Protecting Rights in Mental Health Law: The Relationship between the Courts and Mental Health Tribunals

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Introduction

Mental health law, and in particular the law concerning involuntary detention, has been a subject of protracted debate in Irish society. The European Court of Human Rights (ECtHR) held in *Winterwerp v The Netherlands* (1979-80) 2 EHRR 387 that, except in emergency cases, the decision to detain a 'person of unsound mind' must be supported by objective medical expertise, the mental disorder must be serious enough to warrant compulsory confinement, and the validity of confinement must be based on the persistence of the disorder (at para. 39). Article 5(4) of the European Convention on Human Rights (ECHR) does not necessarily require that all detentions be automatically reviewed, as long as a detained person has the right to take proceedings by which the lawfulness of his or her detention shall be decided speedily by a 'court' (which includes independent tribunals). Ireland's Mental Health Act 2001 requires that all involuntary admissions for mental disorder be reviewed within twenty-one days by a three-person Mental Health Tribunal (MHT). The tribunals review both procedural and substantive aspects of the person's detention. Under section 18 of the 2001 Act, they also have the power to waive or 'cure' a procedural defect which may have occurred, provided the defect does not affect the substance of the order and does not cause an injustice.

The tribunal system became operational in 2006, and there are hundreds of hearings each year.[1] Inevitably, there has been a significant amount of litigation about the exact parameters of the tribunals' powers and the relationship between the tribunals and the courts. This litigation has been an important opportunity for the courts to establish principles and standards for the tribunals. As a person's liberty is at stake, it would be expected as a matter of policy that courts would subject the tribunal

[1] For example, there were 1,896 hearings by the MHTs in 2013 - Mental Health Commission (2014), p. 43.

process to very strict scrutiny. However, there is strong evidence that the Irish courts are, in general, extremely deferential to the decisions of Mental Health Tribunals. The courts' approach raises serious questions about their commitment to the rights of persons detained under mental health legislation.

In this chapter, the focus will be on key written judgments of the High Court and Supreme Court where the courts have in some way reviewed a decision of a Mental Health Tribunal. The issues will be considered under five headings: an examination of the remedies of applications under Article 40 and judicial reviews; the MHTs' power to review procedural matters; the power to waive procedural irregularities; statements from the courts concerning the importance of MHTs following procedures correctly and the relevance of the ECHR and the Convention on the Rights of Persons with Disabilities (CRPD). Detailed accounts of the Mental Health Act 2001 and case-law interpreting it may be found in literature by authors such as Keys (2002), O'Neill (2005), Whelan (2009) and Casey et al. (2010). An expert group has recently recommended various reforms of the 2001 Act (Expert Group on the Review of the Mental Health Act 2001, 2015).

Despite some statements to the contrary, the general picture which emerges is that the courts have not engaged in robust supervision of mental health tribunals. Instead, the general tenor of the case-law has been to endorse decisions of tribunals to affirm detentions, and to limit access to the courts to the most extreme violations of procedural rights. This is a disappointing outcome, in light of the supposed rights-based focus of the Mental Health Act 2001.

Remedies: Applications under Article 40 and Judicial Reviews

The focus of this chapter will be on cases which took the form either of an application under Article 40 of the Constitution or a Judicial Review. These remedies have distinct features which significantly impact on the courts' role.

An application under Article 40 of the Constitution (which is also known as a habeas corpus application, although there are technical differences) is an inquiry by the High Court into the lawfulness of a person's detention. The onus is on the detaining authority to justify the detention and if it is not justified, the person must be released.[2]

[2] The courts may use the technique of delayed or 'staggered' release if a person has a serious mental disorder and may require to be detained again – see Whelan (2009), 2-42 to 2-44 and also the recent case of *F.X. v Clinical Director of Central Mental Hospital* [2014] IESC 1.

As Mental Health Tribunals are public bodies, their decisions may alternatively be challenged by way of a Judicial Review application in the High Court. This is a more flexible remedy than an application under Article 40 as issues other than the current legality of the detention may be considered. For example, the person may seek a declaration that one of the actions which took place in the chain of events was unlawful, or that a particular section of the 2001 Act is repugnant to the Constitution or incompatible with the ECHR. The grounds for judicial review are mainly procedural and the courts will generally steer away from consideration of the merits of the decision.

In cases concerning the 2001 Act, the courts have applied four limitations on the availability of these remedies. Firstly, in the key Supreme Court case of *E.H. v Clinical Director of St. Vincent's Hospital* [2009] IESC 46, para.50, it was held that an application under Article 40 should only be brought if 'the best interests of the patient so demand' (see further Whelan, 2012). This limits the availability of the remedy and has had a chilling effect on potential challenges to detention. Given that 'best interests' in this context appear to be equated with medical best interests, the case represents a remarkable prioritisation of medical considerations over legal ones. It has been commented that courts tend to be deferential to medical opinion (Teff, 1994: xxiii-xxiv) and this may be seen as a further example of this phenomenon (see further Whelan, 2009; Irish Human Rights Commission, 2010; Lynn, 2010; Murray, 2010).

Secondly, in *T.O'D.* v *Kennedy* [2007] IEHC 129, Charleton J. commented that if there are procedural issues with a detention, the 'ordinary remedy' is to being these matters before the tribunal. He said that the High Court in exercising its jurisdiction under Article 40 of the Constitution has a much more limited function in simply declaring, at any particular point in time, whether someone is or is not lawfully detained. It can review the MHT's decisions but he did not see that this would be either appropriate or necessary if the statutory scheme was followed. He said that he 'would expressly hold that if at a time when the High Court considers an application for habeas corpus, a period of unlawful detention has been cured validly by a decision of the mental health tribunal under section 18(1) of the Mental Health Act 2001 that [*sic*] the remedy is no longer available.' This view would appear to unduly restrict the availability of the remedy of an application under Article 40, placing unwarranted weight on the decision of a MHT as to which procedural defects are sufficiently minor to be waived.

Thirdly, the courts have repeatedly held that there is no 'domino effect' in applications under Article 40. If there is an unlawfulness at an earlier stage of detention, it may be 'cured' by a subsequent lawful detention. For example, in *R.L. v Clinical Director of St. Brendan's Hospital* (Supreme Court, *ex tempore*, 15 February 2008), the Supreme Court held that even if there had been breaches of section 13 of the 2001 Act (regarding removal of the person to the hospital), this would not render what is on the face of it a lawful detention on foot of an admission order invalid (at 5-6). The courts have contrasted this with a criminal matter, where different reasoning might apply, and previous matters which have a causal relationship with the present detention might need to be considered.[3] However, if a stage in the statutory procedure for involuntary admission is omitted completely, a different outcome may result. In *S.O. v Clinical Director of Adelaide and Meath Hospital* [2013] IEHC 132 there had been a failure to comply with the requirement that a doctor should examine the person before making a recommendation that the person be admitted under the Act and Hogan J. therefore ordered that the person's subsequent admission was unlawful.

Fourthly, O'Malley J. noted in *D.H. v Clinical Director of St. Patrick's Hospital* (High Court, *ex tempore*, 18 June 2012) that, as Judicial Review is a discretionary remedy, the court might in some cases take into account the powers of the MHT in deciding whether to exercise the court's discretion. Her suggestion seemed to be that on occasions the court might refuse the remedy of Judicial Review due to the existence of the MHT's parallel 'sort of mini judicial review jurisdiction of its own' (at 2). On the other hand, O'Malley J. also stated in that case that, where personal liberty is at stake, she would be 'reluctant to close the door to the person seeking the protection of the High Court' (at 2).

The MHTs' power to review procedural matters

The function of the MHT hearing is to review the person's detention and decide whether to confirm or revoke the relevant admission or renewal order. According to section 18 of the Act, to affirm the order, the MHT must be satisfied that

1. the person is 'suffering from a mental disorder' *and*

[3] *S.C. v Clinical Director of St. Brigid's Hospital*, Supreme Court, 13 March 2009, Judgment not available, quoted in *E.H. v Clinical Director of St. Vincent's Hospital* [2009] IESC 46; [2009] 3 IR 774 at 792.

2. [certain procedures] have been complied with, or, 'if there has been a failure to comply with [these procedures], that the failure does not affect the substance of the order and does not cause an injustice.'[4]

The MHTs therefore are clearly required to consider procedural matters, which is in sharp contrast to the powers of the first tier tribunals in England, which may not consider procedural issues (section 72 Mental Health Act 1983, England and Wales, as amended). However, only certain procedural matters may be reviewed by MHTs. A difficult issue is whether the lack of power to review certain procedural sections leads to a breach of the ECHR.

Article 5(4) of the ECHR states that a detained person has the right to take proceedings by which the lawfulness of his or her detention shall be decided speedily by a 'court' (which includes independent tribunals). It can be argued that MHTs must have the power to review, without restrictions, both the substantive and procedural aspects of the person's detention. The primary authority for this argument is *Brogan v United Kingdom* (1989) 11 EHRR 117, a case concerning detention under the Prevention of Terrorism Act 1984, where it was held that arrested or detained persons are entitled to a review hearing upon the procedural and substantive conditions which are essential for the 'lawfulness', in the sense of the ECHR, of their deprivation of liberty. Thus, an Article 5(4) 'court' reviewing detention (which includes mental health tribunals) must be able to review both procedural and substantive grounds for a person's detention. This was confirmed in *Nikolova v Bulgaria* (2001) 31 EHRR 3, a case concerning an appeal against a remand in custody on a criminal charge. There are possible counter-arguments which may be made, by referring for example to the fact that an application under Article 40 of the Constitution could be used to 'fill in the gaps' in the powers of MHTs (see Whelan, 2009: para. 9-16).[5]

An attempt of sorts was made to raise this issue in *C.C. v Clinical Director of St. Patrick's Hospital (No.1)*, but the judgment only considers one aspect of the issue. It was argued that MHTs ought to have power to release a person if section 13 of the 2001 Act, concerning removals to hospitals, were

[4] The tribunal must be satisfied 'that the provisions of sections 9, 10, 12, 14, 15 and 16, where applicable, have been complied with.'

[5] See also *X. v United Kingdom* (1981) 4 EHRR 188, where it was held that a review by way of habeas corpus procedure in England was not sufficient for a continuing confinement. The court referred to the fact that in habeas corpus cases, the case is considered on the basis of affidavit evidence, and the focus is on enquiring into whether the detention is in compliance with the requirements stated in the relevant legislation and with the applicable principles of the common law. As a result, the habeas corpus proceedings were not in compliance with Article 5(4) of the ECHR.

breached, even though section 13 is not one of the listed procedural sections which may be reviewed by the tribunal. The applicant relied on *Storck v Germany* (2006) 43 EHRR 6 in which it was held that Article 5(1) of the ECHR lays down a positive obligation on the State to protect the liberty of its citizens, and that the State cannot absolve itself from responsibility by delegating its obligations in such matters to private bodies. McMahon J. rejected this argument, referring to the fact that the MHT had offered an adjournment to the applicant. He continued:

> Had the applicant availed of the adjournment it would have given the applicant's solicitor the opportunity of making the same request to those who had power of release including presumably the clinical director. If the applicant got no satisfaction from the clinical director then the applicant could have commenced proceedings against the clinical director's refusal under Art.40.4 of the Constitution. A claim, however, that the State failed under the Convention to protect the applicant's right to liberty, because the Tribunal did not have the power under the Act, is not sustainable for the simple reason that the applicant did not have the correct target for his complaint (at 27).

This only deals with one aspect of the case-law on Article 5 – the fact that a state cannot delegate its responsibility to protect citizens' liberty to private bodies. There had been no tribunal or court review of the person's first stay in the clinic in the *Storck* case, and so the case has very little relevance to the question of the scope of such a review if such a review takes place.

The power to waive procedural irregularities

As stated earlier, MHTs have the power, under section 18 of the 2001 Act, to waive a procedural irregularity under certain listed sections if 'the failure does not affect the substance of the order and does not cause an injustice.' In a series of cases, mainly clustered in the period from April to July 2007, the courts interpreted section 18 inconsistently. The details of these cases may be found elsewhere (Whelan, 2009: 9-24-9-38) but the main points will now be reviewed, before turning to some more recent case-law. Interestingly, two of the 2007 cases[6] concerned procedural compliance with sections 23 and 24 of the 2001 Act, which concern re-grading of persons from voluntary to involuntary status, even though technically a MHT does not have power to consider compliance with those sections. As technically the tribunals did not have jurisdiction to consider these sections, the comments of the High Court in those cases may also, technically, not be binding on future courts.

[6] *Q. v Governor of St Patrick's Hospital*, High Court, O'Higgins J., *ex tempore*, 21 December 2006 and *T.O'D. v Kennedy* [2007] 3 IR 689. Another example is *N.B. v Clinical Director of Our Lady's Hospital Navan and Others* [2007] IEHC 403.

In the 2007 cases, there were clearly two schools of thought: some cases held that section 18 could only be used to excuse minor failures of an insubstantial nature, while others held that tribunals could excuse virtually any procedural defect, unless it was in reckless disregard of the statutory scheme. Statistically speaking, there was more support for the first school. O'Neill J. held in *W.Q.* v Mental *Health Commission* [2007] IEHC 154 that only failures of an insubstantial nature which did not cause an injustice could be excused. In that case, he held that it was not permissible for a Renewal Order to be signed by a psychiatrist from outside the hospital, who was not involved in care and treatment, but was brought in for the purposes of review. This approach was expressly followed by Mac Menamin J. in *J.B. v Director of the Central Mental Hospital (No.2)* [2007] IEHC 201, a case where it was found that the person was in lawful detention even though the Renewal Order was signed by a psychiatrist who was not on the staff of the hospital in which the person was detained. Similar reasoning was used by O'Higgins J. in *Q. v Governor of St. Patrick's Hospital* (High Court, O'Higgins J., *ex tempore*, 21 December 2006), where he held that one cannot do violence to the section and a tribunal cannot excuse a failure to use sections 23 and 24 in sequence. This approach was also supported indirectly by Hardiman J. in *M.D. v Clinical Director of St. Brendan's Hospital* [2007] IEHC 183 when he stated that tribunals must contribute to a situation of total compliance with statutory provisions, although admittedly he was focusing on the necessity for the MHT to record its decision carefully rather than on the meaning of section 18.

Charleton J. belonged to the second school; in *T.O'D.* v *Kennedy* [2007] IEHC 129 he stated that section 18 refers to the entirety of the relevant sections, not simply minor matters as to typing, time or procedure and he held that a tribunal could affirm a detention under section 23 which was six days longer than permitted. This reasoning was approved of by Peart J. in *J.H. v Lawlor* [2007] IEHC 225, concerning a detention which was twenty minutes longer than permitted, although Peart J. did say that each case of delay would have to be considered in its own context and on its own facts. O'Keeffe J. also adopted the second school of thought in *A.R. v Clinical Director of St. Brendan's Hospital* [2009] IEHC 143, concerning failure on the part of a psychiatrist to tick a box on a renewal form indicating that the person continued to suffer from a mental disorder.

There have been fewer cases since 2007 in which the meaning of section 18 has been considered. In *G.F. v Clinical Director of Acute Psychiatric Unit* [2013] IEHC 309, a doctor had signed

a recommendation for admission in which he stated the person's clinical condition but did not tick a box indicating which subsection(s) of section 3 applied to the person's mental disorder. This meant that on a strict reading of the form, the doctor had not recommended the person's admission. The tribunal decided that this was a breach of the Act but it did not affect the substance of the admission order or cause an injustice. Hogan J. stated:

> In my view, while no procedural error is excluded ex ante from the scope of section 18, the task of the Tribunal under this section is essentially to examine whether the substance of the procedural protections was satisfied and to ensure that any non-compliance did not cause an injustice (at para. 9).

He went on to hold that the case was 'really indistinguishable' from the *A.R.* case, and applying that case by analogy, the tribunal was entitled to apply its section 18 powers and affirm the person's detention.

Although section 18 was not specifically mentioned in *D. v Health Service Executive* [2009] IEHC 488, there was an endorsement of the tribunal's decision to consider the report of an independent psychiatrist in circumstances where the independent psychiatrist had (for understandable reasons) not had an opportunity to interview the responsible consultant psychiatrist. The requirement that this interview take place is contained in section 17, which is not one of the listed procedural sections which the tribunal may consider.[7] Peart J. noted a submission by counsel that compliance with section 17 could not be considered by the tribunal, but did not return to this issue in his judgment. It is also unclear whether the tribunal explicitly relied on section 18 to 'cure' the lack of interview between the two psychiatrists. Ultimately, Peart J. found that 'the defect, if it be that, in the report is not so fundamental as to invalidate the report to the extent that the tribunal could not be entitled to have regard to it' (at p. 8). In his view the tribunal was entitled to decide as it did and proceed, if it so decided, to affirm the order.

Hogan J. enunciated a new principle concerning the meaning of section 18 in the recent case of *P.D. v Clinical Director, Department of Psychiatry, Connolly Hospital* [2014] IEHC 58. A psychiatrist had intended to make a second renewal order for a three-month period, but had made two mistakes on

[7] See *W.Q. v Mental Health Commission* [2007] IEHC 154; [2007] 3 IR 755 at 769, where one of the points raised was that a tribunal had not been convened under s. 17 to review the person's detention before the renewal order was made. O'Neill J. noted that this matter was outside the scope of the tribunal's consideration because s. 17 is not listed amongst the sections in respect of which an MHT is required to consider compliance.

the renewal order: she completed the wrong part of the form, filling out the reference to section 15(2) of the 2001 Act rather than section 15(3), and she inserted the wrong date, referring to either 13 or 14 April 2013 (when she should have referred to 12 April 2014). The tribunal had waived these irregularities, relying on its power under section 18. Hogan J. held that the detention was unlawful, as the renewal order was bad on its face, and therefore this was not a case where the provisions of section 18(1)(a)(ii) came into play at all.

The reasoning applied by the court in this case is noteworthy. Hogan J. noted that a critical point is that the tribunal's task is simply to review the earlier admission or renewal order. Even where the tribunal affirms such an order, the decision of the Tribunal does not actually supplant or replace the earlier order. The renewal order itself remains the basis for the detention. Section 18 did not come into play at all because it concerns infirmities which might attach to the renewal order by reason of earlier non-compliance with certain key procedural requirements prescribed by the 2001 Act. Hogan J. continued:

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

Hogan J. then discussed an immigration case, *G.E. v Governor of Cloverhill Prison* [2011] IESC 41, in which the Supreme Court held that a notice refusing leave to land in the state was invalid on its face and therefore the applicant's detention was unlawful. Applying these standards, he held that the errors on the face of the document were too significant to admit of any conclusion other than that the renewal order was bad on its face. Hogan J. concluded that the clinical director in this case had not clearly established the lawful basis for the detention in the manner required by Article 40 of the Constitution. He commented that the Oireachtas might well consider amending the 2001 Act to enable obvious clerical errors of this kind to be corrected 'by means of a form of slip rule procedure, along, of course, with safeguards and external supervision of any changes to an admissions order or renewal order' (at para. 16).

This is a very significant finding for cases where such an error arises in future. It re-opens the prospect of the courts applying a stricter approach to construction of documentation in detentions under the Mental Health Act, especially where there is an error in the most recent document justifying

detention at the time of the tribunal or court hearing. It is notable that Hogan J. did not review the previous case-law on section 18, and moved very quickly to immigration case-law regarding the validity of a detention based on a document which is bad on its face. He also did not refer to the best interests principle, or to the *E.H.* case, where it was held that 'mere technical defects' should not give rise to a 'rush to court' (at para. 50). Questions remain open as to whether, if the *G.E.* principle were being applied to some of the 2007 case-law on the meaning of section 18, a different result would have been reached. For example, was the detention in the *T.O'D.* case, which was six days longer than permitted, bad on its face?

Unfortunately, it is not possible to state definitively what the current legal position is regarding the meaning of section 18(1)(a)(ii). There appears to be more support for the view that it can only be used to excuse minor failures of an insubstantial nature, but it is possible that the courts will swing again in the opposite direction. From the perspective of constitutional and human rights, the view that section 18 can only be used to excuse minor failures would be more appropriate, given that the person's liberty is at stake. In a review of the issue in 2011, Amnesty International Ireland recommended clarification of the statutory wording by referring to 'minor failures of compliance which are of an insubstantial nature' (2011: 109). The Expert Group on the Review of the Mental Health Act 2001 (2015: 50) decided not to recommend a change in the wording of s.18, although the emphasis in the group's report was on whether or not a "slip rule" allowing rectification of errors within 14 days of admission should be introduced.

Statements from the courts concerning the importance of MHTs following procedures correctly

The courts have made some statements to the effect that it is very important that MHTs follow procedures correctly. The most significant example is *M.D. v Clinical Director of St. Brendan's Hospital* [2008] 1 IR 632*,* a case in which the psychiatrist had failed to tick the relevant box on the information notice to notify the person whether he was being detained under an admission order or a renewal order, which was a breach of section 16 of the 2001 Act. The tribunal had affirmed the person's detention. In the High Court, Peart J. held (at p. 640) that the psychiatrist's oversight did not result in any unlawfulness of detention. By the time the case reached the Supreme Court, a second tribunal hearing had been held, which also affirmed the person's detention. While the Supreme Court found the detention to be lawful, Hardiman J. considered the question of the role of the tribunal in such a case in

more detail. Referring to the tribunal's recording of reasons for its decision, he said that this was an absolutely essential part of the tribunal's functions and neither the psychiatrist nor the tribunal could avoid or frustrate the review simply by the making of an inadequate or insufficient record of the exercise by them of the very considerable powers conferred upon them by statute (at p.644).

When the tribunal was filling in the form which recorded its decision, it ticked both the box which indicated that the provisions of sections 9, 10, 12, 14, 15 and 16 had been complied with and the box indicating that if there had been a failure to comply with any such provisions, the failure did not affect the substance of the order and did not cause an injustice. Hardiman J. expressed concern that, the psychiatrist having omitted to comply with section 16, the tribunal nevertheless certified that section 16 had been complied with when 'it manifestly had not' (at p. 649).

Hardiman J. made the following additional comments regarding the tribunal's decision:

> In my view it was illogical to reach both of these findings. If the first finding was correct, the second was otiose. If the proviso contained in section 18(1)(a)(ii) (that there has been a failure it did not affect the substance of the order or cause an injustice) requires to be invoked, as it did, then that situation will arise only if there has in fact been a failure to comply with some section of the Act of 2001. Moreover, I cannot see how it can be certified, as it was, that if there has been a failure to comply with any such provision then the failure did not affect the substance of the order and did not cause an injustice unless the precise failure in question is identified and its effect ascertained (at p. 649).

He also stated that the tribunal consists of three persons, a lay representative, a lawyer and a psychiatrist. It was important that, if it is found that a particular section of the 2001 Act has not been complied with, that fact should be ascertained, recorded, and its effect discussed. Only in this way can the mental health tribunal hope to contribute to a situation of total compliance with the statutory provisions (at p. 649).

Hardiman J's comments are an important expression, at Supreme Court level, of the importance of following procedures correctly. His strong emphasis on the need for tribunals to comply with the Act, and principles of natural justice, in full sends a significant signal to members of tribunals and guides them in the performance of their role.

The relevance of the ECHR and the CRPD

In the case-law on the Mental Health Act 2001 to date, there have only been a small number of references to ECHR case-law, and the courts have generally tended to distinguish the ECHR cases rather than apply them to the issues in the case (on the relevance of the ECHR to mental health law,

see Bartlett et al., 2006). A good example here is *E.H. v Clinical Director of St. Vincent's Hospital* [2009] IESC 46, where the person sought to challenge her classification as a voluntary patient from December 10 to 22, 2008, when she arguably lacked capacity to be "voluntary" and was not free to leave the hospital. Heavy reliance was placed in the legal argument on *H.L. v United Kingdom* (2005) 40 EHRR 32, also known as the 'Bournewood gap' case. However, the Supreme Court held that the *H.L.* case was not relevant as it could not bear on the applicant's detention subsequent to December 22, thus glossing over the fact that from December 10 to 22, the procedural safeguards of the Mental Health Act were not available to the person (for fuller discussion of *E.H.* see Whelan, 2009: 5-32-5-37 and Murray, 2010). Another case where ECHR case-law was distinguished is *P.L. v Clinical Director of St Patrick's University Hospital (No.2)* [2012] IEHC 547.

These decisions have sent a signal to Mental Health Tribunals that, in general, ECHR case-law is not very relevant to their deliberations. This is a matter of concern, as clearly the tribunals, as organs of the state, are required to perform their functions in a manner compatible with the State's obligations under the Convention (section 3 ECHR Act 2003; Kilkelly, 2009; De Londras and Kelly, 2010). This means that, in principle, decisions of the European Court of Human Rights in Strasbourg should be taken very seriously by the tribunals. No case concerning the 2001 Act has been brought to the Strasbourg court since the Act came into force. This is surprising, as if a person were to challenge the Act's provisions concerning voluntary status before the ECtHR, it is likely that such a challenge would succeed.

While the state has not yet ratified the Convention on the Rights of Persons with Disabilities (CRPD),[8] the European Court of Human Rights has held that the CRPD may be used as an aid to interpreting the ECHR (*Glor v Switzerland*, Application No. 13444/04, Judgment 30 April 2009; *Stanev v Bulgaria*, (2012) 55 EHRR 22). Furthermore, Mac Menamin J. held in *M.X. v Health Service Executive* [2012] IEHC 491 that the CRPD is a helpful reference point in interpreting constitutional rights. It will be interesting to see, as awareness of the CRPD grows, and as the state moves to its ultimate ratification, whether it will have an impact on the courts' approach to issues of interpretation of the Mental Health Act. For example, the courts may have difficulty in reconciling the prohibition on

[8] For consideration of the relationship between the CRPD and mental health law, see for example Doyle (2010), Fennell and Khaliq (2011), Bartlett (2012), Morrissey (2012) and Szmukler et al. (2014).

deprivations of liberty based on disability in Article 14 of the CRPD with the right to detain 'persons of unsound mind' under Article 5 of the ECHR.

Conclusion

The decisions of the courts regarding Mental Health Tribunals have been affected to a great extent by the limitations of the application under Article 40 as a remedy. In applications under Article 40, the courts will not, in general, find that the detention is unlawful if there have been 'mere technical defects' in the process. Judicial Review is a more flexible remedy, but most of the applications to date have been brought under Article 40 instead. Lawyers' preference for applications under Article 40 appears to relate to its relatively speedy availability as a remedy, and the possible easier availability of free legal aid for such a case. The courts' reluctance to find detention unlawful is also informed by their paternalistic interpretation of the 'best interests' principle. The *E.H.* case, in requiring legal representatives to consider the person's best interests, has had a chilling effect on litigation.

The courts have not been consistent in their interpretation of the power of the MHTs, under section 18 of the Mental Health Act, to waive procedural irregularities in the process. Some cases suggest that this power should only be used to waive minor irregularities; others suggest that tribunals may 'cure' more significant procedural breaches. In some cases, tribunals have waived procedural irregularities regarding sections which they are not even empowered to consider. More recently, it has been held in the *P.D.* case that if the current order justifying detention is bad on its face, section 18 does not even 'come into play' at all. It may be that a statutory amendment is required to clarify the meaning of section 18.

There have been very few references to the ECHR or the CRPD in the case-law. When the ECHR has been referred to, the courts tend to distinguish the relevant cases so that they are held not to apply. This is an issue of concern as tribunals may take this as a signal that they can conduct their reviews without regard to ECHR case-law when in fact they are statutorily obliged to do so under the ECHR Act 2003.

On the whole, the courts have tended to give very wide latitude to the tribunals in their decision-making, when closer supervision seems warranted. While the Mental Health Act heralded a new era of rights-based mental health law in many respects and was intended to ensure compliance with international obligations, the Irish courts have not embraced this new era and have preferred to hark

back to paternalistic reasoning from the 1940s. Further legislative change may assist in re-orientating the courts' perspective more to the rights-based approach, although they may continue to refuse to change what appears to be a deeply entrenched approach even if required to do so by new legislation.

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