THE HIGH COURT

Record No. 2011/1122JR

P.L.

Applicant

and

THE CLINICAL DIRECTOR OF ST PATRICK'S UNIVERSITY HOSPITAL and DR. SEAMUS O'CEALLAIGH

Respondents

and

THE ATTORNEY GENERAL
THE HUMAN RIGHTS COMMISSION

Notice Parties

OUTLINE SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION

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1. In these proceedings, the applicant is seeking declarations of incompatibility with the European Convention on Human Rights ('the ECHR') in respect of rules of law which have been held to provide a lawful basis for the applicant's detention in St. Patrick's University Hospital ('the hospital') from 12th October until he left the Special Care Unit (date unknown).

2. Accordingly, in the first part of these submissions, the Human Rights Commission, as *amicus curiae*,[1] focuses on the relevant law under Article 5 of the ECHR.

3. In the second part of these submissions, the *amicus curiae* turns to the Constitution, as the Court must be satisfied as to the constitutionality of an impugned provision,

[1] Leave was granted to the Commission on ... to be joined as amicus curiae in accordance with section 8(h) of the *Human Rights Commission Act 2000*, which empowers the Commission to apply to the High Court and to the Supreme Court to be joined as *amicus curiae* in proceedings that pertain to the human rights of any person. The term "human rights" is defined in the Act of 2000 as meaning: '*(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and (b) the rights, liberties or freedoms conferred on or guaranteed to, persons by any agreement, treaty or convention to which the State is a party.*'

whether it be a rule of law (*I.S. v. Minister for Justice, Equality and Law Reform*[2]) or a statutory provision (*Carmody v. Minister for Justice, Equality and Law Reform*[3]) before a declaration of incompatibility with the ECHR can be made.

4. Consideration must also be given to as to whether sections 2 (the interpretative obligation) or 3 (the statutory duty of compliance) of the European Convention on Human Rights Act 2003 can resolve the matters raised or can provide an effective remedy.

5. These submissions are being filed without sight of the Attorney General's submissions which were not served on the *amicus curiae* prior to completion of these submissions.

6. The core facts, as found by the learned trial judge in his judgment dated 24th January, 2012, are as follows (all occurring in 2011):

26th Aug	The applicant was admitted as a voluntary patient to St. Patrick's University Hospital ('the hospital') following a psychotic episode at home and was admitted to the Special Care Unit.
14th Sept	He was made an involuntary patient, pursuant to sections 23 and 24 of the Mental Health Act 2001 ('the Act').
27th Sept	A renewal order issued authorising his continued detention as an involuntary patient.
12th Oct	The renewal order was revoked by his responsible consultant psychiatrist pursuant to section 28 of the Act following a finding that the applicant was no longer suffering from a mental disorder. However, the applicant remained in the Special Care Unit, which was a locked ward, and was "not free to leave", although he was permitted supervised periods in the hospital garden. The applicant "subsequently expressed an intention to leave, but was not permitted to do so, and no order to detain him under section 24 of the Act [was] made to again detain him" (page 4 of the judgment).
1st Nov	The applicant attempted to jump over the garden wall but was encouraged by hospital staff to remain in the hospital and agreed to do so.
21st Nov	The applicant attempted to leave the hospital but was not permitted to do so and was restrained and sedated because he became violent and aggressive. According to his responsible consultant psychiatrist, the applicant tried on three occasions to jump over the garden wall but, when encouraged by staff, he agreed to return to the ward.
22nd Nov	The applicant's solicitor visited the applicant and read his medical notes which showed that he had been forcibly restrained on about 30 occasions. The applicant met with his responsible consultant psychiatrist and stated that he wanted to leave the hospital and "indicated that he was withdrawing his consent to remaining on a voluntary basis". His responsible consultant psychiatrist initiated the involuntary admission process under sections 23 and 24 of the Act but the doctor who then carried out the required second

[2] High Court, 21st January, 2011.
[3] [2010] 1 I.R. 635.

assessment refused to admit the applicant as an involuntary patient on the basis that the applicant was then taking his medication and was agreeing to remain in the Special Care Unit and wanted to remain as a voluntary patient.

ARTICLE 5 OF THE ECHR

7. Article 5(1) of the ECHR provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(e) the lawful detention of ... persons of unsound mind ...

8. The Commission proposes to examine:

(i) what is meant by

(a) being "*deprived of liberty"*,

(b) *"a procedure prescribed by law*",

(c) "*lawful detention*" under sub-paragraph (e);

(ii) the importance of independent review as emphasised in the recently decided case of *M v. Ukraine.*[4];

(iii) the role of international human rights instruments in informing Article 5;

(iv) the application of Article 5 to the facts of the applicant's case.

"Deprived of liberty"

9. A comprehensive analysis of the case law of the European Court of Human Rights on what constitutes a deprivation of liberty was carried out by Munby J. in *JE v. DE.*[5] The Commission very respectfully concurs with his analysis and conclusions (see, in particular, paragraph 77 of the judgment).

10. When applied to the applicant's case, the key questions are:

(i) was the applicant free to leave the hospital?

(ii) did the applicant give valid consent to his confinement, bearing in mind that the fact that he may at times have agreed to his confinement did not necessarily mean that there was a valid consent?

11. Whether a person is compliant with his hospital admission, or attempts to leave the hospital, is not determinative of whether there is a deprivation of liberty. This is

[4] Application Number 2452/04, 19th April, 2012.
[5] [2007] 1 M.H.L.R. 39; [2006] EWHC 3459 (Fam).

particularly so where the person "is legally incapable of consenting to, or disagreeing with, the proposed action": *H.L. v. United Kingdom.*[6]

12. The "concrete situation" facing the person as a matter of fact must be assessed. In *H.L.*, "the concrete situation was that the applicant was under continuous supervision and control and was not free to leave": paragraph 91. The Court held that there was a deprivation of liberty.

13. In *Storck v. Germany*,[7] at issue was whether the applicant had "validly consented" to her confinement. In determining that the applicant had been deprived of her liberty, the European Court of Human Rights held that her attempts to escape were such that she had not agreed to stay in the clinic and, in the alternative, that her treatment with medication gave rise to a presumption that she lacked the capacity to consent: "... assuming that the applicant was no longer capable of consenting following her treatment with strong medication, she cannot in any event be considered to have validly agreed" (paragraph 76).

"Procedure prescribed by law"

14. The European Court of Human Rights' classic articulation of what is meant by 'prescribed by law' is contained in *Sunday Times v. United Kingdom*[8]:

> *In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.*

15. Substantive certainty is particularly important in mental health cases. In *Kawka v. Poland*,[9] the Court stated:

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[6] (2004) 40 EEHRR 32, at paragraph 90.
[7] (2005) 43 EHRR 96.
[8] (1979) 2 EHRR 245, at paragraph 49.
[9] Application Number 25874/94, 9th January, 2001.

48. However, the "lawfulness" of detention under domestic law is the primary, but not always a decisive element. The Court must, in addition, be satisfied that detention during the period under consideration, was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner. Moreover, the Court must ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see, among many other authorities, the Winterwerp v. the Netherlands *judgment of 24 October 1979, Series A no. 33, pp. 19-20, § 45; and the* Erkalo v. the Netherlands *judgment of 2 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2477, § 52).*

49. The Court stresses in this connection that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty is satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law should be clearly defined, and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law should be sufficiently precise to allow the person – if needed, to obtain the appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, pp. 41–42, §§ 35–36, and, mutatis mutandis, *the* Sunday Times v. the United Kingdom (no. 1) *judgment of 26 April 1979, Series A no. 30, p. 31, § 49; the* Halford v. the United Kingdom *judgment of 25 June 1997, Reports 1997-III, p. 1017, § 49, and the* Steel and Others v. the United Kingdom *judgment of 23 September 1998, Reports 1998-VII, p. 2735, § 54).*

"Lawful detention" under sub-paragraph (e)

16. Detention must also:

(a) conform with the procedural and substantive aspects of domestic law,[10]

(b) be necessary,[11] and

(c) there must be adequate legal protection against arbitrary deprivation of liberty.[12]

There can be overlap between these conditions and the requirement that detention be prescribed by law. For example, in determining whether a procedure is 'prescribed by law', the adequacy of procedural protections may be assessed. In *H.L.*, cited above, the European Court of Human Rights stated (at paragraph 115):

Lastly, the Court reiterates that it must be established that the detention was in conformity with the essential objective of Article 5 § 1 of the Convention, which is to prevent individuals being deprived of their liberty in an arbitrary fashion (see, among many authorities, Wassink v. the Netherlands, *judgment of 27 September 1990, Series A no. 185-A, p. 11, § 24, and, more recently,* Assanidze v. Georgia *[GC], no. 71503/01, § 170, ECHR 2004-II). This objective, and the broader condition that detention be "in accordance with a procedure prescribed by law",*

[10] *H.L.*, cited above, paragraph 114. For an example of a breach on this ground, see *Van der Leer v. Netherlands*, (1990) 12 EHRR 567, para 23.

[11] *Witold Litwa v. Poland*, Application Number 26629/95, 4th April, 2000.

[12] *Winterwerp*, 24th October, 1979, Series A no. 33, paragraph 45; *H.L. v. United Kingdom*, Application Number 45508/99, paragraph 115.

require the existence in domestic law of adequate legal protections and "fair and proper procedures" (see Winterwerp, *cited above, pp. 19-20, § 45, and* Amuur v. France, *judgment of 25 June 1996,* Reports *1996-III, pp. 851-52, § 53).*

17. In *H.L.*, the applicant was autistic with a history of self-harm. He lacked the capacity to consent or object to medical treatment. He was an in-patient at Bournewood Hospital but did not in fact stay at the hospital but resided with paid carers and attended a day-care centre on a weekly basis. On 22nd July, 1997, he became particularly agitated when at the day-care centre and was taken to the hospital where he was assessed and admitted on the basis that he required in-patient care. He was recorded as making no attempt to leave. He was admitted as an "informal patient" because he was compliant and did not resist his admission. His doctor confirmed later that had he attempted to leave, he would have been detained under the Mental Health Act 1983. The applicant later brought proceedings which challenged his detention from 22nd July to 29th October, 1997, as unlawful. The House of Lords held that it was lawful under the common law doctrine of necessity. However, the European Court of Human Rights held that the absence of adequate procedural safeguards meant that the detention was unlawful. It stated:

120. In this latter respect, the Court finds striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted. The contrast between this dearth of regulation and the extensive network of safeguards applicable to psychiatric committals covered by the 1983 Act (see paragraphs 36 and 54 above) is, in the Court's view, significant.
In particular and most obviously, the Court notes the lack of any formalised admission procedures which indicate who can propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The appointment of a representative of a patient who could make certain objections and applications on his or her behalf is a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities.
121. The Court observes that, as a result of the lack of procedural regulation and limits, the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit: as Lord Steyn remarked, this left "effective and unqualified control" in their hands. While the Court does not question the good faith of those professionals or that they acted in what they considered to be the applicant's best interests, the very purpose of procedural safeguards is to protect individuals against any "misjudgments and professional lapses" (Lord Steyn, paragraph 49 above).
122. The Court notes, on the one hand, the concerns regarding the lack of regulation in this area expressed by Lord Steyn (see paragraph 47 above), Lady

Justice Butler-Sloss (see paragraph 61 above) and the Law Commission in 1995 (see paragraphs 66-68 above). On the other hand, it has also noted the Government's understandable concern (outlined in paragraph 80 above) to avoid the full, formal and inflexible impact of the 1983 Act. However, the current reform proposals set out to answer the above-mentioned concerns of the Government while at the same time making provision for detailed procedural regulation of the detention of incapacitated individuals (see, in particular, the Mental Capacity Bill described in paragraphs 77-78 above).

123. The Government's submission that detention could not be arbitrary within the meaning of Article 5 § 1 because of the possibility of a later review of its lawfulness disregards the distinctive and cumulative protections offered by paragraphs 1 and 4 of Article 5; the former strictly regulates the circumstances in which one's liberty can be taken away, whereas the latter requires a review of its legality thereafter.

124. The Court therefore finds that this absence of procedural safeguards fails to protect against arbitrary deprivations of liberty on grounds of necessity and, consequently, to comply with the essential purpose of Article 5 § 1. On this basis, the Court finds that there has been a violation of Article 5 § 1 of the Convention.

18. Further requirements which arise in respect of persons with a mental disability, as established by the landmark case of *Winterwerp v. the Netherlands*[13], are that a person cannot be deprived of his liberty on the basis of unsoundness of mind unless three minimum conditions are satisfied: (i) he must reliably be shown by objective medical expertise to be of unsound mind; (ii) the mental disorder must be of a kind or degree warranting compulsory confinement; and (iii) the validity of continued confinement depends upon the persistence of such a disorder.[14]

19. Where a person who is detained on the basis of having a mental disorder is subsequently held to no longer have such a disorder, release can be delayed pending the arrangement of suitable discharge conditions. In *Johnson v United Kingdom*,[15] the European Court of Human Rights stated:

61. ... it does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released into the community.

Such a rigid approach to the interpretation of that condition would place an unacceptable degree of constraint on the responsible authority's exercise of judgment to determine in particular cases and on the basis of all the relevant circumstances whether the interests of the patient and the community into which he is to be released would in fact be best served by this course of action. It must also be observed that in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science. Whether or not recovery from an episode of mental illness which justified a patient's confinement is complete and definitive or merely apparent cannot in all cases be measured with absolute certainty. It is the behaviour of the

[13] 24th October, 1979, Series A no. 33, at paragraph 39.
[14] Referred to at paragraph 55 of *M. V. Ukraine*, cited further below.
[15] 24th October, 1997, Application Number 22520/93, (1997) 27 EHRR CD 296.

patient in the period spent outside the confines of the psychiatric institution which will be conclusive of this.

62. It is to be recalled in this respect that the Court in its Luberti *judgment (cited above, pp. 13–15, § 29) accepted that the termination of the confinement of an individual who has previously been found by a court to be of unsound mind and to present a danger to society is a matter that concerns, as well as that individual, the community in which he will live if released. Having regard to the pressing nature of the interests at stake, and in particular the very serious nature of the offence committed by Mr Luberti when mentally ill, it was accepted in that case that the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.*

63. In the view of the Court it must also be acknowledged that a responsible authority is entitled to exercise a similar measure of discretion in deciding whether in the light of all the relevant circumstances and the interests at stake it would in fact be appropriate to order the immediate and absolute discharge of a person who is no longer suffering from the mental disorder which led to his confinement. That authority should be able to retain some measure of supervision over the progress of the person once he is released into the community and to that end make his discharge subject to conditions. It cannot be excluded either that the imposition of a particular condition may in certain circumstances justify a deferral of discharge from detention, having regard to the nature of the condition and to the reasons for imposing it. It is, however, of paramount importance that appropriate safeguards are in place so as to ensure that any deferral of discharge is consonant with the purpose of Article 5 § 1 and with the aim of the restriction in sub-paragraph (e) (see paragraph 60 above) and, in particular, that discharge is not unreasonably delayed.

64. Having regard to the above considerations, the Court is of the opinion that the 1989 Tribunal could in the exercise of its judgment properly conclude that it was premature to order Mr Johnson's absolute and immediate discharge from Rampton Hospital. While it is true that the Tribunal was satisfied on the basis of its own assessment and the medical evidence before it (see paragraphs 17 and 18 above) that the applicant was no longer suffering from mental illness, it nevertheless considered that a phased conditional discharge was appropriate in the circumstances ...

It should be noted that in *Johnson* his discharge was subject to periodic scrutiny by an independent tribunal.

M v. Ukraine, Application Number 2452/04, 19th April, 2012

20. In *M v. Ukraine*,[16] the applicant complained that four periods of hospitalisation on the basis of her mental health were unlawful. Whilst procedural safeguards were in place, including review by a court, the European Court of Human Rights examined those safeguards against the provisions of international human rights instruments. It held that the absence of "specific time-limits" for compulsory hospitalisation, coupled with the fact that monthly reviews by a panel of psychiatrists did not provide adequate guarantees of independence, impartiality and objectivity, meant that two of

[16] 19th April, 2012, Application Number 2452/04.

the periods of hospitalisation (of two months and 21 days, and one month and 20 days) were in breach of Article 5:

66. ... Accordingly, after the compulsory admission of the applicant on the basis of the court decisions, the practitioners of the mental health facility assumed effective internal control of the applicant's liberty and treatment for the whole period of the second hospitalisation, which lasted for two months and twenty-one days (from 28 September to 19 December 2003), and the third hospitalisation which lasted for one month and twenty days (from 19 July to 8 September 2004). The Court finds no indication that, following her admissions to the hospital, the applicant was subject to any assessment by an outside authority. Moreover, the Government did not provide any medical or other documentary evidence to show that after the admission the applicant's status was subsequently reviewed by specialists within the hospital.
67. Based on the foregoing considerations the Court concludes that the applicant's admissions to the hospital and subsequent retentions therein were not protected by appropriate safeguards against arbitrary deprivation of liberty. Moreover, it has not been reliably shown that the applicant's retention in the hospital was justified by the mental illness throughout the whole period of her second and third hospitalisations. Accordingly, there has been a violation of Article 5 § 1 of the Convention in this regard.

21. In respect of the fourth hospitalisation, the Court had to consider whether the applicant was deprived of her liberty, in circumstances where as she was purportedly admitted to the hospital on her own application, but she claimed that she had been compelled to sign the admission application. The Court referred, *inter alia*, to a voluntary patient's "guaranteed right ... to leave the hospital whenever he or she wishes to do so" and of the need for "sufficient and reliable evidence suggesting that the person's mental ability to consent and comprehend the consequences [of in-patient treatment] has been objectively established in the course of a fair and proper procedure and that all the necessary information concerning placement and intended treatment has been adequately provided to the patient". The Court stated:

(i) The nature of the measure in question
71. With respect to the applicant's stay in the hospital, the Court notes that if in-patient psychiatric treatment is voluntary this presupposes that the patient has the guaranteed right to stop any further treatment and to leave the hospital whenever he or she wishes to do so. This freedom of action is subject to mental health practitioners' authority to refuse to discharge the patient, provided that the relevant compulsory admission procedures are immediately applied, following which the person shall be treated as an involuntary patient. This approach is recognised both internationally (see principle 15 of the UN Principles cited in paragraph 37 above) and at the domestic level (see section 18 of the Psychiatric Assistance Act cited in paragraph 35).
72. However, there is no indication that after being admitted the applicant was free to leave the hospital. The applicant contended that she was confined in the hospital in quite strict conditions, even as to freedom of movement within the premises of the hospital, let alone freedom to leave the hospital. The control over her liberty and privacy extended to strict limitations on her personal belongings. The applicant's

account of the factual situation is indirectly corroborated by the CPT's observations expressed after the visit to a similar mental health facility in Ukraine. The CPT noted that a large number of adult patients, who had not been officially admitted as involuntary patients, could not in fact leave the hospital of their own free will (see paragraph 40 above).

73. At the same time the applicant's submissions have not been shown by the Government to be false in any way. No evidence has been provided by the Government as to the regime of the applicant's stay in the hospital specifying, in particular, what difference there was between the applicant's daily supervision and that of involuntary patients, the amount of social contact allowed, the restrictions on privacy and other matters of fact. These matters were in the possession of the authorities rather than of the applicant.

74. Therefore the Court, having regard to the overall context of the case, must give preference to the applicant's account of the facts and conclude that after the admission the applicant was deprived of liberty throughout the period of the fourth hospitalisation, within the meaning of Article 5 § 1 of the Convention.

(ii) The consent to admission

75. With respect to the applicant's consent to admission, the Court considers that medical practitioners are required to pay particular attention to the validity of decisions made by a person whose mental health is questionable.

76. The international community has developed a set of relevant principles under which the validity of a patient's consent to psychiatric treatment can be ensured. In particular, under principle 11 § 2 of the UN Principles an agreement to psychiatric treatment implies that a patient has been provided with adequate and understandable information, in a form and language he or she understands on the diagnostic assessment; the purpose, method, likely duration and expected benefit of the proposed treatment; alternative modes of treatment, including those less intrusive; possible pain or discomfort, risks and side-effects of the proposed treatment (see paragraph 37 above). The CPT has specified that consent to treatment can only be qualified as free and informed if it is based on full, accurate and comprehensible information about the patient's condition and the treatment proposed (see paragraph 39 above).

77. Accordingly, the Court takes the view that a person's consent to admission to a mental health facility for in-patient treatment can be regarded as valid for the purpose of the Convention only where there is sufficient and reliable evidence suggesting that the person's mental ability to consent and comprehend the consequences thereof has been objectively established in the course of a fair and proper procedure and that all the necessary information concerning placement and intended treatment has been adequately provided to him.

78. In the present case the applicant's hospitalisation was conducted on the basis of the consent given by the applicant who, at the relevant time, had been diagnosed with a mental disorder. The only document evidencing the applicant's consent is her admission application. While section 13 of the Psychiatric Assistance Act requires that consent to hospitalisation should be signed by the person concerned and a psychiatrist, no such consent countersigned by a psychiatrist has been presented to the Court. There is no evidence suggesting that her mental ability to consent was established, that the consequences of the consent were explained to her or that the relevant information on placement and treatment was provided to her.

79. In these circumstances the Court considers that the applicant's consent to the fourth hospitalisation cannot be viewed as valid and lawful for the purpose of the Convention.

22. The Court then made specific reference to the potential vulnerability of "voluntary patients".

81. The Court further reiterates that the requirements of appropriate procedural safeguards against arbitrary retention in a mental health facility are inherent in the concept of lawfulness under Article 5 § 1 of the Convention. This issue is equally important with respect to voluntary patients, because without safeguards for this type of patient, there may be improper inducements to circumvent the complicated procedure for compulsory hospitalisation by admitting a person on a "voluntary" basis. As a result, the guarantees provided within a compulsory hospitalisation may lose their practical efficiency and not serve as a real shield against arbitrary deprivation of liberty.

International human rights instruments inform Article 5

23. In mental health cases, the European Court of Human Rights has repeatedly used international human rights instruments to inform its application of Article 5. *M. v. Ukraine* is a recent example, with the Court giving weight to the 'UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care' and 'Recommendation Rec (2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder'.

24. In a recent Grand Chamber judgment, *Stanev v. Bulgaria*[17], the Court stated that it felt "*obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible*", referring to the UN Convention on the Rights of Persons with Disabilities, Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe, and reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The UN Convention on the Rights of Persons with Disabilities

25. In applying contemporary human rights standards in mental health cases, a key instrument now is the Convention on the Rights of Persons with Disabilities ('the CRPD') which was adopted by the United Nations on 13th December, 2006, and came into force on 3rd May, 2008. Ireland signed the CRPD on 30th March, 2007, and intends to ratify it.

[17] 17th January, 2012, Application number 36760/06, paragraph 244.

26. The European Union has acceded to the CRPD through Council Decision 2010/48/EC, formally adopted on 26th November, 2009. The instrument of ratification was deposited in December 2010. It is the first time that the EU has become a party to an international human rights treaty, and that an intergovernmental organization has joined a United Nations human rights treaty.

27. The right of equal treatment in the vindication of legal rights is at the core of the CRPD as enshrined by Article 12, which is headed 'Equal recognition before the law', and provides:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

28. Academic commentary on the CRPD includes the following:

Attitudinal change is a central element of progress recognising the paradigm shift from the paternalistic system to one where persons with disabilities have rights on an equal basis with others as provided for in the Convention on the Rights of Persons with Disabilities, and particularly Article 12 on legal capacity. One commentator says that Article 12 '... lies at the very heart of the revolution in disability – treating people as "subjects" and not as "objects".[18]

This change in understanding disability in its social context has also resulted in the CRPD acknowledging that persons with disabilities are subjects of rights, rather than objects of welfare. This approach started with the Tallinn Guidelines, but with the human rights development under the CRPD the shift to recognising persons with disabilities as holders of rights has been reinforced.[19]

[18] 'Legal Capacity Law Reform in Europe: An Urgent Challenge', Mary Keys (founding member of the Centre for Disability Law and Policy Research at the School of Law in NUI Galway), published in European Yearbook of Disability Law, Volume 1, 2009, pages 59-88, the extract being at page 61.
[19] *International Trends in Mental Health Laws, 2008*, The Federation Press, ed. Bernadette McSherry, "The Disabilities Convention and its consequences for Mental Health Laws in Australia", Annegret Kampf, pp21-2.

Read in the context of mental health care, [Article 12.4 of the CRPD] represents a summary of the essential elements of an appropriate approach to medical decision-making processes. The approach is based on the fundamental assumption that persons with disabilities have capacity, and that any suspension of legal capacity should be temporary, for the shortest time possible and subject to regular review. Second, it prioritises the exercise of personal self-determination by privileging the will and preferences of the person concerned. Significantly, the prioritisation of the will and preferences of persons with disabilities are seen as carrying weight throughout the decision-making process, and continue to have relevance even where a determination of incapacity is made. Finally, the approach recognises that decision-making processes involving vulnerable persons may be unduly coloured by the interests of others.[20]

While the CRPD does not set out any 'new' rights, it clarifies the obligations of States Parties to promote and ensure the rights of persons with disabilities and sets out the steps that should be taken to ensure equality of treatment. It goes into much more detail than previous general human rights conventions concerning what action needs to be taken to prohibit discrimination.[21]

29. Article 14 of the CRPD is headed 'Liberty and security of the person' and provides:

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

a. Enjoy the right to liberty and security of person;

b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

30. It is submitted that the requirement of equality includes ***equality of protection***. Whilst a mental illness may give rise to the need to detain a person, the quality of protection against arbitrary detention must not be diminished because the person suffers from a mental illness. The protections in place for the applicant must be of no less a standard than that applied to all persons and, arguably, should be more rigorous because of the potential vulnerability of a person with a mental illness (see, e.g. the judgment of Costello P. in *R.T. v. The Director of the Central Mental Hospital,*[22] referred to below).

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[20] *International Trends in Mental Health Laws, 2008,* The Federation Press, ed. Bernadette McSherry, "Supported Decision-Making and Non-Discrimination", Penny Weller, p103.

[21] *International Trends in Mental Health Laws, 2008,* The Federation Press, ed. Bernadette McSherry, "Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment", Bernadette McSherry, p111.

[22] [1995] 2 IR 65

Other human rights instruments

31. The right to effective protection against unlawful detention is reflected in other human rights instruments.

32. The UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by General Assembly resolution 46/119 of 17 December 1991 state:

> ***Principle 15 Admission principles***
> *...*
> *3. Every patient not admitted involuntarily shall have the right to leave the mental health facility at any time unless the criteria for his or her retention as an involuntary patient, as set forth in principle 16 below, apply, and he or she shall be informed of that right.*
> ***Principle 16 Involuntary admission***
> *1. A person may be admitted involuntarily to a mental health facility as a patient or, having already been admitted voluntarily as a patient, be retained as an involuntary patient in the mental health facility if, and only if, a qualified mental health practitioner authorized by law for that purpose determines, in accordance with principle 4 above, that that person has a mental illness and considers:*
>
> > *(a) That, because of that mental illness, there is a serious likelihood of immediate or imminent harm to that person or to other persons; or*
> > *(b) That, in the case of a person whose mental illness is severe and whose judgement is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative.*
>
> *In the case referred to in subparagraph (b), a second such mental health practitioner, independent of the first, should be consulted where possible. If such consultation takes place, the involuntary admission or retention may not take place unless the second mental health practitioner concurs.*
> *2. Involuntary admission or retention shall initially be for a short period as specified by domestic law for observation and preliminary treatment pending review of the admission or retention by the review body. The grounds of the admission shall be communicated to the patient without delay and the fact of the admission and the grounds for it shall also be communicated promptly and in detail to the review body, to the patient's personal representative, if any, and, unless the patient objects, to the patient's family.*
> *...*
> ***Principle 17 Review body***
> *1. The review body shall be a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law. It shall, in formulating its decisions, have the assistance of one or more qualified and independent mental health practitioners and take their advice into account.*
> *2. The initial review of the review body, as required by paragraph 2 of principle 16 above, of a decision to admit or retain a person as an involuntary patient shall take*

place as soon as possible after that decision and shall be conducted in accordance with simple and expeditious procedures as specified by domestic law.
3. The review body shall periodically review the cases of involuntary patients at reasonable intervals as specified by domestic law.
4. An involuntary patient may apply to the review body for release or voluntary status, at reasonable intervals as specified by domestic law.
5. At each review, the review body shall consider whether the criteria for involuntary admission set out in paragraph 1 of principle 16 above are still satisfied, and, if not, the patient shall be discharged as an involuntary patient.
6. If at any time the mental health practitioner responsible for the case is satisfied that the conditions for the retention of a person as an involuntary patient are no longer satisfied, he or she shall order the discharge of that person as such a patient.
7. A patient or his personal representative or any interested person shall have the right to appeal to a higher court against a decision that the patient be admitted to, or be retained in, a mental health facility.
...

33. Recommendation Rec (2004) 10 of the Committee of Ministers to members States concerning the protection of human rights and dignity of persons with mental disorder provides:

Chapter III – Involuntary placement in psychiatric facilities, and involuntary treatment, for mental disorder

Article 16 – Scope of chapter III
The provisions of this chapter apply to persons with mental disorder:
i. who have the capacity to consent and are refusing the placement or treatment concerned; or
ii. who do not have the capacity to consent and are objecting to the placement or treatment concerned.
Article 17 – Criteria for involuntary placement
1. A person may be subject to involuntary placement only if all the following conditions are met:
i. the person has a mental disorder;
ii. the person's condition represents a significant risk of serious harm to his or her health or to other persons;
iii. the placement includes a therapeutic purpose;
iv. no less restrictive means of providing appropriate care are available;
v. the opinion of the person concerned has been taken into consideration.
2. The law may provide that exceptionally a person may be subject to involuntary placement, in accordance with the provisions of this chapter, for the minimum period necessary in order to determine whether he or she has a mental disorder that represents a significant risk of serious harm to his or her health or to others if:
i. his or her behaviour is strongly suggestive of such a disorder;
ii. his or her condition appears to represent such a risk
iii. there is no appropriate, less restrictive means of making this determination; and
iv. the opinion of the person concerned has been taken into consideration.
...
Article 20 – Procedures for taking decisions on involuntary placement and/or involuntary treatment
Decision

1. The decision to subject a person to involuntary placement should be taken by a court or another competent body. The court or other competent body should:

i. take into account the opinion of the person concerned;

ii. act in accordance with procedures provided by law based on the principle that the person concerned should be seen and consulted.

2. The decision to subject a person to involuntary treatment should be taken by a court or another competent body. The court or other competent body should:

i. take into account the opinion of the person concerned;

ii. act in accordance with procedures provided by law based on the principle that the person concerned should be seen and consulted.

However, the law may provide that when a person is subject to involuntary placement the decision to subject that person to involuntary treatment may be taken by a doctor having the requisite competence and experience, after examination of the person concerned and taking into account his or her opinion.

3. Decisions to subject a person to involuntary placement or to involuntary treatment should be documented and state the maximum period beyond which, according to law, they should be formally reviewed. This is without prejudice to the person's rights to reviews and appeals, in accordance with the provisions of Article 25.

<u>Procedures prior to the decision</u>

4. Involuntary placement, involuntary treatment, or their extension should only take place on the basis of examination by a doctor having the requisite competence and experience, and in accordance with valid and reliable professional standards.

5. That doctor or the competent body should consult those close to the person concerned, unless the person objects, it is impractical to do so, or it is inappropriate for other reasons.

6. Any representative of the person should be informed and consulted.

Article 21 – Procedures for taking decisions on involuntary placement and/or involuntary treatment in emergency situations

1. Procedures for emergency situations should not be used to avoid applying the procedures set out in Article 20.

2. Under emergency procedures:

i. involuntary placement or involuntary treatment should only take place for a short period of time on the basis of a medical assessment appropriate to the measure concerned;

ii. paragraphs 5 and 6 of Article 20 should be complied with as far as possible;

iii. decisions to subject a person to involuntary placement or to involuntary treatment should be documented and state the maximum period beyond which, according to law, they should be formally reviewed. This is without prejudice to the person's rights to reviews and appeals, in accordance with the provisions of Article 25.

3. If the measure is to be continued beyond the emergency situation, a court or another competent body should take decisions on the relevant measure, in accordance with Article 20, as soon as possible.

Article 22 – Right to information

1. Persons subject to involuntary placement or involuntary treatment should be promptly informed, verbally and in writing, of their rights and of the remedies open to them.

2. They should be informed regularly and appropriately of the reasons for the decision and the criteria for its potential extension or termination.

3. The person's representative, if any, should also be given the information.

Article 23 – Right to communication and to visits of persons subject to involuntary placement

The right of persons with mental disorder subject to involuntary placement:

i. to communicate with their lawyers, representatives or any appropriate authority should not be restricted. Their right to communicate with

their personal advocates or other persons should not be unreasonably restricted;

ii. to receive visits should not be unreasonably restricted, taking into account the need to protect vulnerable persons or minors placed in or visiting a psychiatric facility.

Article 24 – Termination of involuntary placement and/or involuntary treatment

1. Involuntary placement or involuntary treatment should be terminated if any of the criteria for the measure are no longer met.

2. The doctor in charge of the person's care should be responsible for assessing whether any of the relevant criteria are no longer met unless a court has reserved the assessment of the risk of serious harm to others to itself or to a specific body.

3. Unless termination of a measure is subject to judicial decision, the doctor, the responsible authority and the competent body should be able to take action on the basis of the above criteria in order to terminate that measure.

4. Member states should aim to minimise, wherever possible, the duration of involuntary placement by the provision of appropriate aftercare services.

Article 25 – Reviews and appeals concerning the lawfulness of involuntary placement and/or involuntary treatment

1. Member states should ensure that persons subject to involuntary placement or involuntary treatment can effectively exercise the right:

i. to appeal against a decision;

ii. to have the lawfulness of the measure, or its continuing application, reviewed by a court at reasonable intervals;

iii. to be heard in person or through a personal advocate or representative at such reviews or appeals.

2. If the person, or that person's personal advocate or representative, if any, does not request such review, the responsible authority should inform the court and ensure that the continuing lawfulness of the measure is reviewed at reasonable and regular intervals.

3. Member states should consider providing the person with a lawyer for all such proceedings before a court. Where the person cannot act for him or herself, the person should have the right to a lawyer and, according to national law, to free legal aid. The lawyer should have access to all the materials, and have the right to challenge the evidence, before the court.

4. If the person has a representative, the representative should have access to all the materials, and have the right to challenge the evidence, before the court.

5. The person concerned should have access to all the materials before the court subject to the protection of the confidentiality and safety of others according to national law. If the person has no representative, he or she should have access to assistance from a personal advocate in all procedures before a court.

6. The court should deliver its decision promptly. If it identifies any violations of the relevant national legislation it should send these to the relevant body.

7. A procedure to appeal the court's decision should be provided.

Chapter IV – Placement of persons not able to consent in the absence of objection

Article 26 – Placement of persons not able to consent in the absence of objection

Member states should ensure that appropriate provisions exist to protect a person with mental disorder who does not have the capacity to consent and who is considered in need of placement and does not object to the placement.

34. In its 8th General Report the European Committee for the Protection against Torture (CPT Committee) set down standards in relation to the treatment of patients involuntarily placed in psychiatric establishments,[23] which provides inter alia:

51. On account of their vulnerability, the mentally ill and mentally handicapped warrant much attention in order to prevent any form of conduct - or avoid any omission - contrary to their well-being. It follows that involuntary placement in a psychiatric establishment should always be surrounded by appropriate safeguards. One of the most important of those safeguards – free and informed consent to treatment - has already been highlighted (cf. paragraph 41).

The initial placement decision

52. The procedure by which involuntary placement is decided should offer guarantees of independence and impartiality as well as of objective medical expertise.

As regards, more particularly, involuntary placement of a civil nature, in many countries the decision regarding placement must be taken by a judicial authority (or confirmed by such an authority within a short time-limit), in the light of psychiatric opinions. However, the automatic involvement of a judicial authority in the initial decision on placement is not foreseen in all countries. Committee of Ministers Recommendation N° R (83) 2 on the legal protection of persons suffering from mental disorder placed as involuntary patients allows for both approaches (albeit setting out special safeguards in the event of the placement decision being entrusted to a non-judicial authority). The Parliamentary Assembly has nevertheless reopened the debate on this subject via its Recommendation 1235 (1994) on psychiatry and human rights, calling for decisions regarding involuntary placement to be taken by a judge.

In any event, a person who is involuntarily placed in a psychiatric establishment by a non judicial authority must have the right to bring proceedings by which the lawfulness of his detention shall be decided speedily by a court.

Safeguards during placement

53. An introductory brochure setting out the establishment's routine and patients' rights should be issued to each patient on admission, as well as to their families. Any patients unable to understand this brochure should receive appropriate assistance.

Further, as in any place of deprivation of liberty, an effective complaints procedure is a basic safeguard against ill-treatment in psychiatric establishments. Specific arrangements should exist enabling patients to lodge formal complaints with a clearly-designated body, and to communicate on a confidential basis with an appropriate authority outside the establishment.

54. The maintenance of contact with the outside world is essential, not only for the prevention of ill-treatment but also from a therapeutic standpoint.

Patients should be able to send and receive correspondence, to have access to the telephone, and to receive visits from their family and friends. Confidential access to a lawyer should also be guaranteed.

55. The CPT also attaches considerable importance to psychiatric establishments being visited on a regular basis by an independent outside body (eg. a judge or supervisory committee) which is responsible for the inspection of patients' care. This body should be authorised, in particular, to talk privately with patients, receive directly any complaints which they might have and make any necessary recommendations.

Discharge

56. Involuntary placement in a psychiatric establishment should cease as soon as it is no longer required by the patient's mental state. Consequently, the need for such a placement should be reviewed at regular intervals.

[23] Eight General Report, European Committee for the Protection against Torture, CPT/Inf (98) 12 [EN], 31 August 1998.

When involuntary placement is for a specified period, renewable in the light of psychiatric evidence, such a review will flow from the very terms of the placement. However, involuntary placement might be for an unspecified period, especially in the case of persons who have been compulsorily admitted to a psychiatric establishment pursuant to criminal proceedings and who are considered to be dangerous. If the period of involuntary placement is unspecified, there should be an automatic review at regular intervals of the need to continue the placement.
In addition, the patient himself should be able to request at reasonable intervals that the necessity for placement be considered by a judicial authority.
57. Although no longer requiring involuntary placement, a patient may nevertheless still need treatment and/or a protected environment in the outside community. In this connection, the CPT has found, in a number of countries, that patients whose mental state no longer required them to be detained in a psychiatric establishment nevertheless remained in such establishments, due to a lack of adequate care/accommodation in the outside community. For persons to remain deprived of their liberty as a result of the absence of appropriate external facilities is a highly questionable state of affairs.

The need to qualify 'paternalism'

35. Whilst the Supreme and High Courts have said in a number of judgments that mental health legislation in this jurisdiction should be viewed as 'paternalistic' insofar as it allows for involuntary admission and treatment,[24] the Mental Health Act 2001 was introduced in order to provide statutory safeguards for persons detained on the basis of their mental health. It establishes a minimum threshold of illness or disability which must be met (section 3), and a range of statutory safeguards which include the provision of legal aid and review by an independent tribunal (Part 2). In the event that a voluntary patient (i.e. for the purpose of the Act, a patient who is not the subject of an involuntary admission order) "indicates a wish to leave" an approved centre, it is open to the responsible consultant psychiatrist to admit the patient on an involuntary basis if the patient's illness or disability constitutes a mental disorder (sections 23 and 24). This provides the patient with the requisite procedural safeguards. An admission order must be revoked if a patient's responsible consultant psychiatrist forms the view that the patient is no longer suffering from a mental disorder and ensure appropriate discharge (section 28).

36. It is the amicus curiae's respectful submission that the protections in the Mental Health Act 2001 must be enforced rigorously and that any reliance on paternalism in the application of the Act must be qualified, or counter-balanced, with contemporary human rights standards which require that persons with a mental disability be recognised as individual rights-holders, and not as "objects of welfare", and that

[24] See, for example, *E.H. v. Clinical Director of St. Vincent's Hospital* [2009] 3 I.R. 774.

effective protection and equality before the law be guaranteed. The notion of paternalism must not dilute the enforcement and vindication of rights by, or on behalf of, disabled persons. Indeed, it is respectfully submitted that paternalism cannot be given such a broad application as to defeat the significant recognition given to the patient's human rights, accorded by the Mental Health Act, 2001.

37. In any event, in the applicant's case, during the period of admission which he is challenging as unlawful, he was not admitted under the Mental Health Act 2001 and so the manner of its applicant does not appear relevant.

Application to the facts

Was the applicant deprived of his liberty?

38. In the amicus curiae's respectful view, the repeated attempts by the applicant to leave the hospital, and the hospital's determination that he would not leave (which included placing him in a locked ward and restricting his movement to supervised visits to the hospital garden, the use of physical restraint, and the extreme resort of sedation) was such that the hospital imposed complete and effective control over his care and extent of movements, such that he was deprived of his liberty for the purpose of Article 5. In phraseology used in *H.L. v. United Kingdom*, the concrete situation appears to have been that the applicant was under continuous supervision and was not free to leave the hospital.

39. Whilst the applicant "indicated a willingness" to stay in the hospital, he also attempted to leave but was not permitted to do so. His capacity to give a valid consent appears to have been in issue (Dr. Mohan expressed the opinion that he lacked capacity). Whilst the applicant did not dissent to his admission much of the time, that would not appear to be a valid consent in accordance with the safeguards referred to in *M v. Ukraine*.

Was the detention in accordance with 'a procedure prescribed by law' and/or lawful for the purpose of Article 5(1)(e)?

40. The renewal order was revoked on the basis that the applicant was no longer suffering from a mental disorder, i.e. because (i) the applicant's judgment was no longer so impaired that failure to admit him to the hospital would be likely to lead to

a serious deterioration in his condition or prevent the administration of treatment and/or (ii) the reception, detention and treatment of the applicant in the hospital were no longer likely to benefit or alleviate his condition to a material extent (the applicant had been detained under sub-paragraph (b) of section 3(1) of the Mental Health Act 2001 – the 'therapeutic' ground).

41. This finding, or these findings, having been made, it is difficult to see what legal basis existed which would have justified the continuing detention of the applicant in hospital. Either the applicant was suffering from a mental disorder or he was not. If he was not, then he fell outside the Mental Health Act 2001, for the purpose of detention, and there was no statutory basis to continue to deprive him of his liberty.

42. Once outside the Mental Health Act 2001, there were no procedural rules imposed on the hospital authorities which guaranteed the applicant safeguards in respect of his continuing detention, such as clear criteria justifying detention, or independent periodic review. In the absence of such procedural safeguards, it is the amicus curiae's respectful view that there was no sufficient guarantee against arbitrary detention such that whatever rules of law permitted his detention were incompatibile with Article 5(1) of the ECHR.

THE CONSTITUTION

43. As stated at paragraph 3 above, the Court must examine the constitutionality of an impugned provision prior to making a declaration of incompatibility with the ECHR. The Commission has previously submitted to the Superior Courts that the ECHR, and other international legal instruments, are of assistance in interpreting and applying the Constitution and attaches, by way of appendix, submissions in this regard.

44. Article 40.4.1° of the Constitution provides:

No citizen shall be deprived of his personal liberty save in accordance with law.

45. Case law concerning the phrase 'in accordance with law' under Article 40.4.1° is referred to in Kelly, *The Irish Constitution*, 4th edn, at pages 1541 to 1563. It focuses mostly on criminal detention and the types of violations of prisoners' rights that might entitle them to habeas corpus. But there are some general principles that can

apply to other forms of detention. Not every departure from legal correctness will render a detention unlawful so as to attract an order of habeas corpus. In *The State (McDonagh) v Frawley* [1978] IR 131, Chief Justice O'Higgins stated: *"[t]he phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law*." In *The State (McKeever) v. Governor of Mountjoy Prison* (Supreme Court, 19 December 1966), Ó Dálaigh CJ held that it could not be said that applicant was detained in accordance with the law "*if the irregularities or the procedural deficiencies complained of were shown to be such as would invalidate any essential step in the proceedings leading ultimately to his detention*."

46. In *The People (Director of Public Prosecutions) v Howley* [1989] ILRM 629, Walsh J. stated in relation to detention under section 30 of the Offences Against the State Act 1939: "*Either his detention is lawful or it is not. There is no intermediate position. There can be no question of competing or predominant issues which can determine that question. If an arrest is not lawful it is not rendered so by the seriousness or importance of the offence being investigated…. there can be no question of any consideration being given to permitting the detention to continue because of some dominant motive*."

47. Case law concerning detention on mental health grounds is referred to at pages 1618 to 1625, and includes reference to *R.T. v. The Director of the Central Mental Hospital*,[25] in which Costello P. held that section 207 of the Mental Treatment Act 1945 was unconstitutional, and stated a case to the Supreme Court (which was never heard due a resolution of the case on the facts). That section empowered a District Judge to certify that a person was suitable for transfer to the Central Mental Hospital where the person had been charged with an indictable offence and there was prima facie evidence both that the accused committed the offence and that he or she would, if placed on trial, be unfit to plead. In such circumstances, the Minister for Health could authorise the transfer of the accused to the Central Mental Hospital where that person would be detained until he or she was sent to a local hospital or other institution, was discharged, or died.

48. Costello P. cautioned that the benign objective of the 1945 Act did not justify any restriction designed to further such an objective and that the State's duty to protect

[25] [1995] 2 IR 65

the rights of a citizen was more exacting in the case of weak and vulnerable citizens such as those suffering from mental disorder. Thus the Oireachtas had to be particularly astute when depriving persons suffering from such illness of their liberty and had to ensure that the relevant legislation contained adequate safeguards against abuse and error in the interests of those detained. Costello P. referred to Article 40.4.1° and stated:

> *This article provides that no citizen shall be deprived of his personal liberty save in accordance with law. This does not mean that the Oireachtas is free to enact any legislation it wishes trenching on the guaranteed right. It is however well established that legislative restrictions on the citizen's liberty must be in accordance with the fundamental norms of the legal order postulated by the Constitution. (See* King v. Attorney General *[1981] I.R. 233). These fundamental norms are manifold — that with which this case is concerned is the constitutional requirement that the State should defend and vindicate the citizen's personal rights, and these include the right to liberty. So, if it can be shown that a law fails to defend and vindicate the right to liberty it infringes a fundamental norm of the legal order postulated by the Constitution and will be invalid as trenching on the rights guaranteed by Article 40, s. 4, sub-section 1.*
> *The right to liberty is, of course, not an absolute right and its exercise is in fact and in many different ways restricted by perfectly valid laws, both common law and statutory. Adjudication on a challenge to restrictive laws will be helped by considering the object and justification advanced in support of the law. It is obvious that if the object of the law is to punish criminal behaviour different considerations will apply than when the impugned law has a totally different object, such as the welfare of the person whose liberty is restricted.*
> *The reasons why the Act of 1945 deprives persons suffering from mental disorder of their liberty are perfectly clear. It does so for a number of different and perhaps overlapping reasons — in order to provide for their care and treatment, for their own safety, and for the safety of others. Its object is essentially benign. But this objective does not justify any restriction designed to further it. On the contrary, the State's duty to protect the citizens rights becomes more exacting in the case of weak and vulnerable citizens, such as those suffering from mental disorder. So, it seems to me that the constitutional imperative to which I have referred requires the Oireachtas to be particularly astute when depriving persons suffering from mental disorder of their liberty and that it should ensure that such legislation should contain adequate safeguards against abuse and error in the interests of those whose welfare the legislation is designed to support. And in considering such safeguards regard should be had to the standards set by the Recommendations and Conventions of International Organisations of which this country is a member.*

49. Costello P. then identified a number of defects in section 207 of the 1945 Act including the absence of any time limit on the period of detention and the lack of procedural safeguards stating that *"[t]here are no safeguards to protect the patient against a possible error in the operation of the section. The only professional opinion on the question of the suitability of the Central Mental Hospital is that of the Inspector. There are no procedures for the review of his opinion*" (at page 80).

Costello P. went on to hold that because of the absence of procedural safeguards, the section was unconstitutional:

The defects in the section are such that there are no adequate safeguards against abuse or error both in the making of the transfer order, and in the continuance of the indefinite detention which is permitted by the section. These defects, not only mean that the section falls far short of internationally accepted standards but, in my opinion, render the section unconstitutional because they mean that the State has failed adequately to protect the right to liberty of temporary patients. (at page 81)

50. It is the amicus curiae's respectful view that Costello P.'s judgment is good authority that the Constitution requires adequate procedural safeguards to be in place to protect a person's liberty, and that there is no reason to assess these safeguards in a manner less rigorous under the Constitution than that established under Article 5 of the ECHR. It is noted however, that in *Croke v Smith* (No 2) [1998] 1 IR 101 the Supreme Court held that, on the facts of that particular case, the Constitution did not require automatic review by an independent tribunal of the patient's detention. However, it is submitted that the Oireachtas has now expressed a clear intention, that this would not be the case by enacting the Mental Health Act 2001.

Michael Lynn

19th June, 2012

APPENDIX

INTERPRETATION OF THE CONSTITUTION IN LIGHT OF INTERNATIONAL STANDARDS

1. The Commission submits that, when considering the constitutionality of statutory provisions or executive acts, analysis should be informed by the provisions of international Conventions ratified by the State.

2. In the event of any conflict between the provisions of an international convention and any provision within the domestic legal framework, effect must of course be given to the domestic provisions.[26] Nonetheless the Courts have on a number of occasions shown a willingness to *consider* the terms of international human rights instruments with a view to informing their understanding of the applicable constitutional standards. For example, in *State (Healy) v Donoghue*,[27] the Supreme Court had regard to the terms of Article 6 of the ECHR when considering the scope of the right to legal aid under Irish law and was willing to have regard to an unincorporated international instrument in the context of its interpretation of the constitutional guarantee of the right to a trial in due course of law as protected in Article 38 and of the guarantees set out in 40.3 of the Constitution. The Court saw the acknowledgement of the right to legal aid under the ECHR as significant in its confirmation of the generally recognised existence of such a right.

3. In *O'Leary v Attorney General*,[28] Costello J considered the constitutional status of the presumption of innocence in the context of the guarantee of a trial in due course of law pursuant to Article 38 of the Constitution, by reference to Article 6(2) of the ECHR, Article 11 of the UN Universal Declaration on Human Rights, Article 8(2) of the American Convention on Human Rights and Article 7 of the African Charter of Human Rights. In *Rock v Ireland*[29] and *Murphy v I.R.T.C.*[30] the principle of proportionality (and the parameters of that principle), as expounded in the jurisprudence of the ECtHR, was adopted and employed in a domestic context prior to the incorporation of the ECHR. The principle

[26] To do otherwise would be to ignore the rule embodied in Article 29(6) of the Constitution that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas and would also amount to disregard of Article 15.2.1º which confers the sole and exclusive law making power in the State upon the Oireachtas - per in *Re Ó Laighléis* [1960] IR 93.
[27] [1976] IR 325.
[28] *Ibid*.
[29] *Rock v Ireland* [1997] 3 IR 484.
[30] *Murphy v IRTC* [1999] 1 IR 12. In both cases, the Supreme Court adopted Costello J's formula regarding the principle of proportionality in *Heaney v Ireland* [1994] 3 IR 593 in which he referred to the test frequently adopted by the ECtHR as set out, for example, in *Times Newspapers Ltd v UK* (1979) 2 EHRR 245.

of proportionality was referred to in the judgments in *Heaney v Ireland* [31] and *In re the Employment Equality Bill 1996.*[32]

4. Indeed, unincorporated international law provisions may have indirect effect through the operation of a presumption of compatibility of domestic law with international obligations. In *State (DPP) v Walsh*,[33] Henchy J expressed the view that our domestic laws are generally presumed to be in conformity with the then unincorporated ECHR. The notion of such a presumption was endorsed by O'Hanlon J, in support of his view that the provisions of the ECHR, then unincorporated, ought to be considered by Irish judges when determining public policy: *Desmond v Glackin (No.1).*[34] Reference was made to the Convention on the Rights of the Child in *Nwole v Minister for Justice*,[35] when considering aspects of the asylum application process as it applied to minors. [36]
5. In *Bourke v Attorney General*,[37] the Supreme Court, when interpreting the meaning of the term "political offence" in section 50 of the Extradition Act 1965, placed reliance upon the meaning attributed to same in the European Convention on Extradition, and also upon the *travaux preparatoires* thereof.[38] In *McCann v The Judge of Monaghan District Court & Ors*[39] Laffoy J took into account both provisions of the ECHR and International Covenant on Civil and Political Rights in declaring the legislation governing enforcement of civil debt as being unconstitutional.

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[31] *Heaney v. Ireland* [1994] 3 IR 593.
[32] *In re Employment Equality Bill* [1997] 2 IR 321.
[33] *DPP v. Walsh* [1981] IR 412 to the effect that our laws are generally presumed to be in conformity with the then unincorporated European Convention on Human Rights.
[34] *Desmond v Glackin* [1992] 2 ILRM 490. In *O Domhnaill v Merrick* [1984] IR 151, Henchy J noted the submission that the Statute of Limitations 1957, enacted after the State ratified the European Convention on Human Rights, should be deemed to be in conformity with the Convention in the absence of any contrary intention, and should be construed and applied accordingly. However, Henchy J did not express a concluded opinion on the point as the application of the Convention had not been argued. McCarthy J in his judgment stated (at p.166) "I accept, as a general principle, that a statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law".
[35] *Nwole v Minister of Justice* High Court (Finlay Geoghegan J) 31st October 2003, at p.12.
[36] *Ibid*, Finlay Geoghegan J went on to consider the terms of Article 12 of the Convention on the Rights of the Child, which entitles children capable of forming their own views "the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". It also contained provision for the child having an opportunity to be heard in any judicial and administrative proceedings affecting the child. Finlay Geoghegan J concluded that (at p.13) "this would appear to require, at a minimum, an inquiry by or on behalf of the respondent in respect of any minor applicant for a declaration of refugee status as to the capacity of the minor and the appropriateness of conducting an interview with him or her".
[37] *Bourke v Attorney General* [1972] IR 36.
[38] This may be seen as an example of the principle of statutory construction referred to by the House of Lords in *Garland v British Rail* [1983] 2 AC 751 at 771 "that the words of a statute passed after a treaty has been signed and dealing with the subject matter of the international obligation of the State are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it."
[39] HR unreported, 18 June 2009.

6. The approach advocated by the Commission corresponds with the practice often adopted by the ECtHR wherein the Court has considered the provisions of relevant international law provisions when considering the meaning and parameters of rights protected under the ECHR. One clear example is *Chapman v United Kingdom*[40] where, in considering the relevance of Article 8 of the ECHR to the circumstances of a woman, a gypsy, who argued that the actions of the relevant public authorities interfered with her pursuit of her right to pursue a nomadic lifestyle, the Court considered the Council of Europe Framework Convention on the Protection of National Minorities and also certain measures adopted by the institutions of the European Union. In *Glor v. Switzerland*,[41] the ECtHR found that discrimination based on disability status came within the scope of Article 14 of the ECHR, considering inter alia, the principles espoused in the UN Convention on the Rights of Persons with Disabilities.

7. It is submitted that the Courts have shown a willingness to use non-binding instruments to inform the understanding of specific and consistent constitutional provisions. The international instrument may be seen both as a buttress and a guide to existing constitutional guarantees. The Commission is of the opinion that it is entirely appropriate that the Constitution and the guarantees thereunder should be informed by international treaties ratified by the State, where possible, and endorses the above approach in the herein appellant's case. In this regard, it is noted that the State's submissions herein appear to state that the right to personal liberty under the Constitution and ECHR are consonant (see paragraph.18 of the State's submissions) with which the Commission would respectfully agree.

[40] *Chapman v. the United Kingdom* (2001) 33 EHRR 399.
[41] Judgment 30 April 2009. Judgment only available in French at time of writing.