THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 749 J.R.]

BETWEEN

SM

APPLICANT

AND

THE MENTAL HEALTH COMMISSIONER, THE MENTAL HEALTH TRIBUNAL, THE CLINICAL DIRECTOR OF ST. PATRICK'S HOSPITAL, DUBLIN

RESPONDENTS

AND

ATTORNEY GENERAL,

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice McMahon delivered on the 31st day of October, 2008

1. The Issue and Section 15 of the Mental Health Act 2001

The main issue to be addressed at this stage in the proceedings is whether the power vested in the consultant psychiatrist under s. 15 of the Mental Health Act 2001, is satisfied when he makes a renewal order expressly stating it to be one which does "not exceed 12 months".

Section 15 of the Mental Health Act 2001 reads as follows:-

> "**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 *subs. (2)* and *s. 18 (4)*, shall then expire.
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> (2) The period referred to in *subs. (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.
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> (3) The period referred to in *subs. (1)* may be further extended by order made by the consultant psychiatrist concerned for a period not exceeding 6 months beginning on the expiration of the renewal order made by the psychiatrist under *subs. (2)* and thereafter may be further extended by order made by the psychiatrist for periods each of which does not exceed

12 months (each of which orders is also referred to in this Act as 'a renewal order').

(4) The period referred to in *subs. (1)* shall not be extended under *subs. (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."

2. The Factual Background

The factual background to these proceedings is succinctly set out in the outline submissions on the part of the third named respondent in this case and can be usefully reproduced here for the purposes of this application:-

> "Dr. Corry is the applicant's responsible consultant psychiatrist and the factual background is set out in Dr. Corry's grounding affidavit, grounding the statement of opposition. The applicant is now 36 years of age. Since the age of 19, she has been admitted to St. Patrick's Hospital on 23 occasions, of which 15 were involuntary admissions. Unfortunately, her condition is deteriorating as the interval between admissions has become shorter, and her admissions have increased in frequency. There has been a constant and sustained pattern of relapse upon discharge from hospital, attributable almost entirely to her inability to remain on necessary stabilising medication upon release. She has a history of violence towards both herself and others, and has attempted suicide on a number of

occasions. Prior to her readmission in August 2007, she had seriously assaulted her mother and had attempted to throw herself into the river at the back of her mother's house.

Dr. Corry is of the view that the applicant's ongoing medical needs can only be met by the applicant taking sustained and stabilising medication. Ideally, the more suitable regime for the applicant's care is by way of supported accommodation rather than involuntary admission in St. Patrick's Hospital, where necessary "supports" would ensure that her significant medication regime is adhered to. She is emphatic that the ongoing supervised administration of her medication is crucial to the applicant's wellbeing. Both she (and the other consultant psychiatrists who have assessed the applicant, Dr. Mohan and Dr. Walsh), are of the view that if she is discharged other than into a supportive environment, she will relapse with consequent risk to herself and others. There is a demonstrable case history which supports this view. Therefore, at this moment in time, she is not medically fit to be discharged into the community in an unsupported and unsupervised situation. As Dr. Corry has emphasised, the applicant is subject to daily ongoing review by Dr. Corry in conjunction with the nursing and medical staff of St. Patrick's Hospital. Dr. Corry has also sought the opinion of Dr. Mohan when she sought his updated opinion when the applicant's condition improved after admission. As Dr. Corry has emphasised, in para. 21 of her affidavit, the order detaining the applicant will be revoked if there is a change in

circumstances such that the applicant can be safely discharged having regard to the provisions of s. 4 of the Act of 2001.

It is further submitted that Dr. Corry has made persistent, systematic attempts to secure appropriate supported accommodation for the applicant as set out...in...her first affidavit, and this approach is ongoing."

These facts are not in dispute, save to the extent that in a more recent opinion of Dr. Mohan, he seems to have hardened his opinion somewhat as to the suitability of the patient for treatment in supervised accommodation.

3. The Mental Health Act 2001

Involuntary admission of persons to approved centres is legislated for in Part II of the Mental Health Act 2001. An application for a recommendation that a person be involuntarily admitted to an approved centre may be made to a registered medical practitioner by certain persons listed in the legislation (section 9). If the general practitioner, having examined the individual, is satisfied that he/she suffers from a mental disorder, the general practitioner may make a recommendation that the person be admitted to an approved centre. Such a recommendation remains in force for seven days (section 10). Once a general practitioner makes such a recommendation he shall send it to the clinical director of the approved centre concerned as well as furnishing a copy of the recommendation to the subject matter of the recommendation (section 10 (4)). When the recommendation is received by the clinical director of the approved centre, a consultant psychiatrist on the staff of the approved centre shall carry out an examination,

as soon as may be, of the patient. After such an examination the consultant psychiatrist may refuse to make an involuntary admission order or may make such an order. Where an involuntary admission order is made then a copy of it is sent to the Mental Health Commission (hereafter "the Commission"). The Commission informs the patient that he/ she is entitled, *inter alia*, to a review under provisions of s. 18 of the Act and that he/ she is entitled to appeal to the Circuit Court against a decision of the tribunal under the same section *i.e.* section 18. Following the receipt by the Commission of a copy of an admission order or a renewal order, the Commission shall, as soon as possible refer the matter to a tribunal and direct in writing that a member of the panel of consultant psychiatrists is to: i) examine the patient, ii) interview the consultant psychiatrist responsible for the care and treatment of the patient and iii) review the records relating to the patient to determine that the patient is suffering from a mental disorder. This independent psychiatrist reports in writing within fourteen days to the tribunal (section 17).

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 affirm the order or revoke the order (section 18). In the present case the applicant accepts that the statutory provision in s. 18 does not empower the tribunal to vary the psychiatrist's order in that context.

Apart from the admission procedure just described and the provisions relating to renewal orders contained in s. 15, two other sections must be considered in the present context. Section 28 of the Act provides that when the consultant psychiatrist responsible for the care and treatment of the patient becomes of the opinion that the patient no longer

suffers from a mental illness he "shall" revoke the admission orders or the renewal orders. This is clearly an ongoing obligation for the treating psychiatrist (s. 28), and is an independent obligation which rests on the treating psychiatrist irrespective of whether the patient is classified as a voluntary or involuntary patient: when the treating psychiatrist forms the opinion that the patient no longer suffers from a mental illness, he/she must revoke any orders authorising detention.

Secondly, s. 4 of the Act makes the following provision in subs. 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 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."

Subsection 3 of same subs. specifies:-

> "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) due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy."

The scheme for admission and detention of involuntary patients set out in Part II of the Act is designed to remedy some defects in previous legislation where because of lack of proper procedures and safeguards an involuntary patient in particular was in danger of being forgotten. Speaking of the new scheme in *O'D v. Kennedy & Ors* [2007] IEHC 129, Charleton J. at para. 15 of his judgment refers to the new scheme in the following words:-

> "15. These provisions are exacting and complex. They were designed, however, by the Oireachtas in order to replace the situation whereby it was potentially possible for a person to be certified and detained in a mental hospital and then forgotten. The need for periodic review and renewal, and the independent examination of these conditions is not a mere bureaucratic layer grafted on to the previous law for the treatment of those who are seriously ill and a danger to themselves and others: it is an essential component of the duty of society to maintain the balance between the protection of its interests and the rights of those who are apparently mentally ill."

By placing the best interests of the patient (s. 4) at the centre of the decision making process and by imposing a statutory obligation on the treating consultant to revoke detention orders when the patient no longer suffers from a mental illness (s. 28), the 2001 Act now ensures that due respect will be given to the patient's rights including his right to dignity and bodily integrity. The procedural scheme set up in Part II of the Act spells out in greater detail how these values are to be respected in relation to admission orders and renewal orders. It is important to bear in mind the structure of the Act and its history when interpreting the provisions in Part II and in particular s. 15 in the present case.

Much has been said in argument about the purposive approach that the courts must adopt in interpreting this legislation. The purposive approach was canvassed extensively in *Gooden v. St. Otteran's Hospital* [2005] 3 I.R. 617 where the applicant argued that as a voluntary patient, since he had given written notice of his wish to be discharged, under s. 194 of the Act of 1945 he had an absolute right to be discharged and physically released at the expiry of the 72 hour period. In upholding the High Court's

decision to refuse the applicant's appeal, the Supreme Court had to consider various construction techniques when interpreting different sections of the legislation. When construing one section it adopted a literal construction, while when construing another section of the Act an extended construction was used in a purposive way to achieve the desired result. That the purposive approach, however, cannot be resorted to by the court whenever it wishes to achieve a particular result is clear from the *dicta* of both McGuinness J. and Hardiman J. in that case. It is also important to recall that in *Gooden* the court was prepared to act because the matter in dispute had not been provided for in the legislation and the court was prepared to give effect to the purpose of the Act in that situation. The purposive approach may be given greater latitude in mental health legislation because of its paternal nature, but it cannot be resorted to willy-nilly by the courts to thwart the clear meaning of the legislator.

How these various interpretive techniques are to be used in the context of mental health legislation is admirably summarised by Hardiman J. in *Gooden* where he says at p. 639:-

> "I believe that these techniques and their varied applications are justified in this case on the principle stated by Denham J. in *Director of Public Prosecutions (Ivers) v. Murphy* [1999] 1 I.R. 98 at p. 111 in considering the *dictum* of Lord Griffiths in *Pepper v. Hart* [1993] A.C. 593, as follows:-
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> > 'The rules of construction are part of the tools of the court. The literal rule should not be applied if it obtains a result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section

> without rewriting the section then this is the appropriate interpretation for the court to take.'
>
> I believe however that 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." (At pp. 639 to 640).

I have little difficulty in accepting the appropriateness of using the purposive interpretive technique, perhaps more generously in the context of legislation which is paternal in nature, but where the rights and protection of the patient are specifically dealt with in the legislation itself, the occasions where this paternal approach comes into play are limited. The first obligation of the court in such a situation is to interpret the section and give

effect to the plain meaning of the provision when it is clear. The paternalistic approach in not intended to rewrite the legislation.

4. The Applicant's Initial Submission

Counsel for the applicant makes two essential submissions in these proceedings:

(i) It is submitted that if the Mental Health Tribunal's jurisdiction is limited under s. 18 of the Act to affirming or revoking the psychiatrist's renewal order then it fails to provide a sufficient independent review mechanism for the purpose of Article 5 of the European Convention on Human Rights (hereinafter 'the Convention'), and accordingly the court should make a declaration that the statutory provision is incompatible with the State's obligations under the Convention provisions.

(ii) In the alternative, counsel for the applicant submits that s. 18 may be read in a manner that is compatible with Article 5 of the Convention, and should be so read as to enable the Tribunal to *vary* the psychiatrist's order.

During the course of the opening, the court enquired of counsel for the applicant whether he was challenging the renewal order on the basis of uncertainty and because it lacked the specification of a fixed period of detention. The court had raised this question because in its outline submissions the applicant's counsel made the following statements:-

"7. In the applicant's case, no time limit was fixed on the renewal order such that it remains in force for the maximum permitted period of one year. The order was issued in this form despite the fact that it was Dr. Corry's view that the most appropriate regime for the applicant was supervised

accommodation and not involuntary admission. The applicant's condition *per se* is not one that requires hospital detention. Her condition can best be managed by way of supported accommodation. The only reason that she is currently hospitalised is because of the lack *(sic)* of such accommodation. Far from warranting compulsory confinement for one year, the applicant's condition should be met by discharge to supervised accommodation. Despite this, the applicant is now the subject of an involuntary admission order of such length that she has no right of independent review of her detention until May, or more probably June, 2009. No independent assessment of her detention will be carried out during that time.

8. The failure to fix a time limit on the renewal order may result from the design of the renewal order form. A renewal order is a standard form produced by the Mental Health Commission (a) 'Form 7'. Its wording requires a doctor who is signing the form to make it 'for a period not exceeding 12 months' where it is the third successive renewal order being made, regardless of the patient's condition, future needs and prognosis. It is submitted that this is arbitrary. It has no regard to the individual circumstances of the patient. It has no regard to a patient's right of periodic review, the timing of which should be assessed according to the patient's condition. In the applicant's case, it had no regard to the fact that she should be released from hospital and placed in supervised accommodation. It is submitted that Dr. Corry failed to exercise the

> power vested in her by section 15(3) of the Act, to assess and determine the appropriate maximum length of the renewal order and to fix it with regard to the individual circumstances of the applicant, such that the order is unlawful."

5. The Question Raised by the Court

The question that troubled the court was when the consultant psychiatrist was authorised to make a renewal order "for a period not exceeding 12 months", did the psychiatrist have power in such circumstances to make the renewal order which was stated to be for "a period not exceeding 12 months" without fixing any more definite period. The court was concerned with the apparent lack of certainty in such an order. The court indicated its concern on the issue and also indicated that it was an issue which was more fundamental, and perhaps less subtle, than the arguments advanced by the applicant's counsel. The court, for this reason, requested all parties to address it as a preliminary issue before proceeding to the more subtle arguments advanced by the applicant's counsel. Counsel for the first and second respondents requested time to make submissions and the matter was adjourned to enable him to do so.

When the matter resumed, counsel for the applicant applied to amend the Statement Required to Ground the Application for Judicial Review by the inclusion of para. XI A, seeking:-

> "A declaration that the renewal order issued in respect of the applicant, by or on behalf of the third named respondent, and dated the 21st May, 2008, is invalid and void by reason of its failure to specify a definite duration."

This proposed amendment was opposed by counsel for the respondents.

Bearing in mind the unusual way in which the issue had arisen, being prompted by the court itself, and the fact that the liberty of the individual was at stake and since the amendment does not extend the statement of grounds in a significant manner and was made in a timely fashion by counsel for the applicant once the matter was raised by the court, I acceded to the applicant's request. I accept that it is unusual to grant amendments in judicial review proceedings, but because it is a matter of importance which will resurface again, and because it would be wholly artificial to pretend that there was not a fundamental issue beneath the Applicant's initial arguments which needed to be confronted, I formed the view that it was in the interests of all parties to have the issue addressed in these proceedings.

The matter was further adjourned to enable all parties to submit further affidavits and to consider the matter before the next sitting.

6. The Submissions

The respondent's argument concerning the meaning of s. 15 can be put at its highest in the following way. The plain reading of s. 15, and the use of the phrase "... for a period not exceeding 12 months", means that the renewal order is for a definitive period of 12 months, especially when one considers the whole scheme of the Act and the way the various other sections (especially s. 4 and s. 28) interact with each other. The integrity of the scheme clearly suggests that such orders are for a period of 12 months. The renewal order in this case, by repeating exactly, *ipsissima verba,* the phrase used in the section, considering the paternal nature of the legislation as established in the

jurisprudence, and the purposive rule of interpretation which is appropriate when interpreting this legislation, the suggested meaning of "for 12 months" for the phrase "not exceeding 12 months" is clearly warranted. This interpretation is also supported when one considers what the phrase "a period not exceeding" means in other legislative contexts such as in s. 2 of the Criminal Justice (Drug Trafficking) Act 1996 as amended by s. 10 of the Criminal Justice Act 2006.

On the proper interpretation of s. 15 of the Act the first and second respondents argue that "a period not exceeding twelve months" means "a period of twelve months". Apart from greatly departing from the plain meaning of the language used, this argument excludes the possibility of the consultant psychiatrist who is treating the patient making an order for a period of less than twelve months. This is an extraordinary proposition and would clearly not be in the interests of the patient where, for example, a consultant psychiatrist who was of the opinion that detention for a shorter period (e.g. three weeks to complete a course of medication or therapy) was appropriate would not be permitted to make a renewal order for less than twelve months. The respondents argue that the proposition is sustainable

(i) because there is no specific provision in the Act which states that the consultant psychiatrist must fix an exact period; and

(ii) because the Act gives no guidance as to what criteria the consultant psychiatrist should use in determining what is the appropriate fixed period.

As to (i), this is the very issue before the court and the applicant argues that the literal meaning of s. 15(2) and (3) does mandate a fixed period. With regard to (ii), that the Act should refrain from specifying criteria for the consultant psychiatrist which he/

she should observe when determining the exact period, is not surprising, as in so refraining it is merely respecting and showing due deference to the professional expertise and clinical knowledge of the consultant psychiatrist. It is not unreasonable in such circumstances for the legislature to say: "This is a case of where "doctor knows best.""

The first and second respondents also argue that since no provision is made in the Act for a review by anyone during a fixed period of the renewal order this suggests that the legislators never contemplated orders of a fixed period of twelve months. I have some difficulty appreciating this argument. The opposite could, in fact, be argued more convincingly: since the legislators did not provide for a review during a fixed period, the possibility of orders for periods shorter than twelve months (e.g. five months) should be assumed, since the patient will then have more frequent reviews and this would clearly be for the benefit of the patient. Since there can be no review during the life of an order, the shorter the periods in the orders, the more the reviews.

The argument was also advanced that in s. 23(1) of the Act where power is given to prevent a voluntary patient from leaving an approved centre and certain persons are given power to detain the person "for the period not exceeding 24 hours...". When referring to this power in the next section, at s. 24(5), the Act states that the consultant psychiatrist concerned shall be entitled to take charge of the person concerned "for the period of 24 hours referred to in section 23". It is argued that this confirms that the period is a fixed period of 24 hours in that section. By analogy the respondents argue that the use of the same phrase in s. 15 must be similarly interpreted as applying to a fixed time period, in our case, a fixed time of twelve months. I concede that this argument has some force on its face. But when it is taken in the context of the very serious effect such

an interpretation would have for the patient, one realises that it is a very small nail on which to hang a big argument. The opposing considerations greatly outweigh it.

A more general argument advanced on behalf of these respondents is that because of the law as stated in *A. v. The Governor of Arbour Hill Prison* [2006] 4 I.R. 88, this court should not entertain the application advanced by the applicant. The relevant facts in the *Arbour Hill* case are summarised at para. 1 of the head note and this may conveniently be reproduced at this juncture:-

> "The applicant was convicted in the Circuit Criminal Court on the 15th June, 2004, on a plea of guilty of unlawful carnal knowledge contrary to s. 1(1) of the Criminal Law (Amendment) Act 1935, and was subsequently sentenced to three years imprisonment. It is common case that the indictment on foot of which the applicant was charged was a one count indictment. The applicant sought release from custody pursuant to Article 40.4.1 of the Constitution. The applicant contended that his detention was unlawful on the basis that on the 23rd May, 2006, the Supreme Court declared (see *C.C. v. Ireland* [2006] IESC 33, [2006] 4 I.R. 1) s. 1(1) of the Criminal Law (Amendment) Act 1935, to be inconsistent with the Constitution. It was this section that created the offence of which the applicant was convicted."

The High Court had ordered the applicant's release from detention following the *C.C.* case and this was appealed to the Supreme Court. The Supreme Court allowed the appeal.

In the *Arbour Hill* case the Supreme Court was dealing with an applicant who was claiming that he was a beneficiary of a subsequent Supreme Court decision *in another case* declaring a particular piece of legislation unconstitutional. The Supreme Court held that the applicant was not entitled to such benefit in his case even though the piece of legislation under which he was earlier found guilty had subsequently been struck down in another case. This is not what is happening here. Apart from *Arbour Hill* being concerned with the constitutionality of a statute, the applicant here, SM, is not seeking to free-ride on the slipstream of another court. Ours is the first case in which the renewal order which is stated to be for "a period not exceeding twelve months", has been explicitly challenged and it is challenged in the context of its own facts. The objections which the first and second respondents advance would be more appropriately made if the other 200 involuntary patients, who, it has been suggested, are detained under similar orders, were to advance it later as a result of a decision made in this case. Our case is more analogous to the courts decision in *C.C. v. Ireland* (*supra*) itself, the first case which declared the legislation unconstitutional, than with the *Arbour Hill* case which concerned persons subsequently claiming a collateral benefit from the decision in *C.C. v. Ireland*. Paragraphs 5 and 6 of the head note clearly identify what was at issue in *Arbour Hill* where it was held by the Supreme Court:

> "5. That the declaration that a law was unconstitutional applied in the litigation to the parties in which the issue arose, and prospectively. There was no general retrospective application of such an order but the possibility that an exception might arise where in wholly exceptional

circumstances, the interests of justice so required should not be excluded. (*Murphy v. The Attorney General* [1982] I.R. 241 considered).

6. That there were circumstances in which things that have been done under and by virtue of a statute which had been declared inconsistent or invalid must nevertheless continue to be given force and effect and could not be described as nullities as far as their continuing force and effect were concerned."

The argument advanced under this heading on behalf of the first and second respondents and based on the *Arbour Hill* case really addresses the issue of the consequences of a decision favouring the applicant here, for others involuntarily detained under similarly worded orders in the past. And in this regard the *Arbour Hill* decision bodes well rather than ill for the respondents.

7. The Court's View

I am of the view that a renewal order made under subs. (2) and (3) of s. 15 and which does not specify a particular period of time , but merely provides that it is an order for a period "not exceeding 12 months" is not an order permitted under the legislation and is void for uncertainty. An order made in such unspecified terms does not comply with the power given to the consultant psychologist under the Act. My reading of the section leads me to the following analysis: subs. (1) of s.15 provides that the admission order which authorises the reception, detention and treatment of the patient shall remain in force "for a period of 21 days" from the making of the order. This it is to be noted, is for quite a specific fixed period of time. Renewals and extensions can subsequently be

made ("renewal orders") by the consultant psychiatrist treating the patient for periods "not exceeding" three months or six months and thereafter for periods "each of which does not exceed 12 months".

Section 15(1) is also subject to the provisions of s. 18(4) of the Act which I will refer to later in this judgment.

In construing the subsections of s. 15 dealing with renewals it is important to note the introductory clause used in these subsections, which reads:

"The period referred to in *subsection (1)* may be extended..."

To the question what is "the period", there can only be one answer: 21 days from the making of the order. Moreover, subs. (2) of the same section, in providing for extensions also refers to "the period referred to in subs. (1)...". The use of the word "period" in these introductory sections, strongly suggests that the extensions too should be for similar fixed and defined lengths of time.

The renewals provided for in subs. (2) and (3) make provision for extending the order of the fixed period (21 days) to longer periods up to a specified maximum. In the case of a twelve month renewal this clearly enables the consultant psychiatrist to make an order for detention of anything up to twelve months. What it does not permit, in my view, is for the consultant psychiatrist to merely make an order which declares that it is "an order not exceeding 12 months" without more. To argue otherwise would be to suggest that the definite period of 21 days could be "renewed" for a period of uncertain duration up to a year. Such an order is not an order permitted by the Act. It does not extend "the period" as permitted by the Act. In my view such an order does not specify any period, in the sense that it does not specify a particular length of time.

To argue that the renewal order, in this case declared to be for a period "not exceeding 12 months", appropriately extends the 21 day order merely because there is an upper limit to what the consultant psychiatrist may do, does not bring, in my view, any specificity or certainty to the measure of time required. From the applicant's point of view, it means that he/she does not know, subject to the upper limit of 12 months, what length of time the order applies to. The legislative discretion left to the consultant translates into uncertainty for the patient.

I should make it clear that I would have no difficulty if the consultant psychiatrist in this case renewed the order for a period of twelve months if that was the appropriate period in her medical opinion. But a renewal order which simply says it is an order which "does not exceed 12 months" is not something which the section permits.

It must be remembered that what is at stake here is the liberty of the individual and while it is true that no constitutional right is absolute, and a person may be deprived of his/her liberty "in accordance with the law", such statutory provisions which attempt to detain a person or restrict his/ her liberty must be narrowly construed. Further, such a renewal order, has consequences for the applicant in that while an order is in existence, the applicant is denied the right to be referred to the tribunal and the right to an independent medical examination by a consultant psychiatrist under section 18.

From the scheme and history of the Act it is clear that the purpose of s. 15 is to protect the involuntary patient and to give him/ her public assurance that an external monitoring mechanism exists to ensure that the involuntary patient is being properly cared for and treated. It is proper, as several counsel have suggested, to consider s. 28 in this context. Section 28 gives the treating consultant psychiatrist power at any time to

release the patient when he/ she concludes that the patient is no longer suffering from a mental illness. It is clearly a power which, when it operates, trumps the existing admission or renewal orders. It operates without reference to, and is independent of, section 15. It is important to note, however, that it is a section that only operates for the benefit of the patient: it grants the treating psychiatrist the power to revoke existing renewal orders and discharge the patient. In contrast s. 15 is concerned with orders which authorise the detention of the patient.

Section 15 since it purports to restrict a constitutional right to liberty albeit for the patients own good and safety and the safety of others, should be interpreted in a proportionate way so that the detention is not for longer periods than are necessary to achieve the object of the legislation. The approach to an interpretation of the section should be that which is most favourable to the patient while yet achieving the object of the Act. To accept the arguments advanced by the respondents, that a renewal order for a period "not exceeding 12 months" is an order for a fixed period of twelve months, would be to adopt an interpretation which is neither in the patient's interest, nor proportionate in the circumstances. On the contrary, one would be restricting the patient's rights in an unnecessarily wide way. To accept the respondent's interpretation would mean that the patient would have an order for the maximum period allowed in every situation when a shorter period might be warranted. This would in turn deprive the patient of a fresh tribunal hearing and an examination by an independent psychiatrist as well as the possibility of a fresh appeal to a Circuit Court (see subsections 17 and 19). Such an interpretation in not justified on the wording of the section, does not advance the intention of the section and results in a greater erosion of the patient's right to liberty than

is necessary to attain the objects of the section itself or the Act in general. More significantly, however, such an interpretation would prevent the treating psychiatrist from making shorter orders, in the best interests of the patient, where the consultant psychiatrist deems it appropriate to do so.

The respondents also argue that s. 15 must be read in conjunction with the obligations imposed on the treating consultant in section 28. This section, it is recalled, obliges ("shall") the treating psychiatrist to revoke the admission order or the renewal orders when he/ she becomes of the opinion that the patient no longer suffers from a mental illness. When this is taken into account, the respondents argue, no real disadvantage occurs to the patient by having the order fixed for a period of 12 months. This argument of course suffers from the flaw that s. 28 can only be operated by the consultant psychiatrist who is responsible for the care and treatment of the patient and this is the very exclusivity which s. 15 is designed to address. Section 15 is designed to protect the patient from the risks of unnecessary detention at the hands of the establishment and it can be no consolation to the patient to say to him that as soon as the treating psychiatrist thinks he/ she is well he/ she is obliged to release him. What the Act is designed to do and what the patient wants is the possibility of more frequent independent reviews by an outside psychiatrist and pointing to s. 28 gives no comfort to the patient in this situation. For this reason too it is quite clear that renewal orders for shorter periods (i.e. for less than 12 months), as already noted, give the patient more frequent reviews, examinations and appeals to the Circuit Court.

While it is true that s. 4 of the Act obliges the treating psychiatrist to have the wellbeing of the patient as a foremost consideration in caring for the patient, and s. 28

obliges the treating psychiatrist to revoke admission orders or renewal orders as soon as the patient is well, s. 15 is concerned with providing a mechanism for external scrutiny and must be interpreted, first and foremost independently of s. 28 to realise this objective. Moreover, since s. 28 only operates where the patient no longer suffers from a mental illness, when it obliges the psychiatrist to revoke the orders, it makes no provision for the situation where the patient though still ill, has improved to an extent that a shorter period of detention is warranted.

The various respondents have also urged the court to take on board in considering the meaning of s. 15 the jurisprudence in this area which strongly suggests that a paternalistic approach is required *i.e.* an approach which advises an interpretation which is in the best interests of the patient, in considering the provisions of the Mental Health Act. Several examples of this paternal approach in operation were referred to in the case law opened to the court. (*Supra Gooden v. St. Otteran's Hospital* (*Supra*).)

I have no difficulty in accepting as a general principle that the courts in considering the Mental Health Acts should where possible adopt such a purposive or teleological approach to the legislation and should in appropriate cases do so bearing in mind the paternal nature of the legislation itself. I have, however, problems with the argument as it is suggested in the case before the court. First, there is no room for the purposive approach to interpretation where a particular section is clear and unambiguous. The literal approach is the first and proper rule of interpretation when one has to construe the meaning of an act. It is only when the literal rule leads to an ambiguity or an absurdity that other canons of interpretation are called in to assist. In this regard I have no difficulty in accepting the *dicta* of Denham J. in *Director of Public Prosecutions*

(Ivers) v. Murphy [1999] 1 I.R. 98 at 111, quoted with approval by Hardiman J. in *Gooden (supra).*

It is my opinion that the meaning of s. 15(2) and (3) is clear and unambiguous. It obliges the consultant psychiatrist to make a renewal order for a definite period which does not exceed twelve months. This definite period may be for one day or for one year but the period must be specified within that range. The section does not permit the consultant psychiatrist to remain vague and uncertain within that time span. Why would the legislature use the phrase "for periods each of which does not exceed 12 months" if what it meant was "for 12 month periods" or "for periods of 12 months"? Equally, why if the respondents are correct did not the legislature say in section 15, if it intended the renewal orders to *exactly* repeat the words of the act, that the psychiatrist "shall make an order "for a period not exceeding 12 months"". This is what it should have done, if the respondent's argument is to prevail. It should have clearly indicated that the renewal order had to be made in the *exact* words of the section. Failure to use a parenthesis favours the applicant's interpretation.

It was also argued that the court should take note of the powers of detention under some criminal statutes, where detention is authorised for periods "not exceeding" specified periods of time.

For example, s. 2 of the Criminal Justice (Drug Trafficking) Act 1996 as amended by s. 10 of the Criminal Justice Act 2006 in essence allows a person to be arrested and detained on reasonable suspicion of having committed a drug trafficking offence and provides for a series of graduated periods of detention commencing with an initial period that "shall not exceed 6 hours". I am not satisfied that the analogy taken from the

criminal law context is convincing. First, in the criminal context the person is being arrested and detained on reasonable suspicion of having committed a crime and it might be reasonable in those circumstances to contemplate that the period is for a fixed one of six hours, etc. In the mental health legislation there is no question of detaining a person who is suspected of having committed a crime. In our case the applicant is ill and is being detained, not to assist in police inquiries into a crime, but because she is ill and is being detained for her own benefit and safety and for the safety of others. Second, in the criminal context where the phrase is also found, the periods of detention are for much shorter periods measured normally in hours or days rather than months and years. Thirdly, the paternal nature of the mental health legislation and the purposive approach are not so evident in the context of construing a criminal law statute. Finally, if during the period of detention for questioning it becomes clear that the reason for detaining the person no longer exists, then he must be released forthwith, even though the allowed period (i.e. six hours) is not complete.

The Case Law

The meaning of the phrase "not exceeding 12 months" has not to my knowledge been decided by the courts in this jurisdiction to date. Of the many cases cited to assist the court the decision of the High Court in *J.D. v. Clinical Director of Central Mental Hospital & Anor* [2007] IEHC 100, has been the most helpful. In that case the doctor extended a temporary order by writing the following endorsement on the order "temp. order extended 14/10/2006" (The date referred to the date the note was made). Although the court was in that case concerned with s. 189 of the Mental Health Act 1945, and

related provisions, the language used was very similar to the language of ss. 15 and 25 of the 2001 Act. It is helpful to quote Ms. Justice Finlay Geoghegan at some length not only because of her analysis of a similar provision but also because she prefers a general approach to mental health legislation in general.

> "The issue is whether or not the endorsement made by Dr. Lynch on the order complies with the statutory provision that he "may by endorsement on the order extend the said period by a further period not exceeding six months". The endorsement does not on its face specify any period for which the order is to be extended. Counsel for the Respondents, Mr. McEnroy, referred the court to the decision of the Supreme Court in *Gooden v. Waterford Regional Hospital* (Unreported the Supreme Court 21st February 2001) and to the judgments of Mrs. Justice McGuinness and Mr. Justice Hardiman in that decision. Mr. McEnroy seeks to rely upon the approach taken by the court in that decision to the construction of Section 194 of the 1945 Act and, their refusal to construe that section literally because it appears that they formed the view that to do so would in effect be contrary to the scheme or intention of the Act and lead to an absurd result. As is pointed out in the judgment, if s. 194 were to be construed literally it would have meant that in the period of 72 hours provided for where a voluntary patient gives notice of intention to leave he could not have been made the subject of a reception order under Section 184. Mr. McEnroy also relies upon that court's approach to the construction of the Mental Treatment Acts, in particular, in reliance upon the decision of the former Supreme Court in *Re: Phillip Clarke* [1950] IR 235 where Mrs. Justice McGuinness having quoted what I think is a well known passage from O'Byrne J in that judgment then said of the passage:
>
> > 'This passage has been generally accepted as expressing the nature and purpose of the 1945 Act. The Act provides for the detention of persons who are mentally ill both for their own sake and for the sake of the common good.'
>
> In the extract to which she refers O'Byrne J had referred to the legislation as being 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'. Notwithstanding those principles it is clear from the judgment of the Supreme Court that there are limits to which the Court cannot go in construing an act notwithstanding the paternalistic nature and purpose of the legislation. Those limits are well set out in the differing approach of the Supreme Court in the *Gooden* case to the construction of Section 194 where they did not apply a literal construction because of what they perceived to be a result which would be clearly contrary to the intention of the scheme of that part of the Act and what is referred to as an absurd result and the construction which they felt constrained to apply to Section 5(3) of the Mental Treatment Act in 1953 by reason of its wording notwithstanding what appears to be certainly Mrs. Justice McGuinness' very strong view of the lack of wisdom of the particular provision.

The difference is well set out in the short judgment of Mr. Justice Hardiman in which he states at paragraph 63:

> 'Moreover, the result arrived at in this case has involved the application of different techniques of construction to two of the sections involved. In construing the word "received" where it occurs in Section 184(1) of the Mental Treatment Act 1945 as amended (where it is desired to have a person received and detained as a temporary patient and as a chargeable patient in an approved institution ...") an extended construction was required in order to apply the section to a person already physically present in the institution. On the other hand, the circumstances of the case required a literal construction to be applied to the words "convey" where it occurs in Section 5(1)(a) of the Mental Treatment Act 1953. If the section were otherwise interpreted the detention of the applicant would have been in valid for on non compliance with the later provisions of Section 5.'

Then she continues at paragraph 64:

> 'I believe that these techniques and their varied applications are justified in this case on the principle stated by Lord Griffiths in *Pepper v. Hart* as follows 'the rules of construction are part of the rules of the Court. The literal rule should not be applied if it obtains a result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section then this is the appropriate interpretation for the Court to take.'

Then she went on to say:

> 'I believe however that in construing the statutory provisions applicable in this case in the way 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 be 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 *Re: Phillip Clarke* [1950] IR 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 am, of course, bound by the principles set out by the Supreme Court in these cases and I would respectfully say that in any event I fully agree with the principles. However, applying those principles to the facts of this case and the justification which Mr McEnroy for the Respondents has sought to make out they do not appear to assist him. The difficulty from his perspective is that he has very fairly said that the construction which must be placed on Section 189, subsection (1)(a)(ii) in accordance with its wording is one which requires that the extension be for a specified period." (At pp.4 to 7).

In *A.M. v. Clinical Director of Central Mental Hospital & Ors* [2007] IEHC 136, Peart J. had to consider the meaning of a renewal order made pursuant to s. 189 which was stated to be for a fixed period of time, i.e. six months, from a specified date. In construing the endorsement he indicated that he must be informed by the fact first that s. 189(1)(a)(i) of the 1945 Act provides for an endorsement which extends detention not for a period of six months but rather for a period "not exceeding 6 months". In this context he goes on to say:-

> "No purposive statutory interpretation can alter what is stated in the endorsement. The only way in which this court could hold that the renewal order made...endured [beyond what it stated] would be to decide that it does not matter what is stated on the form of endorsement, and that the only matter to be considered is the overriding interest of ensuring that the applicant is detained in his own and others best interests. Such a manner of approaching the meaning of orders of depriving a person of his or her liberty could not in my view be correct, as it would nullify the very purpose of inserting safeguards in the statutory procedures put in place. In matters involving the deprivation of liberty, and I place persons such as the applicant who are ill in no lesser position than other persons whose liberty is in other circumstances curtailed or removed, the greatest care must be taken to ensure that procedures are properly followed, and it ill serves those whose liberty is involved to say that the formalities, laid down by statute, do not matter and need not be scrupulously observed. That is not to say that where the meaning of a statutory provision is

> unclear or open to different interpretations the meaning which is consistent with a purposive interpretation of the legislature's intention is not the one which should be adopted. That is a different question altogether." (At p. 11).

Counsel for the Attorney General too, in the case before this court, relying on these authorities submits that:-

> "These authorities, and a plain interpretation of the interrelationships between different provisions of the Act – irrespective of the underlying philosophy of the Act, its paternal nature and the legitimacy of a purposive interpretation – tends to the correct interpretation of the expression 'not exceeding' in s. 15 as requiring the period for which detention is authorised to be for a fixed period of time. This also accords with the literal meaning and does not lead to any absurdity or outcome inconsistent with the legislative intention or purpose."

Notwithstanding this submission on the meaning of the term "not exceeding 12 months" when used in s. 15, counsel for the Attorney General nevertheless submits that the order made, on the facts of this case, should be interpreted as amounting to an authorisation for a detention of twelve months. He argues that the reference to "a period not exceeding" in the renewal order does not have any material legal effect since when the phrase appears on the renewal form the phrase merely qualifies the actual medical opinion of the doctor. Since the medical opinion of the doctor is always subject to s. 28 it is not unreasonable, according to the counsel for the Attorney General for the doctor to qualify his/ her opinion by the phrase "for a period not exceeding". Insofar, however, as

it authorises the detention of a patient, according to the counsel for the Attorney General, it is surplusage. Counsel for the first and second named respondents makes a similar submission.

The argument advanced on behalf of the Attorney General, however, seems to change when the oral presentation was being made. There a more subtle and different proposition was advanced. While counsel for the Attorney General continued to say that the treating psychiatrist can still make orders for less than the maximum period in question (*i.e.* less than three, six or twelve months), say two months, this can only be achieved by saying that the order is renewed "for a period not exceeding 2 months". In this case if the treating psychiatrist's optimism proves well-founded then she may make no further order and the authority to detain ceases. If, however, things do not progress as anticipated, the treating psychiatrist may wish to make a further renewal order for a further period, in which event, having made the order, the patient will be referred to the tribunal and will have an examination by an independent psychiatrist.

In developing his argument during the oral submissions, counsel for the Attorney General places great emphasis on the fact that when the treating psychiatrist is making a renewal order he/ she merely authorises others to detain the patient, in contrast to the decision to detain and the act of detention which rests with someone else. Counsel draws an analogy from the requirement of causation in other areas of the law, for example, Tort Criminal Law or the Law of Contract. In that somewhat oblique analogy, it is suggested that the renewal order of the treating psychiatrist is merely a *causa sine qua non*, but the decision of the director of the facility, is the *causa causans* (*i.e.* the legal cause of

detention). When one appreciates this distinction, it is argued, that the language actually used in the order in this case is not to be objected to in any way:-

> "That is why the order is not an order for a fixed period of time, it is an enabling order, it is an authorising order. It is, certainly, of legal effect, in the sense that it extends a period during which your *(sic)* detention can be authorised. But it doesn't completely, unlike a warrant, mandate your detention."

Counsel continues:-

> "And it is in those circumstances that I think it is very hard to argue on behalf of the applicant that the order is in some sense an order...or should be an order for a specified period of detention, it can't be. That's not what it does. It is not what it is intended to do. All it is intended to do is to provide for an extended time period to allow for someone's detention."

The subtlety of the argument fails to convince me. Neither does it reflect the views of the other respondents who argue that a renewal order for "a period not exceeding 12 months" is in fact a twelve month order. The truth is unless a renewal order is made the patient is entitled not to be detained: when a renewal order is made, however, detention is legitimated. In this situation the renewal order is an important factor of some legal significance in whether the patient is further detained, and its causal connection to the actual detention is in my view irrelevant and unhelpful to our analysis.

It appears that counsel for the Attorney General is arguing therefore that because the treating psychiatrist does not know whether the patient will be detained, even though she has made a renewal order, it is very hard to argue as the applicant does, that the order

should be for a specified period of detention. (This would appear to contradict counsel's earlier submissions on this issue.) Neither, in spite of the urgings of counsel for the Attorney General, am I impressed by the fact that the treating psychiatrist may sign the renewal order before it is due to kick in, *i.e.*, before the old renewal order expires for example, nor by the fact that for other reasons the patient may be released before the period indicated in the renewal order.

I cannot agree with this submission since to do so would mean that s. 15 of the Act cannot be read independently, but must always be read in conjunction with, and subject to section 28. I am not prepared to do this, as it seems to me that the strength of that argument is based on an assumption that the person making the order under s. 15 will always be the same person who has to respond to the statutory duty contained in section 28.

Using one's commonsense, as most parties have suggested at various times in their submissions we ought to do, I have come to the conclusion that once it is conceded that the treating psychiatrist can make orders for less than 12 months, under s. 15(3), then a renewal order which is expressed to be for a period "not exceeding 12 months" does not conform with the section.

From the above analysis I have reached the conclusion that the authorisation order made by Dr. Corry on the 21st May, 2008 does not conform with the requirements of s. 15(3) of the Mental Health Act 2001, and accordingly does not provide a legal basis for the detention of the applicant.

It is common case that the applicant is a very ill young woman requiring medication on an ongoing basis. Further, it is also quite clear that she requires

continuous supervision to ensure that she complies with her psychiatrist's instructions in this regard: unsupervised self-medication is not a realistic option in this case. Dr. Corry, the applicant's treating psychiatrist was of the opinion when making the order on the 21st May, 2008, that the applicant was well enough to be released to "supervised accommodation", although the most recent medical opinion of Dr. Mohan, who was also consulted, casts doubt on this as an option. Despite valiant and persistent enquiries by Dr. Corry on the applicant's behalf, no such suitable accommodation has become available.

In these circumstances, I am not prepared to order the applicant's immediate release from her detention at St. Patrick's Hospital, Dublin at this juncture. To do so would not be in the interests of the applicant herself or other persons with whom she might come in to contact. I will, however, make such an order with a stay of four weeks. This should give the relevant parties sufficient time to comply with the provisions of the legislation before determining what, in the opinion of the relevant authorities, including the applicant's treating psychiatrist, is the appropriate order in these circumstances.

Finally, I would like to emphasise that nothing in this judgment is intended to criticise in any way the medical treatment which the applicant received from her treating psychiatrist Dr. Corry. On the contrary, one could only be impressed with the compassion and patience as well as the professionalism shown by Dr. Corry while the applicant was in her care. The error in this case was prompted by the wording of the form used by the Commission and offered to the treating psychiatrist when complying with her obligations under section 15(3). In this regard it is relevant to note that although some sections in the Act require the treating psychiatrist to make the relevant order in

question "in a form specified by the Commission" (see for *e.g.* s. 14(1)(a) – admission orders; s. 15(5) – certification of continuing metal disorder), s. 15(3) is not, however, one of these and this suggests that the order to be made by the treating psychiatrist under this subsection is hers not only in substance but in form also.

What then is the practical effect of holding, as I do, that an order made under s. 15(2) or 15(3) must be for a specific time period and failure to indicate the exact period renders any such order void for uncertainty? One must not think that the skies will fall as a result of this decision which, as I have already indicated, does not prevent the consulting psychiatrist from making twelve month detention orders where he/ she deems it appropriate. All it means is that he/ she must indicate the specific period in the order he/ she makes under those provisions. The procedures which the Mental Health Commission adopts and the forms which they use will, of course, have to be revisited to comply with this interpretation, but this is a simple administrative matter.