SOME NOTES ON OUR MENTAL HEALTH LAWS

1. Introduction

1.1 It is over 10 years since the Mental Health Act 2001 was commenced[1] and a new code introduced to detain under our civil law those in our community suffering from mental disorders. After such a passage of time we do well to take stock of developments. This is the primary focus of this paper, which will touch also to a more limited extent on the main piece of legislation on the criminal justice side namely the Criminal Law (Insanity) Act 2006.

1.2 A necessary precursor I believe is hone in again on some of the basic principles against which the cases which come across lawyers' desks must be considered. These include the following:

"*It must be remembered here that what is at stake 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 law", such statutory provisions which attempt to detain a person or restrict his/her liberty must be narrowly construed*"

Mr. Justice McMahon, *SM v The Mental Health Commissioner & Ors*[2]

"28.Occasionally mistakes will be made by busy personnel, and no matter how well intentioned those personnel may be, and no matter how conscientious they are in looking after and considering only the best interests of the patient, and I of course include all the personnel concerned in the present case in that category, mistakes have legal consequences, and cannot simply be erased for the sake of convenience."

Mr. Justice Peart, *AM v Kennedy*[3]

[1] Commenced on 1/11/2006
[2] Unreported High Court 31/10/08
[3] [2007] 4 IR 667

"20. This, however, is a somewhat different matter from determining whether the accused person now needs to be committed for in-patient care at the Central Mental Hospital. Before that step is taken, the court must remand the accused for that purpose to the Central Mental Hospital for a maximum of 14 days and receive a fresh report from a consultant psychiatrist directed not simply to the question of unfitness, but to the slightly separate question of whether a person found to be unfit to plead now needed in-patient care. It is perhaps easy to overlook these requirements in circumstances where (as here) the accused was already detained in the Central Mental Hospital and where a comprehensive report concerning his mental health and general capacity had already been prepared. But this is a separate statutory requirement which cannot be dismissed as mere surplusage."

Mr. Justice Hogan, *EC v Clinical Director of the Central Mental Hospital*[4]

"A gilded cage is still a cage"[5]

> *"In the circumstances of this case it was in my view appropriate for the Applicant's solicitor to form the view that as the provisions of Section 22 of the Act had clearly not been complied with, the High Court should be asked to enquire into the legality of the Applicant's detention. It is not for the solicitor appointed to represent the interests of the patient to ignore the failure to observe the provisions of s.22 on the basis that she may not have believed that this Court was likely to order his release. That is a matter for this Court to decide. To fail to bring the matter to Court for such an enquiry on such a basis would lead to a risk that in some case or cases a patient might remain in unlawful detention without redress, given in particular the vulnerability of many such patients who may not be in a position to themselves instruct their appointed legal representative to apply for an order releasing him or her from detention. Such a situation would tend also to encourage a slack approach to the observance of the requirements of this legislation whose very purpose is to put in place a regime of statutory procedures for the protection of vulnerable persons against involuntary unlawful detention. The protections put in place are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in which the Act is operated."*

Per Mr. Justice Peart, *PMcG v The Mater Hospital*[6]

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[4] [2012] IEHC 152

[5] Lady Hale, Deputy President United Kingdom Supreme Court, at para.46 for the majority in *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)(Appellants) v Surrey County Council (Respondent) [2014] UKSC 19*. Hereafter referred to as "P".

[6] [2008] 2 IR 332

2. **Appellentscheidung[7] & Delay**

2.1 It is not often that one as a lawyer is a recipient of an appellentscheidung. I was however in the case of ***BG v Judge Murphy, Ireland & Ors[8].***

2.2 In this case Mr. Justice Hogan identified an unconstitutional lacuna at the heart of the fitness to be tried provisions as set out in the Criminal Law (Insanity) Act 2006. In application the provisions under examination meant that whereas one accused could for example be tried for stealing an apple[9] in the district court, an accused who was not capable of giving instructions had to be sent forward to the Circuit Criminal Court to have his or her case disposed of there. Judge Hogan filled this lacuna with the following declaration:

> *"In the event that an accused including the applicant, in relation to whose case a District Court Judge has decided that it was suitable for summary disposal on a plea pursuant to s. 13(2) of the Criminal Procedure Act 1967 and the Director of Public Prosecutions had consented to summary disposal on a plea pursuant to the said s. 13(2), is found fit to be tried by a Judge of the Circuit Court in accordance with s. 4(4) of the Criminal Law (Insanity) Act 2006 and thereafter pleads guilty to the charge of sexual assault of a female, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended, for the sentencing judge to apply a maximum sentence of more than the equivalent sentence that would have been available to the District Court under s. 13(3) of the Criminal Procedure Act 1967, as amended, would be to breach an applicant's constitutional right to be held equal before the law under Article 40.1 of the Constitution of Ireland."*

2.3 Almost 6 years later the relevant provision still wait to be amended.

2.4 Notwithstanding delays in improving deficient provisions in our mental health law code, I am nonetheless of the view that there is much to be positive about in the context of the development of mental health law in the State.

3. **Areas of development**

(1) ***European Arrest Warrant***

Minister for Justice & Equality v MT[10]: this case touched on *inter alia* capacity and fitness to instruct issues in the particular context of the EAW procedure. The case

[7] German word meaning "Admonitory Decision"
[8] [2011] 3 IR 748
[9] Although 'G' had been charged with an allegation of sexual assault
[10] [2015] IEHC 152

generated two judgments, the first dealt with the capacity issue. In the second, which has not been formally approved, Ms. Justice Donnelly refused to surrender the Respondent to the UK.

From the 1st judgment:

"Determination

27. As Dunne J. has set out in Nolan v. Carrick, the question of capacity must be considered in the context of the particular transaction at issue in the proceedings. The court, by virtue of the circumstances of that case, had been required to look back at a particular transaction that had taken place in the course of those legal proceedings. It was, therefore, necessary to look at the decisions made in the context of those proceedings by that defendant.

28. I am of the view that I am also entitled to have regard to the surrounding circumstances in this case regarding the decision I have to make. I do have regard to the fact that this is a man who initially appeared willing to consent to his surrender but, although prepared to tell the court he wished to consent to surrender, was not prepared to sign any documentation to that effect. In hindsight, this reluctance may have been influenced by his wider conspiratorial beliefs which, on the basis of the uncontested evidence of Dr. O'Neill, are delusional in nature. Viewed in this light it demonstrates an impact on how he was prepared to deal with these matters as his agreement to surrender was affected by his delusions.

29. That incident is not in any way determinative of the issue. It is more an observation that appears to corroborate the evidence that I have heard in this case. That evidence is to the effect that the respondent is a man who is severely mentally unwell with a diagnosis of paranoid schizophrenia and that he has conspiratorial delusions that impact on his ability to deal with this case.

30. A diagnosis of mental ill health in and of itself does not negate capacity. There is a presumption of capacity. Those suffering from mental ill health, including delusions, may have a capacity to instruct lawyers and generally to take certain decisions as to where their own best interest lies. The court, when dealing with issues of capacity, must always be scrupulous respect the autonomy of the person appearing before it. Each person, acting with capacity, is entitled to make decisions and judgments that on an objective basis may not seem to be in his or her own best interests. It is only on the test outlined above that the court is entitled to hold that a person lacks capacity.

31. I have taken into account that the respondent also has quite rational and understandable reasons for refusing surrender. In general, it can be observed that respondents to applications for extradition may decide to consent to surrender for various reasons, including an understanding or indeed a hope that they will obtain greater benefits in the issuing state if they consent to surrender, be it bail, reduced

sentence or early release. On the other hand, respondents may take a view that they would prefer to remain on bail in this jurisdiction for as long as possible or, if in custody, they may prefer to serve the sentence already imposed, or a sentence that may be imposed, in what they may perceive as the more advantageous (to them) prison conditions in Ireland. However, this respondent's ability to fully understand the consequences of his decision to oppose surrender is impaired because that understanding is affected in a very real sense by his delusional belief relating to the U.K. prison officer.

32. As stated above, the Court is conscious that each individual is entitled to autonomy and the freedom to make good or bad decisions about their own cases. In this case, objectively speaking, it could be a good decision to stay in this jurisdiction, close to family and to a psychiatric service that has a familiarity with him. It might also be a bad decision as it is possible that he might even now obtain an earlier release date in the U.K. than might apply if he is detained here. Neither decision is for this Court to make on his behalf. The respondent is the only person who can make that decision.

33. In the present circumstances, however, the respondent's delusions touch and concern an important issue relating to the extradition proceedings. I accept that he has a belief that the extradition proceedings are motivated by the desire of the U.K. prison officer to harm him and that he has a belief that he will be so harmed if surrendered. On the basis of the evidence of Dr. O'Neill, I accept that these are delusional beliefs which are the product of his severe mental illness. Unfortunately for the respondent, his capacity to understand the consequences of his decision to oppose surrender is impaired by his delusional beliefs. His understanding of the consequences is affected by those delusional beliefs. The apparent rationality and indeed, objectively speaking, other good reasons for resisting surrender, do not demonstrate that he is not cognitively impaired. His ability to understand consequences of his decisions are impaired by his delusional beliefs as to the desire of the U.K. prison officer to do him harm.

34. In those circumstances, his ability is impaired to the extent that, even with proper explanation, he does not sufficiently understand the consequences of the decisions made by him for the litigation at this time. Therefore, on the evidence before me, the respondent has a cognitive impairment to the extent that he does not sufficiently understand with the assistance of such proper explanation from legal advisors and other experts the consequences of the decisions made by him in respect of this extradition. In all the circumstances, I am quite satisfied that the respondent's ability to make those decisions as to consequences for his surrender is impaired by reason of the particular delusions he has stemming from his paranoid schizophrenia, to the extent that he no longer lacks legal capacity.

……..

56. In my view, the High Court has, by virtue of the Act of 2003, a power to adjourn the hearing of a s. 16 (or s. 15) application. That power includes a power to remand the person in custody or on bail. The power to adjourn envisages remands for a

variety of reasons, perhaps relating to the inability of a case to proceed due to lack of time for instructions, lack of time for the gathering of evidence, or ill health of a respondent. Ill health can, and does, include mental ill health. Therefore, even though the respondent has a present lack of capacity to give instructions, there is the possibility and power to remand the proceedings to allow for a period of treatment."

In relation to the second judgment while a stenographer's note was made available to Mr. T's Solicitor, as mentioned a formally approved judgment is not to hand. However in essence surrender to the UK to serve the balance of a sentence was refused as it was found that to order same would amount to a flagrant denial of justice, in the particular circumstances of the case, where capacity issues arose at important stages of the criminal proceedings in the UK, where our High Court had concerns in relation to a sentencing hearing which proceeded in the absence of a psychiatric report and where Mr. T had no guarantee of being able to remedy the situation he found himself in where he to be returned to the UK.

(2) Cognitive incapacity, in combination with other factors may justify prohibition of a criminal trial

In this regard in delivering judgment recently for the applicant, who was charged with counts of indecent assault dating back to the early 1970s, in ***JC v DPP***[11] Ms. Justice Baker **s**tated:

"*64..The progressive and now irreversible cognitive impairment from which the applicant suffers is such that it would be unfair that he further engage with this criminal trial. In that regard I consider it important that he has fully engaged insofar as he could with the allegations made against him, and he has pleaded on one count on the indictment at a time when he was of capacity. The passage of time and the delay in obtaining the historic evidence, or ascertaining that some of this evidence is no longer available or was never generated, means that in my view the accused is now faced with an insurmountable hurdle. Having pleaded guilty to one count, he is vulnerable to the extent that he cannot now instruct his lawyers in sufficient detail to challenge the complainant with regard to the other two counts, and this is a particularly acute problem when the description by the complainant of the events is not fixed by reference to a particular date, and when all of the incidents are said to have happened in the family home.*

65. I consider it improbable that the applicant would be in a position to instruct his lawyers with any degree of detail to enable them to challenge the details contained in

[11] Unreported High Court, 28/3/17, Baker J.

the statements of the complainant. Indeed the evidence of the solicitor who has acted for the applicant now for over two years is that he cannot take instructions. While the evidence adduced with regard to the mental capacity of the applicant may have come to be considered by the trial judge in the course of the hearing as to his fitness to plead, or to stand trial, the question that must be addressed by me is whether the accused should be put at the hazard of a criminal trial when he cannot give instructions to his lawyers and where the defence to the charge is to be met almost entirely by way of a test of his credibility and that of the complainant and the other witnesses."

And Baker J. concluded with the following:

"*71. I consider that this applicant has made out a case that for the prohibition of his trial. The applicant has already pleaded guilty on one count on the indictment, and the interconnection between the three counts, the length of time that has passed since the alleged incidents, the chaotic and difficult lives of all parties concerned, the consequential impairment of their memories and mind, and the irreversible and serious cognitive impairment of which the applicant now suffers, all combine to make this an exceptional case. It is not in the strict sense a case where the absence of evidence or the delay of themselves can be said to render the trial unfair, but the circumstances of the applicant and the nature of the indictment, and the fact that the trial will be one that will depend almost exclusively now, in the events that have unfolded, on questions of the credibility of both the complainant and the accused, render it unfair that the applicant should now be required to face trial. He should not be put on the hazard of facing a trial, and to borrow the words of Denham J. in P.T. v. DPP [2007] IESC 39, [2008] 1 I.R. 701, "wholly exceptional" circumstances exist.*

72. Further, it would be disproportionate and unfair to require that the trial proceed having regard to the fact that the accused has pleaded guilty on one count, and that the progress of the prosecution was delayed after the complainant indicated she did not wish to pursue the matter in 2011. The resultant delay has caused a loss of the ability of the applicant to now fully and adequately defend himself.

73. For this reason and in these exceptional circumstances, I propose making an order that the trial of the applicant be prohibited."

(3) ***Tribunals***

In addition to resort to domestic law, decisions from the UK will assist all working within the tribunal system in this State on the requirement for a valid mental health tribunal decision.

From ***HK v Llanarth Court Hospital*** [2014] UKUT (AAC): on the need for proper reasoning in tribunal decisions:

"***Adequacy of reasons: some observations***

10. By way of context, both the tribunal and the parties will have knowledge of the written and the oral evidence before the tribunal. Second, both the tribunal and the parties are very likely to be informed about the relevant law. The only exception to this may be when the patient is not legally represented. Finally, to quote the Court of Appeal in English v Emery Reimbold & Strick Limited [2002] 1 WLR 2409 at paragraph 16, justice will not be done if it is not apparent from the tribunal's reasons to the parties why one has won and the other has lost. That latter factor is of particular importance for patients who are detained under the Mental Health Act 1983, such detention being a serious interference with their right to liberty pursuant to Article 5 of the European Convention on Human Rights (now incorporated into English and Welsh law by the Human Rights Act 1998).

11. What follows is intended to be of assistance to tribunals composing reasons in mental health cases. It is not an exhaustive or novel treatise on the art of reason writing but merely an aide memoire of those matters, pertinent to this appeal, which may assist in the production of adequate and intelligible reasons.

12. First, it would be helpful if tribunals were to set out their reasons by reference to the relevant criteria for detention. As Upper Tribunal Judge Jacobs observed in paragraph 9 of JL v Managers of Llanarth Court and SOS for Justice [2011] UKUT 62 (AAC), it might be better if tribunals were to set out their reasons under the headings provided by the legal questions they have to determine. I agree. Using headings within the statement of reasons makes it easier to show that the tribunal has dealt with each of the legal criteria it has to address. I note that the First-tier Tribunal (Mental Health) in England has made template decisions using appropriate headings available to tribunal judges to assist them in reason writing.

13. Second, the tribunal's reasons should address how the tribunal dealt with any disputes as to either the law or the evidence. If this is not done, the unsuccessful party might believe that the tribunal has ignored important issues. In particular, failing to address explicitly any applications made by

one or other of the parties may render a set of reasons inadequate. Such an omission certainly makes it more difficult for a party to know why they have been unsuccessful and additionally raises doubt as to whether the tribunal has dealt fairly with that party's case. However, it is not necessary for a set of reasons to resolve evidential matters which are irrelevant to the legal issues that the tribunal has to determine; a prudent tribunal though may wish to explain briefly why it has not resolved a factual dispute.

14. *Third, the reasons themselves must be clear and unambiguous. It is not for a party to deduce the reasons for a decision.*

15. *Fourth, rehearsing what each witness told the tribunal is, without more liable to render a set of reasons erroneous in law. What is required is to explain (i) what facts the tribunal found as a result of that evidence and (ii) what conclusions on those facts the tribunal reached.*

16. *Fifth, it is not necessary for the tribunal's reasons to mention all of the evidence in a case. It is entitled to be selective in its references to evidence in its reasons though it should, as I have indicated in paragraph 13 above, identify and resolve evidence and applications which are in dispute.*

The tribunal's decision

17. *I turn now to the statement of reasons in this appeal.*

18. *The first three paragraphs set out the background to the hearing and note that the Appellant was not seeking discharge but a recommendation from the tribunal. Unfortunately, though the tribunal identified the application for a recommendation for a Community Treatment Order, it did not explicitly record that the Appellant's solicitor also sought a recommendation for transfer to another hospital.*

19. *The following four paragraphs summarise the oral evidence given at the hearing by the Responsible Clinician, the Appellant's community psychiatric nurse, a staff nurse caring for the Appellant, the Appellant's mother and his sister. The reasons conclude with a paragraph which deals with the application to adjourn and refuses it. There are no headings*

within the body of the reasons addressing the relevant criteria for detention.

20. *However these reasons are presented, I need to consider whether they did what adequate reasons should do and address the legal criteria for detention under the Mental Health Act in sufficient detail and clarity for the Appellant to know why his applications were unsuccessful.*

21. *Unfortunately these reasons do not explain what findings of fact the tribunal made arising from the evidence it summarised. If the summaries of the oral evidence given were intended by the tribunal to stand as the tribunal's findings of fact, that should have been stated. It was not.*

22. *There is no hint in the reasons, with the exception of the application to adjourn, that there were any disputes either about the evidence or the criteria for detention. The absence of apparent dispute within the reasons is implausible given the case advanced by the Appellant at the hearing. Further, if, as the Appellant alleges, there were disputes about whether the patient had a personality disorder as well as paranoid schizophrenia and whether there was appropriate treatment available for him, those relevant evidential disputes are not mentioned at all within these reasons.*

23. *Moreover the tribunal's reasons do not explain the conclusions to be drawn from any facts found. It is thus difficult to discern precisely what the tribunal found, for example, about the availability and suitability of the hospital treatment for the Appellant. Should this be inferred from the tribunal's finding that he could only be managed under conditions of medium security? I do not think that it should. To do so leaves the Appellant second guessing why the criteria for detention are satisfied. Conversely, though the tribunal stated that the patient was a risk to himself and others, I am left in the dark as to the evidential foundation for that conclusion.*

24. *Regretfully I have come to the clear view that the tribunal failed to provide adequate reasons for its decision and thus erred in law. I have every sympathy for tribunals who often need to produce reasons within strict time limits for more than one case heard on the same day but the problems with these reasons are ones of substance rather than form."*

From the Upper Tribunal Decision in ***AM v Partnerships in Care Ltd*** (Appeal No.HM/1334/2015). It was found the tribunal decision was flawed because of a mistake of fact, poor reasoning and impermissible reliance on hearsay:

Mistake of fact

1. *Ms Round submits that the First-tier Tribunal made a fundamental mistake of fact which undermines its conclusion as to the rapes. At paragraph 18(a) the tribunal referred to the police investigations and referral to the CPS of the second alleged rape. At paragraph 18(b), cited above, the tribunal referred to the third alleged rape and the consultant's letter explaining the circumstances of the case being dropped despite there being forensic evidence. In fact, as the Respondent accepts, that letter dealt with the second alleged rape. Thus it appears that the tribunal was under the impression that both the second and third alleged rapes had been the subject of criminal proceedings with forensic evidence to support them. This was a significant error. First, the mistaken belief appears to have been a factor in the tribunal deciding that the third alleged rape took place. Second, there is a risk that the tribunal thought that the fact of two independent allegations, both of which had been taken seriously by police and prosecutors and had been supported by forensic evidence, increased the probability of each of them having occurred.*

2. *Ms Davidson suggests that the reference to the third rape at paragraph 18(b) may have been a typographical error. I do not agree. Paragraph 18(a) deals sequentially with the first and second allegations. It is plain that paragraph 18(b) then goes on to the next in the sequence. If it was a typographical error, that would mean that the First-tier Tribunal had failed to address the evidence in relation to the third alleged rape. I do not consider that to be a realistic possibility.*

3. *I have taken into account that there was other evidence before the tribunal which might have supported the third allegation. Two psychologists, each writing in 2012, said that records suggested that at the time the clinical team viewed this as a credible allegation (pages 342 and 349). Ms Davidson has pointed to a number of other reports in the bundle which referred to the third alleged rape. The problem is that these reports do no more than reproduce allegations found in AM's records. Repetition of the content of the records does add weight to the allegations. The tribunal was of course entitled to take into account that the clinical team was recorded as having viewed the allegations as credible. But one cannot know what conclusion the tribunal would have reached if it had properly understood the evidence.*

4. *The tribunal's finding that two rapes occurred was central to its decision that that AM needed to undergo sexual understanding and treatment work (paragraph 18(d)). In these circumstances, there is a risk that the error of fact was critical to the outcome of the appeal. It was a fundamental error in the light of which the tribunal's decision cannot stand.*

Reasons/ irrationality

5. *Ms Round submits that the tribunal's reasons are inadequate for failing to give an explanation why it found the two rapes had occurred. Ms Davidson accepts that the tribunal's bare statement at paragraph 18(d) is not an adequate explanation for that finding. It had recited relevant evidence in the earlier sub-paragraphs, but it did not explain why it found the allegations proved.*

6. *Ms Davidson relies on the judgment of the Court of Appeal in English v Emery Reinbold and Strick Ltd [2002] 1 WLR 249 at [19]:*

   "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

7. *Ms Davidson submits that, when one reads the First-tier Tribunal's reasons as a whole, the reasons are adequate to explain why the tribunal decided that AM had committed the two rapes. The tribunal recorded the RC's evidence as to AM's change of position as to whether he committed the rapes; in relation to the "collapse" incident, it rejected his claim that his drink had been spiked and found that this claim supported their concerns about his "reduced credibility"; and it recited some specific evidence as to the alleged rapes at paragraph 18.*

8. *The thrust of the challenge, however, is that the reasons are inadequate to support the tribunal's conclusion. This ground of appeal merges with Ms Round's submission that the tribunal failed to address the evidence with sufficient care and that its decision was irrational.*

9. *The First-tier Tribunal's reasons give the impression that, having found that AM lacked credibility, the tribunal simply accepted that the rape allegations were true because they were viewed as credible at the time. But it did not follow from AM's lack of credibility that the allegations were true. I bear in mind the following observations by Munby J in R(AN) v Mental Health Review Tribunal [2005] EWHC 587 (Admin):*

   "129. If the Tribunal is relying upon hearsay evidence it must take into account the fact that it is hearsay and must have regard to the particular dangers involved in relying upon second, third or fourth hand hearsay. The Tribunal must be appropriately cautious of relying upon assertions as to past events which are not securely recorded in contemporaneous notes, particularly if the only evidence is

hearsay. The Tribunal must be alert to the well-known problem that constant repetition in 'official' reports or statements may, in the 'official' mind, turn into established fact something which rigorous forensic investigation shows is in truth nothing more than 'institutional folk-lore' with no secure foundation in either recorded or provable fact. The Tribunal must guard against too quickly jumping to conclusions adverse to the patient in relation to past events where the only direct evidence is that of the patient himself, particularly where there is no clear account in contemporaneous notes of what is alleged to have happened. In relation to past incidents which are centrally important to the decision it has to take the Tribunal must bear in mind the need for proof to the civil standard of proof; it must bear in mind the potential difficulties of relying upon second or third hand hearsay; and, if the incident is really fundamental to its decision, it must bear in mind that fairness may require the patient to be given the opportunity to cross-examine the relevant witness(es) if their evidence is to be relied on at all."[12]

10. *It was incumbent on the tribunal to scrutinise the evidence carefully as above and to address features of the evidence which may cast doubt on the allegations. In my judgment the tribunal failed to do that. Although the reports stated that the second and third allegations were, at the time, viewed as credible, there were no contemporaneous records available either of the allegations or the view of the clinical team as to them. By 2012, when Mr W (psychologist) wrote his report, the relevant records were not available and so it was not possible to make any independent assessment of the credibility of those reports. Mr W seemed to have some doubts as to the veracity of the allegations (see paragraph 5.4.vii at page 350). The tribunal did not acknowledge the difficulties arising from the lack of contemporaneous records, that the only evidence of the alleged incidents was multiple hearsay, and the consequent circumspection of Mr W.*

11. *In addition, the reports stated that the second allegation was not proceeded with because of a concern as to reliability of the victim, as well as other reasons unrelated to his reliability. I do not agree with Ms Davidson that the concerns were limited to the impact of a trial on the victim's reliability. That is one way of reading that sentence of Mr W's report ("the potential negative impact of the court case on the mental state of the alleged victim and his reliability), but it is not the only way. The tribunal noted the issue of reliability (paragraph 18(a)) but it is not clear how it understood that syntactically unclear phrase and gave no indication as to how it weighed the issue in the context of the evidence as a whole. If there had been an issue as to the reliability of the alleged victim's account, then that was material to the decision whether the allegation was true.*

12. *The tribunal's decision was made in error of law because of the tribunal's failure to take into account the above very relevant considerations, or to explain how it reached its conclusion in the light of those matters.*

[12] This passage was not disapproved by the Court of Appeal: [2006] QB 468

The main Irish Supreme Court authority on the work of tribunals remains ***MD v Clinical Director of St. Brendans Hospital & Ors***[13]. This was a case which centred to a significant degree on how the provisions of s.18 and in particular the proviso contained in s.18(1)(a)(ii) require to be applied. In this regard Mr. Justice Hardiman stated:

"[16] As part of the form, the tribunal was invited to provide reasons for the decision of the mental health tribunal.

[17] This is an absolutely essential part of the tribunal's functions and is necessary in law because of the tribunal's very considerable powers to affect directly the rights of a patient, including his right to liberty. It also arises from the terms of s. 49(6)(j) of the Act of 2001. This section deals in general with the obligations and procedures of a tribunal and the relevant sub-paragraph obliges it to attend to "the making of a sufficient record of proceedings of the tribunal". The requirement to give reasons for a mental health tribunal's decision, in my view, arises both in natural justice and under statute.

[18] This, of course, is absolutely essential if the decisions of this powerful body are to be subject to proper review. It is important in the circumstances of this case to recall that neither the consultant psychiatrist nor the tribunal can avoid or frustrate the review simply by the making of an inadequate or insufficient record of the exercise by them of the very considerable powers conferred upon them by statute."

The concept of the "best interests" of the patient which the provisions of the 2001 Act must serve was discussed in ***WQ v Mental Health Commission***[14] Mr. Justice O'Neill as follows:

"*In my opinion the best interests of a person suffering from a mental disorder are secured by a faithful observance of and compliance with the statutory safeguards put into the 2001 Act, by the Oireachtas. That together with the restriction in section 18(1)(a)(ii) mean that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by a Mental Health Tribunal. Therefore it necessarily follows that there must be in existence either an Admission Order or Renewal Order, where appropriate, which in substance is valid. An order which contains a flaw which undermines, or disregards the statutory basis for lawful detention as provided for in this Act, could not be excused under section 18……It is*

[13] [2008] 1 IR 632
[14] [2007] 3 IR 755

clear that what was envisaged by the Oireachtas, was that a mental health tribunal would have the power to excuse minor errors of an insubstantial nature but no more."

On this issue the Supreme Court in *MD* also made this important statement of principle:

"…If the proviso contained in s. 18(1)(a)(ii) (that there has been a failure it did not affect the substance of the order or cause an injustice) requires to be invoked, as it did, then that situation will arise only if there has in fact been a failure to comply with some section of the Act of 2001. Moreover, I cannot see how it can be certified, as it was, that if there has been a failure to comply with any such provision then the failure did not affect the substance of the order and did not cause an injustice unless the precise failure in question is identified and its effect ascertained.

[38] Counsel for the applicant is in my view correct in his submission that the Act of 2001, and in particular ss. 9 to 18 thereof, is intended to constitute a regime of protection for persons who are involuntarily detained because they are suffering from a mental disorder. That purpose will not, in my view, be achieved unless the Act of 2001 is complied with. The mental health tribunal consists of three persons, a lay representative, a lawyer and a psychiatrist. It is in my view important that, if it is found that a particular section of the Act of 2001 has not been complied with, that fact should be ascertained, recorded, and its effect discussed. Only in this way can the mental health tribunal hope to contribute to a situation of total compliance with the statutory provisions."

From ***LB v BMH:***[15]

"Conclusions

10. The grounds of appeal argue that the reports before the First-tier Tribunal gave very little information about the patient' s previous placement, nor about the reasons for the transfer, nor about any previous trials with clozapine. The application for an adjournment was made with a view to persuading the First-tier Tribunal to recommend a transfer under section 72(3), which was not possible without further information. This was especially important because the First-tier Tribunal proceedings were by way of reference and the patient was unlikely to appeal himself "and may

[15] HM/3722/2016 (Decision of the UK Upper Tribunal, 14/3/17)

remain inappropriately placed for a further three years" .

11. I agree with these grounds and also note that the application to adjourn was not made by or on the instructions of the patient but by an experienced specialist solicitor who had herself been appointed by the tribunal and felt that there was inadequate evidence before the tribunal (which, to an extent, the tribunal itself acknowledged). I cannot see that there would have been any prejudice to the interests of justice by the granting of an adjournment. In all of these particular circumstances the refusal to adjourn amounted to a breach of the rules of natural justice and fair procedure and for these reasons this appeal is allowed."

Thus we have strong authority, if indeed it was needed, that if a legal representative needs an adjournment so as to put the best possible case on behalf of their client, they should be granted it.

A "mini judicial review jurisdiction"

In delivering judgment in a judicial review application in ***DH v The Clinical Director of St. Patricks Hospital & Dr. C***[16] Ms. Justice O'Malley, then of the High Court, described the jurisdiction of Mental Health Tribunals as follows:

"*However I do think that the jurisdiction of the Mental Health Tribunal is relevant to the exercise of the Court's discretion because perhaps unusually it is in the legislation specifically mandated to consider the preadmission and admission procedures it does not simply give it's opinion to the current health status of the applicant. It does in fact have an almost sort of mini judicial review jurisdiction of it's own".*

[16] Unreported 18/6/12

"Meaningful, Proper & Fair Manner"

This is how the recently retired Mr. Justice Sheehan described, when directing the release of the applicant in an Article 40 application[17], how mental health tribunals must discharge their role when they come to review the detentions of persons detained under the Mental Health Act 2001.

(4) ***Doctors (GPs) not examining people***

It is a continuing issue that notwithstanding the requirements of the 2001 Act and in particular s.10 thereof, there are still occurrences of GPs signing recommendations for involuntary detention, thus confirming as part of this process that they have personally examined persons, when they have not actually seen the person at all. It has been clear since Judge Hogan's decision in ***S.O.*** that if that occurred any related detention in an approved centre will be illegal, Judge Hogan stating:

"*"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 admissions order. There is accordingly here a default of fundamental requirements in the sense canvassed by Kearns J. is 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 24hour 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."*

(5) ***Documentary Error***

In ***PD v Clinical Director of Connolly Hospital***[18] there were two errors in the renewal order. These were, as Judge Hogan described:

[17] See JB v The Director of the Central Mental Hospital & Ors [2008] 3 IR 61
[18] [2014] IEHC 58

"*First, the wrong part of the form was completed. The consultant filled out the reference to s. 15(2) of the Mental Health Act 2001 ("the 2001 Act") rather than to s. 15(3). Second, the wrong date was inserted, since it refers to (either) 13th or 14th April 2013. Having inspected the original on a number of occasions, I confess that it is hard to say whether the reference is to either 13 or 14. While the figure "4" seems to have been written over the figure "3", both are clearly visible. The reference to "2013" is obviously wrong, since it should be to "2014". The consultant immediately noticed these errors and wrote a brief memorandum to the effect that she hoped that this would not have implications for the subsequent Tribunal hearing."*

The Court found the impugned Renewal Order was bad on it's face and granted Article 40 relief stating *inter alia*:

"11. Judged by the standards articulated in GE, I find myself coerced to hold that the errors on the face of the document are too significant to admit of any conclusion other than that the renewal order is bad on its face. As the Supreme Court made clear in GE, it is of vital importance that any order which provides the legal basis for any form of custody or detention should clearly recite the basis for this on its face. In that case the administrative notice reciting that the applicant had been refused leave to land and providing for his detention pending removal from the State failed to contain certain key recitals required by statute….

13. In the present case not only did the form contain the wrong date, but the incorrect part of the form was filled in. The scheme of s. 15 is that an admission order remains in force for an initial period of 21 days. Section 15(2) provides that a consultant psychiatrist can extend that period of detention for a further three months. However, s. 15(3) enables the consultant psychiatrist to extend that period of detention for a further six months and may be further extended again for further periods not exceeding 12 months. Every such renewal order must, of course, be reviewed by a Mental Health Tribunal under s. 18(1).

14. The recital in the present case is to the wrong sub-section. This, in itself, can have serious legal consequences, because the time periods governing the further renewal of any detention under the 2001 Act (were it to occur) are different depending on whether the renewal order is made under s. 15(2) as distinct from s. 15(3)."

This judgment is also significant for confirming that a mental health tribunal could not deal with the problems caused by the flaws in the detaining order, stating in this regard:

"*5. The Mental Health Tribunal nevertheless affirmed the applicant's detention pursuant to s. 18(1) of the 2001 Act. It heard evidence from the consultant physician*

who clarified that she had intended to refer to 14th April, 2014. The Tribunal summarised its reasoning thus:

> *"In essence, the Tribunal is of the view that these errors on the face of the document do not affect the substance of the order, in particular given the benefit of the receiving consultant physician's evidence relating to these errors….The Tribunal also formed the view that these errors did not cause an injustice. It is the view of the Tribunal that these errors were mere technical defects which could be cured by the Tribunal: see EH v. Clinical Director of St. Vincent's Hospital [2009] IESC 46, [2009] 3 I.R. 771."*

6. I fear that I cannot agree with the Tribunal's conclusion. First, the critical point is that by virtue of the structure of s. 18(1) the 2001 Act the Tribunal's task is simply to review the earlier admission or renewal order. Even where the Tribunal affirms such an order, the decision of the Tribunal does not actually supplant or replace the earlier order. Thus, for example, on the return to the present Article 40.4.2 inquiry, the certified ground justifying the detention was that the respondent held the applicant pursuant to a renewal order made under s. 15 of the 2001 made on the 13th January 2014. It follows, therefore, that the renewal order itself remains the basis for the detention.

7. Second, nor is this case where the provisions of s. 18(1)(a)(ii) come into play at all. These provisions permit the Tribunal to affirm the renewal order even where there has been a failure to comply with the requirements of ss. 9, 10, 12, 14, 15 or 16 if it is satisfied that "the failure does not affect the substance of the order and does not cause an injustice." Section 18(1)(a)(ii) accordingly enables the Tribunal under certain circumstances to disregard any infirmities which might attach to the renewal order by reason of earlier non-compliance with certain key procedural requirements prescribed by the 2001 Act.

8. This, however, is not quite what has happened here. It is not suggested that there has, in fact, been some prior non-compliance with statutory formalities such as might render invalid a renewal order which is otherwise good on its face. It is rather a question of whether the order – in this case, the renewal order of 13th January 2014 – is, in fact, good on its face and whether it recites an appropriate legal basis for the applicant's detention."

(6) *Wardship v. Mental Health Act 2001*

The issue of possible overlap between the wardship process and the Mental Health Act 2001 and questions concerning what would be the appropriate procedure in a given case, have been matters which have caused concern and some confusion amongst practitioners. The issue was dealt with recently in ***In the matter of AM, A Ward of***

Court[19]. In ruling that wardship was appropriate in the particular case before him the President provided guidance *inter alia* as follows*:*

*"**The Issue***

32. Notwithstanding an opportunity for affidavit evidence to be led on the part of A.M. none such was forthcoming. Consequently, all of the evidence given on behalf of the applicant and the Courts Medical Visitor is accepted. There is thus no doubt but that the respondent requires to be detained in the only hospital suitable for his condition which is the High Secure Unit of the Central Mental Hospital.

33. The issue that has been argued before me is a purely legal one. It is contended that the applicant has failed to make out a case for taking A.M. into wardship because it is neither necessary nor appropriate to do so. Counsel for A.M. alleges that the effect of this application is to "circumvent the provisions of the Mental Health Act 2001, and the safeguards contained therein, without any particular or cogent reason having been advanced for such a course of action". This is a rather surprising contention given the failure to controvert a single word of the extensive affidavit evidence put before the court. In the course of submissions it was also accepted that A.M. satisfies the criteria for admission to an approved centre as provided for under the Act.

……..

Post detention treatment

53. In paras. (xv), (xvi) and (xvii) of the extract from the respondent's written submissions which I have reproduced it is pointed out that if he were to be detained under the Act he would be the beneficiary of regular statutory review by an independent Mental Health tribunal and would be under the general monitoring of the Mental Health Commission. He would also have access to the Inspector of Mental Health services. Furthermore, his treatment would have to conform to the provisions of ss. 56-60 of the Act and seclusion and restraint would be subject to s.69 and rules made by the Commission.

54. It was suggested in argument that these rights are superior to any rights which he would have if detained as a ward of court.

55. I am not persuaded that there is any merit in this argument. Wards of Court who are detained pursuant to the exercise of the jurisdiction conferred under s.9 of the 1961 Act have their rights just as effectively secured and respected as if detained pursuant to the procedure set out in the Act.

56. First, the detention of a ward pursuant to s.9 has to be operated in a manner consistent with the Constitution and with the European Convention on Human Rights. This is achieved in part by a system of regular review. Certainly since I took up my

[19] [2017] IEHC 184

present office I have made it clear that any orders made for the detention of a ward of court must be subject to regular reviews at least every six months. In many cases a shorter period of review has been ordered. On such review there is an entitlement on the part of the ward to appear and or to be represented. Each review involves a report being presented to the court by the treating consultant psychiatrist, the contents of which are made known to the committee of that ward. If necessary, the psychiatrist will be required to give oral evidence. If I have any doubts concerning the report presented it is open to me to order a Medical Visitor to conduct an examination and to make a separate and independent report to me on the condition of the Ward.

57. In addition, detention orders made under the wardship jurisdiction are just that. They do not authorise the use of restraint unless such an order is specifically sought and then it is granted only on appropriate evidence as to its necessity being tendered.

58. Furthermore, all detention orders are made with liberty to all interested parties to apply on very short notice. Certainly never more than 48 hours notice is required in order to apply to court. In practice it is often a much shorter notice period that is involved.

59. Indeed, I believe it may be said, that in some respects the entitlements of a ward of court subject to a detention order are superior to those of a person detained under the Act. A long term detainee under the Act has his position reviewed every 12 months. The review period for a ward of court is never more than 6 months. In addition, the ward of court has immediate access to the High Court if any change in circumstances occurs whereas there is no such automatic entitlement to a patient detained under the Act.

Conclusion

60. The provisions of the Act do not in any way interfere with or dilute the statutory wardship jurisdiction vested in the court pursuant to s.9(1) of the 1961 Act.

61. These two statutory jurisdictions exist side by side. Both seek to address the wellbeing of persons of unsound mind. It is a question in every case as to which of the two jurisdictions more appropriately addresses the needs of an individual person.

62. For the reasons which I have already given, I am satisfied that the Health Service Executive in invoking the wardship jurisdiction in this case did so appropriately. It did so in circumstances where on the facts and having regard to the statutory provisions, it was not feasible to operate the provisions of the Act in the case of the respondent.

63. It is both necessary and appropriate that the respondent be detained pending further order of the court in the Central Mental Hospital which is the only facility which has a sufficient degree of security to ensure his safety and the safety of the persons caring for him.

64. As the respondent meets the necessary criteria for admission to wardship I now make that order.

65. I am also satisfied that the rights of the respondent as a ward of court detained at the Central Mental Hospital pursuant to court order are no less than those of a person detained at that same institution pursuant to the provisions of the Act. Accordingly, the order made for his detention will continue and will be the subject of a review by this court which will be carried out on Monday, 26th June, 2017 at 11.00am. Meanwhile there is liberty to all parties to apply should any change in circumstances occur between this and then."

(7) ***Inability of Patients to appeal Admission Orders not unconstitutional***

From ***Ms. F v The Mental Health Tribunal & Ors***[20]:

"***XVI. Purpose of the Act of 2001.***

20. Ms F contends that that the court should have regard to the purpose of the Act of 2001 in approaching its interpretation of same. The overriding purpose of the Act of 2001 is to provide a calibrated system whereby persons may be involuntarily admitted to detention, subject to independent review of every such admission. Ms F has pointed to a certain imperfection in the system established by the Act, viz. that it is possible for an appeal to arrive in the Circuit Court against a lapsed admission order and during the currency of an extant renewal order. However, no matter how a statutory scheme is constructed it will always be possible to point to a different way in which it could have been structured. It may even be possible to point to a different way that is consistent with the purpose of the Act. But it is not for an unelected court, in purported observation of the purpose of an Act, to devise alternative processes to such lawful processes as are established by our elected lawmakers through the medium of such Act.

XVII. Vindicating the rights to liberty and equality.

21. Given that the renewal order (Order B) was affirmed on 16th November, 2015, by a mental health tribunal (a decision that was itself later affirmed by the Circuit Court on 15th December, 2015, the court does not see how Ms F can claim that her right to liberty was not vindicated. Moreover, if there was some failure in any one instance which saw the right to liberty unlawfully infringed, notwithstanding the various protections for patients that the Act of 2001 seeks to establish, a patient always has a right to bring an application to the High Court under Article 40 of the Constitution, though hopefully the instances in which this drastic solution would be required would be very small in number, if indeed they arose at all. The right to equality has been treated with in the context of the alleged discrimination referred to above.

[20] [2016] IEHC 623 (Barrett J.). Under appeal.

XVIII. Fashioning reliefs.

22. The issue of fashioning a relief does not arise as all reliefs sought are being declined.

XIX. Conclusion.

23. The court does not see any unlawfulness to present in how the Circuit Court acted in this matter. Insofar as any inefficiency might be perceived to arise in a process which can see an appeal against a lapsed admission order (Order A) arrive in the Circuit Court at a time when an appeal against a later extant renewal order (Order B) is imminent or can be anticipated, it appears to the court that such inefficiency can be, and apparently is in practice, overcome by the parties to the appeal agreeing that a notice of appeal against Order A should be amended so as to make it an appeal against Order B. This only works, of course, if the appeal is heard after the mental health tribunal has already sat and affirmed Order B; otherwise there can be no appeal under s.19(1). However, in the event that the tribunal has not so affirmed by the time the appeal arrives for hearing before the Circuit Court, there is nothing to stop the Circuit Court (a) adjourning the appeal pending the determination of the tribunal, an approach that should limit wasted time in the event of the tribunal affirming the detention, or (b) if and as the Circuit Court deems appropriate, having regard to the circumstances arising, striking out matters with no further order. It may be that the need for such practical 'work-arounds' could be obviated by means of a future amendment to the Act of 2001 which made provision for the instance where an appeal against a lapsed admission order (Order A) arrives before the Circuit Court during the currency of extant renewal order (Order B) but that is a matter well beyond the remit of the court."

(8) *A Patient's right to call for a review*

Judgment was delivered in this significant case by Binchy J. in ***B v The Mental Health Tribunal & Ors*** last month. It concerned a judicial review application involving *inter alia* a claim that the statutory scheme that governs the review of a person's detention under the 2001 Act is incompatible with the European Convention on Human Rights because it fails to provide a patient with a mechanism where he or she can initiate a review of the lawfulness of his or her detention. The Judge of his own motion was satisfied to grant a declaration of incompatibility because of the 2001 Act's deficiencies in this regard.

(9) ***Access to written records***

A patient and/or his or her lawyers should not be impeded in their requests for such documentation. Per Clarke J. in ***L.K. v. Clinical Director of the Lakeview Unit***[21]:

> "*36 Therefore, in my view, in the absence of special or unusual circumstances, a person acting on behalf of someone detained is entitled to be facilitated with reasonable access both to that person and to that person's medical records for the purposes of facilitating a review by the court of the lawfulness or otherwise of the detention of the person concerned*."

Similarly in ***EJW v. Dr. Liam Watters & The Mental Health Commission***[22] Mr.Justice Peart stated inter alia:

> "*This right to legal representation is not stated to be limited in any way by being confined to legal representation at the tribunal. It is an entitlement simply to legal representation". The Act is silent as to the date on which that right to legal representation is to commence. The section could have provided that the patient was entitled to legal representation at the tribunal hearing, but it has not done so. It follows in my view that the Act therefore intends that the patient should have legal representation to him/her from the moment that the Commission appoints the legal representative, and therefore, that the patient's legal representative is acting on behalf of that patient, not simply in relation to the hearing of the review hearing which could be more than two weeks away of more, but generally in order to protect the patient's interests, as may be appropriate in any particular case.*"

And he continued:

> "*...One cannot equate the role of the independent consultant psychiatrist with that of the legal representative. While it goes without saying that such a psychiatrist will perform his/her statutory function having regard at all times to the best interests of the patient, and in a professional manner, such a person is not*

[21] [2007] 2 IR 465:
[22] [2008] IEHC 462

representing the patient in the sense of speaking or advocating on behalf of the patient, or in any way representing the patient. That role is given to the legal representative alone.

The Court must see the role of the legal representative as being one whereby he/she both advises the patient in so far as that is possible, and acts as an advocate on his/her behalf both at the tribunal review hearing, and where necessary, with or without the assistance of counsel, in any application which may appear necessary by way of application for release under Article 40.4.2 of the Constitution, or judicial review or otherwise."

(10) ***When there are no records***[23]

Prolonged informal admission without consent was found unlawful by the European Court of Human Rights in the *Bournewood* case[24], which triggered the development in the United Kingdom of the Deprivation of Liberty Safeguards, the Mental Capacity Act 2005 and the Mental Health Act 2007. The European Court's decision related expressly to compliant mentally incapacitated mentally disordered persons. In this jurisdiction *in EH v Clinical Director of St. Vincent's Hospital*[25], the Supreme Court did not see how '*Bournewood*' availed the Applicant in that case given inter alia that by the time the Article 40 inquiry was in train a formal order under the 2001 Act detained the Applicant. Another reason why relief was refused was the particular meaning attaching to the term "voluntary patient", as the Court saw it, by virtue of Sections 2,4 and 29 of the Act of 2001.

The Breggin Gap[26] involves however those who are not incapacitated, the concerns being that their "consent" to remain voluntarily, often in locked wards under the same regime as those involuntarily detained, is more a product of coercion rather than the expression of free wills.

To the writer it seems that layers of protection are missing from those "voluntarily" detained but it is not clear if any protections will ultimately be provided to such persons under the Assisted Decision-Making (Capacity) Act 2015. Other jurisdictions such as the United Kingdom have taken steps to broaden protection, passing laws so

[23] In the formal sense, such as those as under 2001 Act that statute requires
[24] HL v United Kingdom [2005] 40 EHRR 32
[25] [2009] 2 ILRM 149
[26] See Rachel Bingham's article, "*The gap between voluntary admission and detention in mental units*", Journal of Medical Ethics [2011]

as to make available "Independent Mental Health Advocates" for persons involuntarily or informally detained.

Very often voluntary patients are detained in precisely the same circumstances as those formally detained under the Act. In truth the distinctions in the daily clinical management of a voluntary case as opposed to an involuntary detention are small in number.

It is noted in terms of working towards an improved situation for persons ostensibly and objectively detained against their will, that Head 3 of the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill [27] is entitled "Deprivation of Liberty" and contains the following entries:

> "[To provide legislative clarity with regard to who has statutory responsibility for a decision that a patient in a nursing home or similar residential care facility should not leave for health and safety reasons.
>
> Provide for an appeals process]

Such "clarity" would be welcome, offering it seems a path towards the equivalent of the 'Deprivation of Liberty Safeguards' (DOLS) system that operates in England & Wales. In the summary to the UK Law Commission's recently published report on "Mental Capacity & Deprivation of Liberty" it described the DOLS system – while however advocating for a radical overhaul- as follows:-

"The DoLS provide for the authorization of deprivations of liberty by an administrative process and also a means to challenge any such deprivation in court. They apply to hospitals and care homes in which people who lack capacity to consent to their living arrangements are deprived of liberty. They do not apply to deprivations of liberty elsewhere, such as in supported living, shared lives, or private or domestic settings.3 Where deprivation of liberty occurs in those other settings an authorisation currently needs to be (but in practice is usually not) obtained from the Court of Protection."

The DoLS have been subject to heavy criticism since their inception. The House of Lords Select Committee on the Mental Capacity Act found that the DoLS were "frequently not used when they should be, leaving individuals without the safeguards Parliament intended" and care providers "vulnerable to legal challenge". It concluded that "the legislation is not fit for purpose" and proposed its replacement.

In 2014 a decision of the Supreme Court (commonly referred to as "Cheshire West") gave a significantly wider interpretation of deprivation of liberty than had been previously applied in the health and social care context. This increased considerably

[27] Version 17 August 2016

the number of people who need to be recognised as being deprived of liberty and requiring safeguards. The implications for the public sector have been significant."

Perhaps also the taking of such steps would reduce the frequency with which stories are emerging about the physical, psychological and verbal abuse in disability and residential centres around the country.[28]

Conclusion

In my view recent developments in the area of mental health law serve to highlight the prospect of improved outcomes for those persons whose circumstances fall to be considered under mental health law. The potential for such improvement would be greatly increased if recommendations contained in the report of the Expert Group on the Review of the Mental Health Act 2001, published in December 2014, were implemented[29].

However in conclusion I do not feel I could do more than wholeheartedly endorse the following statements of Judge Eldergill delivered in ***Westminster City Council v Manuela Sykes (By her RPR and litigation friend, RS[30])*** – in what was described as a "textbook judgment on determining best interests[31]"- in the context of his analysis of Ms. Sykes's desire to return from a nursing home, back to her own home and whether this was in her "best interests". In determining that it was he stated:

"it is her welfare in the context of her wishes, feelings, beliefs and values that is important. This is the principle of beneficence which asserts an obligation to help others further their important and legitimate interests. In this important sense, the judge no less than the local authority is her servant, not her master."

Niall Nolan, Barrister

[28] See for example the Irish Times report of the 15/3/17 under the by-line "*Residents at disability centre subjected to physical and verbal abuse"* which concerned the fact that HIQA, our "health watchdog" was forced to intervene after receiving 21 allegations within a month concerning a disability centre in Dublin

[29] This superb report should be compulsory reading for anyone working within the scheme of involuntary detention provided by the 2001 Act.

[30] [2014] EWHC B9 (COP) (24 February 2014)

[31] See note on the case prepared by 39 Essex Chambers