Neutral Citation Number: [2007] IEHC 73

THE HIGH COURT

[2007 No. 117 SS]

IN THE MATTER OF AN ENQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

M.R.

APPLICANT

AND

CATHY BYRNE, ADMINISTRATOR AND DR. FIDELMA FLYNN, CLINICAL DIRECTOR, SLIGO MENTAL HEALTH SERVICES, BALLYTIVNAN, CO. SLIGO

RESPONDENTS

Judgment of Mr. Justice O'Neill delivered on the 2nd day of March, 2007

1. On the 31st January, 2007 on an *ex-parte* application on behalf of the applicant I directed an enquiry pursuant to Article 40.4 of the Constitution into the legality of the detention of the applicant by the respondents, and I directed the respondents to certify in writing the grounds upon which the applicant was detained. That enquiry proceeded at 11 a.m. on the 2nd February, 2007.

2. The respondents certified that the ground upon which the applicant was detained was that she was detained pursuant to a "Renewal Order" made pursuant to s. 15(2) of the Mental Health Act, 2001 (hereinafter referred to as the Act), made on the 21st December, 2006, which Renewal Order was affirmed by a Mental Health Tribunal pursuant to s. 18(1) of the Act on the 9th January, 2007, both of which orders were said to have been made lawfully.

3. I concluded the enquiry on the 2nd of February, 2007 by holding that the applicant's detention was lawful and hereunder I set out my reasons for that conclusion.

4. The applicant is 43 years of age and for most of her adult life she has suffered from serious mental illness. For most of the past eleven years she has been an involuntary patient in the care of the respondents and since 2002 has been detained pursuant to the relevant statutory provisions then operative, in a special care unit, as distinct form an open admission unit.

5. The Mental Health Act, 2001 (Commencement) Order 2006, (SI 411 of 2006) brought sections 6, 8 to 30 and 56 to 75 inclusive of the Act into operation on the 1st November, 2006. At that time the applicant was detained by the respondents as a patient in the special care unit on foot of a Temporary Chargeable Patient Reception Order made pursuant to s. 184 of the Mental Treatment Act, 1945. This order authorised the detention of the applicant for a period of six months from the 21st June, 2006. By virtue of the provisions of s. 72(2) of the Act the applicant's treatment and detention was authorised by virtue of the Act of 2001 until the expiration of that period of six months.

6. In accordance with the provisions of s. 72(4) of the Act, the detention of the applicant was referred to a Mental Health Tribunal by the Mental Health Commission to be reviewed as if it had been authorised by Renewal Order under s. 15(2) of the Act of 2001.

7. This Mental Health Tribunal met on the 20th December, 2006 to review the detention of the applicant. The decision of this tribunal was to affirm the Admission Order on the grounds that the applicant suffered from a schizo affective disorder that was partially responded but continued to be associated with unstable and intrusive persecutory thoughts and limited insight.

8. The period specified in the Temporary Chargeable Patient Reception Order affirmed by the Tribunal expired on the 21st December, 2006. On the 21st December, 2006 Dr. Donagh O'Neill, Consultant Psychiatrist made a Renewal Order pursuant to the provisions of s. 15(2) of the Act of 2001. In this order, Dr. O'Neill certified that in his opinion the applicant should continue to be detained for a period not exceeding three months because she suffered from a mental disorder of the kind described in s. 3(1)(a) of the Act of 2001 and he further certified that his opinion was based upon the reason that the applicant continued to suffer from persecutory delusions, lacked insight, and was non-adherent in respect of treatment.

9. This Renewal Order of the 21st December, 2006 was referred by the Mental Health Commission to a Mental Health Tribunal. As with the previous Mental Health Tribunal, Mr. Peter Flynn Solicitor was appointed as legal representative to represent the applicant. Dr. Eugene Hill, Psychiatrist was appointed to examine her and he carried out his examination on the 3rd January, 2007 and furnished a written report on the 3rd January, 2007. The Tribunal sat on the 9th January, 2007. Its Chairman was John A. McCormack, a barrister, Dr. Mary MaGuire, a Consultant Psychiatrist and Mr. Eamon Boylan as the Tribunal Lay Member.

10. The proceedings of the Tribunal were attended by the applicant, and she was represented by Mr. Flynn. A written report from Dr. Eugene Hill was available but Dr. Hill did not attend in person. Dr. Donagh O'Neill was present in person and gave evidence to it. A written report dated 5th January, 2006 was made available by Dr. O'Neill to the Tribunal. The applicant gave evidence to the Tribunal similar to that given to the previous Tribunal on the 20th December, 2006 and it was to the effect that she accepted that she suffered from a mental illness for which she required inpatient treatment but she did not wish to be detained as an involuntary patient and further did not wish to be treated in the special care unit. Dr. O'Neill's evidence to the Tribunal, was that the applicant suffered from a "mental disorder" as defined in s. 3(1)(a) of the Act of 2001 as already certified by him in the Renewal Order, but also that her mental illness was such that it could be categorised as "mental disorder" as defined in s. 3(1)(b) of the Act of 2001.

11. In the course of his submissions to the Tribunal Mr. Flynn had submitted that the purported Renewal Order made by Dr. O'Neill on the 21st December was not valid as there was no evidence to justify the stated grounds of that order namely that because of the illness, disability or dementia, there was a serious likelihood of the applicant causing immediate and serious harm to herself or to other persons.

12. The Tribunal rejected that submission holding;

> "The Tribunal was not bound by the decision of Dr. O'Neill to characterise the mental disorder as constituting a serious likelihood etc., but only had to decide whether or not in its view the patient was at this time suffering from a mental disorder on the evidence before it."

13. It is contended on this application that this ruling by the Tribunal was unlawful because it failed to take account of the obligation of the Tribunal to satisfy itself that the provisions of s. 15 of the Act had been complied with and that if there had been a failure to comply with that provision there was an obligation on the Tribunal to decide whether that failure affected the substance of the order or caused an injustice, which latter determination was not made by the Tribunal.

14. The Mental Health Tribunal decided to affirm the Renewal Order of the 21st December, 2006, in the following terms:

> "The patient continues to suffer from persecutory delusions and while her insight has improved somewhat but she continues to require a structured residential treatment and the Tribunal affirms Order."

15. The reasons given in the order for the decision were as follows:

> "In affirming the order the Tribunal held that;
>
> (1) There was clear evidence from Dr. O'Neill's report and the patient's own responses that the patient continues to suffer from a mental disorder, persecutory delusions and schizophrenia.
>
> 2) The patient benefits from the structured environment which her involuntary status ensures. She herself accepted she is not ready for discharge and also that the treatment she is receiving has been beneficial to her.
>
> (3) In the event of her being changed to a voluntary status compliance with medication and O.T. would not be guaranteed."

16. The applicant challenges the lawfulness of her detention for the following reasons:

> (1) The Renewal Order purported to have been made by Dr. Donagh O'Neill on the 21st December, 2006 pursuant to s. 15 of the Act of 2001 was invalid and not made in accordance with law in that there was no proper basis for the certification by Dr. O'Neill that because of illness, disability or dementia there was a serious likelihood of the applicant causing immediate and serious harm to herself or other persons.
>
> (2) The decision of the Mental Health Tribunal on the 9th January, 2007 which purported to affirm the Renewal Order of Dr. O'Neill was invalid and not made in accordance with law in that the Tribunal did not decide, as it was required by s. 18 of the Act of 2001 to do, whether the provisions of s. 15 of the said Act had been complied with and if there had been a failure to comply with that provision, whether the failure affected the substance of the order or caused an injustice and further failed to give notice of that decision and of the reasons for it in writing as was required by s. 18(5) of the Act of 2001.
>
> (3) The Order of the Tribunal was invalid and not made in accordance with law because there had been a failure to comply with the provisions of s. 15 of the Act of 2001 and that failure was such that the Tribunal could not properly have concluded that the failure did not affect the substance of the order and did not cause an injustice.
>
> (4) That the order of the Tribunal was further invalid and not made in accordance with law because the reasons advanced by the Tribunal for concluding that the applicant continued to suffer from mental disorder could not support a decision that the applicant continued to suffer from mental disorder as defined in s. 3 of the Act of 2001.

17. The following parts of the Act of 2001 are relevant to this application.

18. The preamble:

> "An Act to provide for the involuntary admission to approved centres of persons suffering from mental disorders, to provide for the independent review of the involuntary admission of such persons and for those purposes, to provide for the establishment of a Mental Health Commission and the appointment of Mental Commission Tribunals and an Inspector of Mental Health Services, to repeal in part the Mental Treatment Act, 1945, and to provide for related matters."
>
> Section 3:
>
> "3 – (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 very 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.
>
> (2) In subsection (1) –
>
> "Mental illness" means a state of mind of a person which affects the persons thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons;
>
> "Severe dementia" means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression;
>
> "Significant intellectual disability" means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of that person."
>
> Section 4:

"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 their principle consideration with due regard been given to the interests of other persons who may be at risk of serious harm if the decision is not made…"

Section 15

"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 making of the order and subject to subsection (2) and s. 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 three months…"

(3) The period referred to in subsection (1) shall not be extended under subsection (2) or (3) unless the Consultant Psychiatrist concerned has not more than one week before the making of the order concerned examined the patient concerned and certified in a form specified by the Commission that the patient continues to suffer from a mental disorder."

Section 16

"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.

(2) Notice under this section shall include a statement in writing to the effect that the patient –

(a) is being detained pursuant to s. 14 or 15 as the case may be,

(b) is entitled to legal representation,

(c) will be given a general description of the proposed treatment to be administered to him or her during the period of his or her detention,

(d) is entitled to communicate with the Inspector,

(e) will have his or her detention reviewed by a Tribunal in accordance with the provisions of s. 18, paragraph (f) is entitled to appeal to the Circuit Court against a decision of the Tribunal under s. 18 if he or she is the subject of a Renewal Order, and

(f) may be admitted to the approved Centre concerned as a voluntary patient if he or she indicates a wish to be so admitted.

…"

Section 17

"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 the Consultant Psychiatrists established under s. 33(3)(b) 2 –

(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 representatives of the patient…"

Section 18

"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 s. 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.

(2) A decision under subsection (1) shall be made as soon as may be but not later than 21 days after the making of the Admission Order concerned or, as the case may be, the Renewal Order concerned

(3) Before making a decision under subsection (1), a Tribunal shall have regard to the relevant report under s. 17(1)(c).

(4) The period referred to in subsection (2) may be extended by order of the Tribunal concerned, either of its own motion or at the request of the patient concerned) for a period of 14 days and thereafter may be further extended by order for a period of 14 days on the application of the patient if the Tribunal is satisfied that it is in the interest of the patient and the relevant Admission Order or as the case may be, Renewal Order shall continue in force until the date of the expiration of the order made under this subsection.

(5) Notice in writing of the decision under subsection 1 and the reasons therefore shall be given to –

(a) the Commission,

(b) the Consultant Psychiatrist responsible for the care and treatment of the patient concerned,

(c) the patient and his or her legal representative,

and

(d) any other person to whom, in the opinion of the Tribunal such notice should be given.

(6) The notice referred to in subsection (5) shall be given as soon as may be after the decision and within the period specified in subsection (2), or if it be the case that period is extended by order under subsection (4), within the period specified in that order…"

19. Before embarking upon a consideration of the issues which have arisen in this case it is well to establish in general the correct approach when dealing with legislation of the kind involved here. It has been said and indeed it is common case that in approaching the construction of the Act, the purposive approach is to be adopted, and the following passage from the judgement of McGuinness J. *Gooden v. St. Otteran's Hospital* [2005] 3 I.R. where she is speaking of the Mental Treatment Act of 1945 and says the following, illustrates the point;

> "I respectfully accept Denham J.'s analysis of the principles of interpretation as set out in that judgment. In interpreting s. 194, therefore, it would in my view be right to consider the purpose of the Act of 1945 as a whole. It is a wide ranging statute dealing with all aspects of provision of treatment for those suffering from mental illness ranging from the building of mental hospitals to details of their administration and staffing and to the reception and care of patients. It is divided into distinct but related parts. Section 194 occurs in the part of the Act which deals with the voluntary patients in mental hospitals. They cannot however be read entirely in isolation from those parts of the Act which deal with patients who have been committed to mental hospitals as a result of Reception Orders. Still less should it be read isolated from the surrounding sections in the same part and in particular s. 195…."

20. The same approach is in my view entirely appropriate in respect of the interpretation of the Act of 2001, which repealed the whole of the Mental Treatment Act of 1945 other than part VIII and sections 241, 276, 283 and 284. In addition the Act of 2001 also repealed the whole of the Mental Treatment Act of 1953, the whole of the Mental Treatment (Detention in Approved Institutions) Act of 1961, the whole of the Mental Treatment Act of 1961 other than sections 39 and 41. As is apparent from the preamble to the Act, the Act is a piece of legislation which comprehensively deals with the involuntary admission of persons suffering from mental disorders to approved centres and establishes the Mental Health Commission and Mental Health Commission Tribunals and an Inspector of Mental Health Services for the purposes of the independent review of the involuntary admission of persons to approved centres. In the case of In Re *Philip Clarke* [1950] I.R. 235 the former Supreme Court when considering the constitutionality of s. 165 of the Mental Treatment Act of 1945, in the judgment of O'Byrne J., delivering the judgment of the court described the general aim the Act of 1945 as follows:

> "The impugned legislation is of a paternal character, clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and wellbeing of the public generally. The existence of mental infirmity is too widespread to be overlooked, and was, no doubt present to the minds of the draftsman when it was proclaimed in Article 40.1 of the Constitution that though, all citizens, as human persons are to be held equal before the law, the State, may, nevertheless, in its enactments have due regard to differences of capacity, physical and moral, and social functions. We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity, to remain at large to the possible danger of themselves and others. The section is carefully drafted so as to ensure that the person alleged to be of unsound mind, shall be brought before, and examined by, responsible medical officers with the least possible delay. This seems to us to satisfy every reasonable requirement and we have not been satisfied, and do not consider that the Constitution requires, that there should be a judicial enquiry or determination before such a person can be placed and detained in a mental hospital. The section cannot, in our opinion be construed as an attack upon the personal rights of the citizen, on the contrary it seems to us to be designed for the protection of the citizen and for the promotion of the common good."

21. In my opinion having regard to the nature and purpose of the Act of 2001 as expressed in its preamble and indeed throughout its

provisions, it is appropriate that it is regarded in the same way as the Mental Treatment Act of 1945, as of a paternal character, clearly intended for the care and custody of persons suffering from mental disorder.

22. As is plainly obvious there are provisions included in the Act of 2001 which can be regarded as radical reforms of the Mental Treatment Act, 1945. The principal reform is the establishment of the Mental Health Commission and Mental Health Tribunals, thus providing for a quasi-judicial intervention for the purposes of the independent review of detention of persons in approved centres alleged to be suffering from "mental disorders".

23. The definition of "mental disorder" as contained in s. 3 of the Act, is of critical importance as it establishes the benchmark against which all forms of mental illness must be assessed before an Admission Order or a Renewal Order can be made.

24. As is clear from this section there are two separate bases upon which "mental disorder" can be established.

25. The first of these is as set out in s. 3(1)(a) and it is where the Mental Illness, severe dementia or significant intellectual disability is such that there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons.

26. The second basis is where the severity of the mental illness, dementia or disability is such that the judgment of the person concerned is so impaired that a failure to admit the person 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 that the reception, detention and treatment of the person concerned in an approved centre would likely to benefit or alleviate the condition to a material extent.

27. I am quite satisfied that these two bases are not alternative to each other and indeed it would be probable in my view that in a great many cases of severe mental illness there would be a substantial overlap between the two. Thus it would be very likely in my opinion that in a great many cases in which a person could be considered to fall within the categorisation in s. 3(1)(a) that they would also be likely to fall within s. 3(1)(b). To a mush lesser extent, it is probable that persons who are primarily to be considered as falling within s. 3(1)(b), would also be likely to have s. 3(1)(a) applied to them.

28. Insofar as s. 3(1)(a) is concerned the threshold for detention in an approved centre by way of either an Admission Order or as in this case a Renewal Order is set high. There must be a serious likelihood of the person concerned causing *immediate and serious* harm to himself or herself or to other persons.

29. In the course of argument in this case it became common case that the standard of "serious likelihood" was said to be higher than the ordinary standard of proof in civil actions namely balance of probability but somewhat short of certainty.

30. In my view what the Act envisages here is a standard of proof of a high level of probability. This is beyond the normal standard of proof in civil actions of "more likely to be true", but it falls short of the standard of proof that is required in a criminal prosecution namely beyond a reasonable doubt and what is required is proof to a standard of a high level of likelihood as distinct from simply being more likely to be true.

31. The harm apprehended must in the first instance be "immediate". This presents obvious difficulties of construction, in the context of mental illness, because of the unpredictability of when the person concerned may cause harm either to themselves or others.

32. In my view the critical factor which must be given dominant weight in this regard is the propensity or tendency of the person concerned to do harm to themselves or others. If the clinicians dealing with a person concerned are satisfied to the standard of proof set out above that that propensity or tendency is there then in my view, having regard to the unpredictability of when the harm would be likely to occur, the likelihood of the harm occurring would have to be regarded as "immediate".

33. Next one must consider what constitutes "*serious*" harm.

34. The word "harm" is a very general expression and clearly its use is intended to encompass the broadest range of injury. Thus physical and mental injury are included.

35. The term "serious" is somewhat more difficult to fully comprehend. In this regard it may very well be that a somewhat different standard would apply depending upon whether the harm was inflicted on the person themselves or on others. Clearly the infliction of any physical injury on another could only be regarded as "serious" harm, whereas the infliction of a minor physical injury on the person themselves could be regarded as not "serious".

36. Thus assaults directed at others, which had the potential to inflict physical injury could be considered to fall within the ambit of the term "serious". Behaviours on the part of a person suffering from mental illness, dementia or disability, where there was a serious likelihood of these behaviours resulting in serious actual physical injury to the person concerned, should rightly be regarded as "serious" harm. Where the likely end result of these behaviours was merely trivial injury, it would not or should not, normally be regarded as constituting "serious" harm for the purposes of s. 3(1)(a),

37. This brings me to s. 3(1)(b).

38. In my view it is appropriate to take the two parts of this subsection together namely b(I)(II). Between them they establish three essential elements which must be present before "mental disorder" under this provision is established.

39. These are as follows:

> (1) the severity of the illness mental, disability or dementia must result in the judgment of the person concerned being impaired to the extent that failure to admit the person to an approved centre is likely to
>
> (2) lead to a serious deterioration in his or her condition or prevent the administration of appropriate treatment that can be given only on such admission and
>
> (3) that the reception, detention and treatment of the person in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.

40. These elements in s. 3(1)(b)(I) and (II) are in my view clear and self explanatory. It is perhaps worth drawing attention to the

fact that in 3(1)(b)(I) there are alternative provisions, namely that the failure to admit to an approved centre be likely to lead to a serious deterioration in the condition of the person or that the failure to admit into an approved centre would prevent the administration of appropriate treatment that could be given only by such admission.

41. 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. All that is sought to be done, here, is to set out, as stated, above the appropriate legal framework, in which the statutory provisions operate.

42. Before going on to deal with the facts of this case is appropriate to draw attention to s. 4 of the Act which in my opinion gives statutory expression to the kind of paternalistic approach mandated in the case of *Philip Clarke* and approved in the case of *Croke v. Smith and Others* [1998] 1 I.R. 101 and also, as mentioned earlier, in the case of *Gooden v. St. Otteran's Hospital.*

43. In this case on the 21st December, 2006 a Renewal Order pursuant to s. 15(2) was made by Dr. O'Neill as the Consultant Psychiatrist responsible for the care and treatment of the applicant. It is clear that the applicant was examined within one week of the renewal order and in this respect s. 15(4) of the Act of 2001 was complied with and that the procedures set out in s. 16 and s. 17 of the Act were also fully complied with.

44. The challange which the applicant makes to the validity of the Renewal Order is on the ground that there was no basis for a finding or certification by Dr. O'Neill that the applicant was suffering from a "mental disorder" within the meaning of s. 3(1)(a) of the Act of 2001, in that there was no serious likelihood of the applicant causing immediate and serious harm to herself or anyone else.

45. I cannot agree with the applicant's contention in this regard. At the time of the making of this Renewal Order on the 21st December, 2006 Dr. O'Neill had been treating the applicant as an involuntary patient for in excess of four years. The evidence available to the Mental Health Tribunal, establishes that as of the 21st December, 2006, the applicant was suffering from a very serious mental illness characterised by persecutory delusions, lack of insight and poor adherence to medication. In addition her illness was also associated with what has been described as "challenging behaviours", which involved the offering of physical and verbal assaults to staff and other patients in the special care unit. In or about April of 2006 it had been discovered that the applicant, after a visit home, had brought a knife into the unit and concealed it in her wardrobe.

46. In my opinion there would appear to have been ample material available to Dr. O'Neill upon which to form the clinical judgment, within the legal framework as set out above, that there was a serious likelihood of the applicant causing immediate and serious harm either to herself or other persons.

47. It was submitted on behalf of the applicant that the conclusion or finding of Dr. O'Neill in making this Renewal Order ran counter to the findings that the Mental Health Tribunal made on the 20th December, 2006, to the effect that the applicant's "mental disorder" was to be characterised as falling under s. 3(1)(b) of the Act of 2001, and hence unsustainable and invalid. I disagree with this contention. Dr. O'Neill as the Consultant Psychiatrist responsible for the care of the applicant had a specific function to discharge under the Act of 2001 namely; on the day of the making of the Renewal Order he had to form a view as to whether or not the condition of the applicant was such as to give rise to a finding or conclusion that the applicant was at that time suffering from "mental disorder" on either of the bases set out in s. 3(1) of the Act of 2001. It necessarily follows in my view that his discretion in that regard could not be fettered by any decision made either by himself on a previous occasion or by a Mental Health Tribunal on a previous occasion, as to the mental health status of the applicant. This must necessarily be so because the condition of this applicant or any other applicant, perhaps in response to treatment, could change. Hence an essential feature of a decision to make a Renewal Order is that it is independent of previous decisions and has to be made in a contemporaneous context that is to say contemporaneous with the condition of an applicant and because of this there is the requirement set out in s. 15(4) for an examination by the Consultant Psychiatrist not more than one week before the making of a Renewal Order, which was done in this case.

48. I am satisfied that the Renewal Order made by Dr. O'Neill pursuant to s. 15(2) of the Act of 2001 on the 21st December, 2006 was in all respects a lawful and valid order.

49. This brings me on to deal with the comprehensive challenges which the applicant makes to the affirming of the Renewal Order, by the Mental Health Tribunal, pursuant to s. 18(1) of the Act of 2001.

50. The applicant challenges both the form of the decision to affirm and the substance of that decision, contending in respect of the former that the decision on its face failed to disclose any consideration as was required pursuant to s. 18(1)(a)(I), as to whether or not there was compliance with the several statutory provisions set out in that subsection and specifically s. 15 of the Act, or any consideration in the event of a failure of compliance as to whether or not that failure affected the substance of the Renewal Order or whether it caused an injustice. The substantive aspect of the challenge on the compliance issue was to the effect that the Mental Health Tribunal did not consider, whether or not the finding and certification by Dr. O'Neill, in making the Renewal Order, that the applicant was suffering from "mental disorder" within the meaning of s. 3(1)(a), was without basis, invalid and failed to comply with the requirements of s. 15 and specifically s. 15(4).

51. The applicant's challenge as to the form of the order of the Mental Health Tribunal, on the compliance issue is to the effect that the record of the decision of the Tribunal does not reveal a consideration of and determination on the question of compliance, and it was submitted on behalf of the applicant that a consideration of and determination on compliance was a necessary statutory task imposed upon the Tribunal by s. 18(1)(a)(I) of the Act of 2001.

52. The decision of the Mental Health Tribunal was to affirm the Renewal Order made by Dr. O'Neill on the 21st December, 2006 but its finding was that there was "mental disorder" but not on the basis as so found and certified by Dr. O'Neill, namely s. 3(1)(a) but on the second basis namely that set out in s. 3(1)(b).

53. The applicant challenges the substance of this decision by the Mental Health Tribunal on the ground that the decision as revealed in the record of it and the reasons therein set out for the decision are invalid because the standard or test applied by the Tribunal, as disclosed in the record of the decision, for the making of a finding of "mental disorder" under s. 3(1)(b) was wrong and failed to have regard to the necessary elements as set out in s. 3(1)(b)(I) and (II). Specifically in this regard it was contended that the record of the Tribunal did not reveal any consideration of or determination on, whether or not the applicant's condition would deteriorate, that the absence of a Renewal Order would prevent the administration of appropriate treatment that could only be given by involuntary

admission and that the applicant's condition would benefit to a material extent by the making of the Renewal Order. In addition the applicant criticised the specific finding of the Tribunal viz "*In the event of her being changed to a voluntary status compliance with medication and O.T. would not be guaranteed*", as being the application of a wholly inappropriate test or standard, the use of the phrase "*would not be guaranteed*" in the context in which it was used, created a standard not contemplated in the definition of mental disorder and which if applied would mean that no applicant could ever have their liberty restored because in no conceivable circumstance, could full compliance with medication every be "*guaranteed*".

54. In addition it was submitted that insofar as the substance of the decision of the Tribunal is not accurately or fully revealed in the record of it, the decision of the Tribunal to affirm the Renewal Order is invalid because of a failure to comply with s. 18(5) which requires that notice in writing of the decision and the reasons for it must be given *inter alia* to the applicant and his or her legal representative.

55. I propose to deal with the compliance issue first.

56. In approaching an assessment of the decision of the Tribunal as revealed by the record of it, both as to substance and form, in my view, it is not appropriate to subject the record to intensive dissection, analysis and construction, as would be the case when dealing with legally binding documents such as statutes, statutory instruments or contracts. The appropriate approach is to look at the record as a whole and take from it the sense and meaning that is revealed from the entirety of the record. This must be done also in the appropriate context; namely the record must be seen as the result of a hearing which has taken place immediately before the creation of the record, and it must be read in the context of the evidence both oral and written which has just been presented to the Tribunal. The record is not to be seen as, or treated as a discursive judgment, but simply as the record of a decision made contemporaneously, on specific evidence or material, within a specific statutory framework. i.e. the relevant sections of the Act of 2001 as set out above.

57. It is quite clear from the record of the decision that a submission was made to the Tribunal that the certification by Dr. O'Neill that the applicant suffered from "mental disorder" as defined in s. 3(1)(a) was invalid because there was no evidence to that effect. It is also clear that the Tribunal rejected that submission. This appears from the record of the Tribunal at paragraph 23(3).

58. I am satisfied therefore, as to form, the record of the Tribunal does reveal that the issue of compliance with s. 15 was considered and determined by the Tribunal. As to the substance of the decision taken by the Tribunal in that regard, in my view there was ample evidence before the Tribunal to support the finding and certification by Dr. O'Neill in making the Renewal Order, and notwithstanding the fact that the Tribunal itself reached a different conclusion namely that there was "mental disorder", but within the meaning of s. 3(1)(b) rather than s. 3(1)(a), a conclusion or finding by the Tribunal that there was no basis for Dr. O'Neill's opinion would, in the light of the evidence before the Tribunal, have been wholly unwarranted.

59. It being the case, that the Tribunal considered and determined that there had not been a failure to comply with any of the relevant provisions, it necessarily followed that it was unnecessary for the Tribunal to consider whether a failure to comply, affected the substance of the order or caused an injustice as provided for in s. 18(1)(a)(II).

60. Paragraph 24 of the record of the decision sets out the reasons of the Tribunal for affirming the Renewal Order and it reads as follows:

> "In affirming the order the Tribunal held that
>
> > (1) There was clear evidence from Dr. O'Neill's report and the patient's own responses that the patient continues to suffer from a mental disorder persecutory delusions and schizophrenia.
> >
> > (2) The patient benefits from the structured environment which her involuntary status ensures. She herself accepts that she is not ready for discharge and also that the treatment she is receiving has been beneficial to her.
> >
> > (3) In the event of her being changed to voluntary status compliance with medication and O.T. would not be guaranteed."

61. It has to be borne in mind that all of the evidence before the Tribunal, that is is to say, the report of Dr. Hill and the report of Dr. O'Neill together with his oral evidence all concluded that the applicant was suffering from a "mental disorder". The only difference of opinion was as to which category of "mental disorder" provided for in s. 3, she came under. Dr. Hill was of opinion that s. 3(1)(b) applied whereas Dr. O'Neill in his evidence was of opinion that both s. 3(1)(a) and s. 3(1)(b) both applied and it was his evidence to the Tribunal that he had ticked the box opposite 3(1)(a) on form number 7, because he felt in the first instance, it was appropriate and secondly because in his view the form did not provide for or allow both boxes to be ticked, i.e. the boxes opposite s. 3(1)(a) and s. 3(1)(b).

62. Mr. Ferriter for the Tribunal submitted that a finding or determination by the Tribunal that there was not "mental disorder" as provided for in s. 3 would have flown in the face of all of the evidence. I agree with that submission.

63. That state of the evidence had to be a dominant consideration for the Tribunal and it must now be a feature which must be given great weight in assessing whether the decision of the Tribunal as reflected in the record of it, was both in substance and form, valid.

64. Earlier in this judgment I identified the three essential elements for a decision that "mental disorder" as provided for in s. 3(1)(b) was present. The first of these is that the illness disability or dementia causes impairment of the judgment of the person concerned. There is a clearly expressed finding both in paragraph 24 and also in the brief statement of the decision on form number 8, to the effect that the applicant was suffering from persecutory delusions and schizophrenia and impairment of insight. In my view in the presence of these findings, both a clinical judgment on the part of Dr. O'Neill and indeed a finding on the part of the Tribunal to the effect that the judgment of the applicant was impaired to a high degree, simply could not be gainsaid. This finding is entirely consistent with all of the evidence before the Tribunal. In my opinion in this regard this aspect of the decision is entirely valid both in substance and in form.

65. The second necessary element for a decision under s. 3(1)(b) is that a failure to admit the person to an approved centre or indeed a failure to make a Renewal Order would lead to a serious deterioration in the condition of the person concerned or would prevent the administration of appropriate treatment which could only be given by such admission.

66. In its decision at sub paragraph (3) of paragraph 24 the Tribunal concluded that if the applicant was changed to voluntary status

compliance with her medication and occupational therapy could not be guaranteed. Also at sub paragraph (2) of paragraph 24 the Tribunal concluded that the applicant benefited from the structured environment which her involuntary status ensured and that she was benefiting from the treatment she was getting.

67. When one takes these two paragraphs together, in my view the clear sense emerging from the two is that the Tribunal concluded that if she was not an involuntary patient she would not adhere to her medication and occupational therapy and as a consequence having regard to the clear findings made in respect of her underlying condition that this condition would deteriorate and that, in the result, as a voluntary patient she would end up not getting the treatment she needed, and that the inexorable conclusion deriving from this, is that she would only get the treatment she needed if she was an involuntary patient.

68. The third necessary element for a decision under s. 3(1)(b) is that the Renewal Order would be likely to benefit or alleviate the applicant's condition to a material extent.

69. Sub paragraph (2) of paragraph 24 of the record of the decision makes it absolutely clear that the Tribunal considered this element and it was clearly determined that the applicant was benefiting from the treatments he was receiving as an involuntary patient, that she was not ready for discharge and was continuing to benefit from that treatment. This conclusion in fact goes further than what is required in the third element which is that the person is "likely" to benefit from the treatment or to have their condition alleviated. In this case the Tribunal concluded that the plaintiff was actually benefiting from that treatment as an involuntary patient.

70. Much attention was focused by the applicant on the use of the word "guaranteed" in the record of the decision. I do not attach any great significance to the choice of this expression. In my view the use of this word in the overall context of the decision means no more or no less than, if the plaintiff were to be changed from being an involuntary patient to voluntary status that there was a very high degree of probability that she would not adhere to her medication or her occupational therapy. That of course was a very significant finding in the sense that without adherence to her medication and other treatment, having regard to the underlying mental illness, the Tribunal manifestly concluded, entirely consistent with the evidence, that her condition would deteriorate, and the only way this could be avoided was to continue her status as an involuntary patient.

71. I am quite satisfied that the decision of the Tribunal was entirely consistent with the evidence before the Tribunal, and that all of the elements as provided for in s. 3(1)(b) for a finding of "mental disorder" were considered and a determination made in respect of each of these essential elements and the record of the Tribunal records all of this.

72. Thus I am satisfied that the decision of the Tribunal to affirm the Renewal Order is valid in substance and in form.

73. Having completed its determination, the Tribunal then proceeded as it was required to do to complete form number 8. Half way down this form there is a paragraph which is headed as follows:

> "The Mental Health Tribunal has reviewed the detention of the patient concerned and has concluded that :
>
> · it is satisfied that the patient is suffering from mental disorder, and
>
> · the provisions of s. 9, 10, 12, 14, 15 and 16 where applicable have been complied with, or
>
> · if there has been a failure to comply with such provisions that the failure does not affect the substance of the order and does not cause an injustice, AFFIRM THE ORDER or
>
> · if not so satisfied, REVOKE the order and direct that the patient be discharged from the approved centre."

74. Opposite each of these paragraphs there is as box provided which is to be ticked depending on the conclusion reached. Only one box is provided however for the relevant conclusion in regard to compliance with the provisions of the ss. 9, 10, 12, 14, 15 and 16. Thus the form does not permit the expression of a separate decision on whether there has been compliance or not and separately from that if there has not been compliance whether that non-compliance does not affect the substance of the order and does not cause an injustice.

75. In my opinion this form should be amended so as to provide separate boxes so as to allow the expression of these separate decisions.

76. When Dr. O'Neill had made the Renewal Order on the 21st December, 2006 he, as he was required to do, recorded that in form number 7. This form contains the following passage;

> "This patient continues to suffer from a mental disorder where
>
> (a) Because of the illness, disability or dementia there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons,
>
> OR
>
> (b)(I) Because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given by only 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."

77. As is clear what is set out in the form is simply the repetition of s. 3(1)(a) and (b). The form presents these two choices as alternative to each other thus compelling the treating psychiatrist to choose one or the other. In his evidence to the Tribunal Dr. O'Neill described how he felt compelled to choose one or the other notwithstanding the fact that in his opinion both applied to the applicant.

78. In my view the compulsion of an alternative choice between ` s. 3(1)(a) and s. 3(1)(b) is incorrect, as discussed above, and the form should be amended so as to allow in appropriate cases for the selection of both provisions. This can be done easily by changing the "OR" to "AND/OR", in between the two provisions as set out on the form.

79. I am satisfied that the detention of the applicant pursuant to the Renewal Order made on the 21st December, 2006, as affirmed by the Tribunal pursuant to s. 18(1) of the Act of 2001 on the 9th January, 2007 is legal in all respects, and I have determined this enquiry pursuant to Article 40.4 of the Constitution, accordingly.