THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 27 J.R.]

BETWEEN

JF

APPLICANT

AND

MENTAL HEALTH TRIBUNAL

RESPONDENT

JUDGMENT of Mr. Justice Coffey delivered on the 5th day of March, 2018

1. This is an application for judicial review in which the applicant seeks to challenge a decision of the respondent made on the 2nd January, 2018 pursuant to s. 18 of Mental Health Act 2001 ("the Act") which affirmed an admission order made on 13th December, 2017 pursuant to s. 14(1) of the Act.

2. The applicant challenges the decision on three grounds:-

> (1) It is contended that the respondent erred in law in failing to determine that a decision had been made on 10th December, 2017 to refuse an admission order so that the underlying application and recommendation were spent as of the date of the purported making of the admission order on 13th December, 2017;
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> (2) It is further contended that the respondent erred in law in failing to determine that the examination of the applicant carried out by a consultant psychiatrist on the 13th December, 2017 was not carried out "as soon as may be" as required by s. 14(1) of the Act;
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> (3) It is further contended that having found that ss. 9, 10, 11, 12, 13, 14, 15 and 16 of the Act had not been compiled with and having further found that the failure did not affect the substance of the admission order or cause an injustice, the respondent failed in its duty to give reasons for its decision.

3. The applicant seeks the following reliefs:-

> (1) An order of *certiorari* quashing the decision of the respondent in respect of the applicant dated 2nd January, 2018;
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> (2) A declaration that the respondent erred in law in failing to hold that the application contained in a form dated 8th December, 2017 and used in the process to involuntarily detain the applicant on 13th December, 2017 was spent and/or had already be determined prior to 13th December, 2017 That is to say, a decision not to make an admission order had already been made on or about 10th or 11th December by a consultant psychiatrist;
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> (3) A declaration that the respondent, having found that there existed a failure to comply with the provisions of ss. 9, 10, 12, 14, 15 and 16 where applicable, did not give adequate reasons why s. 18(1)(a)(ii) applied to the various failures to a comply with the mandatory provisions of the Act;
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> (4) A declaration that where the respondent was satisfied that there had been failures to comply with the provisions of the Act, relating to the process of the applicant's involuntary admission, in order for s. 18(1)(a)(ii) of the Act to be utilised to affirm the admission order, notwithstanding such errors or failures, the respondent is required as a matter of law to identify the precise failures, to ascertain their effects and estate why the failures did not affect the substance of the admission order and why they did not cause an injustice.

4. It is common case that on the day of its making, the impugned decision of the 2nd January, 2018 was superseded by a renewal order made pursuant to s. 15 of the Act. It thereby ceased to have any legal effect for which reason a preliminary issue arose as to whether the proceedings were moot.

5. On 24th January, 2018 this Court gave an *ex tempore* ruling in which, for the reasons stated therein, it held that the proceedings were moot but nonetheless decided in the exercise of its discretion to allow the hearing to proceed.

6. In so deciding, this Court accepted that the applicant had raised a novel and important point of law in relation to the powers and obligations provided for by s. 14 of the Act and further accepted that the opportunity afforded to the applicant to raise the issue before the making of the renewal order was so insufficient as to be almost nonexistent. In so ruling, however, this Court expressly retained its discretion to review its ruling in the light of how the case proceeded.

Factual Summary

7. On 8th December, 2017 the applicant's mother completed an application to a registered medical practitioner for a recommendation for the involuntary admission of her son to "an approved centre", as prescribed under the Act.

8. At s.7 of the application, the applicant's mother stated her reason for making the application as follows:-

> "[JF] is hallucinating, delusional and agitated. He has a history of psychosis and is on ozanzapine but may not be compliant."

9. Section 9 of the relevant form states that the person completing it should not make an application unless he or she has observed the person who is the subject of the application "not more than 48 hours before the date of the making of the application." The applicant's mother completed s. 9 of the form to indicate that she last observed her son at 17:20 on the 8th December, 2017. It is common case that the stated date of observation was within the requisite period of 48 hours and it is further accepted that the

numeral "2" in the time recorded in the application was overwritten.

10. On the same day, the applicant's general practitioner, Dr. Patrick O'Connor, completed a recommendation in the prescribed form for the involuntary admission of the applicant to an approved centre. Dr. O'Connor ticked the relevant box at s.7 of the recommendation to indicate that in his opinion "the reception, detention and treatment of (the applicant) in an approved centre would be likely to benefit or alleviate (his) condition … to a material extent".

11. Section 8 of the form requires the doctor to give a clinical description of the applicant's mental condition and to state the grounds for his opinion which Dr. O'Connor set out as follows:-

> "Patient has been treated for psychotic episode currently on olanzapine 5 mg a day behaviour now erratic + patient has been having…"

12. It is not in dispute that in completing s. 8 of the recommendation, Dr. O'Connor failed to state his opinion that involuntary detention and treatment of the applicant in an approved centre would be likely to benefit or alleviate the applicant's condition. However, he had clearly indicated his opinion to that effect by ticking the relevant box when completing s. 7 of the form.

13. On the evening of Sunday, 10th December, 2017 the applicant's mother brought the application and the recommendation to the approved centre.

14. At this point, there is a divergence in the evidence relied upon by the applicant and the respondent. The applicant contends that the on call consultant psychiatrist at the approved centre "decided" to treat the applicant in the community and relies on the fact that the following day a community mental health nurse was sent out to visit the applicant at his home. It is alleged that the intention behind this decision was to avoid the involuntary detention of the applicant in a situation where the applicant's mother wished the matter to be dealt with as calmly as possible. The respondent contends that no such decision is recorded in the relevant clinical notes for the 10th/11th December, 2017 and characterises the decision on the 10th December, 2017 to send the nurse out to visit the applicant at his home as no more than a decision "not to act precipitously" in circumstances where the applicant was not an immediate risk to himself or to others in order to "explore" if the applicant could be treated in the community rather than putting him through the stress associated with an involuntary admission.

15. It is common case that on 11th December, 2017 a community mental health nurse did visit the applicant at his home where the applicant indicated that he would not adhere to community treatment. It is averred by the applicant's solicitor in her affidavit that "upon receiving this confirmation, the Consultant Psychiatrist on call sent the necessary paperwork to 'Assisted Admissions' in order that the applicant would be brought to the approved centre." "Assisted Admissions" brought the applicant to the approved centre where he was received and taken charge of at 8pm on 12th December, 2017 and examined by a consultant psychiatrist at 2pm on 13th December, 2017. It is not in dispute that, having examined him, the consultant psychiatrist was satisfied that the applicant was suffering from a mental disorder and consequently made an admission order on the 13th December, 2017. The admission order was affirmed by the decision of the respondent on 2nd January, 2018 and it is that decision which is the subject matter of these proceeding.

The Hearing Before the Tribunal

16. The applicant's solicitor raised two issues before the respondent:-

> (1) She contended that the application and the recommendation were spent as of the 10th December, 2017 by reason of the fact that the consultant psychiatrist on call had made a decision that community treatment was still a viable option and had thereby refused to make an admission order for the purposes of s. 14 of the Act;
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> (2) She further submitted that the time set out by the applicant's mother in section 9 of the Application was "clearly changed" and that Dr. O'Connor's opinion at section 8 of the recommendation was "incomplete."

The Tribunal's Decision

17. The respondent rejected both points of objection and held as follows:-

> (1) That the application was not spent (and by implication, that the s. 14(1) process had not been completed) on 10th January, 2018. It stated its reasons for so deciding as follows:
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> > "In light of the 2001 Act's omission to specify a timeframe when such an application would expire that in contrast to the procedure surrounding a recommendation (s. 10(5)) where a time limit was specified with this omission in the Act did not invalidate the procedure";
>
> (2) It accepted that the provisions of ss. 9, 10, 12, 14, 15 and 16 of the Act where applicable had not been compiled with but stated that:-
>
> > "notwithstanding these errors, the Tribunal concludes that by virtue of s. 18(1)(a)(2), no injustice (was) caused and does not affect the substance of the Order under the Act"

Relevant Statutory Provisions

18. Section 8(1) of the Act provides:-

> "A person may be involuntarily admitted to an approved centre pursuant to an application under *section 9* or *12* and detained there on the grounds that he or she is suffering from a mental disorder."

19. Section 3 of the Act defines a "mental disorder" as follows:-

> "(1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where—
>
> > *(a)* because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or

(b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and

(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."

20. Section 9 of the Act sets out the categories of persons who may apply for involuntary admission and further provides:-

"(3) An application shall be made in a form specified by the Commission.

(4) A person shall not make an application unless he or she has observed the person the subject of the application not more than 48 hours before the date of the making of the application."

21. A registered medical practitioner who has examined a person who is the subject of an application and who is satisfied following that examination that he or she is suffering from a mental disorder may make a recommendation for that person's involuntary detention pursuant to s. 10 of the Act which provides as follows:

"(1) Where a registered medical practitioner is satisfied following an examination of the person the subject of the application that the person is suffering from a mental disorder, he or she shall make a recommendation (in this Act referred to as "a recommendation") in a form specified by the Commission that the person be involuntarily admitted to an approved centre (other than the Central Mental Hospital) specified by him or her in the recommendation….

(5) A recommendation under this section shall remain in force for a period of 7 days from the date of its making and shall then expire."

22. In order to be of any legal consequence, a recommendation made pursuant to s. 10 of the Act must be received by the clinical director of an approved centre whereupon a consultant psychiatrist on the staff of the centre is obliged to carry out the duties provided for by s. 14(1) of Act which provides as follows: -

"(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 may be, 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 as "a patient", or

(b) if he or she is not so satisfied, refuse to make such order.

23. Section 2(1) of the Act defines an "examination", in relation to a recommendation, admission or renewal order, as:-

"a personal examination carried out by a registered medical practitioner or a consultant psychiatrist of the process and content of thought, the mood and the behaviour of the person concerned".

24. Section 14(2) of the Act allows a person who is being examined under s. 14(1) to be detained for the purpose of carrying out the examination but limits the permitted period of detention to a period not exceeding 24 hours:-

"(1) A consultant psychiatrist, a medical practitioner or a registered nurse on the staff of the approved centre shall be entitled to take charge of the person concerned and detain him or her for a period not exceeding 24 hours (or such shorter period as may be prescribed after consultation with the Commission) for the purpose of carrying out an examination under *subsection (1)* or, if an admission order is made or refused in relation to the person during that period, until it is granted or refused."

25. Section 15 of the Act provides for the legal effect and duration of both an admission order and a renewal order as follows:-

"(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 *subsection (2)* and *section 18 (4),* shall then expire.

(2) The period referred to in *subsection (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 further period not exceeding 3 months."

26. Section 17 of the Act provides for the mandatory review both of an admission order and a renewal order before a Tribunal established by the Commission.

27. Section 18 of the Act provides for the duties and powers of the Tribunal when reviewing an admission or renewal order, referred to it under s. 17 of the Act and provides:-

"(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….
>
> (5) Notice in writing of a decision under *subsection (1)* and the reasons therefor shall be given to— …
>
> *(c)* the patient and his or her legal representative…"

The Alleged Refusal of the 10th December, 2017

28. The applicant contends that on 10th January, 2018 the consultant psychiatrist on duty at the approved centre made what is characterised as a "decision" that community treatment was still a viable option. It is alleged that this constituted a refusal of an admission order for the purpose of s. 14(1)(b) of the Act. Consequentially, it is contended that the underlying application and recommendation were spent as of that date.

29. An application pursuant to s. 9 of the Act is not an application for an admission order but rather an application to a registered medical practitioner for a recommendation for involuntary admission of the person concerned to an approved centre. Upon receipt by the clinical director of an approved centre of a recommendation so made, a consultant psychiatrist on the staff of the centre is obliged to examine the person concerned "as soon as may be" and thereafter to either make or refuse an admission order depending on whether he or she is satisfied that the patient is suffering from a mental disorder.

30. It is clear from the provisions of s. 14(1)(b) of the Act that the entitlement of a consultant psychiatrist to refuse to make an admission order can only arise after he or she has carried out an examination of the person who is the subject of a recommendation pursuant to s. 10 of the Act. Accordingly, even if a consultant psychiatrist purports to refuse to make an admission order before carrying out the requisite examination, or indeed refuses to carry out such an examination, the refusal so made would not in law constitute a decision to "refuse" to make an admission order within the meaning of s. 14(1)(b) of the Act.

31. Assuming without deciding that this interpretation of the provisions of s. 14(1)(b) of the Act is incorrect, I am nonetheless satisfied that there is in any event no evidence either from or attributable to the consultant psychiatrist on call, Professor Swanick, to suggest that he made a concluded and final decision on the 10th January, 2018 to abandon the process of examination under s. 14(1) of the Act.

32. The limited evidence available suggests that at all material times the applicant was psychotic but not a risk either to himself or to others. The real concern was whether or not he could be relied upon to take his medication whilst living at home. Professor Swanick made a decision, late on Sunday, 10th December, 2017, to send out a community mental health nurse the following day on what was effectively a fact finding mission to assess the applicant in his own environment and specifically to establish whether he could be relied upon to take his medication whilst living at home so that he could be managed in the community. It is accepted that this approach was taken because of the applicant's mother's stated wish that the matter be dealt with "as calmly as possible". There is nothing in the evidence to suggest that in making this decision Professor Swanick did not have an underlying intention to carry out an examination of the applicant or that if he had such an intention that it had been abandoned by him on either the 10th or 11th December, 2017.

33. Accordingly, this point of objection fails.

The Alleged Failure to Examine the Applicant "as soon as may be"

34. The applicant further contends that the examination by the consultant psychiatrist of the applicant carried out at 2pm on 13th January, 2018 was of no legal effect insofar as it was not carried out "as soon as may be" as required by s. 14(1) of the Act.

35. It is to be noted at the outset that this argument was not in fact made before the respondent, who clearly cannot be criticised for any failure to give a reasoned decision in relation to the matter. However, this Court will nonetheless, in the exercise of its discretion, determine the issue not least because the respondent has accepted at paragraph 48 of its written submissions that the applicant's "entire case" before the respondent "must be based… on the fact that the examination pursuant to s. 14(1) did not take place 'as soon as may be'."

36. In her oral submissions on this issue, counsel for the applicant accepted that it was reasonable for the consultant psychiatrist on duty to allow the applicant to remain at home on the night of Sunday, 10th December, 2017. Further, she made no criticism of the failure to carry out an examination of the applicant between 8pm, on 12th December, 2017 (when he was admitted to hospital) and 2pm on 13th December, 2017 (when the examination was in fact carried out). Moreover, it is accepted by the applicant's solicitor, at paragraph 7 of her affidavit, that upon receiving confirmation from the community mental health nurse that the applicant would not adhere to community treatment, the responsible consultant psychiatrist sent the necessary paperwork to "Assisted Admissions" to facilitate the applicant being brought to the approved centre. There is no suggestion either by the applicant's solicitor in her affidavit or by the applicant's counsel in her submissions that there was any undue delay on the part of the relevant consultant psychiatrist in acting on the information provided by the nurse. What remains is an allegation that there was a wrongful failure to carry out an examination on the 11th December, 2017 in circumstances where, on the undisputed evidence, the applicant did not pose a risk either to himself or to others and where such delay as occurred did not deprive the applicant of his liberty.

Relevant Law

37. The correct approach to be adopted by the courts to the interpretation of the Act was considered by the Supreme Court in *Gooden v. St. Otteran's Hospital* [2005] 3 IR 617, where Hardiman J. indicated that a purposive and not literal approach should be applied to the interpretation of the Act because of its paternal nature. He stated at pp. 639-640 as follows:-

> "…in construing the statutory provisions applicable in this case in the way that we have, the court has gone as far as it possibly could without rewriting or supplementing the statutory provisions. The court must always be reluctant to appear to be doing either of these things having regard to the requirements of the separation of powers. I do not know that I would have been prepared to go as far as we have in this direction were it not for the essentially paternal character of the legislation in question here, as outlined in *In re Philip Clarke* [1950] I.R. 235. The nature of the legislation, perhaps, renders less complicated the application of a purposive construction than would be the case with a statute affecting the right to personal freedom in another context. The overall purpose of the legislation is more easily discerned and, where the medical evidence is unchallenged, the conflicts involved are less acute than in other detention cases. I do not regard the present decision as one which would necessarily be helpful in the construction of any statutory power to detain in any other context."

38. The paternal nature of the Act is underscored by s. 4(1) which provides:-

> "In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made."

39. In his survey of the Act in *T.O'D. v. Kennedy* [2007] 3 I.R. 689, Charleton J. described s. 4 as "fundamental" and stated, at p. 703, that it:-

> "…infuses the entire of the legislation with an interpretative purpose as well as requiring the personnel administering the Act of 2001 to put the interests of the person to be treated as being paramount, with due regard to those who may be harmed by a decision not to treat that person."

40. In *M.R. v. Byrne* [2007] 3 I.R. 211, Ó'Néill J. addressed the issue of how the provisions of the Act impacted on the proper exercise of clinical autonomy by medical experts who are required to operate its provisions and stated as follows at p.224:-

> "It should be stressed that the foregoing analysis or description of these provisions merely seeks to set out the legal framework of the operation of the statutory provisions. It cannot be over emphasised however that on a daily basis these provisions will have to be operated by clinical experts who within the broad framework set out above have to make clinical judgments and I would like to stress that it is not intended in this judgment to interfere in the proper realm of clinical judgment or to cut down or limit the proper scope of clinical judgment."

41. The meaning of the words "as soon as may be" in s. 14(1) of the Act was considered by Peart J. in *M.Z. v. Khattak* [2009] 1 IR 417, who stated as follows, at p. 432:-

> "The phrase "as soon as may be" is difficult to interpret precisely. It is conceptually different to a word such as "forthwith", or even "as soon as possible" or "as soon as practicable". It seems to permit of some more latitude that any of these. Counsel for the applicant referred to the judgment of Geoghegan J. in *McCarthy v. An Garda Síochána Complaints Tribunal* [2002] 2 I.L.R.M. 341, where some consideration was made of the meaning to be given to the phrase " as soon as may be" and similar phrases in various statutory provisions. The judge concluded that "as soon as may be means as soon as may be reasonably possible in all the circumstances"."

42. Peart J. went on to say that following a patient's admission to an approved centre as an involuntary patient, there was "clearly an imperative" that he/she must be examined "quickly". *Prima facie* this suggests that the imperative for expedition is greater after the person concerned has been admitted into involuntary detention rather than in the proceeding period after a recommendation in which no deprivation of liberty has occurred. Peart J. nonetheless observed, at p.432, that even after the person concerned had been admitted into involuntary detention for the purpose of examination that:-

> "…it must be borne in mind also that s. 10(2) of the Act itself at least contemplates that such an examination may not occur for up to 24 hours following admission. That is not to say that in all cases this must be taken as permitting of a 24 hour delay…"

Decision

43. When construing the true meaning and effect of the words "as soon as may be" in s. 14(1) of the Act, the court must apply the canon of construction that requires that legislation should be interpreted as a whole. In *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317, at p.341, Walsh J stated:-

> "…the whole or any part of the Act may be referred to and relied upon in seeking to construe any particular part of it, and the construction of any particular phrase requires that it is to be viewed in connection with the whole Act and not that it should be viewed detached from it. The words of the Act, and in particular the general words, cannot be read in isolation and their content is to be derived from their context. Therefore, words or phrases which at first sight might appear to be wide and general may be cut down in their construction when examined against the objects of the Act which are to be derived from a study of the Act as a whole including the long title. Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous".

44. Applying this cannon of construction to s. 14(1) of the Act, it is clear that the phrase "as soon as may be" cannot be read in isolation but must be construed with due regard to the requirements of s. 4(1) of the Act which provides that:-

> "In making a decision under this Act… (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made."

45. A consultant psychiatrist who is making a decision to make an admission order pursuant to s. 14(1) must have regard to the requirements of s. 4(1) of the Act and, therefore, must "put the interests of the person to be treated as being paramount with due regard to those who may be harmed by a decision not to treat that person" (see dictum of Charleton J. in *T. O'D v. Kennedy supra*). The requirements of s. 4(1) of the Act cannot be attained unless s. 14(1) of the Act is interpreted in such a way as to permit the exercise of clinical judgment to ensure that the examination upon which the decision is based is timed, prepared for and carried out in such a way as to enable the consultant psychiatrist to best assess and protect both the interests of the patient and the interests of other persons who may be at risk of serious harm if the decision is not made. Thus, in a case where the person concerned poses a risk either to himself or to others, the phrase "as soon as may be" in s. 14(1) as interpreted in the light of s. 4(1) will require a greater urgency of response than in a case where such a risk factor is not present. Absent such a risk factor, s. 14(1) of the Act is not to be construed as precluding the exercise of clinical judgment to procure relevant information about the person concerned prior to his or her admission and examination at the approved centre provided that the delay which it thereby caused is reasonable, proportionate and in pursuit of the requirements of s. 4(1) of the Act.

46. It is common case that on the 11th of December, 2017 the applicant did not pose a risk either to himself or to others and that there was no interference with his liberty. I am satisfied on the evidence that the clinical engagement that took place with him on that date was reasonable, proportionate and intended to attain the best interests of the applicant who at no time ceased to be a person who was to be examined by a consultant psychiatrist pursuant to the provisions of s. 14(1) of the Act. Absent any suggestion of undue delay occurring after the 11th December, 2017, I am satisfied that the examination of the 13th December, 2017 was carried out "as soon as may be" within the meaning of s. 14(1) of the Act.

Alleged Failure to Give Reasons
47. The applicant further contends that there was a wrongful failure on the part of the respondent to give reasons for rejecting the points of objection raised in respect of the overwriting of the time of the last observation of the applicant in section 9 of the application and the failure of Dr. O'Connor to state his opinion that the applicant required involuntary detention in section 8 of the recommendation notwithstanding the fact that he had indicated that he was of such opinion by ticking the relevant box in the previous section of the relevant form.

48. The irregularities complained of are manifestly immaterial and do not advance the applicant's case in any meaningful way. In her oral submission to this Court, counsel for the applicant conceded that the matters complained of were of a type that could be properly excused under s. 18(1)(a)(ii) of the Act and further accepted that the relevant reasons had in any event been fully set out on affidavit by the respondent. For the foregoing reasons, I will exercise the discretion that I have reserved to treat the issue as moot.

Conclusion
49. For the reasons set out above, I refuse the reliefs sought.