Keith Walsh - One flew over the Judges' nest - signs of a less paternalistic attitude to mental health law in the Superior Courts? **An examination of recent successful and unsuccessful superior court applications in the mental health law area, including the decisions in "S.O." and "X.Y".** Irish Mental Health Lawyers Association seminar, October 2013**.**

Introduction- the low (or high) point of Judicial Paternalism

Following the decision of the Supreme Court in *EH v Clinical Director of St. Vincent's Hospital* on 28th May 2009, the volume of cases taken to the High Court in relation to the Mental Health Act, 2001 reduced considerably. One of the most quoted passages in subsequent High Court cases is from EH and is as follows:

> *Mere technical defects, without more, in a patient's detention should not give rise to a rush to court, notably where any such defect can or has been cured – as in the present case. Only in cases where there had been a gross abuse of power or default of fundamental requirements would a defect in an earlier period of detention justify release from a later one.*

In some cases, the preceding sentences in Kearns J.'s judgement are included:

> *These proceedings were initiated and maintained on purely technical and unmeritorious grounds. It is difficult to see in what way they advanced the interests of the applicant who patently is in need of psychiatric care. The fact that s. 17 (1) (b) of the Act of 2001 provides for the assignment by the Commission of a legal representative for a patient following the making of an admission order or a renewal order should not give rise to an assumption that a legal challenge to that patient's detention is warranted unless the best interests of the patient so demand.*

Dr Darius Whelan in his book *'Mental Health Law & Practice'* points out that Kearns J. made these comments following his finding that the case in question was a moot and this may be a reason for the harshness of his language. Dr Whelan was concerned that this paragraph would deter legal representatives from bringing applications under article 40 even where there is a strong case to be made. He was right to be concerned. Kearns J. in *EH* set out the Supreme Court's view on how the 2001 Act should be interpreted as follows:

> *Any interpretation of the term in the Act must be informed by the overall scheme and paternalistic intent of the legislation as exemplified in particular by the provisions of sections 4 and 29 of the Act. Such an approach to interpretation in this context was approved by this Court in the course of a judgment delivered by McGuinness J. in Gooden v. St. Otteran's Hospital [2005] 3 I.R. 617 when, in relation to s. 194 of the Mental Treatment Act 1945 she emphasised that a purposive construction of the section was appropriate, stating at pp. 633 to 634*:-

> *"In interpreting s. 194, therefore, it would in my view be right to consider the purpose of the Act of 1945 as a whole....*
> *At first reading the wording of s. 194 appears clear and unambiguous. If, however, it is interpreted literally as providing an absolute right to physical release from the hospital and as preventing any use of the machinery of s. 184 or the making of a reception order while the patient is still in the hospital, the logical result is that the only person for whom a reception order cannot in any circumstances be made is a voluntary patient who has given notice of discharge. During the 72 hour period of notice he is inviolate and at the end of it he must be physically released. This situation would apply even if the patient in question was so mentally ill as to be a danger either to himself or the public. That this is the effect of a literal interpretation of s. 194 is candidly admitted by counsel for the applicant."*

I pause only to state that at least in that case, unlike the present one, counsel appears to have been willing to consider the impact and likely effect on the patient of an order made directing release. McGuinness J. then continued:-

> *"In In re Philip Clarke [1950] I.R. 235 the former Supreme Court considered the constitutionality of s. 165 of the Act of 1945. O'Byrne J. who delivered the judgment of the court, described the general aim of the Act of 1945 at pp. 247 to 248 thus:-*
> *'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 well-being 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 draftsmen when it was proclaimed in Article 40.1 of the Constitution that, though all citizens, as human beings 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 of social function. 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'*
> *This passage has been generally accepted as expressing the nature and purpose of the Act of 1945. 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."*

I do not see why any different approach should be adopted in relation to the Mental Health Act, 2001, nor, having regard to the Convention, do I believe that any different approach is mandated or required by Article 5 of the European Convention of Human Rights. I have great difficulty in understanding how the decision in HL v. UK (2004) 1 MHLR 236 avails Mr. Rogers to any degree. In addressing the topic of the adequacy of safeguards against arbitrary detention the head note to the decision of the court states:-

> *"When 'unsoundness of mind' within Article 5.1 (e) is involved, in addition to the three minimum conditions (namely, the detainee must reliably be shown of unsound mind; the mental disorder must be of a kind or degree warranting*

> *compulsory confinement; and the validity of the continued confinement depends upon the persistence of such disorder), it must be established that the detention was in conformity with the essential objective of Article 5.1, namely, to prevent individuals being deprived of their liberty in an arbitrary fashion. This objective, and the broader condition that detention be 'in accordance with a procedure prescribed by law' require the existence in domestic law of adequate legal protections and 'fair and proper procedures'…"*

This approach was followed, as Niall Nolan points out today, by McMenamin J. in *MX (APUM) v HSE & Oths [2013]*. It is disappointing to note, as Whelan has highlighted, that post 2006 judgements have imported the pre Mental Health Act, 2001 case law into their interpretation of the act. Surely a more rights based approach was intended to be introduced by the 2001 Act when compared with the 1945 Act ?

The *EH* decision can be regarded as the low point of a rights based approach to mental health law. More recent cases provide some optimism that failures to comply with statutory safeguards will not be forgiven or justified by the superior courts on the basis that the detention of the person is in their best interests. The leading recent case in this regard is the decision of Hogan J. in *S.O. v Clinical Director of the Adelaide & Meath Hospital of Tallaght [2013] IEHC 132.* where he held that the validity of the admission order was so corrupted by the fundamental failure to comply with safeguards in the 2001 Act (the doctor had not examined the patient at all prior to making the recommendation) that the detention was unlawful. This case followed a 2012 decision of Hogan J. in *XY* where he found that the detention was lawful as there was an incidental invalidity in the process of examination by the doctor of the patient prior to making the recommendation. An earlier case on a similar point of *Z(M) v Abid Saeed Khattak and Tallaght Hospital Board [2009] 1 IR 417* is also helpful. We will start with Z(M) and move up to S.O. before considering other recent caselaw.

Z(M) - does a cigarette break constitute an examination under the 2001 Act ?

In this case the Doctor was called to a Garda station to conduct an examination. The patient was introduced to the doctor while the Garda Sergeant, doctor and the patient were outside having a cigarette. The doctor spoke to the patient for about 10 minutes and on this basis of this 'examination' completed his recommendation for the purposes of section 10 of the 2001 Act. Peart J. said he had some disquiet about the doctor's examination, it appeared very informal, however Peart J. held that the examination required under section 10 is less rigorous that that required under section 14 (by a consultant psychiatrist) (although the definition of examination is the same for both) and contained in section 2 of the Act.

> *"examination", in relation to a recommendation, an admission order or a renewal order, means a personal examination carried out by a registered medical practitioner or a consultant psychiatrist of the process and content of thought, the mood and the behaviour of the person concerned;*

He found that in spite of his reservations that the manner of the examination did not invalidate the lawfulness of the detention.

X.Y -v- Clinical Director of St Patricks University Hospital & Anor [2012] IEHC 224

While at least in Z(M), the doctor had spoken to the patient, in XY the examination took place as follows, according to the doctor's evidence in the article 40 proceedings:

> *"...on 20th May, 2012, the applicant's husband advised me that the applicant would be at a graduation Mass [at her son's school]. I arrived at the car park at 11.30am to await her arrival. The applicant arrived at 11.55am. I saw her in the car park. I had already formed the opinion from my previous assessment that the applicant had a major psychiatric illness. I was aware that I had to see the applicant in order to be clinically appropriate and legally compliant.*
>
> *I confirm that I did not speak to the applicant. I simply examined her through observations. I remained of the belief that the applicant had a major mental illness which required treatment at an approved centre and I thought it appropriate to make the recommendation on Form 5. I saw nothing on the morning of 20th May, 2012, to change my mind from my previous assessment.*
>
> *I did not believe that there was anything to be gained from speaking to her or informing her on the 20th May, 2012, that I was observing here. I felt that I would upset the applicant and inflame the situation."*

This case is interesting not only for the reasons why Hogan J. gave to ground his decision to find this examination lawful but also to see how he subsequently clarified this judgement in the context of the S.O. judgement. In X.Y. he appears to be saying that even if no examination took place, then this would not necessarily invalidate a valid admission order. However he clarifies the true ratio of X.Y. in his judgement in S.O. It is worth looking at this reasoning in XY and then examining the clarification in S.O.

> ***Whether the detention of the applicant is lawful***
> *28. I turn now to the central question which I am required to consider, namely, whether the detention of the applicant is currently lawful. In this context it may be observed that I have no jurisdiction to determine the medical merits of Ms. Y.'s mental state. This is a matter which will shortly be adjudicated upon by the Mental Health Tribunal. My task is rather to determine whether the applicant is in lawful detention.*
>
> *29. The definition of the word "examination" in the Act of 2001 is at the heart of the present application. Section 2(1) of the Act of 2001 defines "examination" as meaning in relation to a "recommendation, admission order or a renewal order" a:-*
>
> > *"personal examination carried out by a registered medical practitioner or a consultant psychiatrist of the process and content of thought, the mood and the behaviour of the person concerned".*

30. The meaning of the word "examination" in a mental health context was previously considered by the Supreme Court in 0'Reilly v. Moroney, judgment delivered the 16th November, 1993. This was not an Article 40 application, but the case rather arose out of an application by the plaintiff to seek leave, pursuant to the provisions of s. 260 of the Mental Treatment Act 1945, to institute civil proceedings against a medical doctor for negligence, breach of duty, assault, battery and false imprisonment and trespass to the person. The former s. 260 provided that leave should not be granted to commence civil proceedings unless the High Court was satisfied that:-

> *"There are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care."*

31. In 0'Reilly the claim against the doctor was he had provided the requisite certificate for the purposes of the Act of 1945 in circumstances where he had not properly conducted an examination of the plaintiff in the manner required by s. 184 of the 1945 Act and had thus acted "without reasonable care". It is important to recall that - in contrast to the position under the Act of 2001 - the word "examination" was not defined by the Act of 1945.

32. In that case the plaintiffs husband and her father had both gone to see the defendant general practitioner at his surgery late one evening. They both expressed deep concern about the behaviour of the plaintiff, albeit that she was not Dr. Moroney's patient. Dr. Moroney was, however, the general practitioner of both the plaintiffs husband and his children. Both the plaintiffs husband and father expressed considerable concern and anxiety, not least because the plaintiff had apparently threatened to kill herself earlier that day. While Dr. Moroney was anxious to arrange a psychiatric consultation for Ms. O'Reilly on the following day, it was impressed on him that the matter was urgent and that it could not wait. Dr. Moroney finally agreed to call to the family home later that evening where the husband agreed to arrange admission for him in order to interview the former's wife. Dr. Moroney then saw the husband knocking at the door and was it was opened by his wife who, on seeing him, became very agitated and violent.

33. It is clear from the majority judgment of Egan J. that the plaintiff shouted and flayed her arms and her legs, while uttering expletives in the process and saying she did not care about the couple's children. Egan J. then observed:-

> *"Dr. Moroney came to the conclusion that she was in 'an extremely disturbed mental state, very agitated, acutely anxious and very hysterical'. He decided that there was a probability or possibility at least of her being a danger to herself that night. He decided not to try to interview her as he was afraid it might aggravate the situation. He stated that he had been told earlier that evening that she had threatened to assault her husband with a hay fork. He made no effort, therefore, to interview her but went to the house of the mother of the husband where he signed the certificate."*

34. In delivering the majority judgment of the Supreme Court dismissing the plaintiff's appeal against the refusal of the grant of leave pursuant to s. 260, Egan J. observed:-

"There is no definition of the word 'examine' in the section and the fact that Dr. Moroney himself agreed that there was no physical examination or interview does not conclude the matter. Here was a case where the doctor had evidence which he considered to be reliable to the effect that the plaintiff had threatened suicide and needed treatment so urgently that it might be unsafe to leave it until the following day. This was followed by what he actually saw outside the plaintiff's house where she was shouting and screaming, kicking out at her husband. This observation having regard to what he had been told constituted a form of 'examination' in my opinion and justified the doctor in pursuing the course which he did."

35. It is perhaps unnecessary here to consider whether 0'Reilly would be decided differently today in view of the new statutory requirement that the examination constitute a "personal examination". Certainly, it was plainly thereby the intention of the Oireachtas to ensure that the safeguards for patients or prospective patients be appreciably improved. Even then, some allowance may have to made for the exigencies of the situation, such as happened in Z. v. Khattak [2008] IEHC 262 where Peart J. held- albeit with understandable reluctance and unease - that an informal conversation between a registered medical practitioner of some experience and a patient at the rear of a Garda station constituted an "examination" for this purpose.

36. The critical question, therefore, is whether Ms. Y. was subjected to an "examination" by a consultant psychiatrist within the meaning of s. 14(1) of the Act of 2001. Dr. O'Ceallaigh, a consultant psychiatrist, has deposed to the fact that he examined her on the following day and that he made an admission order pursuant to s. 14(2) in the early afternoon. As we have already noted, he concluded that the applicant was "suffering from an acute episode of psychosis with grandiose and persecutory features." His medical notes record that Ms. Y. had "spiritual preoccupations" and was convinced that there were "spiritual demons" in her son's school. He further observed that her judgment was "severely impaired".

37. For my part, however, I find it well nigh impossible to find that there was not an examination in the sense envisaged by the definition of this term in s. 2(1) conducted by Dr. O'Ceallaigh. Ms. Y. was interviewed by a consultant psychiatrist and his clinical assessment obviously traversed matters such as the process and content of thought, mood and behaviour. This is borne out by his medical notes and his clinical conclusions.

38. I agree that the question of whether Dr. B. conducted an examination in this sense is more finely balanced. In this regard it must be recalled that the registered medical practitioner must conduct the examination within 24 hours of the receipt of the application for the involuntary detention of the patient: see s.10(2). Accordingly, neither the consultations of July and August, 2011 nor the conversation of 15th May, 2012, can be reckoned for this purpose, precisely because such examinations did not take place within the 24 hour period stipulated by the sub-section. It follows that only the events which constitute an "examination" by Dr. B. for this particular purpose are those which he made by way of observation of Ms. Y. on 20th May.

39. It is true that the definition of examination in s. 2(1) as requiring a personal examination might be thought to require a face to face meeting between the doctor and the patient. At the same time, the fact that s. 10(2) envisages that a registered

medical practitioner can carry out an examination without informing the patient where the doctor concludes that this "might be prejudicial to the person's mental health, well-being or emotional condition" necessarily suggests that an observation of the patient from a distance can - at least in some circumstances - also constitute a "personal examination" for this purpose, not least where (as here) the registered medical practitioner is very familiar with the patient's clinical presentation.

40. Beyond expressing sympathy in respect of the enormously difficult situation in which Dr. B. found himself, I think it unnecessary to decide this difficult question. Even if it were to be accepted that the Dr. B.'s observations of Ms. Y. on 20th May did not constitute an "examination" in this sense, it is clear that such a failure does not invalidate a subsequent detention under s.14 if this detention is otherwise valid: see the judgment of Feeney J. in the High Court in L. v. Clinical Director of St. Brendan's Hospital [2008] IEHC 11 and that of Hardiman J. for the Supreme Court in L., delivered on 15th February, 2008.

41. In L. the suggestion was made that the initial arrest under s.13 was invalid, but it was held that even if that were so, this did not affect the validity of the admission order under s. 14. As Feeney J. observed:-

> *"Section 14 is not dependent upon how a person arrived at an approved centre, the word used in the section is the word 'received' ...An admissions order is a separate and stand-alone matter. ...The facts herein demonstrate the very limited nature of the alleged wrong. There is no evidence before the Court that the suggested breaches in relation to s.13 were made other than in good faith. In this instance any wrong which might potentially have been done to this applicant is cured by the complete and proper implementation of the provisions in relation to the admissions order. .."*

[KW note- see view of Niall Nolan p9 of his paper today re: the case of L – Mr. Nolan states it needs to be revisited]

42. The Supreme Court took a similar view on appeal, with Hardiman J. observing that even "assuming the breaches of s. 13 to have occurred, we see no reason to believe that it would invalidate the making of an admission order under s. 14".

43. The reasoning in L. clearly applies by analogy to the present case. If - as I have held - a valid admission order was made by Dr. O'Ceallaigh following an examination of Ms. Y. under s.14, then it is immaterial so far as the continued validity of the detention under that admission order is concerned that the requirements of s. 10 were not perfectly complied with by the registered medical practitioner concerned.

44. It remains to observe that I consider that the detention of the applicant amply satisfies the test articulated by the European Court of Human Rights in Varbanov v. Bulgaria [2000] ECHR 457, an authority relied on by Ms. O'Hanlon SC. In that case the applicant who had no prior psychiatric history and who had been found to be mentally well in 1993 was detained for a 20 day period by a public prosecutor to await a psychiatric examination. The Court held that the detention in these circumstances amounted to a violation of Article 5(1)(e):-

"The Court considers that no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness, inherent in Article 5 of the Convention.

The particular form and procedure in this respect may vary depending on the circumstances. It may be acceptable, in urgent cases or where a person is arrested because of his violent behaviour, that such an opinion be obtained immediately after the arrest. In all other cases a prior consultation is necessary. Where no other possibility exists, for instance due to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind (see the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46).

Furthermore, the medical assessment must be based on the actual state of mental health of the person concerned and not solely on past events. A medical opinion cannot be seen as sufficient to justify deprivation of liberty if a significant period of time has elapsed.

In the present case the applicant was detained pursuant to a prosecutor's order which had been issued without consulting a medical expert. It is true that the purpose of the applicant's detention was precisely to obtain a medical opinion, in order to assess the need for instituting judicial proceedings with a view to his psychiatric internment.

The Court is of the opinion, however, that a prior appraisal by a psychiatrist, at least on the basis of the available documentary evidence, was possible and indispensable. There was no claim that the case involved an emergency. The applicant did not have a history of mental illness and had apparently presented a medical opinion to the effect that he was mentally healthy. In these circumstances, the Court cannot accept that in the absence of an assessment by a psychiatrist the views of a prosecutor and a police officer on the applicant's mental health, which were moreover based on evidence dating from 1993 and 1994, sufficed to justify an order for his arrest, let alone his detention for twenty-five days in August and September 1995.

It is also true that when he was arrested the applicant was taken to a psychiatric clinic where he was seen by doctors.

However, there is no indication that an opinion as to whether or not the applicant needed to be detained for an examination was sought from the doctors who admitted him to the psychiatric hospital on 31 August 1995. The applicant's detention for an initial period of twenty days, later prolonged, had already been decided by a prosecutor on 27 January 1995, without the involvement of a medical expert.

It follows that the applicant was not reliably shown to be of unsound mind.

The Court therefore finds that the applicant's detention was not "the lawful detention ...of [a person] of unsound mind" within the meaning of Article 5 § I (e) as it was ordered without seeking a medical opinion."

45. The present case is very a different one. Dr. B. had clearly formed a medical opinion that Ms. Y. was suffering from a psychiatric disorder and this was confirmed by Dr. Santal within minutes of Ms. Y's admission to the Hospital and further confirmed by Dr. O'Ceallaigh following an examination on the following day. Furthermore, procedures are currently in train whereby an independent Tribunal will shortly consider and adjudicate upon Ms. Y.'s mental state. It can therefore be said that in these respects - at the very least- the Act of 2001 contains the guarantees against arbitrary confinement on the supposed ground of psychiatric illness of which the European Court spoke so eloquently in Varbanov.

Conclusions

46. In the event, therefore, I find myself coerced to the conclusion that the admission order made by Dr. 0 Ceallaigh was valid and that the validity of that order was not tainted by any possible invalidity attaching to the recommendation made by Dr. B. under s.10. It follows, accordingly, that as I am satisfied for the purposes of Article 40.4.2 that Ms. Y. is presently detained in accordance with law I must, therefore, refuse to order her release.

Clarification of X.Y. in S.O.

20. In XY I did not find it necessary to reach a concluded view on the question of whether the observation of the patient from a short distance by a medical practitioner in a car park constituted an "examination" in this sense, because even if there had not been such an examination in the statutory sense of that term, any invalidity had been cured by the subsequent admissions order:-

"The reasoning in L. clearly applies by analogy to the present case. If - as I have held - a valid admission order was made by Dr. O'Ceallaigh following an examination of Ms. Y. under s.14, then it is immaterial so far as the continued validity of the detention under that admission order is concerned that the requirements of s. 10 were not perfectly complied with by the registered medical practitioner concerned."

21. The true ratio of XY, accordingly, is that an incidental invalidity in the examination process will not render invalid an otherwise valid admissions order which was subsequently made thereafter. In other words, the mere fact that the medical practitioner had not "perfectly" complied with the requirements of s. 10 will not suffice to render the detention invalid. It was clear in that case that at least such had been attempted and it was essentially for those reasons that I concluded that the detention was not invalid. In those circumstances it was therefore unnecessary to determine whether there had been full or perfect compliance with the requirements of s. 10 so that what had occurred could properly be described as an "examination" of the patient.

This clarification by Hogan J. is extremely useful and indicates the importance of pursuing a point on behalf of a client even where the previous case law does not appear to be favourable.

S.O -v- Clinical Director of the Adelaide and Meath Hospital [2013] IEHC 132

a. The Decision

Hogan J. gets straight to the point in this case and started his judgement with the following:

> *1. The case-law which has followed the enactment of the Mental Health Act 2001 ("the Act of 2001") has endeavoured to strike a balance between the need to protect rights to personal liberty, due process and the rule of law on the one hand and the effective protection of the mentally ill, medical professionals and the patients' family and friends on the other. It is not an easy balance to strike. If the courts veer in the direction of the paternalistic protection of the patient, important safeguards might suffer erosion over time to the point whereby the effective protection of the rule of law might be compromised. Yet, if on the other hand, the courts maintain an ultra-zealous attitude to questions of legality and insist on punctilious adherence to every statutory formality, the might lead to the annulment of otherwise perfectly sound admission decisions, sometimes perhaps years after the original decision has been taken.*
>
> *2. The present case may be thought to provide a paradigm example of this dilemma. There is no doubt at all but that the applicant, Mr. O., suffers from psychiatric illness and is in urgent need of psychiatric care. Yet the manner in which he came to be involuntarily detained in the early evening of 8th March, 2013, raises significant questions regarding the operation of the 2001 Act.*

Unlike the Supreme Court in *EH or L*, Hogan J. recognises the possibility that patient safeguards might be eroded by an overly paternalistic interpretation of the Mental Health Act which in turn might lead to a point where the effective protection of the rule of law would be compromised. He also cautions against an over zealous approach to every statutory formality while acknowledging that a balance must be found, presumably on a case by case basis.

The facts of this case are that Mr. O's brother and mother attended his GP's surgery. They told his GP that his behaviour had deteriorated significantly and gave instances of bizarre behaviour including keeping a hammer beside his bed. Other family members were fearful of their safety and he appeared to have paranoid and delusional thinking. Mr. O's brother played a recording of Mr. O from the day before. On foot of these representations and without meeting Mr. O., his GP completed a recommendation which led to the almost immediate detention of Mr. O. in an approved centre and his examination by a consultant psychiatrist the following day who made an admission order and who also found that Mr. O. had persecutory delusions and was aggressive and homicidal.

In a letter to Mr. O's solicitors, the GP said that he completed the recommendation '…. out of concern for the possibility that [Mr. O.] may potentially abscond should he see me and given my long standing and extensive knowledge of [Mr. O.'s] history, I proceeding to sign the form 5 … '.

Hogan J. defines the issue as 'whether the applicant's admission is lawful by reason of the fact that no actual examination was conducted by the GP prior to making the making of a recommendation for his admission. Hogan J. considered section 10(1):

> ***10.***—*(1) Where a registered medical practitioner is satisfied following an examination of the person the subject of the application that the person is suffering from a mental disorder, he or she shall make a recommendation (in this Act referred to as "a recommendation") in a form specified by the Commission that the person be involuntarily admitted to an approved centre (other than the Central Mental Hospital) specified by him or her in the recommendation.*

and section 10(2) which states the examination must be carried out within 24 hours of receipt of the application. He went on to consider the definition of examination in section 2(1):

> *"examination", in relation to a recommendation, an admission order or a renewal order, means a personal examination carried out by a registered medical practitioner or a consultant psychiatrist of the process and content of thought, the mood and the behaviour of the person concerned;*

Hogan J. notes that no such examination was conducted by the GP within the 24 hour period and states ' I am nonetheless driven to the conclusion that the failure to conduct an examination rendered the subsequent involuntary detention of the applicant unlawful'. He viewed the examination within 24 hours and the recommendation as essential safeguards for the patient.

b. How Hogan J. deals with the caselaw which suggests that non compliance with some of the protections contained in the 2001 Act will not render invalid a subsequent valid order (eg an admission order)

14. It is true that the recent case-law indicates that non-compliance with some of the protections contained in the 2001 Act will not render invalid a subsequent valid order, such as an admissions order: see the judgment of Feeney J. in L. v. Clincial Director of St. Brendan's Hospital [2008] IEHC 11 and that of Hardiman J. for the Supreme Court in L., delivered on 15th February, 2008.

15. In L. the suggestion was made that the initial arrest of the patient under s.13 was invalid, but it was held by both this Court and the Supreme Court that even if that were so, this did not affect the validity of the admission order under s. 14. As Feeney J. observed:-

> *"Section 14 is not dependent upon how a person arrived at an approved centre, the word used in the section is the word 'received'…An admissions order is a separate and stand-alone matter….The facts herein demonstrate the very limited nature of the alleged wrong. There is no evidence before the Court that the suggested breaches in relation to s.13 were made other than in good faith. In this instance any wrong which might potentially have been done to this applicant is cured by the complete and proper implementation of the provisions in relation to the admissions order…"*

16. The Supreme Court took a similar view on appeal, with Hardiman J. observing that even "assuming the breaches of s. 13 to have occurred, we see no reason to believe that it would invalidate the making of an admission order under s. 14." Section 13 deals, however, simply with the method whereby patients in respect of whom a recommendation has been already made may be removed to the approved centre. While an important safeguard, it could not be said that s. 13 is as vital and critical to the orderly operation of the admissions procedure as is the necessity for a prior recommendation by a registered medical practitioner based on an actual examination of the patient.

17. The approach taken in L. is also evident in the approach taken by Kearns J. in EH v. Clinical Director of St. Vincent's Hospital [2009] IESC 46, [2009] 3 I.R. 771. In that case a patient who was not involuntarily detained was so detained when she sought to leave the psychiatric unit. An otherwise valid admission order was subsequently made. The Supreme Court held that even if the initial detention was invalid, this was cured by the subsequent admissions order. Kearns J. went on to say ([2009] 3 I.R. 771, 792):-

> *"These proceedings were initiated and maintained on purely technical and unmeritorious grounds. It is difficult to see in what way they advanced the interests of the applicant who patently is in need of psychiatric care. The fact that s. 17 (1) (b) of the Act of 2001 provides for the assignment by the Commission of a legal representative for a patient following the making of an admission order or a renewal order should not give rise to an assumption that a legal challenge to that patient's detention is warranted unless the best interests of the patient so demand. Mere technical defects, without more, in a patient's detention should not give rise to a rush to court, notably where any such defect can or has been cured – as in the present case. Only in cases where there had been a gross abuse of power or default of fundamental requirements would a defect in an earlier period of detention justify release from a later one."*

18. These words have given me pause for thought. The applicant here is certainly in need of psychiatric care and all the evidence is that the medical professionals and his family have striven to care for him under exceedingly difficult circumstances. Yet I find myself obliged to conclude that there was a default of fundamental requirements in that the applicant was not examined at all in the manner required by s. 10 by the registered medical practitioner in the twenty-four hour period prior to the making of the recommendation.

19. In this respect, the present case is different from both MZ v. Khattak [2008] IEHC 262, [2009] 1 I.R. 417 and XY v. Clinical Director of St. Patrick's University Hospital [2012] IEHC 224. In MZ Peart J. held – albeit with understandable reluctance and unease - that an informal conversation between a registered medical practitioner of some experience and a patient at the rear of a Garda station constituted an "examination" of the patient for the purposes of s. 10. One might say that this was a case where the detention order was not invalid because the examination requirements had, at least, been substantially complied with, even if the manner and nature of the examination had been somewhat unconventional.

c. How Hogan J. distinguishes X.Y. from S.O.

In X.Y. the GP at least attempted to examine the patient whereas in S.O. no attempt whatsoever was made.

'It is rather the complete failure to comply with the requirement of s.10 that there be a prior examination which renders invalid the subsequent admission order. There is accordingly here a default of fundamental requirements in the sense canvassed by Kearns J. in EH. If it were otherwise, it would mean that a patient could be validly admitted on an involuntary basis without the necessity for an examination within the previous 24 hour period or even, perhaps, without a recommendation at all. If this were so, it would entirely set at naught the safeguards deemed to be fundamental by the Oireachtas.

23. In so far as any dicta of mine XY suggested that any defect whatever attaching to the s. 10(1) examination procedure could subsequently be automatically cured by a valid admissions order, I think that these should stand qualified in the light of the present case.

Hogan J. found that the detention of the applicant was not in accordance with law. No stay was sought on this order by the Respondent hospital and the applicant was released from the approved centre.

Consequences of S.O.

1. **Defects in procedure prior to the making of an Admission Order can invalidate an otherwise lawful admission order**

Defects in procedure prior to an otherwise valid admission order will invalidate the admission order only where there was a gross abuse of power or default of fundamental requirements. An example of a fundamental requirement is that the GP actually must attempt to carry out a personal examination of the person the subject of the application to the approved centre. Problems with section 13 – removal of persons to approved centres- are unlikely to be seen as fundamental breaches of the act. In addition the mental health tribunal has no power to cure defects arising from section 13. It is possible that invalid applications may be considered a default of fundamental requirements eg where a disqualified person makes an application. It is likely that applications by a member of an Garda Siochana under section 12 will be granted more scrutiny by both the MHT and the High Court. Following *S.O*. there must be a question mark over the obiter comments of Dunne J. in *S.C. v Clinical Director, St. Brigid's Hospital, Ardee, Co. Louth [2009] I.E.H.C.* where she states, following an examination of *CC v Clinical Director of St. Pats* and *RL v the Clinical Director of St. Brendan's Hospital* '… as a general proposition a breach of the provisions of s.12 of the 2001 Act, would not affect the subsequent process by which someone may be detained'. Professor Whelan notes that when *S.C.* was appealed to the Supreme Court, [2009] Hardiman J. stated that ' we do not feel called upon by authority or otherwise

to apply to this case the sort of reasoning that would be applied if it were a criminal detention and to investigate whether previous matters which might have a causal relationship to the present detention are invalid'. This speaks of a different approach to the more recent decision of Hogan J. in *S.O.*

2. **How does section 18 fit in with the decision in S.O. ?**
   The MHT, in order to affirm the admission order under review, must satisfy themselves that the patient is suffering from a mental disorder and that the provisions of section 9,10,12,14,15 and 16 where applicable have been complied with or 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. The High Court appears to have raised the bar slightly by introducing a 'default of fundamental requirements' test for pre admission order breaches of sections 9,10 & 12.

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