THE COURT OF APPEAL
(CIVIL)

Court of Appeal Record No. 2017/344 High Court Record No. 2016/46 JR

Between:-

AB

Applicant/Respondent

and

THE CLINICAL DIRECTOR OF ST LOMAN'S HOSPITAL, THE HEALTH SERVICE EXECUTIVE, THE MINISTER FOR HEALTH, THE ATTORNEY GENERAL and IRELAND

Respondents/Appellants

and

THE MENTAL HEALTH COMMISSION and

Notice Party

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

OUTLINE SUBMISSIONS OF THE AMICUS CURIAE

A. INTRODUCTION

1. The Irish Human Rights and Equality Commission ('IHREC') was granted liberty to appear in this appeal as *amicus curiae* in accordance with section 10(2)(e) of the Irish Human Rights and Equality Commission Act 2014 by Order dated 20 October 2017.

2. Under section 10(2)(e) of the Act of 2014, IHREC's statutory functions including making application for liberty to appear as *amicus curiae* in proceedings 'that involve or are concerned with the human rights or equality rights of any person.' The role of an *amicus curiae* is to assist the Court in determining the issue before it: see *HI v. Minister for Justice, Equality and Law Reform* [2003] 3 IR 197, 203. IHREC has identified, in its view, the following questions of human rights and equality law arising in this appeal in respect of which, in its role as *amicus curiae*, it proposes to make submissions:

(a) whether the Applicant/Respondent ('AB') had *locus standi* to challenge the constitutionality of the Mental Health Act 2001;

(b) whether the Constitutional guarantee of liberty, or Article 5§4 ECHR, or both, require that a person detained on foot of a lengthy renewal order made pursuant to section 15(3) of the Mental Health Act 2001 should be able to initiate of his or her own motion a review of his or her detention after the expiry or exhaustion of his or her right of appeal to the Circuit Court pursuant to section 19; and

(c) if so, whether Irish law currently contains any mechanism whereby such a review may effectively be precipitated by a person detained on foot of such an order.

B. *LOCUS STANDI*

3. At all material times, AB was detained in St Loman's Hospital on foot of a Renewal Order made pursuant to section 15(3) of the Act of 2001.

4. AB was suffering from a mental disorder as defined by section 3(1)(b) of the Act of 2001 when the Renewal Order was made, when it was reviewed by the Mental Health Tribunal, when his Circuit Court appeal pursuant to section 19 was heard and when he was examined by ---- on 19 January 2017. There is however no evidence that he was suffering from a mental disorder when the case was heard. Indeed, the available evidence was that if he continued to be detained in St Loman's Hospital, his condition would deteriorate, and that he might therefore cease to be detainable on therapeutic grounds pursuant to section 3(1)(b)(i) and (ii) of the Act of 2001.

5. In holding that AB lacked *locus standi* to maintain his constitutional claim, Binchy J accepted the arguments made by the Respondents/Appellants that in the absence of proof that he was not suffering from a mental disorder, AB could not establish that his interests were adversely affected by the absence of a

review mechanism to determine the validity of his continuing detention under the 2001 Act.

6. In normal course IHREC would not make submissions on a factual or evidential issue between the parties which did not directly concern any party's human rights. However, in this case submissions were made on the state of the evidence which led to a finding by Binchy J. that AB did not have *locus standi* to assert a potential breach of his fundamental rights under the Constitution. It is of concern to IHREC that in a case complaining of the absence of a review mechanism to determine whether AB continued to suffer from a mental disorder, his inability to assert or prove, in the absence of such mechanism, that he was not suffering from a mental disorder should operate as an absolute bar to his seeking relief on constitutional grounds. His complaint is not that he is no longer suffering from a mental disorder *simpliciter*, but that there is no mechanism whereby this can be determined.

7. Further, even if AB were suffering from a mental disorder at all material times, the nature of mental illness is such that his condition might improve or deteriorate at any time: *Thynne, Wilson and Gunnell v. United Kingdom*, 25 October 1990, Series A no 190-A, § 76.

8. The absence of the possibility of a review of his detention by an authority independent of his doctors for a prolonged period of time impacted directly on AB's personal situation. The danger of deterioration meant that he was in real danger of suffering prejudice in the form of unlawful detention. For this reason, the Commission concludes that he had *locus standi* to commence and maintain his proceedings.

9. Apart from the "Catch 22" situation that the denial of *locus standi* creates for AB and persons in like situations, it opens a gap between the ability of a person to rely on the legal protection afforded to them under the Constitution and under the ECHR Act 2003 which would not seem justified by reference to the terms in which fundamental rights are protected by the Constitution. The Irish courts have recognised that the jurisprudence of the European Court of Human Rights in analysing similar rights guaranteed under the Convention (and indeed

the constitutional jurisprudence of other common law jurisdictions) can be of assistance in considering the content of Irish constitutional protection: *DPP v. Gormley* and *DPP v. White* [2014] 2 IR 591, 609 and 615

10. IHREC can identify no legal basis upon which a different test for *locus standi* might be applied in an action to challenge the constitutionality of a legislative lacuna on the one hand and an action to challenge such a lacuna's compatibility with the ECHR on the other. The long-established test for standing to challenge constitutionality in *Cahill v. Sutton* [1980] 1 IR 269 is not materially different to the victim status requirement in Article 34 ECHR: see *Johnston v. Ireland*, App No 9697/82, Series A, No 112, §§ 41-42. Thus the test applied ought in both instances to be the same, with the obvious caveat that if a person succeeds in obtaining a declaration of unconstitutionality, he or she no longer has *locus standi* to seek a declaration of incompatibility under section 5 of the Act of 2003: *IS v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31, Hogan J., 21 January 2011, para 9.

C. THE RIGHT TO REVIEW OF ONE'S OWN MOTION

The Convention

11. At the level of principle, it is by now well-established that Article 5§4 ECHR requires that a person suffering from a mental disability detained for a lengthy period is entitled at reasonable intervals to challenge the lawfulness of his or her detention. In *Musiał v. Poland* [GC] App No 24557/94, ECHR 1999-II, a Grand Chamber of the European Court of Human Rights held, at § 43:

> *According to the principles which emerge from the Court's case-law, a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is entitled under Article 5 § 4 of the Convention to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his or her detention, inasmuch as the reasons initially warranting confinement may cease to exist (see the Luberti v.*

Italy judgment of 23 February 1984, Series A no. 75, p. 15, § 31; and the Megyeri v. Germany judgment of 12 May 1992, Series A no. 237-A, pp. 11-12, § 22). Article 5 § 4, in guaranteeing to persons arrested or detained a right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see the Van der Leer v. the Netherlands judgment of 21 February 1990, Series A no. 170-A, p. 14, § 35).

12. In *Gorshkov v. Ukraine*, App No 67531/01, 8 November 2005, the Strasbourg Court held:

The Court reiterates that a key guarantee under Article 5 § 4 is that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review on his or her own motion (see, e.g., Musial v. Poland, judgment of 25 March 1999, Reports 1999-II, § 43; 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 good will of the detaining authority, activated at the discretion of the medical corps or the hospital administration.

13. Similarly, in *Kolanis v. United Kingdom*, App No 215/02, ECHR 2005-II, the Strasbourg Court held, at § 80:

Article 5 § 4 affords a crucial guarantee against the arbitrariness of detention, providing for detained persons to obtain a review by a court of the lawfulness of their detention not only at the time of the initial deprivation of liberty but also where new issues of lawfulness are capable of arising periodically thereafter (see, inter alia, Kurt v. Turkey, judgment of 25 May 1998, Reports 1998-III, p. 1185, § 123,

and Varbanov v. Bulgaria, no. 31365/96, § 58, ECHR 2000-X). Where, as in the present case, the MHRT finds that a patient's detention in hospital is no longer necessary and that she is eligible for release on conditions, the Court considers that new issues of lawfulness may arise where detention nonetheless continues, due, for example, to difficulties in fulfilling the conditions. It follows that such patients are entitled under Article 5 § 4 to have the lawfulness of that continued detention determined by a court with requisite promptness.

14. As regards the requirement for review at reasonable intervals, the European Court of Human Rights found that a period of ten months without the possibility of review amounted to a breach of Article 5§4: *Faulkner v. United Kingdom*, App No 68909/13, 6 March 2017, § 44. In *Musial* and *Kolanis*, cited above, the periods without the possibility were longer than one year. In *Gorshkov*, cited above, there was no possibility of review at all.

The Constitution

15. As a general proposition, IHREC's considered view is that the personal rights provisions of the Constitution should be interpreted as providing a level of protection for human rights, including the right to liberty, equal to or greater than the level of protection provided by the ECHR. And just as the European Court of Human Rights takes a 'dynamic and evolutive' approach to the interpretation of the ECHR as a 'living instrument which must be interpreted in the light of present day conditions and situations', so the Irish Constitution has been held by our Courts to be 'a living document' which 'falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores': *Goodwin v. United Kingdom*, [GC] App No 28957/95, ECHR 2002-VI, § 75; *Sinnott v. Minister for Education* [2001] 2 IR 454, 680.

16. The interpretation of the Constitution in the area of mental health law should be informed by, and have regard to, relevant international conventions: *MX v. Health Service Executive* [2012] 3 IR 254, 282. These include, naturally, the

ECHR itself, but also the UN Convention on the Rights of Persons with Disabilities 2006, 2515 UNTS 3 ('UNCRPD') to which the State is a signatory. While the UNCRPD has not yet been ratified or incorporated, the State's signature of the treaty entails a commitment that it will refrain from acts which will defeat its objects and purposes: see Vienna Convention on the Law of Treaties 1969, ITS No 4 of 2006, art 18.[1] The purpose of the UNCRPD as set out in Article 1 is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.' The UNCRPD, which emerged under strong influence from NGOs and people with disabilities, aims to achieve this purpose by bringing about a 'paradigm shift' in the human rights of persons with disabilities: see C Murray, 'Moving Towards Rights-Based Mental Health Law: The Limits of Legislative Reform' (2013) 49 *Irish Jurist* 161**.**

17. In 1996, the Supreme Court held in *Croke v. Smith (No 2)* [1998] 1 IR 101, that the liberty guarantee in Article 40.4.1 of the Irish Constitution does not require any automatic independent review of the indefinite detention of a person of unsound mind pursuant to section 172 of the Mental Treatment Act 1945. The Supreme Court was satisfied that the Article 40.4.2 inquiry mechanism, in tandem with the possibility of complaint to the President of the High Court pursuant to section 266 of the Act and the duty of the psychiatrist to release the patient if he or she recovered, was sufficient to guard against unlawful detention: *Croke v. Smith (No 2),* cited above, at 112-125.

18. The heavy reliance placed by the Supreme Court on the Article 40.4.2 inquiry mechanism in upholding the constitutionality of section 172 of the Act of 1945 indicates that the liberty guarantee in Article 40.4.1 required that a person suffering from a mental disability detained for a lengthy period be entitled to challenge the lawfulness of his or her detention. Nothing in the judgment

[1] A motion to ratify the UNCRPD was scheduled to be debated by Dáil Eireann on 28 February 2018 but the scheduled sitting was cancelled because of adverse weather conditions. It is anticipated that the motion will be re-tabled in the near future and consequently that the UNCRPD may be ratified by the time this appeal is heard and/or judgment is delivered.

suggests that it might not be possible to do so periodically. The absence in the judgments of any discussion the practicality or accessibility of this remedy will be discussed below.

19. Insofar as the possibility of review at reasonable intervals is concerned, the Commission notes that the *Report of the Expert Group on the Review of the Mental Health Act 2001 to the Department of Health* (2015) states, at p 48:

> *Section 15(1) of the Mental Health Act 2001 authorises the making of an admission order for the reception, detention and treatment of a patient for a period of 21 days. The order may subsequently be extended for periods no longer than 3 months, then up to six months and thereafter periods of up to 12 months. A number of submissions to the original Steering Group felt that the third time period of 12 months was too long and it was subsequently recommended by the Steering Group to reduce the 12 month period to a period not exceeding 9 months. The Expert Group re-examined the time periods for renewal orders and after some deliberation, it was felt that there was merit in limiting the maximum time period for which renewal orders can be made to 6 months.*

20. The Expert Group accordingly recommended:

> *Renewal orders at present can be for up to 3 months, 6 months or a year. The Group believes that the 3rd renewal order of up to 12 months is too long and should be reduced to a period not exceeding 6 months.*

21. In *Health Service Executive v. VF* [2015] 3 IR 305, the High Court proposed reviewing the detention of a vulnerable woman in the exercise of its inherent jurisdiction 'at regular and short intervals' with the first review after two months. Likewise, in *In re AM* [2017] IEHC 184, Kelly P, 27 March 2017, the President of the High Court held that the detention of a person in the matter of an intended application for wardship 'must be subject to regular reviews at least every six months' in order that the wardship jurisdiction should operate

in a manner consistent with the Constitution. In this regard, the Constitutional requirement may be more onerous than that imposed by the ECHR.

22. Accordingly, it is submitted that both Article 40.4.1 of the Constitution and Article 5§4 ECHR require that a person detained for a period of in excess of 6 months pursuant to section 15(3) of the Mental Health Act 2001 be in a position to initiate a review of his or her detention at regular intervals. In this regard at least, the protections provided by the Constitution and the ECHR appear to be approximately coefficient. The question then is whether these rights are real and effective in practice.

D. REAL AND EFFECTIVE ACCESS TO REVIEW

23. The Constitution, and in particular, Article 40.3.2, obliges the courts to secure litigants an effective remedy to vindicate their constitutional rights to person and property: *The State (Quinn) v. Ryan* [1965] IR 70, 122; *Albion Properties Ltd. v. Moonblast Ltd.* [2011] 3 IR 563, 570-571.

24. On the international level, Article 13 ECHR guarantees the right to an effective remedy in respect of any violation of other Convention rights. This right is incorporated into Irish law by section 3 of the European Convention on Human Rights Act 2003, which imposes on organs of the State, including the Courts, an obligation to perform their functions in a manner compatible with the State's obligations under the Convention.

25. In the context of Article 5§4, the Strasbourg Court has expressly held that that it is for the judicial authorities of the Contracting States to organise their procedures in such a way as to meet the procedural requirements laid down in the provision, 'since the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective': *Schöps v. Germany*, App No 25116/94, ECHR 2001-I, § 47. In this regard, it is essential that the right of access to court actually be available in practice, not just in theory. The Court must take realistic account not only of the existence of formal remedies but

also of the context in which they operate and the personal circumstances of applicants: *RMD v. Switzerland*, App No 19800/92, 26 September 1997, § 47.

26. It is necessary, then, to consider whether the mechanisms currently available in Irish law are sufficient in practice to allow a person detained pursuant to section 15(3) of the 2001 Act to initiate an independent review of his or her detention at regular intervals. Only the Article 40.4.2 inquiry mechanism and judicial review will be discussed in this context: self-evidently, the duty imposed by sections 4 and 28 on responsible consultant psychiatrists to act in a patient's best interests and to revoke an admission or renewal orders if they become of the opinion that the patient is no longer suffering from a mental disorder do not amount to independent review: *SM v. Mental Health Commission and Others* [2009] 3 IR 188, 204-205.

27. Before considering whether existing mechanisms are adequate, IHREC notes that, according to the submissions filed on AB's behalf, the State parties were afforded the opportunity in the Court below to amend their pleadings and to adduce evidence as to the manner in which these mechanisms operate in practice but declined to do so. The Court is therefore in a difficult position in applying the presumption of constitutionality, which, in cases of doubt, ordinarily favours the validity of the impugned provision: *Croke v. Smith (No 2)*, cited above, 112. This necessarily begs the question as to whether the presumption of constitutionality should operate in this manner as regards the impugned effectiveness of a remedy being held out as one available to vindicate the rights of a vulnerable class of persons. Nonetheless, following the lead of the parties, the Commission will seek to address these issues as best it can by way of submission.

Article 40 inquiry

28. In *Croke v. Smith (No 2)*, cited above, the Supreme Court did not address whether in practice the operation of the Article 40.4.2 inquiry mechanism was practical and effective. The Court appears to have been satisfied that the possibility of sending a sealed letter to various persons in authority, including

the President of the High Court, under section 266 of the Act of 1945, guaranteed that the procedure would be accessible. Of course, Mr Croke had himself succeeded in mounting two separate Article 40 applications.

29. By contrast, in his judgment in the Court below in *Croke v. Smith (No 2),* High Court, Unreported, 27 and 31 July 1995, Budd J was much less sanguine about the reality of detained persons with mental disabilities being able to access and navigate the procedure whereby a complaint could be made to the President of the High Court. He held, at p 101:

> *Many patients suffering from mental disorders will be either illiterate or otherwise incapable of communicating their complaint, and may have no kith or kin willing able to make representations on their behalf.*

30. Later, at p 121, he voiced the same concern about the accessibility of the Article 40 procedure:

> *Habeas corpus, even a wide-ranging inquiry under Article 40.4, which may probe more deeply than the common law habeas corpus procedure, needs initiation. A detainee in a mental hospital, with perhaps no interested kith and kin, is in practical difficulty in activating this process. In no way can this procedure, of possible availability only, be equated with or amount to a regular, periodic, automatic and independent scrutiny of the continued lawfulness of, and necessity for, the patient's detention.*

31. The State's decision not to contest *Croke v. Ireland*, App No 33267/96, 21 December 2000, suggests that there was real concern on the part of the State that theoretical availability of the Article 40 inquiry mechanism would not have provided a full answer to Mr Croke's complaint of an Article 5 ECHR violation. The judgment striking the case out records, at §11, that the agreement made between the parties included the following paragraph:

> *The State being conscious of its obligations under the Convention in respect of the rights of persons detained under its Mental Health laws has agreed by way of a friendly settlement with the Applicant to acknowledge, by an agreed compensatory sum, the Applicant's legitimate concerns in relation to the absence of an independent formal review of his detention under the Mental Health Acts.*

32. The idea expressed by the Supreme Court in *Croke v. Smith (No 2)*, cited above, that the Article 40.4.2 inquiry mechanism may be more extensive in relation to persons suffering from mental disabilities that more generally is not necessarily borne out by subsequent jurisprudence in the area.

33. Certainly, this proposition was accepted by the High Court in *LK v. Naas General Hospital* [2007] 2 IR 265, in which Clarke J conducted a substantive review of the applicant's condition based on the evidence of various doctors and concluded that there were grounds for her continued detention.

34. However, in *EH v. Clinical Director of St Vincent's Hospital* [2009] 3 IR 774, the Supreme Court endorsed, at p 293, the passage in *The State (McDonagh) v. Frawley* [1978] IR 131, in which, at p 136, O'Higgins CJ held:

> *The stipulation in Article 40, s. 4, sub-s.1, of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attaches to his detention. The 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. For habeas corpus purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded. (at 793)*

35. Likewise, in *FX v. Clinical Director of the Central Mental Hospital* [2014] 1 IR 280, the Supreme Court held, at p 301:

> *In general, if there is an order of any court, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a court of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional and immediate remedy of habeas corpus is not the appropriate approach.*

36. Most recently, in *Mr M v. Clinical Director of the Department of Psychiatry, University Hospital Limerick* [2016] IEHC 25, Barrett J, 18 January 2016, the High Court held that the bases mentioned by the Chief Justice in *Ryan* reflect, *mutatis mutandis*, the bases on which an Article 40 application may properly be grounded in the context of the Act of 2001. The judgment of Barrett J strongly suggests that the detainer relied on the framing of the Article 40 remedy in the judgment of the Supreme Court in *Ryan v. Governor of Midlands Prison* [2014] IESC, Denham CJ, 22 August 2014, to persuade the High Court that the scope of the Article 40 inquiry, even in the case of a person with a mental disability, was a narrow one.

37. These divergent approaches may reflect a judicial response to the commencement in November 2006 of the Mental Health Act 2001, with its system of inbuilt automatic review. It is notable in this regard that some of the earlier cases – most notably *RT v. Director of the Central Mental Hospital* [1995] 2 IR 65 and both the High Court and Supreme Court judgments in *Croke v. Smith (No. 2)*, cited above – the courts lamented the failure of the successive governments to commence the Health (Mental Services) Act 1981, which provided for a system of independent review and which was repealed, without ever having been commenced, by the Mental Health Act 2001. It may be that in the absence of an independent review mechanism, the Courts broadened the scope of their own powers under Article 40.4.2, only to narrow it again when the 2001 Act came into force.

38. Whatever the reason for the different approaches, there is, in IHREC's submission, a lack of clarity as to the legal scope of the Article 40 inquiry mechanism as it relates to applications by persons with mental disabilities. This want of certainty undermines the practical effectiveness of the remedy in this particular context.

39. From the perspective of persons detained under the 2001 Act, the problem caused by the legal uncertainty as to the scope of the remedy is exacerbated by the obvious practical difficulties which must be associated with accessing the Article 40 inquiry mechanism while incarcerated in a psychiatric hospital. Even the method of complaint referred to by the Supreme in *Croke v. Smith (No 2)* – the transmission of a sealed letter to the President of the High Court – which was provided for in sections 266 and 267 of the Act of 1945 has since been repealed without being replaced.

40. Some of the practical difficulties faced by persons detained in psychiatric hospitals are evident from the judgment of the High Court in *LK v. Naas General Hospital*, cited above, in which Clarke J referred to 'a number of potential circularities,' including the difficulty encountered by the patient in accessing her medical records in circumstances where the hospital took the view that she lacked capacity to consent to their release; and the issue of whether the patient had capacity to instruct legal representatives. The Court held that it was required 'to be creative as to the procedures that need to be followed' and that the applicant was entitled 'to a reasonable facility to enable her to put before the court an expert view on the material factual matters to the issues which arise.' In this regard, the Court directed that a consultant psychiatrist nominated by the patient's solicitor should have access to the patient and her relevant medical records for the purpose of preparing a report. The judgment does not record how the report was to be paid for. Certainly, as an expert report, it cannot have been obtained on a contingency basis: *R (Factortame Ltd) v. Secretary of State for Transport (No 8)* [2002] EWCA Civ 932, paras 70-73.

41. Inasmuch as access to legal representation is concerned, it is not clear that a person detained under section 15(3) of the Act of 2001 and assigned a legal representative by the Mental Health Commission under section 17(1)(b) is entitled to retain that legal representative once their rights under section 19 have expired or been exhausted. In *EJW v. Clinical Director of St Senan's Hospital* [2008] IEHC 462, Peart J, 25 November 2008, the Court noted that 'following assignment by the Commission the fees of the assigned legal representative payable by the Commission are confined to those applicable to the review hearing, and that other costs and outlays fall to be awarded, or not as the case may be, under either the Attorney General Scheme where applied for, or under the normal party and party rules' but found that this did not indicate that the legal representative was intended only to represent the patient at the review hearing. Surely, however, it would be a matter for individual lawyers to decide whether or not they were willing to continue to act on this basis. Even if a detained person could access legal representation, the Legal Aid Board's Custody Issues Scheme is essentially discretionary, requiring that legal representatives obtain at all stages recommendations from the Court for the application of the Scheme.

42. On the subject of effective access to legal representation, the judgment of the Supreme Court in *EH v. Clinical Director of St Vincent's Hospital*, cited above, is notable for the stern warning administered to lawyers acting for persons with mental disabilities (at p 792):

> *The fact that s. 17(1)(b) of the Act of 2001 provides for the assignment by the Commission of a legal representative for a patient following the making of an admission order or a renewal order should not give rise to an assumption that a legal challenge to that patient's detention is warranted unless the best interests of the patient so demand.*

43. Certainly, this idea does not support the proposition that effective legal representation for persons detained under section 15(3) would be accessible in practice. Indeed, it is difficult to reconcile with the general obligation on legal

representatives to act on clients' instructions and their duty not to discriminate in the provision of services on the basis of disability.

44. The suggestion by the Respondents that persons detained under the Act of 2001 in psychiatric hospitals can access legal aid in the ordinary way by making an application to the Legal Aid Board under the Civil Legal Aid Act 1995 is, with respect, unserious. Moreover, the suggestion that IHREC would be in a position to assist all such persons in accessing the Article 40 remedy is not sustainable. While section 40 of the Act of 2014 empowers IHREC to provide legal assistance in cases concerning human rights, our resources are insufficient to allow it to provide free legal assistance to all persons detained under section 15(3) of the 2001 Act, and in any event, there remains the practical problem of how such persons would apply to us in the first place.

45. IHREC notes that in its *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities*, the UN Committee on the Rights of Persons with Disabilities expressly called attention to Guideline 20 of the *United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court*, adopted by the Working Group on Arbitrary Detention on 29 April 2015: UN Doc WGAD/CRP.1/2015. Of relevance in the present context is Guideline 20, which states, at paragraph 126(d):

> *126.* ***The following measures shall be taken to ensure procedural accommodation and the provision of accessibility and reasonable accommodation for the exercise of the substantive rights of access to justice and equal recognition before the law:***
>
> ***…***
>
> ***(d) Individuals who are currently detained in a psychiatric hospital or similar institution and/or subjected to forced treatment, or who may be so detained or forcibly treated in the future, must be informed about ways in which they can effectively and promptly secure their release including injunctive relief.***

46. It is not apparent, section 267 of the Act of 1945 having been repealed, that persons detained in psychiatric hospitals circumstances such as those in which AB found himself are provided with information in relation to the availability of the Article 40 remedy.

47. For all of the reasons above, IHREC respectfully agrees with the finding of the Court below that the Article 40 remedy does not offer a practical and effective mechanism for the vindication of rights of persons detained for periods in excess of 6 months under the Act of 2001.

Judicial review

48. Even what the Court of Appeal has called 'modern, post-*Meadows*-style judicial review' is concerned only with the basis upon which an administrative decision has been reached and the process by which it has been decided. A court exercising the judicial review function does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. For this reason, it cannot hear new evidence which was not before the original decision-maker: *NM (DRC) v. Minister for Justice and Equality* [2016] IECA 217, Hogan J, 14 July 2016, para 51.

49. Thus, the remedies available in judicial review would be of limited if any use to a person detained under section 15(3) of the Act of 2001 who wished, having exhausted his or her appeal to the Circuit Court, to have the lawfulness of his or her detention reviewed again. Such a person would, in any event, face the same practical difficulties in terms of access to medical reports, legal advice and assistance and independent psychiatric opinion discussed in the context of the Article 40.4.2 remedy at paragraphs 30-33 above. Finally, it needs to be remembered that judicial review is a discretionary remedy: *Noonan v. Director of Public Prosecutions* [2008] 1 IR 445, 459-460.

50. IHREC therefore concludes that Irish law currently contains no practical and effective mechanism whereby such a person detained in a psychiatric hospital for a prolonged period under section 15(3) of the Act of 2001 may reasonably

access an independent review of his or her detention following the expiry of his or her right to appeal to the Circuit Court under section 19 as required by Article 40.4.1 of the Constitution and Article 5§4 ECHR.

E. CONCLUSION

51. In summary, IHREC submits (a) that AB should be found to have *locus standi* to challenge the constitutionality of the omission from the 2001 Act of an appropriate review mechanism, and, on the assumption that he has such *locus standi*; (b) that Article 40.4.1 of the Constitution requires, like Article 5§4 ECHR, that a person detained for a lengthy period under section 15(3) of the Act of 2001 should be able to initiate an independent review of his or her detention following the expiry of the section 19 appeal (and for reasons discussed at paragraphs 13-14 and 19-21 any period of 6 months or more constitutes a lengthy period); and (c) that no practical and effective mechanism currently exists whereby persons detained under section 15(3) can vindicate this right.

52. IHREC therefore submits that the Court should make declarations to this effect. If the Court makes such declarations on a constitutional basis, this would be adequate to remedy the complaints made by AB in respect of his detention. In these circumstances, there would be no need for the Court to proceed to consider the compatibility of the Act of 2001 with the ECHR pursuant to section 5 of the Act of 2003: *Carmody v. Minister for Justice, Equality and Law Reform* [2010] 1 IR 635, 669. However, if the Court does not conclude that AB has *locus standi* to maintain his constitutional claim or otherwise concludes that that claim should not succeed, then IHREC submits that the findings of Binchy J as regards the incompatibility of Part 2 of the 2001 Act with the Convention should be upheld.

53. Given that section 15(3) is problematic only because of what it does not contain, the Commission submits that it is not necessary that it be struck down its entirety, still less, that Part II of the Act of 2001 be declared

unconstitutional: *Carmody v. Minister for Justice, Equality and Law Reform* cited above, 670.

54. The effect of the declarations referred to above might be suspended for some short period to allow the State the time and scope to resolve the difficulty, whether, for example, by clarifying and improving access to the Article 40 remedy, or amending the Act of 2001 to provide for further possibilities of independent review by the Mental Health Tribunal: *NHV v. Minister for Justice and Equality* [2017] IESC 82, Clarke CJ, 30 November 2017.

55. For all the reasons above, the Commission respectfully submits that the State Parties' appeal should be dismissed, and that to the extent indicated above, AB's cross-appeal should be allowed, with the orders made in the Court below varied accordingly.

Colin Smith BL
Nuala Butler SC

6,232 words **28th February 2018**