Neutral Citation Number: [2007] IEHC 7

THE HIGH COURT

2006 No. 1719 SS

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

J. H.

APPLICANT

AND

VINCENT RUSSEL, CLINICAL DIRECTOR OF CAVAN GENERAL HOSPITAL

RESPONDENT

AND

HEALTH SERVICE EXECUTIVE

NOTICE PARTIES

AND

MENTAL HEALTH COMMISSION

Judgment of Mr. Justice Clarke delivered 6th February, 2007.

1. Introduction

Almost twelve years ago Costello P. in giving judgment in *R.T. v. Director of Central Mental Hospital* [1995] 2 I.R. 65 said, at p. 81, the following:-

> "These defects, not only mean that the section falls far short of internationally accepted standards but, in my opinion, render the section unconstitutional because they mean that the State has failed adequately to protect the right to liberty of temporary patients. The best is the enemy of the good. The 1981 reforms which would have remedied the defects were not brought into force because more thorough reforms were being considered (para. 16.13 of Green Paper). The prolonged search for excellence extending now for over fourteen years has had most serious consequences for the applicant herein."

1.2 That passage followed on from an analysis of certain provisions (and in particular s. 207) of the Mental Treatment Act, 1945 ("the 1945 Act") which had been the subject of criticism in a Department of Health Green Paper to which Costello P. referred and which described that section as "seriously defective". That those, and other, difficulties existed in relation to many aspects of the operation of the 1945 Act had been clear for some time. The Mental Health Act, 2001 ("the 2001 Act") was the means adopted to address those difficulties. It is worthy of note that it was only in the last months of 2006 that some of the most important provisions of the 2001 Act came into force. Costello P. spoke of the consequences of a fourteen year search for excellence. In the events that have happened it has turned out to be over twenty-five years from the Green Paper to which he referred before the full new statutory regime eventually enacted in the 2001 Act came into force.

1.3 I make these comments because this case has as its backdrop the significant difficulties which those engaged as professionals in the provision of mental health services to persons who might require involuntary detention, have had to operate for far too long. It should be emphasised that there was not, nor could there in my view have been, any criticism of the motivation of those who have had to deal with the applicant ("Mr. H.") in this case. However, those persons were required to operate within a wholly unsatisfactory statutory framework and many of the issues with which these proceedings are concerned stem from that unsatisfactory framework and the necessary transitional provisions which had to be put in place to arrange for an orderly transition between the former regime which existed under the 1945 Act, to that which is now in place under the 2001 Act.

1.4 Against that background I had to consider the issues which arose in this case. In light of the fact that the proceedings were concerned with a person in involuntary detention, I informed the parties that I would announce my decision in the matter as soon as I had come to a conclusion as to the proper orders which should be made. That I did on the 8th January, 2007. However, I also indicated that I proposed setting out, in a full reasoned judgment, the basis for coming to the conclusions which I had reached. This judgment is directed to that end. It is necessary to turn, first, to the facts of the case.

2. The facts

2.1 Mr. H was, at the time of the hearing before me, detained in Cavan General Hospital ("Cavan General") on foot of a reception and detention order which, on its face, was said to have been made under s. 184 of the 1945 Act and dated 20th March, 2006 together with an extension of that order made on the 11th September, 2006. Mr. H. was, therefore, detained as what is described in that legislation as "a temporary involuntary patient". There was, however, a history of previous detention which is relevant to some of the issues which I have to decide. Mr. H's detention as an involuntary patient began in March, 2003 and continued uninterrupted on the basis of renewals of the original order until 8th March, 2005. On the face of it he would then appear to have been a voluntary patient between March 2005 up and until 5th September, 2005 when his status changed back to that of an involuntary patient on that date. Immediately thereafter Mr. H. was transferred to the Central Mental Hospital for the balance of the six month period of detention provided for in the order of the 5th September 2005. Thereafter there seems to have been a lacuna when no order was in place providing for his involuntary detention., although he continued in detention in the Central Mental Hospital until being brought back again to Cavan General where the order of the 20th March, 2006 was made.

2.2 A number of complaints are made arising out of the sequence of events which gave rise to the series of orders for detention made in the case of Mr. H. Those points need to be seen against the statutory regime within which the orders were made and to which I will turn in early course. However, in addition, it is contended that the nature and suitability of the conditions and treatment received by Mr. H. while in detention render his detention unlawful. Furthermore, certain issues arise in relation to the transitional provisions contained in the 2001 Act which are designed to enable an orderly transition of the detention of persons previously detained under the 1945 Act to detention under the 2001 Act.

2.3 The general grounds relied upon by Mr. H. can, therefore, be suitably divided into:-

> (a) Statutory grounds, that is to say arguments based upon what is said to be a failure to comply with the statutory regime for the detention of involuntary patients whether under the 1945 Act or under the transitional provisions of the 2001 Act; and
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> (b) Treatment grounds; that is to say grounds which rely upon what is said to be a failure on the part of the authorities to provide appropriate treatment for Mr. H. while in voluntary detention.

2.4 By the close of the hearing before me there was, in fact, no real dispute between the parties as to the precise sequence, and nature of the orders made in relation to detention of Mr. H. The following seems to have been the history of his detention.

2.5 As a result of what would appear to have been an assault by Mr. H. on a neighbour, Mr. H. was initially detained in Cavan General on the 18th March, 2003 having been taken by An Garda Síochána to the psychiatric ward of Cavan General where he was admitted as a patient. That admission was as a temporary patient under the provisions of s. 184 of the 1945 Act. It should also be noted that the original application for the order made on the 18th March 2003 was not made by a relative of Mr. H. It is said that it should have been so made so as to comply with s. 184(2) and (3) of the 1945 Act. Mr. H. had a sister who lived in Australia at all material times but who has had an active interest in his welfare. It is said that the application by someone other than a relative was in breach of s. 184(3) of the 1945 Act, because of the availability of Mr. H's sister. This is an issue to which I will return in due course. In accordance with the statutory regime under which he was detained (which I will detail in due course) the initial period of detention of Mr. H. was for a period of six months. That period was extended for a further period of six months until the 16th March, 2004 by virtue of a decision made in September, 2003. The period was further extended until the 18th September, 2004 as a result of a decision made in March 2004 which was followed, in turn, by a third extension, or fourth period of six months, up and until March, 2005. Thus there is no dispute but that Mr. H. was, between March, 2003 and March, 2005 detained on foot of an initial and three extending orders of six months each.

2.6 For reasons connected with the statutory regime under which Mr. H. was being detained and which I will set out later in the course of this judgment no further extension under s. 184 was, at that stage, permitted.

2.7 The formal status of Mr. H. within Cavan General altered on the 8th March, 2005 in the following circumstances. In early March, 2005 it is clear that Mr. H. was approaching the expiry of the maximum two year detention period permitted under the 1945 Act for temporary patients. In those circumstances it would appear that Mr. H. was informed that it would be necessary that he be certified to be a person of unsound mind and transferred to St. Davnet's, Co. Monaghan or to the Central Mental Hospital. It is clear that Mr. H. was unhappy with that prospect and in those circumstances signed a document which, on its face, allowed him to continue in Cavan General as a voluntary patient. It appears to be accepted that notwithstanding the fact that Mr. H. was a voluntary patient he was, nonetheless, subject to restrictions. Furthermore it appears that some of those, in whose charge Mr. H. was, had concerns as to whether he had truly become a voluntary patient.

2.8 In any event Mr. H. remained ostensibly a voluntary patient until the 5th September, 2005 when his status reverted to that of a temporary patient under s. 184 of the 1945 Act on foot of a reception order of the same date. This order appears to have been brought about as a result of a report by Dr. Henry Kennedy of the Central Mental Hospital dated the 2nd September, 2005. It is worthy of note that at that time Dr. Kennedy expressed the view that Mr. H. lacked "the functional capacity to give or withhold consent". It is also clear from a letter of the 8th September, 2005 from Dr. Kennedy to Dr. Vincent Russell of Cavan General that Dr. Kennedy (and by inference others who attended a meeting to review the case of Mr. H.) did not believe that Mr. H. was likely to recover within six months.

2.9 As a matter of fact Mr. H. was transferred to the Central Mental Hospital on the 16th September, 2005 and remained there until the 20th March, 2006. It would seem to be the case that the motivation behind the re-admission of Mr. H. as an involuntary patient in September, 2005 was to enable his transfer to the Central Mental Hospital. It would appear to be the case that Mr. H. would not have been able to be brought to the Central Mental Hospital as a voluntary patient. It also appears that those with clinical responsibility for Mr. H. were of the view that it was in his best interests, at that time, to go to the Central Mental Hospital. Therefore the primary purpose behind his re-admission as an involuntary patient in September, 2005 would appear, on the facts, to have been to enable his transfer to the Central Mental Hospital rather than any noted change in his personal position concerning the manner in which he should be treated or as to his willingness or capacity to be a voluntary patient.

2.10 It is clear that the six month detention period provided for when Mr. H. was re-admitted to Cavan General as an involuntary patient on the 5th September, 2005 expired on the 5th March, 2006. This fact seems to have been overlooked. Therefore it is common case that Mr. H. was unlawfully detained between that date and the 20th March, 2006 when he was, again, and for the third time, admitted to Cavan General on foot of a reception and detention order. It is that order, together with its extension in September, 2006, under which Mr. H. was detained as of the time of the hearing before me.

2.11 It should be noted that while Mr. H. was detained in the Central Mental Hospital the view appears to have been taken that it would take a period of 18 months before he could reasonably expected to have recovered. There is no evidence to suggest that any different view was taken at the time when he was admitted to Cavan General in March, 2006. Indeed while, as a matter of form, his admission as an involuntary patient to Cavan General in March, 2006 was on foot of a "fresh" application under s. 184 of the 1945 Act, in substance it would appear that what happened on the ground was that Mr. H. was simply brought from the Central Mental Hospital to Cavan General and admitted there in accordance with the provisions of s. 184.

2.12 Against that factual background it is next necessary to turn to the statutory regime within which detention both under the 1945 Act and under the 2001 Act operates.

3. The Terms of the Legislation

3.1 The principle relevant provision of the 1945 Act is to be found in s. 184 which provides:-

> "S. 184.—(1) Where it is desired to have a person received and detained as a temporary patient and as a chargeable patient in an approved institution maintained by the mental hospital authority for the mental hospital district in which such person ordinarily resides or an approved institution in which temporary patients of such authority may, in pursuance of an arrangement made under section 102 of this Act, be received, application may be made in the prescribed form to the person in charge of such institution for an order (in this Act referred to as a temporary chargeable patient reception order) to have such person received and detained as a temporary patient and as a chargeable patient in such institution.
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> (2) An application under this section may be made—
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> (a) by the husband or wife or a relative of the person to whom the application relates, or
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> (b) at the request of the husband or wife or a relative of the person to whom the application relates, by the appropriate assistance officer, or
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> (c) subject to the provisions of the next following subsection, by any other person.

(3) Where an application under this section is not made by the husband or wife or a relative of the person to whom the application relates or, at the request of the husband or wife or a relative of such person, by the appropriate assistance officer, the application shall contain a statement of the reasons why it is not so made, of the connection of the applicant with the person to whom the application relates, and of the circumstances in which the application is made.

(4) An application under this section shall be accompanied by a certificate in the prescribed form of the authorised medical officer certifying that he has examined the person to whom the application relates on a specified date not earlier than seven days before the date of the application and is of opinion either—

(a) that such person—

(i) s suffering from mental illness, and

(ii) requires, for his recovery, not more than six months suitable treatment, and

(iii) is unfit on account of his mental state for treatment as a voluntary patient, or …

(5) After consideration of an application for a temporary chargeable patient reception order and of the certificate accompanying the application, the person to whom the application is made may, if he so thinks proper, make such order in the prescribed form."

3.2 S. 186(1)(b) provides that the order is to last for six months.

3.3 S. 189 (as inserted by s. 18 of the Mental Treatment Act, 1961 ("the 1961 Act")) of the 1945 Act also provides as follows:-

"(1)(a) Where the chief medical officer of an approved institution becomes of opinion that a person detained in the institution under a temporary chargeable patient reception order will not have received on the expiration of the period during which, pursuant to paragraph (b) of subsection (1) of section 186 of this Act, he may be detained-

(i) in the case of an addict, the chief medical officer may by endorsement on the order extend the said period by a further period not exceeding six months, or by a series of endorsements on the order extend the said period by further periods each of which shall be less than six months and the aggregate of which shall not exceed six months, and

(ii) in any other case, the chief medical officer may be endorsement on the order extend the said period by a further period not exceeding six months, or by a series of endorsements on the order extend the said period by further periods none of which shall exceed six months and the aggregate of which shall not exceed eighteen months."

3.4 There were amendments to some aspects of s. 184 made by both the Mental Treatment Act, 1953 and the 1961 Act which are not material to the issues which I have to decide.

3.5 Insofar as material to the issues to which I have to decide the relevant provisions of the 2001 Act, are as follows:-

"16.—(1) Where a consultant psychiatrist makes an admission order or a renewal order, he or she shall, not later than 24 hours thereafter—

(a) send a copy of the order to the Commission, and

(b) give notice in writing of the making of the order to the patient."

ss. (2) provides for the contents of the relevant notice. The reference to the Commission is a reference to the second named notice party which is established by the 2001 Act and plays an independent role in relation to aspects of the operation of that Act.

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

(a) refer the matter to a tribunal,

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

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

(i) examine the patient concerned,

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

(iii) review the records relating to the patient,

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

(2) Where the Commission gives a direction under this section, the consultant psychiatrist concerned shall, on presentation by him or her of the direction at the approved centre concerned, be admitted to the centre and allowed to—

(a) examine the patient and the records relating to the patient, and

(b) interview the consultant psychiatrist responsible for the care and treatment of the patient.

(3) If the consultant psychiatrist to whom a direction has been given under this section is unable to examine the patient concerned, he or she shall so notify the Commission in writing and the Commission shall give a direction under subsection (1) to another member of the panel of consultant psychiatrists.

…

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

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

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

(ii) if there has been a failure to comply with any such provision, that the failure does not affect the substance of the order and does not cause an injustice,affirm the order, or

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

The remaining sub-sections of s. 18 provides for the process and notification of the result of the determination of the Tribunal.

72.—(1) Subject to the provisions of this section, where immediately before the commencement of Part 2, a person stood detained under section 171, 178, 184 or 185 of the Act of 1945, he or she shall be regarded for the purposes of this Act as having been involuntarily admitted under that Part to the institution in which he or she was so detained.

(2) In the case of a person who immediately before such commencement stood detained under section 184 or 185 of the Act of 1945, his or her treatment and detention shall be regarded as authorised by virtue of this Act until the expiration of the period during which he or she may be detained pursuant to the said section 184 or 185 as may be appropriate.

(3) In the case of a person detained under section 171 or 178 of the Act of 1945, his or her treatment and detention shall be regarded as authorised by virtue of this Act for a period not exceeding 6 months after the commencement of this section.

(4) The detention of a person referred to in subsection (2) or (3) shall be referred to a tribunal by the Commission before the expiration of the period referred to in subsection (2) or (3), as may be appropriate, and the tribunal shall review the detention as if it had been authorised by a renewal order under section 15(2).

4. The Legislative Scheme

4.1 As is clear from s. 189 the 1945 Act, a person in relation to whom a reception order had been made could not be detained for more than six months unless the Chief Medical Officer of the Institution where the patient is detained came to the view that the person would not have recovered at the end of the six month period and, on that basis, determined that it was appropriate to extend the period for a further period not exceeding six months. It is also clear that such extensions and, where appropriate, further extensions could not, in aggregate, exceed eighteen months so that the total cumulative period under which a person could be detained under the relevant provisions of the 1945 Act, was twenty four months.

4.2 It is also clear, from the provisions of the 1945 Act, that after a maximum of twenty four months (being the initial detention period of six months and three further extensions of six months each) a person detained had to be released from involuntary detention unless they were declared to be a person of unsound mind. The 1945 Act provided for a separate regime for persons declared to be of "unsound mind" which was not subject to the time limitations set out in s. 184 and s. 189 in respect of temporary patients.

4.3 It is furthermore clear that, at the beginning of the six month detention period, an opinion had to be formed that it was likely that the person concerned would recover within the six month period which was to be the subject of the detention (see s. 184 (4)(a)(ii)).

4.4 It is clear that the legislation acknowledged that any such opinion might turn out to be incorrect. Otherwise there would be no need for extensions. However it seems to me to be clear that what the legislation contemplated in respect of the successive periods of detention under the relevant provisions, was that they were to be short term (i.e. six months) detention periods designed to cover a situation where it was anticipated that the person concerned would recover in that period but where extensions up to a total of twenty four months could be certified provided that there remained a reasonable prospect of recovery in the shorter term.

4.5 It is equally clear that the legislation did not intend that this regime would have any application to cases where persons were considered to suffer from long term psychiatric difficulties such as would lead to a situation which would require that such person be detained for lengthy periods or, indeed, indefinitely. It would appear that the provisions of the 1945 Act, concerning a determination that a person was of unsound mind, were intended as an alternative regime to deal with such long term cases. It also seems that for practical (including legal) reasons which were not gone into in the course of the hearing before me, decisions were taken by those with responsibility for the area, that the system in relation to the detention of persons of unsound mind was regarded as practically or legally unworkable in many cases and, in practice, was given only limited use in more recent times. Therefore, in practice, many persons who were involuntarily detained were, it would appear, so detained under what I have described as the short to medium term provisions of the legislation. The number of places in locations which were authorised to have charge over "persons of unsound mind" may also have been limited and this may have contributed to the difficulties. It is difficult to have anything but sympathy with those who had charge of institutions in which persons were detained as temporary involuntary patients having regard to the fact that they were faced with attempting to operate a system of detention designed, at least in material part, for the purposes of protecting

persons detained, but where the circumstances of such persons were likely, in many cases, to be found not to fit within the parameters for which the short to medium terms provisions of the legislation was designed and where the longer term provisions of the 1945 Act were not considered practicable.

4.6 It is in that context that the search to implement the "excellent", noted by Costello J. in R.T. (which, in substance, lasted for twenty five years), may well legitimately be said to have been the enemy of the "good", in that it forced those within the system to operate for far too long on the basis of a system which was manifestly not fit for the purpose.

4.7 However that system was the system which appears to have been operated in respect of many persons such as Mr. H. and was, in fact, the system used to detain Mr. H. in this case. The lawfulness, or otherwise, of the detention of Mr. H must therefore be judged against that legislative framework notwithstanding the fact that it was manifestly and known to be inadequate and notwithstanding the fact that it is accepted by all concerned in this case that those charged with decisions concerning Mr. H's detention were, at all times, motivated by his best interests.

4.8 It is also clear that the 2001 Act, operates under a radically different system. Firstly there is no distinction between short to medium term detention on the one hand and medium to long term detention on the other hand. All persons in involuntary detention are subject to regular re-certification with provision for an independent review of such re-certification. This case is not, however, concerned with that aspect of the 2001 Act.

4.9 However as can be seen by the provisions of the 2001 Act referred to above (in particular s. 72), the Act, necessarily, made provision for the transition of persons previously detained under the provisions of the 1945 Act. While certain aspects of the 2001 Act came into force at an earlier time, the key provisions concerning the regime to be applied in relation to persons in respect of whom detention orders were to be made under the 2001 Act, only came into force on 1st November 2006. As will be seen from the provisions referred to above, the legislation deems a person detained under ss. 171, 178, 184 and 185 of the 1945 Act, to have been involuntarily admitted under Part 2 of the 2001 Act, and further requires the detention of such a person to be referred to a tribunal by the Mental Health Commission within a specified period. In those circumstances the tribunal is required (under s. 72(4)) to review the detention as if it had been authorised by a renewal order under s. 15(2) of the 2001 Act, itself. Mr. H. was, of course, purportedly detained under s. 184 of the 1945 Act up to the 1st November, 2006 and those transitional provisions, therefore, were considered to apply to him.

4.10 Thus a person who was, as Mr. H, on 1st November 2006, detained under the provisions of the 1945 Act, is, in substance, deemed for the purposes of the 2001 Act, to be the subject of a renewal order and has the benefit of a review by the tribunal established under the 2001 Act, in early course thereafter.

4.11 Two legal issues arise on the facts of this case in relation to that aspect of the transitional provisions.

The first concerns the meaning of the provision which refers (in s. 72(1)) to a person who "stood detained" under any one of the relevant sections. The question which arises is as to whether a person who may not have been validly detained at the time of the commencement of the relevant provisions of the Act 2001 (by reference to the compliance with the provisions of the 1945 Act) can have the validity of their detention rendered good by virtue of going through the review process of the 2001 Act.

The second issue concerns the review itself. Section 18(1) of the 2001 Act, as noted above, requires a tribunal reviewing a renewal order to review the detention of the patient and to consider both the substantive issue of whether the patient is suffering from a mental disorder and whether the procedural requirements of the 2001 Act have been complied with (or if not complied with whether any such non-compliance does not cause an injustice). The question which arises in relation to that provision, so far as a person who was already detained under the 1945 Act on 1st November 2006 is concerned, is as to whether the tribunal has any jurisdiction to enquire into the procedural validity of the person's detention under the 1945 Act, prior to the 1st November 2006. It is clear that, in any event, the tribunal has an obligation to enquire into whether the person concerned is suffering from a mental disorder.

4.12 It seems to me that the transitional provisions are clear as to their meaning. When setting out the procedural matters on which the tribunal has to satisfy itself, s. 18 specifies, in terms, the relevant procedural requirements of the 2001 Act, itself. It therefore requires the tribunal to be satisfied that the procedural requirements of the 2001 Act were complied with. It does not (as it easily could have if it were so intended) set out an obligation on the tribunal to satisfy itself that the person concerned (in the case of a person formerly detained under the 1945 Act) was properly detained under the provisions of the 1945 Act.

4.13 There is, indeed, logic in the Oireachtas having adopted that position. The tribunal is established to deal with a new regime. The tribunal will be well capable of making decisions as to whether the procedures set up under that new regime have been complied with and to reach a determination on such issues including a determination as to whether any lack of complete compliance might give rise to an injustice. It would be much more difficult for the tribunal to concern itself with the difficult and flawed regime under which persons were detained under the 1945 Act.

4.14 Furthermore I am satisfied that where s. 72 refers to "persons detained", that reference is to persons validly detained.

4.15 I am satisfied that a necessary pre-condition for the invocation of s. 72 is a valid s. 184 detention order (or, in an appropriate case an order under one of the other sections of the 1945 Act express referred to in s. 72). In the absence of clear wording to the contrary, it does not seem to me to be appropriate to construe s. 72 as curing a prior invalid detention. It would, in my judgment, require very clear wording indeed for a court to interpret a statutory provision as rendering lawful an involuntary detention which was otherwise unlawful. There is no such wording present in the instant case and it, therefore seems to me that the proper construction of s. 72 requires that there be in place a valid detention order under (on the facts of this case) s. 184 prior to the provisions of s. 72 kicking in.

5. Conclusions on transitional provisions

5.1 I am, therefore, satisfied that in the case of a person detained under the provisions of the 1945 Act, who was detained as of 1st November, 2006, the following provisions apply.

> (a). Firstly it is necessary to consider whether that person's detention under the provision of the 1945 Act was valid as of 1st November, 2006. If it was not valid as of that date then it seems to me that the provision of the 2001 Act, concerning the transition of persons formerly detained under the 1945 Act, cannot apply. There would not, of course, be a barrier to a fresh application wholly under the provisions of the 2001 Act, which would need to be processed in accordance with the procedural requirements of that Act.

(b). Secondly where a person does not raise, immediately after 1st November, 2006, the question of the validity or otherwise of his or her former detention under the 1945 Act, it is likely that the case of such a person will be referred to a tribunal in accordance with the provisions of the 2001 Act. In that eventuality the tribunal does not have a jurisdiction to consider the procedural validity of a person's previous detention under the 1945 Act, but must, of course, consider whether the substantive requirements concerning the mental health of the person justify their involuntary detention. It, therefore, follows that even where a tribunal is satisfied that the substantive mental health condition of the person justifies detention, that finding does not "cure" any question concerning the validity of that person's detention which relates back to the validity of their detention under the 1945 Act, prior to 1st November, 2006.

5.2 In this case Mr. H. makes no complaint concerning any findings relating to his substantive mental health. In those circumstances it seemed to me that the validity of his detention as of the time of the hearing before me, depended on the validity of his detention immediately before the coming into force of the relevant provisions of the 2001 Act, that is to say immediately before the 1st November, 2006.

6. Conclusions on validity of detention under 1945 Act

6.1 While a number of separate issues were raised under this heading on behalf of Mr. H. it seems to me that two key issues arise.

6.2 It is clear from the facts recited above that Mr. H was in a form of detention for a cumulative period not far short of twice the statutory maximum of twenty four months. Three particular aspects of that overall period of detention are relied on to suggest that, at a minimum, by 31st October, 2006, Mr. H. was in unlawful detention.

6.3 The most immediate in time concerns the fact that, as is again clear from the facts set out above, when Mr. H. left the Central Mental Hospital to return to Cavan General, it was at a time when there appeared to be in place a regime which, it was hoped (as of the time when the regime was initially determined upon by the director of the Central Mental Hospital) that there might be a sufficient improvement in the condition of Mr. H. over time such that he might not require involuntary detention after eighteen months but not likely after any lesser period. There is nothing in any of the documentation which was put before the court to suggest that any more optimistic view of Mr. H's future had been arrived at prior to his subsequent involuntary detention in Cavan General. Given the gap that occurred immediately before that detention in March 2006 (because of the oversight to which I have referred) it was accepted by all the parties, and I agree, that the detention order made in March 2006 was a fresh or new original order rather than a renewal. As indicated above it was a prerequisite to the making of orders under s. 184 of the 1945 Act, that an opinion be formed that the person in respect of whom the order was made was likely to recover within a six month period from the making of the order. It does not appear that there was any basis for taking such a view of Mr. H. (or indeed that such a view was in fact, taken) when the order of 20th March, 2006 was made. On that ground alone I was satisfied that, while made for the best of motives, the order made which facilitated the return of Mr. H. to Cavan General in March 2006 was invalid and that his detention thereafter was, it follows, equally invalid. There was no basis for believing, at that time, that Mr. H. would recover in 6 months. Such a belief was a prerequisite for using the short to medium term provisions of the 1945 Act.

6.4 Secondly it is suggested that, at a number of points in the history of the detention of Mr. H., orders were made which were contrived for the purposes of attempting to fit the circumstances of Mr. H. into what was, undoubtedly, a flawed statutory regime. In addition to the point with which I have just dealt, it is also suggested that the period of apparent voluntary detention (as referred to above) was not genuine in that Mr. H. was subjected to an identical regime concerning control (some of it not, apparently, in accordance with his wishes) when he was formally detained under detention orders and when he was, apparently, a voluntary patient. It is also questioned as to whether Mr. H. was truly a consensual patient during the relevant period. Indeed it is worthy of note that some of those in whose charge Mr. H. was placed, questioned, at that time, the validity of his detention on that very basis. I was again satisfied that Mr. H's detention was invalid on this ground. The legislation is clear. A person could only be detained under s. 184 for a maximum of twenty four months. I was satisfied that at the expiry of that period there either had to be a finding that Mr. H. was being a person of unsound mind (which, for the reasons which I have indicated earlier, may not have been considered a practical proposition or, indeed, desirable), a release, or a genuine transfer into voluntary detention. While I was satisfied that what occurred was done with the best of intentions, I was not satisfied that Mr. H. went into a period of genuine voluntary treatment at that stage. I appreciate that it would appear that part of his own motivation in signing the relevant documentation related to a desire to stay in Cavan. However I was not satisfied that the relevant period during which Mr. H. was, apparently, a voluntary patient, was in substance properly voluntary and I am therefore satisfied that he was inappropriately detained for in excess of the maximum twenty four month period.

6.5 I am mindful of the fact that the courts have had regard, when looking at the process which may have led to the detention of persons under the Mental Treatment Acts, to the fact that the legislation is designed, at least in significant part, for the protection of the individuals concerned. Nonetheless it seems to me that the legislation cannot be construed in a way which goes against the clear meaning and intent of the provisions which limit involuntary detention under s. 184 to a maximum of twenty four months. While I fully understand the pressures which may have led to those in charge of Mr. H. to attempt to devise means of ensuring his continued treatment, (which they clearly considered desirable) notwithstanding the defective legislation within which they were operating, I was nonetheless satisfied that his detention was unlawful on that ground as well.

6.6 The final question, concerning the process relied on, related to the identity of the person who made the original application for detention in respect of Mr. H. That application was made almost four years ago and irrespective of the merits or otherwise of the legal issue raised (i.e. that the application should have been made by Mr. H's sister) I was not satisfied that it could, at this remove, be said to effect the validity of his detention as of 1st November, 2006.

6.7 For those reasons I was satisfied that Mr. H's detention as of 1st November, 2006, under the provisions of the 1945 Act, was unlawful, and for the reasons which I have outlined above in relation to the transitional provisions contained in the 2001 Act, I was not satisfied that anything in those provisions rendered lawful his detention thereafter. For those reasons I was satisfied the Mr. H's detention was unlawful as of the date of the hearing before me.

7. The Treatment Afforded to Mr. H.

7.1 Lest I be wrong in the conclusions which I reached concerning the procedural validity of Mr. H's detention, I also felt it necessary to consider the alternative substantive ground put forward which argues that the detention of Mr. H. was invalid by reason of the failure to afford Mr. H. appropriate treatment while he was an involuntary patient. There is no doubt that the provisions of the 1945 Act to which I have drawn attention earlier in the course of this judgment made clear that the statutory purpose behind involuntary detention is to ensure that the individual receives "suitable treatment". In *Re Philip Clarke* [1950] I.R. 235 O'Byrne J. noted that the legislation was "designed for the protection of the citizen and the promotion of the common good". Similar comments are to be found in *Croke v. Smith* [1994] 3 I.R. 525.

7.2 To similar, but not necessarily identical, effect, the European Court of Human Rights noted in *Ashingdale v. The UK* (8225/78 (1985) ECHR 8) that, while it would not, generally, consider the conditions available in a hospital it was also accepted that:-

> "there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of subpara. (e) of para. 1 (Article 5-1-e) if effected in a hospital, clinic or other appropriate institution authorised for that purpose".

7.3 There is no doubt but that those in whose care Mr. H. was placed for much of the relevant period were concerned that the treatment which he was receiving was insufficient for the purposes of treating his underlying condition. Indeed those persons acted as advocates on his behalf seeking more appropriate treatment on a number of occasions and, in so doing, expressed themselves in fairly trenchant terms. There can be little doubt, therefore, that there was a view amongst those treating Mr. H. that the treatment available to him, for at least significant portions of the time of his involuntary detention, was far from ideal.

7.4 I am prepared to accept, for the purposes of argument in this case, that the conditions in which a person may be detained as a mental health patient might, in theory, fall so far short of acceptable conditions so as to render unlawful a detention which might otherwise be regarded as lawful. I am also prepared to accept, for the purposes of argument in this case, that amongst the relevant conditions that might, theoretically, render such detention unlawful would be the treatment (or perhaps more accurately the lack thereof) being afforded to the person concerned in all the circumstances of the case.

7.5 However by a parity of reasoning with the jurisprudence of the courts in respect of persons who are detained within the criminal justice process, it does not seem to me that anything other than a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful. See for example *State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82. That is not to say that a person may not have a remedy in circumstances falling short of such complete failure. If there is a legal basis for suggesting that the conditions in which a person is detained or the treatment being afforded to a person so detained are less than the law requires, then an appropriate form of proceeding (whether plenary or judicial review) may be used as a means for enforcing whatever legal entitlements may be established. In many cases (and it would appear on the evidence that this case is one of them) the issues may well centre around the availability of resources for more appropriate treatment. Such cases are undoubtedly complex and require the court to consider the legal entitlements of persons in the context of there being argued to be a lack of resources available to provide more appropriate treatment. It does not seem to me that such cases are properly determined in the context of an application under Article 40.4 of the Constitution, which is concerned with the narrow question of the validity or otherwise of the detention of the person concerned. In my view counsel for Cavan General was correct when he argued that cases involving resources issues are not ones which can properly be dealt within the narrow parameters of an Article 40.4 Inquiry.

7.6 In those circumstances I was not satisfied that the undoubted questions which arise as to the appropriateness or otherwise of the treatment of Mr. H. are ones which, even from the high watermark of his case, could conceivably result in a conclusion that his detention was, on that ground alone, unlawful. Therefore if I had not been satisfied that there were grounds for deeming Mr. H's. detention unlawful by reason of the process, I would not have been satisfied that his detention was unlawful by reason of the treatment (or the lack of it) which he has received. If (and I express no concluded view on the issue) there is any merit to his contention that his treatment falls short of that which the law entitles him to, then his entitlements should be determined in appropriate proceedings designed to obtain appropriate declarations or orders concerning the nature of the treatment to which he is entitled rather than in proceedings which question the validity of his detention.

8. The Form of Order

8.1 Having, therefore, concluded that Mr. H. was in unlawful detention, the only further issue which arose for consideration was as to the form of order which I should make. Anticipating the possibility that I might be persuaded to find that Mr. H. was in unlawful custody, counsel for Cavan General submitted that I retained a discretion as to the form of order which I would make which could and should, it was argued, reflect the mental health condition of Mr. H. In the context of that submission counsel for Cavan General placed reliance on *N. and Anor v. Health Services Executive and Others* [2006] IEHC 60 in which case the Supreme Court concluded that the interest and welfare of an infant who was the subject matter of the relevant proceedings required that she be returned to the custody of her natural parents.

8.2 As pointed out in the judgment of Murray C.J. in that case, a successful application pursuant to Article 40.4 concerning an unlawful detention would normally lead to an order for the release of the person concerned from the unlawful detention concerned with no further order being necessary. However the court took into account the fact that there were special circumstances, namely on the facts of that case the welfare of an infant of tender years, to be taken into account when determining the manner in which effect might be given to the order of the court pursuant to Article 40.4.

In the course of his judgment Murray C.J. stated the following:-

> "In my view the court has jurisdiction, in the circumstances of a case such as this, involving as it does a minor of very tender age, to make ancillary or interim orders concerning the immediate custody of such infant which are necessary in order to protect her rights and welfare pending effect being given to the substantive order of the court".

8.3 In coming to that view Murray C. J. placed reliance on the decision of the Supreme Court in *D.G. v. Eastern Health Board* [1997] 3 I.R. 511 where a minor was ordered to be detained in St. Patrick's Institution in order to provide for his welfare, having regard to a severe personality disorder, in special circumstances where there was no other suitable facility within the State for his detention and notwithstanding the fact that St. Patrick's Institution was not designed for holding persons in his circumstances. While both of those cases were concerned with under age persons I see no reason in principle why that jurisprudence should not equally apply, in an appropriate case, to persons under a mental disability. The underlying logic of the approach of the Supreme Court in both those cases was that the normal rule (i.e. immediate release) might not be appropriate in all circumstances involving persons whose detention was, at least in significant part, designed for their own good. A similar situation arises in the case of involuntary patients.

8.4 I am therefore satisfied that the court has a jurisdiction to make an ancillary order of the type identified by the Supreme Court in *N.* as to how best to give effect to the decision of the court. I was, therefore, persuaded that, in all the circumstances of this case, it was appropriate to put in place arrangements which would facilitate appropriate procedures being put in place to seek to invoke the new process set out in the 2001 Act for the purposes of seeking a fresh detention order in respect of Mr. H. under the provisions of that Act. In coming to that view I was principally motivated by the fact that no argument was addressed to the court, nor was there any evidence before the court, which sought to contradict the contention that Mr. H. was in need of treatment in an institution. Obviously very different considerations would apply in circumstances where a court was persuaded that there was a difficulty with

the conclusions reached concerning the mental status of the patient concerned. There was no such difficulty in this case.

8.5 At the close of the hearing before me, I was informed by counsel on behalf of Cavan General that it would, in all probability, take some four to six hours for the authorities to put in place the necessary arrangements to allow for an orderly application of the process contemplated in the 2001 Act, for the making of an application to admit Mr. H. under that Act. It was therefore suggested that, subsequent to a possible determination by the court that it was appropriate to direct the release of Mr. H, such a period should be given to the authorities to put the necessary procedures in place.

8.6 In those circumstances, when indicating the order which I proposed to make, I went further and indicated that I was satisfied that I had a jurisdiction of the type urged by counsel on behalf of Cavan General and that, in reliance on that jurisdiction, I proposed directing the release of Mr. H. at 6 p.m. on 8th January, 2007 (being 6 p.m. on the day when I made the order concerned, the order having being made at approximately 11 a.m. in the morning). It was made clear to the parties that the purpose of directing the release of Mr. H. some 6 to 7 hours after I had issued a brief ruling in the case (indicating the form of order which I intended to make) was to facilitate the authorities in Cavan General to put in place a regime which would allow for a fresh application for detention to be made in accordance with the process set out in the 2001 Act. It is my understanding that since making that order, an application for the detention of Mr. H. under the provisions of the 2001 Act has been processed. This case is not concerned with that process. If Mr. H. has any complaint about the way in which that process was conducted then he is, of course, free to return to court on the separate grounds of whatever complaint he might have. However it is important to emphasise that the order which I made was intended to facilitate such a process being activated.

8.7 I make this point because the court has received a number of communications from Mr. H.'s sister which seem to imply wrongdoing on the part of Cavan General in activating that process in the circumstances in which they did. While it is not appropriate for me to comment on what actually happened (the case with which I am concerned relates solely to the lawfulness or otherwise of the detention of Mr. H. up to the making of the order by me on 8th of January) nonetheless it is important to note that, in general terms, there was nothing inappropriate in the authorities in Cavan General invoking the processes of the 2001 Act immediately after the release of Mr. H. Indeed the order which I made in the form in which it was made was specifically designed to facilitate such an eventuality.