerous periods of seclusion within the secure unit. The delusions which the Applicant suffered from include the belief that he is God and that as a result the usual moral strictures do not apply to him. Further details are set out in the affidavit and Dr. Kilbride concludes that the Applicant poses very serious risks to members of the public and

that the risk will only abate with ongoing treatment and medication. Due to his progress in taking his treatment, Dr. Kilbride did not feel that he was an immediate risk of causing serious harm to himself or others. He believed the Applicant would become such a risk within a short time period if his treatment were to stop. In these circumstances, he believed that he should be detained on therapeutic grounds rather than presenting a risk to himself or others.

Dr. Kilbride said he made the Renewal Order dated 10th December, 2008 on the grounds that he had examined the Applicant on 10th December, 2008 (he examined the Applicant twice weekly) and formed the view that he continued to suffer from a mental disorder within the meaning of the Mental Treatment Act which required his continued detention. In particular, he was of the view that because of the severity of the Applicant's illness his judgment is so impaired that failure to detain would be likely to lead to a serious deterioration in his condition and would prevent the administration of appropriate treatment that can only be given by the Applicant's continued detention. He was of the view that the Applicant continued to suffer from the psychotic illness and impaired insight which he had particularised and which was fully dealt with in the hospital notes and the previous Renewal Orders and it was his view that community treatment, that is outpatient treatment was likely to be unsuccessful. He stated that the Applicant remained very ill with his mental disorder and needed ongoing monitoring and treatment and indeed detention in order to ensure that he received such treatment and did not become a risk to the public. He confirmed as set out in paragraph 11 of the Renewal Order that the Applicant required continued detention for therapeutic reasons and he so informed the Tribunal.

In respect of the Renewal Order two further points rose during the hearing. Firstly, paragraph 11 referred to the Renewal Order being extended for a further period of 12 months commencing 12th December, 2008 and ending on 12th December, 2009. No issue is being taken on that date, which should have been 11th December, 2009.

Secondly, in paragraph 12 the date of the Renewal Order being signed by Dr. Kilbride is stated to be 10th December, 2009 whereas in fact it was 10th December, 2008. This point was not raised by Mr. Walsh at the Tribunal. It was mentioned to the High Court that it would be raised in the full High Court hearing. However, at this hearing it was not pursued by the Applicant.

An affidavit was sworn by the Chairperson of the Tribunal, which sat on 22nd December 2008, Rory de Bruir. He stated that prior to the commencement of the Tribunal the members had reviewed the section 17 Independent Report prepared by Dr. Cassidy dated 19th December, 2008 which stated at paragraph 9 that the Applicant was suffering from a mental disorder, that his judgment was severely impaired and if he was discharged he would be non-compliant, would deteriorate, would be a risk to females and could only receive the treatment he required on an order in an appropriate centre. They had also reviewed the hospital notes of the clinicians caring for the Applicant.

He confirmed that at the outset Mr. Walsh submitted the Tribunal did not have jurisdiction to review the order as Dr. Kilbride had not ticked the boxes in section 8 of the Form 7 and therefore had failed to indicate his opinion that the Applicant was suffering from a mental disorder and the Form could not be retrospectively amended. Based on this objection the Tribunal did not ask Dr. Kilbride to give evidence. The Tribunal then adjourned, considered the matter and decided it had jurisdiction to review the order and so informed Mr. Walsh.

He stated that section 18(1)(a)(ii) of the Mental Health Act 2001 allowed the Tribunal to cure defects where the defects did not cause an injustice or affect the substance of the Order. They had looked at the entirety of the Order and gave particular consideration to paragraph 9 of the Order and its wording. He stated that paragraph 9 is prefaced by the words "my opinion is based on the following reasons" which refers back to paragraph 8 which sets out the opinion. It was their view that Dr. Kilbride had clearly formed an opinion that the patient had a mental disorder, but had inadvertently failed to tick a box in paragraph 8. They had looked at paragraph 9 in the context of the section 17 report and the hospital notes. The Tribunal was of the view that the failure to mark the relevant box in section 8 of Form 7 did not cause an injustice or affect the substance of the Order and accordingly they relied on section 18(1)(a)(ii) of the 2001 Act.

A supplemental affidavit of Mr. de Bruir stated that when the Tribunal ticked the third box of section 6 of the Form 8 they did so in error. The Tribunal he said based on the decision it had reached was of the view that one of the provisions had not been complied with but the failure did not affect the substance of the Order or cause an injustice. He stated that the Tribunal should have ticked the fourth box in section 6 of the Form 8 and that this was an error on the part of the Tribunal. This box reads:-

> "The provisions of sections 9, 10, 12, 14, 15 and 16 where applicable **have not** **been complied with** but the failure **does not** affect the substance of the order or cause an injustice."

He also stated that the Tribunal read out his decision to Mr. Walsh and therefore he believed that Mr. Walsh was in no doubt about what the Tribunal had decided and the Tribunal's reliance on section 18(1)(a)(ii) to deal with the failure on the Form 7.

In cross examination Mr. Walsh agreed in his evidence that no issue was taken by him at the Tribunal hearing in relation to the insertion by Dr. Kilbride of 12th December, 2009 as the date of expiry of the period of the Applicant's detention. He said he had not adverted to the fact that the incorrect date was inserted in paragraph 12 of Form 7 by Dr. Kilbride namely 10th December, 2009 whereas in fact he knew that there was a Renewal Order made on 10th December, 2008 that was an issue in the case. He agreed that he had worked on the understanding that the Tribunal had made its decision under section 18(1)(a)(ii). He was not in a position to contradict what Mr. de Bruir had said namely that he had read their decision at the conclusion of the Tribunal hearing. Whilst Mr. Walsh stated he did not recollect the reasons for the Tribunal's decision being read out it was accepted by counsel of behalf of the Applicant that whilst Mr. Walsh had no recollection of the reasons being read out that he was not in a position to take issue with what Mr. de Bruir had sworn in his supplemental affidavit namely that the reasons were read out. In case there is any residual doubt on this issue, I accept the evidence of Mr. de Bruir in this respect which has not been materially challenged.

At the hearing, counsel for the Applicant, Mr. Coleman Fitzgerald conceded that no point was being made in relation to the incorrect date in paragraph 12 of the Renewal Order as it was a matter that could be cured by section 18(1)(a)(ii).

Relevant Legislation

Section 3 of the Mental Health Act 2001, provides as follows:-

"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."

Section 4 provides as follows:-

"(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.

(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."

Section 8(1) provides that a person may be involuntary admitted to an approved centre pursuant to an application under section 9 or 12 and detained there on the grounds that he/she is suffering from a mental disorder.

The Applicant in the instant case is the subject of a Renewal Order made under section 15(3), which provides:-

"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')."

Subsection 4 provides:-

"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."

Section 18(1) provides:-

"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."

Submissions

Mr. Colman Fitzgerald on behalf of the Applicant submitted that the failure to certify that it was the Responsible Consultant Psychiatrist's opinion that the Applicant continues to suffer from a mental disorder of either, or both, types defined by section 3(1)(a) and (b) of the Act was a fundamental breach of section 15 of the Act. Referring to the statement by the Tribunal in its decision that "there was sufficient indicator that the doctor believed in paragraph 9 (of the certificate) that the Applicant had a mental disorder" it was submitted this analysis was flawed because the doctor's statement at paragraph 9 did not, in itself, bring the Applicant within the definition of "mental disorder" as set out by section 3 of the Act.

Furthermore, the Tribunal had unlawfully made conclusions arising from the initial submissions of the Applicant, before it heard the evidence of Dr. Kilbride. He submitted there was a fundamental breach of section 15(4) because of the failure of Dr. Kilbride to certify under paragraph 8 of the Renewal Order.

In relation to section 18(1)(a)(ii), he relied on the decision of O'Neill J. in *W.Q. v. Mental Health Commission* [2007] 3 I.R. 755, where he held that only failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by a Mental Health Tribunal. The Applicant also relied on the decision of McMahon J. in *S.M. v. Mental Health Commission*, 31st October 2008, where the judge stated the approach to an interpretation of section 15 of the Act, would be that which was most favourable to the patient whilst yet achieving the object of the Act. He submitted that

there was not alone an infringement of the constitutional rights under Article 40 but, *prima facie*, an infringement of his convention rights under the European Convention of Human Rights under Articles 5 and 8. He relied on the decision of MacMenamin J. in *J.B. v. Director of Central Mental Hospital* [2007] 4 I.R. 778, which approved of the decision of O'Neill J. in *W.Q. v. Mental Health Commission* in holding that the best interests of a person suffering from a mental disorder are secured by a faithful observance of and compliance with the statutory safeguards put into the Act of 2001 by the Oireachtas and that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by such a tribunal.

He relied on the decision of Peart J. in *A.M. v. Kennedy* [2007] 4 I.R. 667, he stated that in matters involving the deprivation of liberty, the greatest care must be taken to ensure that procedures are properly followed and that it ill serves those whose liberty is involved to say that the formalities laid down by statute do not matter and need not be scrupulously observed. He referred to the comments of Hardiman J. in *M.D. v. Clinical Director of St. Brendan's Hospital* (27th July, 2007) who in considering a case where there was failure to notify a patient of the making of a Renewal Order as required by section 16 of the Act, stated that if a particular section of the Act had not been complied with that fact should be ascertained, recorded and its effect discussed. He accepted that such comments were not part of the *ratio decidendi* of the case. Counsel on behalf of the Applicant relied on *Nakach v. the Netherlands*, 30th September 2005, a decision of the European Court of Human Rights which held that despite the fact that the decision to detain an Applicant on the grounds of his mental health was justified in substance, the failure to comply with a procedural requirement under domestic law was such as to render the detention unlawful. Finally he relied on the decision in the State *Trimbole v. Governor of Mountjoy Prison* [1985] I.R. 550, where the Supreme Court held that courts have not only have an inherent jurisdiction but a positive duty (a) to protect persons against the invasion of their constitutional rights; (b) if invasion has occurred, to restore as far as possible the person so damaged to the position in which he would have been if his rights had not been invaded and (c) to ensure as far as possible that persons acting on behalf of the executive who consciously and deliberately violate the constitutional rights of citizens, do not for themselves or their superiors obtain the planned results of that invasion.

Counsel for the first named respondent, Mr. Peter Finlay, submitted that the Applicant had been assessed by two consulting psychiatrists, Dr. Kilbride in whose care the Applicant was for some 23 months with his diagnosed condition of paranoid schizophrenia and was also examined by the independent consultant appointed by the Mental Health Commission. He submitted section 4 of the Act influenced the interpretation of the Act including its application to section 18(1) and that such had been accepted by Charleton J. in *T.O'D. v. Kennedy, Clinical Director of the Central Mental Hospital and the Health Service Executive* [2007] 3 I.R. 689. With reference to the reasons by Dr. Kilbride in paragraph 9 of the Renewal Order when Dr. Kilbride said that he had not yet fully treated psychotic illness such a condition he submitted was in plain language, a severe form of mental disorder. He submitted that it was the duty of the Tribunal to be satisfied as to the existence of the mental disorder not the High Court. If the Tribunal erred in law then it could be corrected by way of judicial review. He submitted that Dr. Kilbride attended and gave his evidence and the Tribunal having heard his evidence following submissions from the Applicant's legal representative, formed the view that he suffered from a mental disorder and that such was in discharge of the Tribunal's statutory obligations.

He referred to the reasoning of O'Higgins C.J. in *the State (McDonagh) v. Frawley* [1978] I.R. 131, where the Supreme Court held that in relation to an Article 40.4 application, "in accordance with law" does not mean that a convicted person must be released on *habeas corpus* merely because some defect or illegality attaches to his detention. O'Higgins C.J. stated at p. 136 "the phrase seems to mean that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law…". A legal error or impropriety or the inadvertent exceeding of jurisdiction were insufficient. This reasoning he submitted had been accepted by Peart J. in *J.H. v. Professor Brian Lawlor, Clinical Director of Jonathon's Clinic, St James Hospital* (Unreported, High Court, 25th June 2007).

Mr. Paul Anthony McDermott on behalf of the Tribunal and the Mental Health Commission referred to the readiness of the Applicant to accept that the statement on the Renewal Order that it ended on 12th December, 2009 instead of 11th December, 2009 was not a serious defect. It was clear the doctor intended the time to be for 12 months. He submitted that the other effects now complained of were of a more minor nature. He submitted that the decision of the Tribunal which renewed the detention of a period of 12 months was manifestly in the Applicant's best interest having regard to section 4 of the Act. He referred to paragraph 3 of the Tribunal's decision when it stated it was satisfied on the evidence of Dr. Kilbride that he intended to mark paragraph 8B (i) and (ii) on Form 7 as he had clearly formed an opinion that the patient was suffering from a mental disorder. He submitted the failure to tick the box did not to cause an injustice or affect the substance of the order and accordingly he relied on section 18(1)(a)(ii). He submitted that at no stage was anyone under the mistaken impression that the Tribunal thought that section 15 of the Act had been complied with. He submitted the failure by Dr. Kilbride to tick the box was a non-compliance with section 15. The Applicant had submitted that there was a fatal flaw and that section 18(1)(a)(ii) could not be relied upon whereas the Tribunal disagreed and so decided. He relied on the comments of O'Flaherty J. in *Faulkner v. Minister for Industry and Commerce* [1997] ELR 107 where he stated that when reasons are required from administrative tribunals they should be required to give only the broad gist of the basis of their decisions. He submitted that there was a distinction between non-compliance with section 15(4) where such non-compliance was in terms of what was actually done as against non-compliance of fully recording what was done on the face of the document. He submitted that Dr. Kilbride had concluded that the Applicant was suffering from a mental disorder and his only omission was not to tick a box to record the conclusion. He submitted that there was material before the Tribunal on which it could have reached its decision under section 18(1)(a)(ii) in affirming the Renewal Order. If the issue were to be determined by way of judicial review, the test applicable was whether or not the decision of the Tribunal was rational. The decision of the Tribunal had been made in the context where all the relevant medical records were before it including the report of Dr. Brendan Cassidy, the independent Consultant Psychiatrist, who expressly ticked the box for the therapeutic ground in his report.

In relation to the order in which the Tribunal conducted its hearing by first examining the documentation, he submitted it may be that it might have been preferable to hear Dr. Kilbride's evidence at the outset. To some extent this might have arisen due to the fact that legal objection had initially been taken on behalf of the Applicant as to the completion of the forms. Ultimately, he submitted the Tribunal had all necessary evidence before it including that of Dr. Kilbride before reaching his decision. What is critical is the decision of the Tribunal including the matters it took into consideration and the evidence heard by it.

Conclusion

In coming to my judgment I think it is appropriate to refer to the decision of Charleton J. in *T.O'D.* where he states:-

"25. 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 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 that person. I note that section 4(2) specifically requires that the patient, or proposed patient, should be heard and that his or her rights should be considered in making any decision under the Act. It may be argued that the principle of *audi alteram partem* would be implied in any event into section 18(1) but that, it appears to me, is not of itself sufficient answer to a specific statutory provision that is designed to bring to the attention of non legal personnel who are administering a form of detention, the fundamental principles upon which their decision-making should pivot. In addition, any possibility that medical people might ignore the rights of a patient to such matters as dignity, bodily integrity, privacy and autonomy are also given prominence under section 4(3) of the Act by requiring these to be addressed. These principles apply to all aspects of patients care in this context. I could not hold that a Mental Health Tribunal, which is set up by the Mental Health Commission, itself specifically charged with ensuring that the best interests of mental patients are upheld, would be entitled to make any decision without bearing in mind the interests of the person whose treatment is at issue and the risks of those who may be harmed in consequence. Were it to be the case that a Tribunal set up under section 18 had ignored the rights of such a patient, then this court, on a judicial review application, would have authority to intervene. The Mental Health Tribunal under section 18 is acting as an integral part of the scheme of protection of patients, and prospective patients, under the Mental Health Act, 2001. They are reporting to the Mental Health Commission which is charged with the maintenance of the best standards in the psychiatric care of patients. It is, pursuant to the statutory scheme, a branch of that body and, although its function is limited, in reporting to the Mental Health Commission it is assisting that body in fulfilling its statutory function. Finally, a decision under section 18(1) cannot be construed as anything other than one which has the result that a person must continue in care as a patient or may be discharged as someone who has been found, on a review of the evidence and documents, not to be suffering from a mental disorder. It would be wrong, and completely contrary to the scheme whereby the Mental Health Tribunal fits into the administration constructed by the Mental Health Act, 2001, to regard such a decision as being anything other than one which concerns the care or treatment of a person.

26. Section 18(1) of the Mental Health Act, 2001 specifically mentions ss. 9, 10, 12, 14, 15 and 16 and then excuses a failure to comply with such provisions provided that failure does not affect the substance of an order detaining a patient and does not cause an injustice. The Act is, on occasion, specific in its terms in referring to subsections when this is required and, at the other end of the spectrum of statutory construction, setting out broad principles as aims to be pursued by the Mental Health Commission and, as we have just seen under section 4, by those administering the Act. I have no doubt that in referring to these sections that concern the administration of involuntary detention, section 18(1) refers to the entirety of them and not simply to more minor matters as to typing, time or procedure. I would hold that the purpose of section 18(1) is to enable the Mental Health Tribunal to consider afresh the detention of mental patients and to determine, notwithstanding that there may have been defects as to their detention, whether the order of admission or renewal before them should now be affirmed. In doing so, the Mental Health Tribunal looks at the substance of the order. This, in my judgment, means that they are concerned with whether the order made is technically valid, in terms of the statutory scheme set up by the Act or, if it is not, whether the substance of the order is sufficiently well justified by the condition of the patient.

27. In this regard, the Mental Health Tribunal was entitled to have regard to the fact that Mr O'D. was at all material times suffering from a serious psychiatric illness which required that he should be treated and which treatment was of assistance to him and to the community. In addition, they were obliged, in my judgment, to have regard to the fact that if the Applicant had been discharged, which would have been the effect of their refusal to uphold the order, the Applicant himself would have been at immediate risk from his paranoid delusional fantasies as would those with whom he might come into close contact. I would specifically hold that the purpose of section 18(1) of the Act is to enable the Tribunal to affirm the lawfulness of a detention which has become flawed due to a failure to comply with relevant time limits.

28. That, however, is not the end of the matter. An injustice can be caused by a reckless failure to fulfil the statutory scheme, either as regards the time limits set out in the relevant sections or through ignoring the dignity of the patient or in failing to make decisions concerning his or her care which have, as the principal consideration, the best interests of that person with due regard being given to the interest of those other persons who may be at risk of serious harm if a decision to detain is not made. If, for instance, a person were to be warehoused, without any proper review, and without any genuine attempt to comply with the statutory provisions of the Mental Health Act, 2001 that would constitute an injustice, notwithstanding that the substance of the orders earlier made, but long elapsed, were valid. As to what other examples of injustice, within the meaning of section 18(1) of the Mental Health Act, 2001 might arise, that is a matter for decision should any later cases arise. The ordinary remedy, however, where there is an issue as to the appropriateness of a time limit and compliance with the other statutory norms, is to bring the matter before the Mental Health Tribunal. The High Court in exercising its jurisdiction under Article 40.4.2 has a much more limited function in simply declaring, at any particular point in time, whether someone is or is not lawfully detained. It does not have the powers of the Mental Health Tribunal set out in s. 18(1). It can review its decisions but I do not see that this would be either appropriate or necessary if the statutory scheme is followed."

In *J.H. v. Professor Brian Lawlor* (above referred to) Peart J. was required to consider sections 23 and 24. He found as a matter of fact that the Tribunal did not rely in that case on its powers under section 18(1). He stated at p. 11:-

"I have no doubt that a purposive approach to interpretation of the Act, consistent with its paternalistic and protective nature, must be adopted by this Court when reviewing the lawfulness of a patient's detention thereunder. That is not the same as stating that when errors are made they may always be overlooked if the interests of the patient so require, due regard having been also had to the interests of other persons who may be at risk of serious harm if he/she were to be released."

Continues at p. 12 stating:-

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

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

In relation to the complaint that the Tribunal firstly looked at the documentation and stated that they were satisfied that Dr. Kilbride was of the view that the Applicant had a mental disorder before hearing the evidence of Dr. Kilbride, whilst it may be more preferable from an order point of view at the hearing to hear firstly the evidence of Dr. Kilbride, it did not constitute a fundamental flaw in the process as the Tribunal before it gave its decision, heard the evidence of Dr. Kilbride. Paragraph 3 of the decision records fully the consideration given by the Tribunal to the evidence of Dr. Kilbride and the Tribunal's conclusions in relation to such evidence having had access to all relevant documents and having completed the entirety of the hearing. The Tribunal specifically addressed section 18(1)(a)(ii) and considered the relevant issues under the section. It had evidence on which to reach the conclusions it did in relation to its decision.

I find the reasoning of Charleton J. in *T.O'D. v. Kennedy* more persuasive than that of O'Neill J. in *W.Q. v. Mental Health Commission* in relation to the interpretation and application of section 18(1). Neither of the cases relate to section 15(4) and the consequences of any non-compliance with such section. In my opinion, section 18(1) is not confined in its application to minor matters such as the forwarding of notice to the patient or the preparation of documentation to the Commission. Section 18(1) is capable of application to section 15(4) in circumstances such as arose in this case, where Dr. Kilbride failed to complete the forms specified by the Commission because he omitted to tick one of the boxes in paragraph 8 of the Form 7. In my opinion, the failure to comply with section 15(4) in this limited respect does not affect the substance of the order. Furthermore, the condition of the Applicant as determined by the Tribunal is such that no injustice would be caused to the Applicant if the order is affirmed. It is equally consistent with the application of section 4 namely that affirming the order is in the best interest of the Applicant having regard to his mental condition as determined by the Tribunal, having heard the evidence of Dr. Kilbride and having had the report of the Consultant Psychiatrist appointed under section 17(1), Dr. Brendan Cassidy. The decision of the Tribunal can also be viewed as having due regard to the interests of other persons who may be at risk of serious harm, having regard to the evidence of Dr. Kilbride, if the decision is not made.

In my opinion, the Tribunal acted lawfully and was entitled to apply section 18(1)(a)(ii) in the manner it did. For these reasons, I am satisfied that the Applicant is detained in accordance with law, and I refuse the application for his release.

There are two additional matters to which I wish to refer. I have found no assistance from the case of *Nakch v. Netherlands* referred to by the Applicant. The Applicant's case is decided under domestic law.

Secondly, so far as a complaint was made at the initial stages in relation to the Tribunal's refusal to take account of a previous decision of another Tribunal hearing, the matter was not pursued to any great extent at the hearing save for recording what had happened. In any event, I agree with the views put forward in opposition that such decisions were of no relevance in circumstances where the full facts and evidence were not known. The Tribunal Chairman said on affidavit the Tribunal took the view the case was not relevant, involved different considerations and there was no onus of the Tribunal to follow a decision of another Tribunal.