Judgment

Title: I.F. -v- Mental Health Tribunal & ors

Neutral Citation: [2018] IECA 101

Court of Appeal Record Number: 2017 3

High Court Record Number: 2015 642 JR

Date of Delivery: 04/18/2018

Court: Court of Appeal

Composition of Court: Peart J., Hogan J., Gilligan J.

Judgment by: Hogan J.

Status: Approved

Result: Allow Appeal

THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 101

Record No. 2017/3

Peart J.
Hogan J.
Gilligan J.

BETWEEN

I.F.

APPLICANT

- AND -

THE MENTAL HEALTH TRIBUNAL,

THE MENTAL HEALTH COMMISSION,

IRELAND,

THE ATTORNEY GENERAL

RESPONDENTS

- AND -

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on 18th day of April 2018

1. Section 19 of the Mental Health Act 2001 ("the 2001 Act") provides for a right of appeal to the Circuit Court against a decision of a Mental Health Tribunal made under s. 18(1) of that Act to affirm an admissions order or a renewal order in respect of a particular patient "on the grounds .that he or she is not suffering from a mental disorder." In essence the question now presented is whether the Circuit Court, hearing such a statutory appeal against an admission order or a renewal order, is confined to considering whether the patient who is involuntarily detained is suffering from a mental disorder (i.e., on the date the appeal is heard) or whether on a proper construction of the section having regard to the Act as a whole and, in particular, s. 28(5), the Court may also consider that issue as of the date of the admission order or renewal order as the case may be.

2. As will be seen, this appeal from the decision of Barrett J. in the High Court raises yet again a question of statutory interpretation concerning the 2001 Act which is of no little difficulty and in respect of which there is no perfectly satisfactory answer. It may well be that in view of the issues highlighted by this appeal the Oireachtas might with advantage wish to reconsider the scope of both s. 19 and s. 28(5) of the 2001 Act with a view to bringing about greater legislative clarity on these important questions.

3. I propose to consider these legal issues presently, but it is necessary first to sketch out the background to this appeal.

The background to the appeal

4. The applicant, Ms. F., is a lady who is now in her early 60s who has had a long history of mental illness. It appears that on the 6th October 2015 an application in respect of Ms. F. was made by a member of An Garda Síochána pursuant to the provisions of s. 12 of the 2001 Act. Ms. F. had come to Garda attention following an allegation that she had threatened her neighbours with a butcher's knife. A recommendation was made by a general practitioner pursuant to s. 10 of the 2001 Act for an involuntary admission and Ms. F. was then brought to an approved centre.

5. An admission order was then made by a consultant psychiatrist on the morning of the following day, the 7th October 2015, pursuant to the provisions of s. 14 of the 2001 Act. That admission order was due to expire on the 28th October 2015.

6. On the 27th October 2015 that admission order was affirmed by the Mental Health Tribunal pursuant to s. 18(1)(a) of the 2001 Act. Ms. F. instructed her solicitor to lodge an appeal to the Circuit Court against that decision and such an appeal pursuant to s. 19 of the 2001 Act was lodged on the following day. The earliest available return date for the hearing of the appeal was the 9th November 2015, but due to another professional commitment on the part of Ms. F.'s solicitor on that day, it was agreed that the appeal would be heard on the following day, the 10th November 2015.

7. In the meantime a renewal order had been made on the 27th October 2015 pursuant to s. 15(2) of the 2001 Act extending the period of involuntary detention to the 27th

December 2015. This decision had been made within a short period of the affirmation of the admission order by the Tribunal following an examination of Ms. F. by the consultant psychiatrist responsible for the making of the initial admission order.

8. When the matter came before the President of the Circuit Court on the 10th November 2015 the issue arose as to whether the s. 19 appeal was now spent on the basis that the initial admission order had been overtaken by the subsequent renewal order. In the course of argument Groarke P. observed that when the 2001 Act was being drafted the drafters had considered "what was to happen in the event that this situation occurred and it is a lacuna because it should have been covered." While recognising that the appeal had come on quickly in the circumstances, Groarke P. nevertheless ruled that the appeal was now moot, saying:

> "In this instance, the order is spent and I have to say I see the merits of the arguments for and against. I am not going to make any order in respect of an order which is spent. It think that the courts are required to see, whatever the statutory provisions may be, they are required to see that orders which [they are] asked to consider must have some propriety, some effect. There must be a consideration of something which is material to the parties who are involved and I appreciate that…were I to hear this appeal I would be hearing or carrying out an assessment of the mental health of the appellant today, but whatever I determine in that regard is moot and the Tribunal were hearing the appeal against the new renewal order would have to make their determination on the day when they are considering it."

9. The applicant then commenced the present judicial review proceedings in which she sought, *inter alia*, a declaration that the Circuit Court had erred in failing to make an adjudication on the merits of the appeal. That application was dismissed by Barrett J. in a judgment delivered on the 8th November 2016.

The judgment of the High Court

10. In his judgment Barrett J. rejected the argument that s. 19 had been applied in a constitutional fashion by the Circuit Court by denying an appeal on the merits. He noted that the consistent view of the operation of the 2001 Act had been that an admission order was replaced by a renewal order (see, *e.g., W.Q. v. Mental Health Commission* [2007] 3 I.R. 755; *E.H. v. Clinical Director of St. Vincent's Hospital* [2009] 3 I.R. 744). If, therefore, s. 19(1) confined the jurisdiction of the Circuit Court to hear appeals where the patient "is suffering" from a mental disorder at the time of the appeal so that it had no historical jurisdiction to consider the correctness of the original Tribunal decision, it followed that:

> "….her appeal against the admission order (Order A) had become moot because that order had been supplanted by the renewal order (Order B). Thus, the Circuit Court could neither affirm nor revoke Order A and, as a mental health tribunal had yet to affirm or revoke Order B, it would have been premature for the Circuit Court to make a finding concerning that order….It suffices at this point to note that [the 2001 Act] does not envision the Circuit Court making a finding as to whether or not a person is suffering from a mental disorder before the admission/renewal order that includes that finding is affirmed by a mental health tribunal."

11. The judge further rejected arguments to the effect that the limited right of appeal was unconstitutional, saying that the Constitution "does not confer a right of appeal to the Circuit Court, whether by virtue of Article 34 or any other provision of the Constitution."

Barrett J. also rejected all arguments based on the European Convention of Human Rights Act 2003.

12. The applicant has now appealed to this Court against that decision.

The relevant provisions of the 2001 Act

13. It is next necessary to examine the relevant provisions of the 2001 Act. Section 18(1) of the 2001 Act provides:

> "Where an admission order or a renewal order has been referred to a tribunal under section 17, the tribunal shall review the detention of the patient concerned and shall either -
>
> (a) if satisfied that the patient is suffering from a mental disorder, and
>
> (i) that the provisions of sections 9, 10, 12, 14, 15 and 16, where applicable, have been complied with, or
>
> (ii) if there has been a failure to comply with any such provision, that the failure does not affect the substance of the order and does not cause an injustice, affirm the order, or
>
> (b) if not so satisfied, revoke the order and direct that the patient be discharged from the approved centre concerned."

14. Section 19 provides in relevant part as follows:

> "(1) A patient may appeal to the Circuit Court against a decision of a tribunal to affirm an order made in respect of him or her on the grounds that he or she is not suffering from a mental disorder.
>
> (2) An appeal under this section shall be brought by the patient by notice in writing within 14 days of the receipt by him or her or by his or her legal representative of notice under section 18 of the decision concerned.
>
> ….
>
> (4) On appeal to it under subsection (1), the Circuit Court shall:-
>
> (a) unless it is shown by the patient to the satisfaction of the Court that he or she is not suffering from a mental disorder, by order affirm the order, or
>
> (b) if it is so shown as aforesaid, by order revoke the order.
>
> (5) An order under subsection (4) may contain such consequential or supplementary provisions as the Circuit Court considers appropriate."

15. Section 19(6) provides for the service of the notice of appeal on both the consultant psychiatrist and the tribunal concerned. Section 19(7) then provides:

"Before making an order under this section, the Circuit Court shall have regard to any submission made to it in relation to any matter by or on behalf of a party to the proceedings concerned or any other person on whom notice if served under sub-s. (6) or any other person having an interest in the proceedings."

16. Section 28 of the 2001 Act deals with the discharge of patients:

"(1) Where the consultant psychiatrist responsible for the care and treatment of a patient becomes of opinion that the patient is no longer suffering from a mental disorder, he or she shall by order in a form specified by the Commission revoke the relevant admission order or renewal order, as the case may be, and discharge the patient.

(2) In deciding whether and when to discharge a patient under this section, the consultant psychiatrist responsible for his or her care and treatment shall have regard to the need to ensure:

(a) that the patient is not inappropriately discharged, and

(b) that the patient is detained pursuant to an admission order or a renewal order only for so long as is reasonably necessary for his or her proper care and treatment.

(3) Where a consultant psychiatrist discharges a patient under this section, he or she shall give to the patient concerned and his or her legal representative a notice in a form specified by the Commission to the effect that he or she:

(a) is being discharged pursuant to this section,

(b) is entitled to have his or her detention reviewed by a tribunal in accordance with the provisions of section 18 or, where such review has commenced, completed in accordance with that section if he or she so indicates by notice in writing addressed to the Commission within 14 days of the date of his or her discharge.

(4) Where a consultant psychiatrist discharges a patient under this section, he or she shall cause copies of the order made under subsection (1) and the notice referred to in subsection (3) to be given to the Commission and, where appropriate, the relevant health board and housing authority.

(5) Where a patient is discharged under this section:

(a) if a review under section 18 has then commenced, it shall be discontinued unless the patient requests by notice in writing addressed to the Commission within 14 days of his or her discharge that it be completed, or

(b) if such a review has not then commenced, it shall not be held unless the patient indicates by notice in writing addressed to the Commission within 14 days of his or her discharge that he or she wishes such a review to be held,

and, if he or she requests that a review under section 18 be completed or held, as the case may be, the provisions of sections 17 to 19 shall apply in relation to the review with any necessary modifications."

17. It is necessary at this juncture to call attention to the provisions of s. 28(5) of the 2001 Act in particular because these provisions envisage that any detained patient who is subsequently discharged pursuant to s. 28(1) on the ground that the treating consultant psychiatrist "becomes of opinion that the patient is no longer suffering from a mental disorder" may nonetheless insist that the Tribunal and, by extension, the Circuit Court should proceed with the review or, as the case may be, the appeal.

The nature of the appeal under s. 19

18. Perhaps the starting point of any analysis of the problem presented in this appeal is to inquire as to the nature and purpose of the s. 19 appeal. The s. 19 appeal has, to date, at any rate, been regarded in the case-law as entirely prospective in nature, so that the focus of the inquiry is on whether the appellant "is suffering from a mental disorder" at the time of the hearing before the Circuit Court. On this analysis, the task of the Circuit Court is to ask simply whether or not the appellant is mentally ill at the date of the appeal and not what the position historically might have been a few weeks earlier when the Tribunal affirmed the admission order or the renewal order (as the case might be).

19. If that is the premise of the s. 19 appeal, then it is easy to see why the Circuit Court should take the view that it should not hear the appeal if the appeal has been rendered moot, either by reason of the discharge of the patient under s. 28(1) on the ground that they are no longer suffering from a mental illness, or (as here) due to the existence of a later renewal order. That, after all, was the rationale for the very important decision of Charleton J. in *Han. v. President of the Circuit Court* [2008] IEHC 160, [2011] 1 I.R. 504 to which I shall now turn.

The decision in Han. v. President of the Circuit Court

20. In *Han*. a Tribunal had affirmed a renewal order and the patient then lodged a s. 19 appeal to the Circuit Court. By the time the appeal had come on for hearing, however, the patient had already been discharged from involuntary detention under s. 28 and was regarded as no longer suffering from a mental disorder. The President of the Circuit Court then struck out the s. 19 appeal as the appellant was no longer being detained under the provisions of the 2001 Act.

21. Mr. Han. then brought judicial review proceedings seeking to quash the decision to strike out the appeal on this ground, but following a thorough and close review of the 2001 Act, Charleton J. refused to grant the relief sought, stressing the purely limited nature of the s. 19 appeal. This thoughtful analysis of the section deserves an extended consideration.

22. Charleton J. commenced his analysis by saying ([2011] 1 I.R. 504, 513-514):

> "Central to any analysis of the issue of whether that patient who has been released from detention in a hospital, under an admission order or a renewal order, is entitled, nonetheless, to have an appeal to the Circuit Court decided on an historical basis is the actual wording of s. 19 of the Act…. It seems to me to be impossible to ignore the express wording of s. 19 of the Mental Health Act 2001, when it states that the issue before the Circuit Court is whether a patient "is not suffering from a mental disorder", a phrase that occurs only in the present tense in s. 19(1) and (4)(a). Further, any court in reviewing an order under appeal either quashes or affirms the order, whereas the wording in s. 19(4)(b) indicates that the burden of proof that is on the patient is to show that he or she "is not suffering from a mental disorder", and that if this is not shown then the Court affirms the order or, if the patient has met the burden of proof, the Circuit Court is required to revoke the order."

23. Charleton J. then observed that "…primacy, though not total supremacy, has to be given to the actual and literal words of any statute." He continued ([2011] 1 I.R. 511, 514-515):

> "The function of the Circuit Court under s. 19 is more limited than that which the Mental Health Tribunal exercises under s. 18 of the Mental Health Act 2001. The only issue before the Circuit Court is whether or not the patient is suffering from a mental disorder. This contrasts with the wide powers set out in s. 18 of the Act whereby the Tribunal, reviewing the detention of a patient, is not only concerned with whether the patient is suffering from a mental disorder but whether the procedures and time limits set out in ss. 9, 10, 12, 14 and 16 have been complied with and, further, if they have not been so complied with whether there has been an injustice; *T. O'D v. Kennedy* [2007] IEHC 129, [2007] 3 I.R. 689."

24. Charleton J. then continued ([2011] 1 I.R. 511, 515-516):

> "The Circuit Court, on the literal sense of the wording of s.19 of the Mental Treatment Act 2001, has no function in deciding on anything to do with the historical basis for detention. Its sole function is focussed, on the express wording of s. 19, on the current state of health of the patient. Nor does it have any function in awarding damages should it be the case that a patient is found at the time of the Circuit Court appeal not to be suffering from a mental disorder. The wording of the section excludes any issue as to whether a patient has been wrongfully detained in the past. Rather, the express purpose of the section is for the Circuit Court to review the determination of the Mental Health Tribunal that the patient is suffering from a mental disorder. Further under s. 73 of the Act no court has an entitlement to award damages except by civil proceedings outside the Act which can only be commenced with the leave of the High Court where it has been shown that there are reasonable grounds that an admission or renewal order was made "in bad faith or without reasonable care", and where the proceedings are shown not to be "frivolous or vexatious".

25. Charleton J. then addressed the question of the legislative purpose of s. 28(5), acknowledging the lack of clarity in the sub-section ([2011] 1 I.R. 511, 517-518):

> "The legislative purpose of one part of this section is unclear. It provides that a patient who is being discharged, and that can only happen when he or she is no longer suffering from a mental disorder, and who has commenced a review, is entitled to have that review completed by the Mental Health Tribunal where they request it. Where a review has not been commenced it is not to be held unless the patient requests such a review, in which case

there is a statutory entitlement to the review. Where a patient has been discharged and a review is held at the request of a patient then ss. 17, 18 and 19 of the Act apply "with any necessary modification". What is the purpose of such a review? The sole ground for discharging a patient under s. 28 is that "the patient is no longer suffering from a mental disorder". A review by a Mental Health Tribunal is concerned with that issue and with whether the relevant procedures under ss. 9, 10, 12, 14, 15 and 16 have been complied with and, if they have not, with whether an admission or renewal order should justly be affirmed notwithstanding a breach of one or more of those sections. It can, therefore, happen that a patient has been detained pursuant to an admission order or renewal order and has become well, but is entitled under s. 28, upon being discharged to have a review of these issues by the Tribunal. It is clear that such a review is historical since the relevant sections are not only concerned with whether the patient is suffering from a mental disorder but whether the administration sections leading to a patient's detention have been complied with. Since the operation of all of these the sections depends on whether or not a patient was, at the time they were used against them, suffering from a mental disorder, one cannot remove that issue from the review before the Mental Health Tribunal insisted on by a patient, notwithstanding his or her discharge, no more than one can remove the technical operation of the relevant detention sections."

26. Charleton J. then concluded by saying ([2011] 1 I.R. 511, 517-518, 520):

"It is argued that it would be absurd not to allow for an appeal to the Circuit Court from a review conducted by the Mental Health Tribunal at the request of a discharged patient. I do not agree that just because a discharged patient can insist on the Mental Health Tribunal looking at the issues surrounding his or her detention as a patient that an appeal must lie in respect of all of those issues to the Circuit Court. Expressly, the Circuit Court on appeal from the Mental Health Tribunal, and the High Court on appeal from that on a point of law, can only consider one issue, is the patient suffering from a mental disorder at the time of the hearing and if he or she is not the court must order his or her release from detention under the Act. As to what modification of s. 19 is necessary as a result of s. 28, the answer to that is that s. 19, is limited by its express words to the current condition of the patient and that the power of appeal under s. 28, is expressly stated as being to a Mental Health Tribunal. The modification necessary is that a patient being discharged can seek to have what happened to him or her as to detention in a mental hospital reviewed by the Mental Health Tribunal. They have no further power to appeal any decision of that Tribunal once they are released. They do have a power to appeal the decision of that Tribunal to the Circuit Court, but only where they are still detained, solely on the grounds that they are no longer suffering from a mental disorder; but they cannot do this if they are no longer detained under the Mental Health Act 2001, because a psychiatrist treating them has decided that they are well and so must be released. There is nothing in the Constitution which requires all and every, or any, decision, of the Mental Health Tribunal to be reviewed by the courts under a statutory scheme. The legislation limits the powers of the Circuit Court on appeal from the Mental Health Tribunal to a single narrow issue on the current state of the health of a detained patient. The legislation limits the statutory right to appeal of a person who was once detained as a patient but has been discharged to the ample powers as to review given to the Mental Health Tribunal. It is also noteworthy that the

> powers of the Mental Health Tribunal, whether the patient has been discharged or not, cover not only his or her current state of health but the historic matters of how the relevant sections of the Mental Health Act were operated. The Circuit Court, as I have pointed out, never had such a power of historic review.
>
> The legislative purpose behind s. 19 of the Mental Health Act 2001 is to allow those patients who are still detained, following on a hearing before the Mental Health Tribunal, to have the condition of their mental health reviewed before a judge of the Circuit Court. It is not to engage in a historical analysis. Whether there would or would not be a point, to such an historical analysis is irrelevant given the express wording of the section. I am obliged to give grammatical and ordinary sense to the use of the present tense in s. 19, and to the choice given to the Circuit Court of either affirming an admission or renewal order or revoking it.
>
> ….A patient detained by an admission order or a renewal order under the Mental Health Act 2001, automatically has his case reviewed as to his state of mental health and as to the operation of the detention provisions in the Act by the Mental Health Tribunal. The provisions of the Act allow for independent clinical examination and independent legal representation. Where a decision has been made by the Mental Health Tribunal, on such review, that a patient is suffering from a mental disorder and is in consequence detained under the Act then a patient may appeal that decision, and that decision only, to the Circuit Court. The Circuit Court has no jurisdiction to decide any such appeal unless the person is then the subject of an admission order or a renewal order, and is thus detained in a hospital. The sole issue that can come before the Circuit Court under the Mental Health Act 2001 is whether or not at the time of the hearing the patient is or is not suffering from a mental disorder."

27. It is admittedly difficult to disagree with such a powerfully argued and reasoned judgment. It is quite true that, as Charleton J. has so painstakingly illustrated, s. 19 is couched in the present tense ("….is not suffering from a mental disorder…") and unlike the Tribunal, the Circuit Court has been given no express power to deal with the historical position of any given patient. The Tribunal is vested with such a jurisdiction, because although its principal role is also to determine whether the "patient is suffering from a mental disorder", it is also expressly required by s. 18(1)(a)(i) and (ii) to consider whether the statutory requirements in relation to admission orders and renewal orders have been complied with. If matters stood at that point, then I agree that Charleton J.'s analysis would be unimpeachable.

28. The difficulty, however, with this approach is that it effectively renders s. 28(5) of the 2001 Act unworkable. Section 28(5) expressly envisages that a patient who has been released from involuntary detention because he is no longer suffering from a mental illness is nonetheless entitled to insist that the original decision to detain him or to renew that detention be reviewed by the Tribunal. Just as in the case of s. 19(1), the language of s. 18(1) dealing with the role of a Mental Health Tribunal in respect of either affirming or revoking admission or renewal orders is expressed to be in the present tense ("…if satisfied that the patient is suffering from a mental disorder…").

29. Section 28(5) further expressly contemplates that a person no longer suffering from a mental disorder should be able to appeal a decision of a Tribunal to the Circuit Court, since that sub-section provides that s. 19 should apply in relation to the s. 18 review "with any necessary modifications."

30. While Charleton J. found the legislative purpose of this sub-section somewhat unclear, for my part I think that the Oireachtas must have thereby intended that the Circuit Court should have an appellate jurisdiction to determine whether a particular patient not only is suffering from a mental disorder, but also was suffering from such a disorder and that this was intended as a further protection for persons who had been involuntarily detained under the 2001 Act, even if they had either since been released under s. 28 (as in Han.) or if that order providing for such detention had been overtaken in the meantime by another order for involuntary detention (which is the case here). The provisions of s. 28(5) therefore constitute the clearest possible legislative signal that the words "is suffering from a mental disorder" in s. 19(1) should not be construed entirely literally.

31. In this situation where there is an actual or potential conflict between two provisions of the same Act, the general principle of *generalia specialibus non derogant* is called into play. In such circumstances, the task of the Court is to ascertain which provisions are the more general and which are the specific: see, *e.g., Keane v. Western Health Board* [2006] IEHC 370, [2007] 2 I.R. 555, 559 *per* Quirke J.

32. This is further illustrated by the Supreme Court decision in *Cork County Council v. Whillock* [1993] 1 I.R. 231. That case concerned the interpretation of the Malicious Injuries Act 1981, one provision of which (s. 23) appeared to create a three year limitation period (subject to an exception for disability) while yet another (s. 14(3)) expressly permitted the court to extend the time. The Supreme Court held that given the express and specific words of s. 14(3), the court was given a discretion to extend time. As Egan J. explained ([1993] 1 I.R. 231, 239:

> "There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain."

33. On this analysis it is clear that s. 19(1) represents the general provisions vesting an appellate jurisdiction in the Circuit Court, whereas s. 28(5) is the specific provision addressing the precise problem at hand, namely, whether a person who is no longer suffering from a mental disorder is nonetheless entitled to maintain such an appeal to the Circuit Court against a decision of the Tribunal. By analogy, therefore, with the reasoning in *Whillock*, it is necessary to give an effect and meaning to the provisions of s. 28(5).

34. In this situation, therefore, the lex specialis contained in s. 28(5) must be held to prevail over the purely general provisions of s. 19(1). What, then, is the consequence of this? To my mind it must follow that in order to make s. 28(5) operative, this in turn must require some modification of the literal words of s. 19(1). The Oireachtas could not reasonably have intended that by expressly providing that the person who had been – but was no longer – suffering from a mental illness would nonetheless be entitled to maintain such an appeal only to find that the Circuit Court dismissed that appeal by reason of the fact that he was no longer suffering from a mental disorder at the time of the hearing of the appeal.

35. All of this means that s. 19(1) of the 2001 Act must be read as if it read "is or was" suffering from a mental disorder. This means in turn that the Circuit Court is not confined on a s. 19 appeal to determining whether the appellant *is* suffering from a mental illness at the exact time of the hearing of the appeal, but this jurisdiction also extends to determining whether she was suffering from this illness at the time of the Tribunal decision from which the appeal has been taken. As I have already indicated, this modified interpretation of s. 19(1) is necessary so that s. 28(5) can have real meaning and effect.

36. This has the further consequence for the present case that the Circuit Court has a jurisdiction to hear an appeal against the affirmation of an admission order by a Tribunal under s. 18(1), even if – as in the present case - that original admission order has subsequently been replaced by a renewal order. The Circuit Court can accordingly determine whether the Tribunal was correct to affirm that order.

37. This general conclusion regarding the scope of the s. 19 appellate jurisdiction is, I think, also justified by the language of s. 5(1) of the Interpretation Act 2005 ("the 2005 Act") which enables the court to depart from the literal interpretation of an enactment where such "would fail to reflect the plain intention" of the Oireachtas. In these circumstances, s. 5(1) of the 2005 Act requires the courts to apply "a construction that reflects the plain intention of the Oireachtas…..where that intention can be ascertained from the Act as a whole."

38. An interpretation of s. 19(1) which confined the jurisdiction of the Circuit Court to those cases where the patient "is suffering" from a mental disorder would fail to reflect the plain intention of the Oireachtas for all the reasons I have just mentioned. A reading of the 2001 Act as a whole – and, in particular, the provisions of s. 28(5) – demonstrates that the Oireachtas intended that the appellate jurisdiction contained in s. 19 should not be so confined, so that the criteria contained in s. 5(1) of the 2005 Act justifying this departure from the literal wording of s. 19(1) are thereby satisfied.

39. It is, of course, true that as Charleton J. pointed out in *Han.*, the Oireachtas is not obliged by the Constitution to provide for an appellate remedy in the case of decisions of every administrative tribunal. But a decision of a Mental Health Tribunal under the 2001 Act affirming an admission order or a renewal order has far-reaching consequences for the constitutional rights of the detained person, including liberty (Article 40.4.1) the protection of the person and his or her good name (Article 40.3.2). As Henchy J. put it (in an admittedly dissenting judgment) in *O'Dowd v. North Western Health Board* [1983] I.L.R.M. 186, 205 many of the statutory safeguards attending the involuntary detention of persons with a mental disorder must be deemed to be the "implementation of these constitutional guarantees" and, in particular, to ensure that:

> "…not even for a short period will a citizen be unnecessarily deprived of liberty and condemned to the tragic and degrading status of a compulsory inmate of a mental hospital with the dire social consequences that such a fate is likely to have on his future and that of his relations."

40. Section 19 of the 2001 Act must also be construed in that light and this is another reason why the Oireachtas must be taken to have provided a real and effective appellate remedy for persons detained under the 2001 Act, even where the order against which they are appealing has been subsequently replaced by a subsequent renewal order.

41. This conclusion does not, however, quite dispose of all the difficulties thrown by this appeal. Counsel for the Mental Health Commission, Mr. McDermott S.C., posed the

question as to what would happen to the intervening renewal order in the event that the Circuit Court were to allow the appeal from the original admission order.

42. I agree that, as I indicated at the start of this judgment, there is, perhaps, no perfectly satisfactory solution to the conundrums thrown up by this appeal. But I do not think that the Circuit Court could address the merits of any address the merits of any subsequent renewal order in the course of such a s. 19 appeal (including, if necessary, setting aside that order) in the manner urged by counsel for the applicant. Any such subsequent renewal order would have to be considered by the Tribunal under s. 18(1), with the further right of appeal to the Circuit Court under s. 19(1). All that this Court is now deciding, however, is that the Circuit Court has jurisdiction to hear and determine the original appeal under s. 19(1), even if the underlying admission order or renewal order (as the case may be) has, in fact, been replaced in the interval by a renewal order.

Whether the renewal order replaced the original admission order

43. I have thus far proceeded on the assumption that in the context of a s. 19 appeal, at least, the making of a renewal order replaced the original admission order. For my part, however, I think that Peart J. is entirely correct for the reasons which he has just given in his judgment, namely, that the basis for the detention of Ms. F. at all times remained the original admission order. The renewal order merely prolongs and extends the validity of the original admission order, so that the former has not, in truth, replaced the latter.

44. It is true that, as Peart J. recounts in his judgment, there are judicial dicta such as those of O'Neill J. in *W.Q. v. Mental Health Tribunal* [2007] 3 I.R. 755 and Kearns J. in the Supreme Court in *E.H. v. Clinical Director of St. Vincent's Hospital* [2009] 3 I.R. 774 which suggest that a renewal order supplants the original admission order. But as is clear from the latter judgment, these comments were simply made in the context – and in that context alone - of rejecting what Kearns J. described as a "domino" theory, *i.e,* the suggestion that a defect in, say, the original admission order would automatically infect the validity of a subsequent renewal order even though a Tribunal had subsequently sat and approved that renewal order.

45. The present context is rather a different one. It is, I think, sufficient to say that in the context of the s. 19 appeal, at least, the admission order remains the basis of the detention and it has not been replaced by the renewal order. If this correct, then quite independently of any considerations based on s. 28(5) of the 2001 Act, the Circuit Court fell into error in assuming that because the renewal order had replaced the earlier admission order, that Court no longer had any jurisdiction to consider the s. 19 appeal.

Conclusions

46. In summary, therefore, I would conclude as follows:

47. First, as a matter of *stare decisis* both Groarke P. and Barrett J. were correct to follow and apply the applicable law and understanding of the scope of s. 19 of the 2001 Act as reflected in the judgment of Charleton J. in *Han.*, namely, that the right of appeal applied only where the person in question "is" suffering from a mental illness.

48. Second, I consider, however, that in *Han.* Charelton J. was, with respect, incorrect in applying a purely literal interpretation of s. 19(1) of the 2001 Act, because this interpretation effectively rendered s. 28(5) unworkable. In these circumstances, irrespective of whether one applies the maxim *generalia specialibus non derogant* or the

interpretative principles contained in s. 5(1) of the 2005 Act, it is clear that a purely literal interpretation of the sub-section is not appropriate.

49. Third, it follows that s. 19(1) of the 2001 Act must therefore be read as if it read "is or was" suffering from a mental disorder. This means in turn that the Circuit Court is not confined on a s. 19 appeal to determining whether the appellant is suffering from a mental illness at the exact time of the hearing of the appeal, but this jurisdiction also extends to determining whether she was suffering from this illness at the time of the Tribunal decision from which the s. 19 appeal has been taken. This modified interpretation of s. 19(1) is necessary so that s. 28(5) can have real meaning and effect.

50. Fourth, this has the further consequence for the present case that the Circuit Court has a jurisdiction to hear an appeal against the affirmation of an admission order by a Tribunal under s. 18(1), even if that admission order has been subsequently replaced by a renewal order. The Circuit Court can accordingly determine whether the Tribunal was correct to affirm that original order.

51. Fifth, there remains the difficult question as to what would happen to the intervening renewal order in the event that the Circuit Court was to allow the appeal from the original admission order. While there is no perfectly satisfactory solution to the conundrums thrown up by this appeal, I do not think that the Circuit Court could address the merits of any subsequent order in the course of such a s. 19 appeal (including, if necessary, setting aside that order). Any such subsequent renewal order would have to be considered by a Tribunal under s. 18(1), with the further right of appeal under s. 19(1). All that this Court is, however, now deciding is that the Circuit Court has jurisdiction to hear and determine the original appeal under s. 19(1), even if the underlying admission or renewal order (as the case may be) has been replaced in the interval by a renewal order.

52. In the light of this conclusion regarding the meaning and scope of s. 19(1), I would therefore allow the appeal from the decision of the High Court. I would hear counsel prior to the finalisation of the Court's order.

53. Finally, I would add that I have had the opportunity of reading in advance the judgment which Peart J. has just delivered and I also agree with it.