

THE HIGH COURT
JUDICIAL REVIEW

2007 816 JR

BETWEEN

E. F.

APPLICANT

AND

THE CLINICAL DIRECTOR OF ST. ITA'S HOSPITAL

RESPONDENT

JUDGMENT delivered by Mr. Justice O'Keeffe on 21st day of May, 2009

1. On 2nd July, 2007 the Applicant was granted leave by the High Court to apply by way of an application for judicial review for the following reliefs.

(i) A Declaration that the application was on 24th April, 2007 removed to St. Ita's Hospital otherwise then in accordance with the provisions of the Mental Health Act 2001 and in particular Section 13(2) thereof.

(ii) A Declaration that the First Named Respondent acted *ultra vires* those powers conferred on him by the Mental Health Act 2001 and in particular Section 13(2) thereof in arranging for the Applicant to be physically restrained and removed to St. Ita's Hospital on 24th April, 2007 by person not members of the Hospital's staff.

(iii) A Declaration that the manner in which the removal of the Applicant was effected and/or the purpose thereof communicated to the Applicant occurred without reasonable care on the part of the Respondent nor otherwise in accordance with law and in the circumstances that prevailed in this case the breach of both the Applicant's Constitutional Rights and those rights available to her pursuant to the European Convention on Human Rights in particular her rights to liberty to freely associate to privacy and to bodily integrity.

(iv) An Order providing for the Applicant's costs.

(v) Such further or other relief as this honourable court considers appropriate.

2. The grounds upon which relief was sought stated as follows:-

(i) "Removal of persons to approved centres

13.-(1) Where a recommendation is made in relation to a person (other than a recommendation made following an application under section 12), the Applicant concerned shall arrange for the removal of the person to the approved centre specified in the recommendation.

(2) Where the Applicant concerned is unable to arrange for the removal of the person concerned, the clinical director of the approved centre specified in the recommendation or a consultant psychiatrist acting on his or her behalf shall, at the request of the registered medical practitioner who made the recommendation, arrange for the removal of the person to the approved centre by members of the staff of the approved centre. [Emphasis added]

(3) Where the clinical director of the approved centre or a consultant psychiatrist acting on his or her behalf and the registered medical practitioner who made the recommendation are of opinion that there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, the clinical director or a consultant psychiatrist acting on his or her behalf may, if necessary, request the Garda Síochána to assist the members of the staff of the approved centre in the removal by the staff of the person to that centre and the Garda Síochána shall comply with any such request.

(4) Where a request is made to the Garda Síochána under subsection (3), a member or members of the Garda Síochána may –

(a) enter if need be by force any dwelling or other premises where he or she has reasonable cause to believe that the person concerned may be, and

(b) take all reasonable measures necessary for the removal of the person concerned to the approved centre including, where necessary, the detention or restraint of the person concerned."

(ii) Following the Respondent deciding that the Applicant should be moved to St. Ita's Hospital, Portrane, County Dublin, the Respondent thereupon, without regard to the terms of the Act which are clear on their face and without reasonable care (should the establishment of same be necessary), procured the arrest and detention of the

Applicant by an entity eventually identified to the Solicitor for the Applicant as "Nationwide Health Solutions Limited". The foregoing entity, its servants and agents at the request of the Respondent, physical restrained and engineered the removal of the Applicant from a point outside of a restaurant in Howth, County Dublin to St. Ita's Hospital, Portrane in the circumstances more particularly set out in the verifying Affidavit filed herewith.

(iii) Following upon correspondence sent by the Applicant's solicitor to both the Respondent and the Mental Health Commission, it became apparent that a Mr. Jim Neville was Nationwide Health Solutions Ltd's "Assisted Admissions Team Leader" who brought the Applicant to St. Ita's. There at the hospital, the Applicant was "received" and "taken charge of" by members of staff of the approved centre, to use the language of the Nationwide Health Solution's Report/Handover of Care form. It appears that there were other members of this "Admissions Team" who assisted Mr. Neville in the physical removal of the Applicant, although the identities of such other persons have not been divulged.

(iv) Neither the aforesaid Limited Liability Company nor Mr. Neville nor any other individual forming part of his "Team" were, at the times material hereto, "members of staff of the approved centre" within the meaning of the Act.

(v) notwithstanding her ability to understand and appreciate such matters on the occasion in question, the Applicant herein was given no or no adequate reason for her removal nor told of the purported lawful basis for same nor the identity of those detaining her nor their (purported) authorisation for so doing.

(vi) In consequence the arrest/detention and restraint of the Applicant procured by the Respondent herein was in breach of a duty owed to the Applicant, and was set in train without reasonable care and otherwise then in accordance with law.

3. The solicitor to the Applicant Ms. Shalom Binchy set out facts concerning the Applicant as follows:-

(i) On 24th April, 2007 an application pursuant to Section 9 of the Mental Health Act 2001, (hereafter referred to as the "2001 Act") was made by the Applicant's brother for a recommendation that she be involuntarily admitted to an approved centre. The recommendation for such a detention was duly made by a registered medical practitioner.

(ii) At 12.30am on the morning of 25th April, 2007 an Involuntary Admission Order in respect of the Applicant was signed by Dr. Malcolm Garland, a Consultant Psychiatrist at St. Ita's Hospital, Portrane.

(iii) The Applicant's solicitor was appointed by the Mental Health Commission to represent the Applicant at a Mental Health Tribunal hearing on 11th May, 2007.

(iv) Prior to the Tribunal hearing, the Applicant stated that she had been forcibly detained by persons on the evening of 24th April having just left a restaurant in Howth. She said that she was most unhappy at the nature of her removal to St. Ita's Hospital. She gave evidence at the hearing that she was "bundled" and "man-handled" into a car having left the restaurant in Howth and that she was bruised as a result. The individuals responsible did not identify themselves and she did not know who they were. It was never explained to her where she was being taken and why. Her solicitor commented the experience appeared to have been very traumatic for her.

(v) The Applicant's solicitor was aware that Section 13(2) of the 2001 Act provided that the Clinical Director of the approved centre specified in a recommendation shall, at the request of the registered medical practitioner who made the recommendation, arrange for the removal of the person to the approved centre by members of the staff of the approved centre. The solicitor at the hearing by the Tribunal raised questions to ascertain who had been responsible for the physical removal of the Applicant to the hospital. She stated these questions were never fully or definitively dealt with. Dr. Maria Moran, the Applicant's treating Consultant Psychiatrist mentioned that she believed "Assisted Admissions" were responsible and Dr. Fiona Fenton, Tribunal Member and Consultant Psychiatrist also speculated on this point but no one could say who had been responsible for same. The solicitor said that this was the first time she became aware of an "Assisted Admissions" procedure and of the possible involvement in the removal of the Applicant to St. Ita's Hospital, persons who might not be members of the staff of the approved centre, as provided for in the Act.

(vi) The solicitor then submitted that the Tribunal could not be satisfied that the provisions of the Act in relation to the Applicant and her removal had been complied with and therefore the Admission Order should be revoked. She said that in the majority decision of the Tribunal, this submission was not addressed, and the Admission Order was affirmed.

(vii) On 18th May, 2007 she wrote to the Chief Executive Officer of the Mental Health Commission requesting him to furnish her with the details of the persons responsible for the removal of her client to the approved centre and confirmation of whether each and every person involved was at the time a member of staff of St. Ita's Hospital. However, she was told to write to Dr. Richard Blennerhassett at St. Ita's Hospital and Mr. Pat Dunne, Local Health Manager, Health Service Executive, St. Ita's Hospital which she duly did requesting the same information. In particular, she requested confirmation of whether the admission and removal to St. Ita's involved the participation of any independent agency contracted in by St. Ita's. If such an agency was retained, confirmation was sought of the terms and conditions of such retention.

(viii) The solicitor was appointed by the Mental Health Commission to represent the Applicant at a Mental Health Tribunal hearing on 1st June, 2007 and again this issue was raised by her. The Tribunal affirmed the Renewal Order.

(ix) Dr. Blennerhassett replied by letter dated 8th June, 2007 and stated that the circumstances in relation to the Applicant's condition was such that the Applicant's brother who applied for her involuntary admission was unable to arrange for her removal to St. Ita's Hospital and the registered medical practitioner who had made the recommendation for involuntary admission contacted St. Ita's Hospital for assistance in the removal of the Applicant to such hospital. He said the Consultant Psychiatrist on duty initiated procedures to arrange for the removal of the Applicant to St. Ita's Hospital. In accordance with procedure in place in St. Ita's Hospital she contacted the Assistant Director of Nursing on duty that day who as part of his role acted as co-ordinator of assisted admissions. He said the Assistant Director of Nursing followed the procedures that had been put in place by the Health Service

Executive in respect of the use of assisted admissions service provided for by Nationwide Resolutions Limited. Enclosed with the letter was documentation on the admission of the Applicant and copies of Policies and Protocols regarding Assisted Admissions.

(x) The information supplied by St. Ita's Hospital stated that at 16.30hrs on 24th April, 2007, a request for an Assisted Admission was made by the Consultant Psychiatrist and received by the Assistant Director of Nursing, Mr. Martin Bray, who was Co-ordinator of Assisted Admissions on that day. At 16.50hrs the request for Assisted Admissions was faxed to Nationwide Health Solutions, Santa Maria House, Newhall, Naas, Co. Kildare. There was a Risk Assessment Tool requested of the registered medical practitioner which was duly returned to St. Ita's Hospital and faxed with other documents to Nationwide Health Solutions team leader, Mr. Neville. The Applicant arrived at St. Ita's Hospital at 20.15hrs and was accompanied by Nationwide Health Solutions Team (team leader, Mr. Jim Neville).

(xi) On 12th June, 2007 the Mental Health Commission informed the solicitor that the Health Service Executive by way of public tender issued a request for proposals for an Assisted Admissions Service for the mental health service in 2006.

4. Following receipt of this information and documentation from Dr. Blennerhassett and the Mental Health Commission, the applicant commenced the preparation of the papers for this application which was heard by the High Court on 2nd July, 2007.

5. In the Statement of Grounds of Opposition, the Respondent by way of preliminary ground contended that the application was not made properly within the meaning of Order 84, rule 21 of the Rules of the Superior Courts 1986, as amended. The Respondent acknowledged that the registered medical practitioner on 24th April, 2007 requested the Consultant Psychiatrist at St. Ita's Hospital for the removal of the Applicant to St. Ita's Hospital by members of the staff of the hospital pursuant to Section 13(2) of the Mental Health Act 2001. The Respondent asserts that it made arrangements on 24th April, 2007 for the removal of the Applicant to St. Ita's Hospital by:-

(a) contacting Nationwide Health Solutions in accordance with the procedures and protocols of St. Ita's Hospital with the view to engaging their possible assistance in the removal of the Applicant to St. Ita's Hospital,

(b) Instructing Martin Bray, Assistant Director of Nursing in St. Ita's Hospital and at a later time, Mary Murphy, Acting Clinical Nurse Manager at St. Ita's Hospital, the co-ordinators of assisted admissions to St. Ita's Hospital during the process of implementation of the procedures and protocols for the removal of the Applicant to St. Ita's Hospital.

(c) Furnishing a copy of St. Ita's Hospital Risk Assessment Tool to the registered medical practitioner for completion.

(d) Considering the Risk Assessment Tool completed by the registered medical practitioner.

(e) Furnishing all relevant documentation and information to Nationwide Health Solutions concerning the request for their possible assistance in the removal of the Applicant to St. Ita's Hospital.

(f) Requesting the assistance of Nationwide Health Solutions in the removal of the Applicant to St. Ita's Hospital and

(g) Taking charge of the Applicant upon her arrival at St. Ita's Hospital for the purposes of carrying out an examination of the Applicant pursuant to Section 14 of the Mental Health Act 2001.

6. It was contended that the decisions and/or actions and/or conduct of the Respondent, his servants or agents in and about the removal of the Applicant to St. Ita's Hospital on 24th April, 2007 were, *intra vires*, the provisions of the Mental Health Act 2001 and in particular Section 13(2) thereof. It is also contended that the decisions and/or actions and/or conduct of the Respondent were *intra vires*, the provisions of the Health Act 2004 and in particular Section 38(1) and Schedule 1 thereof. It was contended save to the extent expressly admitted by the Statement of Opposition the Respondent denied the factual matters averred in paragraph (e)(i) to (vi) inclusive of the Applicant's amended Statement Required to Ground Application for Judicial Review.

The Respondent contended that the actions and/or conduct of himself, his servants or agents in and about the removal of the Applicant to St. Ita's Hospital on 24th April, 2007 were lawful, valid and a proper discharge of his duty.

7. An affidavit was sworn by Anthony Leahy, National Planning Specialist Mental Health, Health Service Executive. He explained the circumstances in which Nationwide Health Solutions had become involved in assisting in the transfer of persons with a mental disorder to hospitals for treatment. He explained that there had been a number of incidents where Health Service Executive staff were seriously injured when assisting in the removal of persons with a mental disorder to hospital for medical treatment and that there had been instances where psychiatric nurses had been injured by such persons in the course of being removed to hospital. A working group had been set up on how best to structure assisted removal of persons with mental disorders to hospital and a working group have recommended the provision of a compensation scheme for health personnel involved, who were injured in the course of an assisted removal to hospital. Whilst this scheme had not been set up, the Health Service Executive on an interim basis had entered into an arrangement with Nationwide Health Solutions to supply properly qualified and experienced health personnel to supplement the number of health personnel necessary for a particular assisted admission to hospital. Nationwide Health Solutions was a reputable company providing a wide range of health related services and health personnel to the Health Service Executive on a continuous basis. The Health Service Executive discharges its statutory duty to provide health and related social services to the community by providing those services directly, or of by funding the provision of those services. St. Ita's Hospital had a broad range of health personnel involved working there. There were persons who were employed full time by the Health Service Executive to work there. There were part-time employees who worked there and at other separate locations and unconnected places of work and there were also independent contractual personnel who provide a

range of services on a periodic basis in the hospital complex and also in the external catchment area of the hospital.

8. He believed that the term "staff" in St. Ita's Hospital in the context of an assisted mission to that hospital meant a person under the continuous command and control of that hospital in relation to the work or service they are doing for the hospital. He said that at that time there was a variable mix of involvement of full time employees of the Health Service Executive and health personnel supplied by Nationwide Health Solutions who were involved in the assisted removal of persons with a mental disorder to hospital. He said the assisted removal of a person with a mental disorder to hospital for treatment is a carefully considered, planned and risk assessed process. Throughout assisted removal to hospital there was a senior Health Service Executive official in continuous command and control of this removal, the operational decisions and instruction are continuously given by this individual from the commencement to the completion of the process. In consultation with the Respondent or in appropriate circumstances with a consultant psychiatrist in the hospital the assistant Director of Nursing in St. Ita's Hospital will take charge of the planning, risk assessment and the carrying out of an assisted admission to the hospital. The assistant Director of Nursing will put an appropriate team of health personnel together to safely complete an assisted admission to hospital. He said that the personnel involved in the assisted admission of the Applicant, included four people supplied by Nationwide Health Solutions, three of those were registered psychiatric nurses with appropriate experience and the fourth was the driver of the vehicle used to transport the patient. The name and qualifications and experience of each of the nurses involved was given. He said that James Neville, the Team Leader was a qualified psychiatric nurse and was the person in contact with St. Ita's Hospital at all material times. He referred to the "Protocol for Assisted Admissions to Approved Centres" issued by the Health Service Executive.

9. In his affidavit Dr. Blennerhasset describes that when a decision is made by a consultant psychiatrist for an assisted admission he would seek a completed risk assessment tool from the registered medical practitioner. In some instances the Garda Síochána will be involved, in other cases the ambulance service of the Health Service Executive or the Dublin Fire Brigade, or a private ambulance or in those such as the admission of the applicant, personnel from Nationwide Health Solutions were involved.

10. In assisted admissions the Assistant Director of Nursing at St. Ita's Hospital would make contact with Nationwide Health Services of a possible request for their assistance in the removal of a person to St. Ita's Hospital. The Assistant Director of Nursing at St. Ita's Hospital acted as co-ordinator of all information, from the time of removal of the person to St. Ita's Hospital up to and including their arrival in St. Ita's Hospital. The Assistant Director of Nursing will continuously liaise with all persons involved and will ensure that the directions of the Consultant Psychiatrist are completed. At all times the Assistant Director of Nursing was in continuous contact with all the personnel involved in the removal of persons to St. Ita's Hospital. It was a planned and managed process throughout. Upon arrival at St. Ita's Hospital, he said the personnel involved in the assisted removal of a person to the hospital completed a handover care form and a report on the removal. He referred to a protocol he had established setting out the admission policy of St. Ita's Hospital. The policy exhibited was that in force in September 2007. It was in the same terms, though in draft form as that in operation on the 24th April, 2007. As part of this document is attached an Assisted Admission Flow Chart under the heading "Nationwide Healthcare Solutions" details Team Leader responsibilities (of Nationwide Healthcare Solutions) and states, inter alia, "The Team Leader retains the responsibility during all stages of the assisted admission including any period where the patient is being transported, in the HSE ambulance. The team leader on arrival in the approved centre shall verbally brief and present a copy of the patient's Handover Form to the co-ordinator (of the approved centre) . . . The Assisted Admission Team must retain responsibility for the care and well being, until the patient has been assessed by the RMP or until the co-ordinator is satisfied that appropriate Risk Management Measures are in place".

The Applicant's Submissions

11. On behalf of the Applicant, Mr. Feicin McDonagh, S.C., submitted that there was no definition in the 2001 Act, of the word "staff" as used in Section 13(2) or of the phrase "members of the staff of the approved centre". The word "staff" though not defined appeared in Sections 8(3), 9(2)(c), 10(3)(b), 14(1) and (2) and 23(1). It was submitted that the "Assisted Admissions Service" personnel provided by Nationwide Health Solutions Limited and its personnel appeared to constitute an independent private contracting entity and that none of its members constituted "staff" of St. Ita's within the ordinary understanding of that term. Reference was made to the description by Mr. Leahy in para. 15 of his affidavit described such arrangements with Nationwide Health Solutions as "independent contractual health personnel". It was submitted that the engagement of Nationwide Health Solutions Limited was an interim arrangement between the Health Service Executive and a private undertaking until negotiations with trade union representatives of actual members of staff or approved centres have concluded to enable such service by staff of St. Ita's to be resumed. It was submitted that Mr. Leahy's opinion as expressed in para. 16 of his affidavit, of what the term "staff" of St. Ita's Hospital meant in the context of an assisted admission to the hospital a person under the continuous command and control of that hospital in relation to the work or service they were doing for that hospital, was not satisfied on the facts of the case or provided for by the very specific terms of Section 13(2).

12. At the outset counsel on behalf of the applicant indicated that the applicant was seeking nominal damages. The case was not made that the applicant's detention was unlawful. He submitted that a company paid to provide a service is not a member of staff. He referred to the statutory scheme in operation and to the Mental Health Act 1945, as amended whereby the resident medical superintendent could arrange for an escort to be arranged by the resident medical superintendent or a member of the An Garda Síochána if such escort is necessary.

13. He referred to the Mental Health Act 2001, (Approved Centres) Regulations 2006 (S.I. No. 551/2006), which Regulations were made by the Minister pursuant to ss. 5(1) and 66(1) of the 2001 Act. Part 5 of such Regulations prescribe requirements as to the staffing including requirements as to the suitability of members of staff of centres. It was submitted that if the Respondent did not know the identity of the persons who were engaged in the assisted removal of the applicant, it was difficult to say that there was conformity with such Regulations.

14. He referred to the decision in *R.L. v. The Clinical Director of St. Ita's Hospital and Ors* (Unreported, Supreme Court, 15th February, 2007), where the Supreme Court ultimately dismissed an application/appeal pursuant to Article 40 of the Constitution without dealing with the substantive merits of the case. In that case, a breach of s. 13(2) in relation to "members of staff" was pleaded. Although not deciding the case on this point, the court said at pp. 4-5:-

"The court has to agree that there is, on the base of it a breach of s. 13(2), I say nothing about the other sections because there may be some evidence of factual excuse..."

And at p. 7:-

"We will repeat, as was said by this court in the previous case of M.D. that that is a scheme of protection and a very elaborate and very necessary scheme of protection because of course, everybody, even from general knowledge, is aware of the serious misuse of the provisions to detain people in mental hospitals which have taken place in fairly recent times in others jurisdictions, and is aware also of the judgment of the former President, Mr. Justice Costello, condemning the procedures formally in place in this jurisdiction and mandating the establishment of a firm scheme or regime of protection."

He also referred to p. 8 of the judgment where Hardiman J. stated:-

"The last thing we will say is that this is a case that turns on a very narrow ground. We have not found it necessary to go into the facts or indeed to call on Mr. McElroy, S.C. or Mr. O'Neill, S.C. simply because we are satisfied that even assuming the breaches of s. 13 to have occurred, we see no reason to believe that it would invalidate the making of an admission order under section 14. That is not to say that we excuse or draw a veil over the alleged breaches of section 13. On the contrary, we will say that these breaches if they occurred, are serious matters and that a person in the position of a Clinical Director may be in a very difficult position and according to Dr. Condon's affidavit was, on this occasion in a very difficult position, in that a removal was required to be affected pursuant to s. 13 but this simply was not physically possible. We have no reason to disbelieve what she says in this regard – she had no resources to effect it by members of the staff. Now that is a serious matter which requires discussions with those responsible for the legislation. But of course we must say that even if the provisions of s. 13 are impractical, those affected by it must comply with it and Mr. Finlay's client certainly has rights in the event of her being able to establish these breaches...and we do not wish it to be thought, that the court is in anyway excusing any breaches of s. 13 that may have occurred."

15. He referred to the high standards imposed on the persons administering the Act as set out by Peart J. in *A.M. v. Kennedy and Ors* (Unreported, High Court, 24th April, 2007):-

"In matters involving the deprivation of liberty, and I place persons such as the applicant who are ill in no lesser a position than other persons whose liberty is in other circumstances curtailed or removed, the greatest care must be taken to ensure the procedures are properly followed, and 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. This is not to say that when the meaning of a statutory provision is unclear or open to different interpretation the meaning which is consistent with the purposive interpretation of the institutive intention is not one which will be adopted. This is a different consideration."

16. He also referred to *W.Q. v. The Mental Health Commission and Ors* (Unreported, High Court, 15th May, 2007) where Mr. Justice O'Neill stated:-

"In my opinion, 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 2001 Act, by the Oireachtas."

17. He also referred to *P. McG. v. The Medical Director of the Mater Misericordia Hospital and Ors* (Unreported, High Court, 29th November, 2007), where Peart J. discouraged a slack approach to the observance of the requirements of the legislation whose very purpose it was to put in place a regime of statutory procedures for the protection of vulnerable persons against involuntary, unlawful detention. He stated that the protections put in place are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in to which the Act is operated.

18. In relation to a preliminary point being taken by the Respondent, namely that the application had not been brought "promptly" it was submitted that time should not run from the 24th April, 2007, but when the applicant had an opportunity to assess the replies of the Respondent and the further information which was only sent by letter dated the 8th June, 2007. It was submitted that following that date consideration of documents that the applicant move promptly bringing her application to the 2nd July, 2007.

19. In response to the Respondents submission that as the applicant was no longer detained that the subject matter of her complaint raised is moot. He submitted that on the authority of *Condon v. Minister for Labour and the Attorney General* [1981] 1 I.R. 62, and *O'Brien v. The Personal Injuries Assessment Board* [2007] 1 I.R. 328, the matter was not moot and that the applicant had a real interest in having the matter determined and if successful, a declaration given. There was, he said, a real possibility that in the future the applicant would have to institute proceedings on the same or a similar point, therefore, the matter had importance for the applicant. He said a harmonious interpretation is required for all references to the "Staff of the approved centre". He said that she was entitled to nominal damages to complement a declaration if necessary.

Submissions of Respondent

20. Mr. Felix McEnroy, S.C. on behalf of the defendant submitted that though the application had been brought within the three month period, the applicant had not acted promptly and referred to the timetable of events. He further submitted that the Statement Required to ground application did not refer to damages being sought as a relief. He referred to O. 84, r. 24 which requires that damages can be awarded if included in the statement in support of the application and provided that the court is satisfied that if the claim had been made in civil action against the Respondent begun by the applicant at the time of making his application he would have been awarded damages. He referred to s. 73 of the 2001 Act, which set out the circumstances in which proceedings could be instituted in respect of an Act done in pursuance of the Act. He also referred to *McCormack v. An Garda Síochána Complaints Board* [1997] 2 I.R. 489, where Costello P. set out the principles governing applications to amend statements of grounds. He submitted that the dispute in the instant case has ceased to be of practical significance. The declaration should not be granted, and he relied on *Hallsburys Laws of England* (4th Ed.) reissue Vol. (1) *Administrative Law* at para. 163. He submitted that the matter is moot now in the context of these proceedings.

21. He submitted that the effect of the applicants submissions were that the Act became unworkable. The applicant was in effect carrying out a war against the outsourcing of services. He submitted that the control of the exercise of removing the applicant to St. Ita's as set out in the affidavits of Dr. Blennerhassett and Mr. Leahy. He submitted the applicants submission that persons involved the removal of the applicant to St. Ita's were employed by Nationwide Health Solutions and were, therefore, not "members of the staff of the approved centre" was incorrect in law because:-

(1) The 2001 Act does not define the term "staff" in its provisions.

(2) The definition of the term "staff" in s. 13(2) of the 2001 Act is a question of fact.

(3) The applicant advances no statutory, or other definition of the term "staff" in the 2001 Act other than the claim that the three psychiatric nurses and the driver concerned were not "staff" within the meaning of s. 13(2) of the Act, and

(4) The Respondent submits that the three psychiatric nurses and the driver were "staff" within the meaning of s. 13(2) of the Act.

(5) The provisions of s. 38(1) of the Health Act 2004, as amended provided an express statutory power to the HSE to "enter, on such terms and conditions as it considers appropriate, into an arrangement with the person for the provision of a health or personal social service by that person on behalf of the Executive.

22. He submitted that in regard to the number of locations in the Act where the term "staff" appears and yet it is not defined in the legislation suggests that this absence of a definition was intended deliberately by the Oireachtas.

23. He referred to the decision in *M.M. v. Clinical Director of the Central Mental Hospital* (Unreported, Supreme Court, per Geoghegan, 7th May, 2008). He also relied on this authority for submitting that it was a question of fact in each individual case as to whether a person was a member of the "staff" or not.

24. Reference was made to an Australian case *Johns v. Australian Securities Commission* [1992] FCA 169 per Heery J. at pp. 11-13 and at appeal at [1992] FCA 288 per Black C.J. at pp. 25-28. Reference was made to para. 53 of the judgment of first instance which considered a statutory provision which provided that:-

"The Commissions staff shall be persons appointed or employed under the Public Service Act 1922."

25. The trial judge, in that case, found that the provision was not a definition of the term "staff" of the Commission, but rather a stipulation of a particular qualification that staff are to hold. He agreed that the words "staff" as used in the legislation was not a term of art and had no particular technical meaning. He said that that word is frequently used to include persons who might be absent from their place of employment perhaps for some considerable time and perhaps without pay and that such a person would ordinarily be regarded as still being on the staff of their employer.

26. It was submitted, the applicant advances no statutory or other definition of the term "staff" other than the claim that the three psychiatric nurses and the driver concerned were not "staff" within the meaning of s. 13(2) of the Act.

27. The Respondent submitted that three psychiatric nurses and the driver were "staff" within the meaning of the section. He submitted that the evidence set out in the affidavit supported this conclusion. It was submitted that the word "staff" in s. 13(2) is a broad term that is, a word or a phrase in an enactment which in its application to certain factual situations is vague and therefore ambiguous. As with any form of statutory ambiguity, the meaning of the term is to be applied in relation to the particular facts is determined by reference to the interpretative criteria. The concept "of staff" s. 13(2) would take account of the nature of the services provided, the nature of the employment of the personnel involved in the provision of those services and the statutory context in which those services are sought to be provided.

28. Reliance was also placed on the provisions of s. 38(1) of the Health Act 2004, as amended which provide an express statutory power to the Health Service Executive to "enter, on such terms and conditions as it considers appropriate, into an arrangement with a person for the provision of a health or personal social service by that person on behalf of the Executive". Reference was made to s. 75 of the Health Act 2004, and Schedule 7 to that Act which amends all references in the 2001 Act to take account of the new statutory agents. Section 59 of the Health Act 2004, and Schedule 3 of the Act transferred all functions under the Mental Health Act 2001, to the Health Service Executive. The transfer became effective when the 2001 Act became effective, i.e. the 1st November, 2006. It was submitted that this provision entitled the Health Service Executive to employ the three psychiatric nurses and the driver of the vehicle to participate in the arrangements for the removal of the applicant to St. Ita's Hospital.

Conclusion

29. At the outset, I conclude that the Applicant did act promptly in bringing this application, once she had been provided by the Respondent and the Health Service Executive with the information she requested.

30. The term "members of the staff of an approved centre" is not defined in the Act. It is true that the reference to the term "staff of an approved centre" occurs in many sections of the Act. It is to be concluded that the Oireachtas deliberately determined that no definition should be given to the term. The term "staff" has been used throughout the legislation and that has to be contrasted with the term "employee". However, in my opinion it is a question of fact in each case as to, whether or not a particular person is a member of the staff of St. Ita's Hospital. I do not get any assistance from the provisions of the Health Act 2004 as to the meaning of the word "staff".

31. In this case no written contract has been exhibited between the HSE and/or St. Ita's Hospital of the one part, and Nationwide Health Solutions of the other part. Certain relevant terms of the relationship are set out in the affidavits of Dr. Blennerhassett and Mr. Leahy, and also details are given in relation to how the assisted removal of a person was initiated, operated and supervised where services of Nationwide Health Solutions were engaged by the hospital. As referred to in paragraph 10, Nationwide Health Solutions retains responsibility for the care and well being of the patient until the patient

has been assessed by the RMP.

32. Mr. Leahy in his affidavit refers to independent contractual health personnel who provide a range of services on a periodic basis in the hospital complex, and also in the external catchment area of the hospital. I believe the engagement of Nationwide Health Solutions is the engagement of one such independent contractual provider in the external catchment area of the hospital.

33. It appears that the identity or qualification of the personnel engaged or assisted (other than that of John Neville) were unknown in advance to the Respondent and indeed it took some time before their identities were revealed to the applicant in these proceedings. The vehicle used to convey the applicant and its driver and other personnel was supplied by Nationwide Health Solutions.

34. The Protocol for Assisted Admissions to Approved Centres (which was exhibited) appears to be drafted on the basis that a senior nurse manager (of the approved centre) will have responsibility for assigning nursing staff to carry out the procedures (that is nursing staff in St. Ita's). It is not drafted on the basis of dealing with the engagement of personnel from Nationwide Health Solutions.

35. There was no nexus or known contract between the psychiatric nurses involved in the assisted admission who were provided by Nationwide Health Solutions (and were part of its staff) and the approved centre, namely St. Ita's Hospital.

36. In my opinion, the meaning of who is a "member of staff" is confined to an individual. A corporate entity such as Nationwide Health Solutions could not be a member of staff. The context of the engagement of personnel from Nationwide Health Solutions has to be seen in the context of the labour relation difficulties described by Mr. Leahy in his affidavit, whereupon on an interim basis the HSE entered into an agreement with Nationwide Health Solutions to supply qualified and experienced personnel. In effect, St. Ita's Hospital was outsourcing this service to a third party. It is significant to note that in the documents provided for an assisted admission service for an involuntary admission it is stated under the heading "Staffing".

"The provider shall be required to ensure that their staff (i.e. staff of the provider) are appropriately skilled and trained in approved courses to enable them to carry out their duties to a high standard."

37. Under the heading Statutory Basis by the Providers Services, it is stated:-

"All parties engaged in an assisted admission/removal situation shall at all times be guided by and adhere to the principles and procedures of the Mental Health Act 2001. Where a provider is engaged to provide this service, the staff they provide shall for the period of the assisted admission/removal, act on the instructions of the senior nurse manage of the approved centre."

Providers of the Assisted Admission Service (such as Nationwide Health Solutions) are required to fully indemnify the Health Service Executive against any liability claims or proceedings from the provision of their services.

38. In my opinion, the nurses and staff provided by Nationwide Health Solutions were at all material times, staff of that entity and were not staff of St. Ita's Hospital. This appears to be contemplated from the documentation from the Health Service Executive.

39. Furthermore, adopting the ordinary canons of interpretation to this word "staff" as used in the legislation, it would be straining the ordinary meaning of the word "staff" to conclude that based on the information supplied by Dr. Blennerhassett and Mr. Leahy, person engaged in bringing the applicant to St. Ita's were at all material times staff of St. Ita's Hospital.

40. In principle, I am prepared to grant a declaration in this case. I do not believe that the applicant's case is moot and I believe that a decision could/would be for her benefit should circumstances arise in the future. In this regard, I apply the decision of the Supreme Court in *O'Brien v. the Personal Injuries Assessment Board* [2007] 1 I.R. 328.