

***A.B. v. Clinical Director of St.  
Loman's Hospital***

**High Court, 3<sup>rd</sup> May 2017**

Dublin Solicitors Bar  
Association/Mental Health Lawyers  
Association Seminar  
27<sup>th</sup> June 2017  
Michael Lynn S.C.

**OUTLINE FACTS**

- Intellectual disability.
- May 2015, psychotic episode – admitted to hospital.
- Nov 2015, recovered.
- Orders: 28<sup>th</sup> May 2015 (21 days)  
17<sup>th</sup> Jun 2015 (3 months)  
14<sup>th</sup> Sep 2015 (6 months)  
14<sup>th</sup> Mar 2016 (6 months) (aff. 30 Mar 2016)  
13<sup>th</sup> Sep 2016 (12 months) (aff. 28 Sep 2016  
under s.3(1)(b))
- May 2016 – community care plan aborted due to lack of funding
- 27<sup>th</sup> Jun 2016 - leave granted to issue JR.

## OUTLINE FACTS

- Statement of Grounds amended, 19<sup>th</sup> Dec 2016.
- Report of Prof. Brendan Kelly, 19<sup>th</sup> Jan 2017.
  - mental disorder, s. 3(1)(a) and (b)
  - acute psychiatric ward deeply inappropriate
  - agreed with RCP's view in Nov 2015 that "very unsuitable"
  - sexual assault
  - continuation will likely lead to deterioration in mental state
  - moved to a ward for patients with a refractory and enduring mental health issues
  - 2015, 154 persons with an intellectual disability detained in psychiatric wards

## MAIN RELIEFS SOUGHT

Applicant subject to 12 month renewal order, in place until 13<sup>th</sup> Sep 2017, but cannot initiate a review by a Tribunal.

- Quash renewal order
- A declaration that MHA 2001 repugnant to the Constitution
- Alternatively, a declaration that MHA 2001 incompatible with ECHR.

## OPPOSITION

Clin. Dir./H.S.E.

Min. for Health/A.G.

Mental Health Commission (Notice Party)

- Moot
- *No locus standi*
- Alternative remedies (inc. s. 28 MHA; and *Croke*)
- Various pleading points (NB – ECHR Act/MHC)
- Detention is in App’s best interests

### *Gorshkov v. Ukraine*

Application No. 67531/01

*“The court reiterates that a key guarantee under Article 5 § 4 is that a patient compulsorily detained for psychiatric treatment must have a right to seek judicial review on his or her own motion (see Musial v. Poland, judgment of 25<sup>th</sup> March 1999 ...; the aforementioned Rakevich v. Russia judgment, § 45). Article 5 § 4 therefore requires, in the first place an independent legal device by which the detainee may appear before a judge who will determine the lawfulness of the continued detention. The detainee’s access to the judge should not depend on the goodwill of the detaining authority, activated at the discretion of the medical corps or the hospital administration.*

## *Gorshkov v. Ukraine* Application No. 67531/01

*“Whilst the legal mechanisms contained in sections 19–22 of the Psychiatric Medical Assistance Act and Chapter 34 of the Code of Criminal Procedure ... ensuring that a mental health patient is brought before a judge automatically, constitutes an important safeguard against arbitrary detention, it is insufficient on its own. Such surplus guarantees do not eliminate the need for an independent right of individual application by the patient. The Court concludes that the applicant was not entitled to take proceedings to test the lawfulness of his continued detention for compulsory medical treatment by a court, as required by Article 5 § 4 of the Convention. There has, accordingly, been a violation of this provision.”*

## High Court judgment

- No *locus standi* for constitutional challenge
- Reference to pleading points re ECHR Act 2003
- Cir. Ct. – *“It is difficult to see how the right of appeal, limited as it is in time, could be an answer to a complaint under Article 5 § 4 of the Convention in circumstances where the applicant is to be detained for 12 months.”* (para. 129)

## High Court judgment

- Art 40 – refers to *Ryan v. Governor of Midlands Prison* [2014] IESC 54. Concludes:

*While this clearly does not rule out an Article 40 review of the detention of a person under the Act of 2001, it is clear that it would only be considered appropriate in cases where there has been “an absence of jurisdiction, a fundamental denial of justice or a fundamental flaw”. It could hardly be considered an appropriate mechanism for undertaking a review of the mental health of a person such as the applicant.* (para. 132)

Also refers to *X. v. United Kingdom* (Application No. 6998/75) (1982) 4 E.H.R.R. 188 and *H.L. v. United Kingdom* (2005) 40 E.H.R.R. 32.

- JR – “*suffers from the similar infirmities ... the Court is unlikely to embark upon a consideration as to whether or not a detained person is suffering from a mental disorder.*” (para. 136)

## High Court judgment

- Court can make a declaration pursuant to s. 5 ECHR Act 2003 “of its own motion”.
- Declaration pursuant to s.5 ECHR Act 2003 that:

***Part 2 of the Mental Health Act 2001 is incompatible with Article 5 § 4 of the European Convention on Human Rights insofar as it does not provide persons who are detained under a 12 month renewal order (made pursuant to section 15(3) of the Act) with an entitlement to initiate a review of their detention following the expiry or exhaustion of their rights pursuant to section 19 of the said Act.***

Update - July 2017 - The Minister for Health, Ireland and the Attorney General have appealed this High Court decision to the Court of Appeal.