

## THE HIGH COURT

[2007 No. 497 SS]

## IN THE MATTER OF THE APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

W.Q.

APPLICANT

AND

THE MENTAL HEALTH COMMISSION,  
THE DIRECTOR OF THE CENTRAL MENTAL HOSPITAL,  
THE MENTAL HEALTH TRIBUNAL AND DR. DAMIAN MOHAN

RESPONDENTS

**Judgment of Mr. Justice O'Neill delivered on the 15th day of May, 2007**

1. The applicant has for many years suffered from serious mental illness. At present he is detained in the Central Mental Hospital on foot of an order made pursuant to s. 15 of the Mental Health Act, 2001. On the 20th April, 2007 an application was made on behalf of the applicant pursuant to Article 40.4 of the Constitution of Ireland for an inquiry into the legality of the applicant's detention. I directed that such an inquiry take place on the 24th April, 2007 and ordered the second named respondent certify in writing the grounds upon which the applicant was detained. By a certificate made by the second named respondent dated the 24th April, 2007 it was certified that the applicant was detained by the second named respondent as Clinical Director of the Central Mental Hospital pursuant to s. 15 of the Mental Health Act, 2001 on foot of a renewal order for his detention made on the 28th March, 2007 which said order was affirmed by a decision of the Mental Health Tribunal dated the 16th April, 2007.

2. The applicant by order of the Minister for Health made on the 19th September, 1986 pursuant to s. 207 of the Mental Treatment Act, 1945 was transferred to the Central Mental Hospital from St. Brendan's Hospital in Dublin. The applicant was detained at the Central Mental Hospital pursuant to this order until the 3rd July, 2006. The applicant was in or about 2003 referred to the Tipperary Mental Health Services by Dr. Damian Mohan because he was from the catchment area for South Tipperary Mental Health Services. Because the applicant had been in detention in the Central Mental Hospital since 1986 he was not under the care of a Consultant Psychiatrist outside of the Central Mental Hospital and this was the reason for his referral. A Dr. Miriam Cussan, a Psychiatrist was invited to attend a case conference at the Central Mental Hospital in relation to the applicant in November, 2003. Thereafter Dr. Zubaidah O'Leary a Consultant Psychiatrist from the South Tipperary Mental Health Services was requested to attend at the Central Mental Hospital to review the applicant on the 3rd May, 2006. Dr. O'Leary examined the applicant there and reached a conclusion that he was suffering from very serious mental illness. Her conclusion included a finding that the applicant lacked the ability to sustain his treatment outside the supervised environment of the Central Mental Hospital and that he would be at risk of non compliance with medication leading to a significance relapse of his mental illness increasing his risk to himself and to others were he to move to a less secure environment.

3. After this examination the applicant was discharged from the Central Mental Hospital and transferred to St. Luke's Hospital in Clonmel, Co. Tipperary on the 3rd July, 2006, under the provisions of s. 184 of the Mental Treatment Act, 1945. Dr. O'Leary remained of the same opinion as she formed on the 3rd May, 2006.

4. Because the applicant continued to require specialist treatment at the Central Mental Hospital Dr. O'Leary completed a transfer form under s. 208 of the Mental Treatment Act, 1945, and on foot of this, the applicant was transferred back to the Central Mental Hospital on the 5th July, 2006.

5. On the 1st November, 2006 the Mental Health Act, 2001 came into force, and the applicant's continued detention thereafter fell to be regulated under the relevant provisions of this Act.

6. Thereupon the applicant's detention was notified by the second named respondent to the Mental Health Commission on the 1st November, 2006.

7. The detention of the applicant pursuant to s. 184 of the Mental Treatment Act, 1945 was for a period of six months which was due to expire on the 2nd January, 2007. On that date Dr. O'Leary attended at the Central Mental Hospital for the purpose of reviewing the applicant in order to consider whether his continued detention was warranted. The applicant was examined by Dr. O'Leary and her conclusion was that the applicant's condition was essentially unchanged, and if in a less secure environment, non compliance with his medication was likely to result in a serious psychotic relapse which would result in the applicant being at serious risk to others in view of his history. Accordingly Dr. O'Leary completed form 7 of the Mental Health Commission's forms in accordance with s. 15 of the Mental Health Act, 2001 renewing the detention of the applicant for a period of 3 months from that date. This renewal order was notified to the Mental Health Commission who pursuant to the provisions of the Mental Health Act, 2001 appointed Dr. Malcolm Garland an independent Consultant Psychiatrist to examine and report upon the applicant. The Mental Health Commission also convened a Mental Health Tribunal in respect of the applicant's detention on the 22nd January, 2007. This Tribunal concluded that the applicant was continuing to suffer from a mental disorder and it affirmed the renewal order made by Dr. O'Leary on the 2nd January, 2007. At the hearing of this tribunal the applicant was represented by a legal representative assigned by the Mental Health Commission, as required by s. 17(1)(b) of the Mental Health Act, 2001.

8. Coming towards the end of the period of three months detention, on the 28th March, 2007 the applicant's detention was further renewed by Dr. Damian Mohan, pursuant to s. 15 of the Mental Health Act, 2001, for a period of six months. The applicant was again examined by Dr. Malcolm Garland an independent Consultant Psychiatrist on the 12th April, 2007 as required by the Mental Treatment Act, 2001. The Mental Health Commission convened a Mental Health Tribunal pursuant to s. 17 of the Act, 2001 for the 16th April, 2007. At the hearing before this tribunal on that date, the applicant was again represented by Ms. Bernadette Parte, Solicitor appointed pursuant to s. 17(1)(b) by the Mental Health Commission to represent the applicant. In the course of this hearing, Ms. Parte made a submission to the tribunal that the applicant's detention was unlawful because no tribunal had been convened to review the applicant's detention prior to the making of the renewal order of the 3rd January, 2007, which failure she submitted was a breach of the applicant's legal entitlements pursuant to s. 72(4) of the Act of 2001, and as a consequence of which, subsequent renewal orders were invalid rendering the applicant's detention unlawful. The tribunal rejected this submission on that the ground that at the previous Mental Health Tribunal hearing on the 22nd January, 2007 no challenge of this kind was made to the lawfulness of the applicant's detention and that any defect in the order which may have existed was remedied by the subsequent affirmation of that order by the Mental Health Tribunal on the 22nd January, 2007. This tribunal on the 16th April, 2007 was satisfied that the applicant was suffering from a mental disorder and that there was compliance with the relevant provisions of the Act of 2001 and accordingly affirmed the renewal order made on the 28th March, 2007, which is as certified by the second respondent the legal basis of the

applicant's detention, now challenged by the applicant in these proceedings.

9. The statutory provisions relevant to this applicant are as follows:-

#### MENTAL TREATMENT ACT, 1945

"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 s. 102 of this Act be received, application may be made in the prescribed form to the person in charge of such an institution for an order (in this Act referred to as a Temporary Chargeable Patient Reception Order) to have such a person received and detained as a temporary patient and as a chargeable patient in such institution...

(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 applicant 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) is suffering from mental illness, and
  - (ii) requires, for his recovery, not more than six months suitable treatment,
  - (iii) is unfit on account of his mental state for treatment as a voluntary patient..."

"207 (1) Where –

- (a) A person detained in a District Mental Hospital or other Institution maintained by a Mental Hospital Authority is charged with an indictable offence before a justice of the District Court sitting in such District Mental Hospital or other Institution and
- (b) Evidence is given which, in the opinion of the justice, constitutes *prima facie* evidence –
  - (i) that such person has committed the offence, and
  - (ii) that he would, if placed on trial be unfit to plead.

The justice shall by order certify that such person is suitable for transfer to the Dublin Central Criminal Lunatic Asylum and shall cause copies of such order to be sent to the Minister and to the person in charge of such District Mental Hospital or other Institution..."

"208 – (1) Where a Mental Hospital Authority, acting on the advice of the Resident Mental Superintendent of the District Mental Hospital, are of opinion that a person detained in such Hospital or in any other Institution maintained by them requires treatment (including surgical treatment) not available save pursuant to this section, the authority may direct and authorise the removal of such person to any hospital or other place where the treatment is obtainable and in which it may be received in pursuance of an arrangement under this section..."

#### MENTAL HEALTH ACT, 2001

4 – (1) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an Admission Order in relation to a person), the best interests of the person shall be the principle consideration with due regard been given to the interests of other persons who may at risk of serious harm if the decision is not made..."

"14 – (1) Where a recommendation in relation to a person the subject of an application is received by the Clinical Director of an approved Centre, a Consultant Psychiatrist on the staff of the approved centre shall, as soon as maybe carry out an examination of the person and shall thereupon either –

- (a) If he or she is satisfied that the person is suffering from a mental disorder, make an order to be known as an Involuntary Admission Order and referred to in this Act as "an Admission Order" in a form specified by the Commission for the reception, detention and treatment of the person and a person to whom an Admission Order relates is referred to in this Act, "a patient", or
- (b) If he or she is not so satisfied, refuse to make such order..."

"15 – (1) An admission order shall authorise the reception, detention and treatment of the patient concerned and shall remain in force for a period of 21 days from the date of the making of the order and, subject to sub-s(2) and section 18(4), shall then expire.

(2) The period referred to in sub-s (1) may be extended by order (to be known as and in this Act referred to as "a Renewal Order") made by the Consultant Psychiatrist responsible for the care and treatment of the patient concerned for a period not exceeding three months.

(3) The period referred to in sub-s (1) may be further extended by order made by the Consultant Psychiatrist concerned for a period not exceeding six months beginning on the expiration of the renewal order made by the psychiatrist under sub-s(2) and thereafter may be further extended by order made by the psychiatrist for a period each of which does not exceed 12 months (each of which order is to be referred to in this Act as "a Renewal Order")

(4) The period referred to in sub-s (1) shall not be extended under sub-s (2) or (3) unless the Consultant Psychiatrist

concerned has not more than one week before the making of the order concerned examined the patient concerned and certified in a form specified by the Commissioner that the patient continues to suffer from a mental disorder..."

"18 – (1) Where an Admission Order or a Renewal Order has been referred to a tribunal under s. 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 the patient to be discharged from the approved centre concerned..."

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

(2) In the case of a person who immediately before such commencement stood detained under s. 184 or 185 of the Act, 1945, his or her treatment and detention shall be regarded as authorised by virtue of the 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....

(4) The detention of a person referred to in sub-s (2) or (3) shall be referred to a tribunal by the Commission before the expiration of the period referred to in sub-s (2) or (3), as maybe appropriate and the tribunal shall review the detention as if it had been authorised by a Renewal Order under s. 15(2)....

10. Up to the 3rd July, 2006 the applicant was detained under s. 207 of the Act of 1945. In the case of *R. T. v. the Director of the Central Mental Hospital* [1995] 2 I.R. 65 this section was declared unconstitutional. Notwithstanding this no alteration took place in the legal basis of the applicant's detention in the Central Mental Hospital until the 3rd July, 2006. Even if it had not been declared unconstitutional, s. 207 would have ceased to exist on the 31st October, 2006 upon the repeal of the Mental Treatment Act, 1945 and the coming into force of the Mental Health Act, 2001.

11. The alteration of the legal basis for the applicant's detention to that of a detention pursuant to s. 184 of the Act of 1945 namely that of temporary chargeable patient was no doubt done as a *bone fide* attempt to regularise the applicant's detention. However a necessary condition of such a detention, pursuant to sub-s 4 of s. 184 is that the authorised medical officer certify *inter alia* that the person in question is suffering from mental illness and requires not more than six months suitable treatment for his recovery.

12. It is perfectly clear from all of the evidence in this case that at that time and indeed at all material times it simply could not have been envisaged that the applicant's recovery could have been achieved in the six month prescribed period.

13. That being so I am satisfied that the order made on the 3rd July, 2006 under the provisions of s. 184 of the Act of 1945 was invalid in *ab initio*.

14. As the plaintiff's detention as of the 1st November, 2006 when the Act of 2001 came into force, was unlawful, in my view the transitional provisions contained in s. 72 of the Act of 2001 were not engaged, it being necessary for the purposes of effecting a lawful transition under s. 72, that the detention as of the 1st November, 2006 was a lawful one. In this regard I agree with the following passage from the judgment of Clarke J. in the case of *J. H. v. Vincent Russell, Clinical Director of Cavan General Hospital and Others* (Unreported, 6th February, 2007), where he says at p. 17 as follows:

"First it is necessary to consider whether that person's detention under the provision of the 1945 Act was valid as of the 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 formally 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..."

15. It is common case that notwithstanding the purported transition of the applicant's detention pursuant to s. 72 of the Act of 2001, a Mental Health Tribunal was not convened to review that detention prior to the expiration of the six month period of detention on the 2nd January, 2007, as would have been required by sub-s 4 of s. 72 of the Act of 2001.

16. The Renewal Order of the 2nd January, 2001, which purported to renew the detention of the applicant pursuant to s. 15(2) of the Act of 2001, was made by Dr. O'Leary. The applicant complains that Dr. O'Leary had no power to make this order because the power to make a Renewal Order under s. 15(2) is restricted to the "Consultant Psychiatrist responsible for the care and treatment of the patient concerned" and it was submitted that Dr. O'Leary was not the Consultant Psychiatrist responsible for the care of the applicant. It was submitted that on this ground alone the order of the 2nd January, 2007 was invalid and the detention resulting from it unlawful.

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

brought in for the purposes of review, could not exercise the power of renewal contained in s. 15(2) and s. 15(3).

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

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

20. Thus as of the 2nd January, 2007 there were three fundamental flaws in the legal regime purporting to lawfully detain the applicant. The first of these was the invalidity of the s. 184 order made on the 3rd July, 2006, the second was the failure to have convened a Mental Health Tribunal to have reviewed the detention of the applicant after the 1st November, 2006 and before the 2nd January, 2007 and the third was the invalidity of the purported Renewal Order of the 2nd January, 2007 resulting from it being made by a Consultant Psychiatrist not entitled to make that order.

21. It could be said that in light of the invalidity of the s. 184 order, with the result that the transitional provisions in s. 72 of the 2001 Act, were not engaged, that the failure to have convened a Mental Health Tribunal before the 2nd January, 2007 was immaterial. Whether that be so or not, it is clear that the detention of the applicant based upon the purported Renewal Order of the 2nd January, 2007 was unlawful. This was because the detention up to the 2nd January, 2007 was unlawful and in my opinion a Renewal Order pursuant to s. 15(2), in the statutory scheme provided in the Act of 2001, can only follow an Admission Order made pursuant to s. 14 of the 2001 Act. Where a person is detained validly pursuant to a s. 184 order, by virtue of s. 72 of the Act of 2001, after the 1st November, 2006 that person is regarded as having been involuntary admitted. Thus where there is a valid transition pursuant to s. 72(1) a Renewal Order under s. 15(2) can be made.

22. It necessarily, follows in my view that if there is no valid s. 184 order, that is akin to the absence of a valid s. 14 Admission Order and hence the necessary statutory basis for a Renewal Order under s. 15(2) is excluded.

23. Thus in my view the Renewal Order of the 2nd January, 2007 is fatally flawed for two reasons namely the absence of the necessary statutory basis for it because of the invalidity of the s. 184 order and the fact that it was made by a psychiatrist not entitled to make it. Because the transitional provisions in s. 72 were not engaged because of the invalidity of the s. 184 order in my view the failure to have convened a Mental Health Tribunal was immaterial in the sense that it did not affect the lawfulness or unlawfulness of the applicant's detention.

24. After the making of the purported Renewal Order on 2nd January 2007, the Mental Health Commission convened a Mental Health Tribunal to review the applicant's detention pursuant to that purported Renewal Order. This Mental Health Tribunal met on the 22nd January, 2007 and affirmed the Renewal Order of the 2nd January, 2007. The applicant was represented by a legal representative pursuant to s. 17(1)(b) of the 2001 Act. No complaint was made to this tribunal about any of the foregoing matters concerning the legality of the applicant's detention.

25. Thereafter on the 28th March 2007 a Renewal Order for a period of six months pursuant to s. 15(3) of the 2001 Act, was made by Dr. Mohan.

26. The validity of this order is challenged on the basis that a necessary prerequisite for the making of a s. 15(3) Renewal Order is the existence of a valid s. 15(2) order immediately prior to the making of the s. 15(3) order. In this regard it was submitted by Mr. McDonagh S.C. for the applicant that having regard to the fact that the detention period in the order of the 28th March, 2007 was for six months, this could only arise after a period of three months detention as contained in a valid s. 15(2) order and if the s. 15(2) order was invalid then there was no legal basis for prescribing a period of six months detention under s. 15(3).

27. For the respondents it was submitted that there was no dispute but that the applicant was suffering from a mental disorder, that even if there was any flaw in the legality of the applicant's detention prior to the 3rd January 2007, that the safeguards in the 2001 Act "kicked in" and the applicant had the benefit of the safeguards contained in s. 18, whereby his detention was reviewed by a Mental Health Tribunal twice, the first occasion being the 22nd January, 2007 and later again on the 16th April, 2007 where on both occasions these two separate tribunals affirmed the two Renewal Orders in question. It was submitted that a Mental Health Tribunal was mandated to and could review compliance with inter alia s. 15 of the 2001 Act, and where any non-compliance was of a procedural nature, as it was submitted, was the situation in this case, and if the tribunal was satisfied no injustice was done by it, it had jurisdiction to affirm the Order, as was done. It was submitted that exactly the same safeguards were applied on each occasion of a review of a Detention Order be it an Admission Order or a Renewal Order, there being no continuum of detention from one order to the next.

28. It was submitted that where a Mental Health Tribunal was acting within jurisdiction, this court should afford a measure of curial deference and not interfere.

29. It was further submitted that if the validity of a Renewal Order could be attacked because of a flaw in a prior Renewal Order made perhaps several years before, that there would be a "domino effect" and a current Renewal Order could not confidently be relied upon because of the potential for its undoing, resulting from flaws effecting Renewal Orders made in the past.

30. In this regard, placing reliance upon the judgment of Henchy J. in *The State (Byrne) v. Frawley* [1978] I.R. 326, it was submitted that the interest of good order in the care and treatment of persons suffering from mental disorders requires that defects in Renewal Orders not brought to the attention of a Mental Health Tribunal or where appropriate this Court, in a timely fashion, cannot be relied upon subsequently to challenge the validity of later Renewal Orders.

31. The first issue which necessarily arises here is whether or not a Mental Health Tribunal would have had jurisdiction under s. 18 to "cure" any of the effects as discussed above in the lawfulness of the detention of the applicant pursuant to the Renewal Order of the 2nd January, 2007.

32. The jurisdiction of a Mental Health Tribunal in this regard is confined by s. 18. It must be observed initially that the essence of the jurisdiction given to a Mental Health Tribunal in this regard is to "review the detention of the patient concerned". The first thing the tribunal must consider is whether the patient is suffering from a mental disorder and it must be satisfied that a patient is so suffering. In this case no issue arises on this. Secondly, a tribunal must consider whether or not there has been compliance with sections 9, 10, 12, 14, 15 and 16, where applicable. In this case the relevant section to be considered was s. 15. It is to be noted that in regard to compliance the tribunal is confined to considering compliance with these numbered sections. Thus as was held by Clarke J. in the *J.H.*

case:

"The tribunal does not have a jurisdiction to consider the procedural validity of a person's previous detention under the 1945 Act ... "

33. It is to be borne in mind that s. 4 requires that the principle consideration where decisions are made under the Act concerning the care and treatment of person, the best interest of the person is to be the principle consideration. This requirement applies to Mental Health Tribunals who must consider the validity or otherwise of Renewal Order or Admission Orders.

34. 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. That together with the restriction in s. 18(1)(a) (ii) mean that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by a Mental Health Tribunal. Therefore it necessarily follows that there must be in existence either an Admission Order or Renewal Order, where appropriate, which in substance is valid. An order which contains a flaw which undermines, or disregards the statutory basis for lawful detention as provided for in this Act, could not be excused under s. 18. Therefore the absence of the necessary valid preceding order or the making of an order by the wrong person are in my opinion defects which take the purported order outside or beyond the statutory scheme provided and cannot be cured under s. 18. It is clear that what was envisaged by the Oireachtas, was that a Mental Health Tribunal would have the power to excuse minor errors of an insubstantial nature, but no more.

35. In my view the Mental Health Tribunal which met on the 22nd January, 2007 could not have excused the making of the order by Dr. O'Leary. Of the three defects affecting the lawful detention of the applicant existing at that time, this was the only one which the tribunal would appear to have has a jurisdiction to consider. The tribunal was not entitled to consider compliance with s. 184 and the failure to have convened a Mental Health Tribunal between 1st November, 2006 and the 2nd January, 2007 as was required by s. 17(1)(a) was also a matter which was outside the scope of their consideration because s. 17 is not listed amongst the sections in respect of which a Mental Health Tribunal is required to consider compliance

36. I am satisfied having regard to the jurisdiction which the Mental Health Tribunal had on 22nd January, 2007, its affirmation of the Renewal Order, having regard to the fundamental defect in it, by reason of it having been made by Dr. O'Leary, was invalid.

37. As the order of the 2nd January, 2007 was invalid it necessarily follows that the necessary statutory basis for the making of the order of the 28th March, 2007 was absent. A s. 15(3) order is clearly intended to follow a s. 15(2) order. It cannot have an existence on its own: you cannot have a s. 15(3) order without first having a s. 15(2) order. As the s. 15(2) order of the 2nd January, 2007 was invalid, it could be said that the s. 15(3) order made on the 28th March, 2007 was consequentially invalid.

38. In my opinion however this consequence does not follow for the following reasons.

39. The scheme of detention provided for in the 2001 Act is based upon the creation of short periods of detention each disconnected from the other, so that on every renewal the detention has to be fully justified. This is achieved by the Admission Order in the first instance followed then by Renewal Orders under s. 15. Thus a patient who requires long term treatment for a mental disorder will have made in respect of him, in all probability, several Renewal Orders over many years. A finding of invalidity of a Renewal Order which in itself is valid in all respects, because of a defect in a previous Renewal Order or Admission Order is a wholly undesirable eventuality and in all probability not in the best interests of persons suffering from a mental disorder.

40. The Act of 2001 provides for the convening of a Mental Health Tribunal following the making of an Admission Order and every Renewal Order, and the Mental Health Tribunal must pursuant to s. 18(2) make its decision within twenty one days of the making of the Admission Order or Renewal Order as the case may. Section 17(1)(b) requires that the Mental Health Commission inter alia assign a legal representative to represent the patient concerned unless he or she proposes to engage one.

41. In my opinion, having regard to the foregoing it is incumbent upon a person in respect of whom an Admission Order or a Renewal Order has been made, to make such complaint in relation to their detention arising out of the making of an Admission Order or a Renewal Order and in respect of which a Mental Health Tribunal has a jurisdiction, to that tribunal when it convenes.

42. In this case the facts pertinent to the lawfulness of the applicant's detention were apparent at all times. The defect in the s. 184 order was readily apparent to anyone who was privy to the applicant's mental health history as recorded in the psychiatric reports concerning this. The failure to have convened a Mental Health Tribunal between 1st November, 2006 and the 2nd January, 2007 was also readily apparent. The fact that the Renewal Order of the 2nd January, 2007 was made by Dr. O'Leary was equally apparent.

43. Whilst it may be the case that the Mental Health Tribunal which convened on 22nd January, 2007 did not have a jurisdiction to deal with procedural defects in the s. 184 order or to consider compliance with s. 17(1)(a), it undoubtedly had jurisdiction to consider compliance with s. 15(2) and in this regard the complaint which is now made in these proceedings concerning the making of the Order by Dr. O'Leary should have been made then.

44. Notwithstanding that fact that a tribunal did not have a jurisdiction to deal with compliance with s. 17 or defects in the s. 184 order, the applicant's grievance in regard to these, being readily apparent at the time, should have been brought to the attention of this Court at that time by way of an application for an enquiry under Article 40.4 of the Constitution, as has now been done.

45. There is, in the best interest of a person suffering from a mental disorder, a need for good order in the care and treatment of that person and the management of that care and treatment. The rendering invalid of an otherwise valid Renewal Order by reason of a defect in a prior Renewal or Admission Order is in my view inimical to good order in this process and ultimately not in the best interest of someone suffering from mental disorder.

46. That being so in my opinion there cannot be a reliance upon defects, even substantial defects in earlier Admission or Renewal Orders, where these defects could have been complained of in a Mental Health Tribunal or brought to the attention of this Court on an Article 40.4 enquiry, but were not, to challenge the validity of a Renewal Order which in itself is valid.

47. In this respect I am satisfied that the *dictum* of Henchey J. in *The State (Byrne) v. Frawley* [1978] I.R. 326 at 350 is apposite where he says the following:

"What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoners competence to lay claim to it in the circumstances of this case"

48. In this case the defects in the s. 184 order or the defects in the Renewal Order of the 2nd January, 2006 are neither cured, excused or ignored. What has occurred is that in the process of events, the applicant has lost competence to lay claim to, or place reliance on the these defects to challenge the validity of the Renewal Order of the 28th March, 2007. In this regard the "domino effect" much feared by the respondents is avoided.

49. The principle that a legal or statutory provision which is subsequently found to be invalid may be sheltered from nullification and thus accorded the continuance of legal force and effect, where its invalidity is not asserted at the appropriate time, and where those affected by it and concerned with it, in good faith, have treated it as valid and acted accordingly, is now well established in our jurisprudence following the judgments of the Supreme in the case of *A. v. the Governor of Arbour Hill Prison* (Unreported, 12th July, 2006).

50. In my view the above conclusion is entirely consistent with that principle.

51. Accordingly I have come to the conclusion that the Renewal Order of the 28th March, 2007 is a valid order and hence the detention of the applicant on foot of it is a lawful detention.