



THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number: [2022] IECA 105
Court of Appeal Record Number: 2021/196
High Court Record Number: 2021 No. 960 SS

**Birmingham P.
Kennedy J.
Ni Raifeartaigh J.**

BETWEEN/

B

APPELLANT

- AND -

CLINICAL DIRECTOR OF AN APPROVED CENTRE

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 5th day of May, 2022

1. This is an appeal from a High Court decision on an enquiry pursuant to Article 40.4.2 of the Constitution into the legality of the appellant's detention at an approved centre pursuant to the Mental Health Act 2001. At the time of the application to the High Court, the appellant was detained in the approved centre, although he has since been released. Apart from a question of mootness which has been raised by the respondent, the case raises an issue of statutory interpretation concerning extensions of time made by a mental health tribunal pursuant to s.18(4) of the Act.

Background

2. It is not necessary to give any detailed description of the facts giving rise to the case, which are in any event set out in further detail in the judgment of the trial judge. It is sufficient to say that the appellant's admission to the approved centre arose initially from events on the 26 May 2021 after the Gardaí were called to the family home of the appellant and formed the belief that he was a risk to his mother and were not satisfied to leave him in the house with her. Events culminated in an admission order being made in respect of the appellant by a consultant psychiatrist on the same date pursuant to s.14 of the Mental Health Act 2001, and no issue arises concerning the lawfulness of any step taken prior to the making of the admission order or the admission order itself.

3. An application was made for a review and a mental health tribunal convened on the 11 June 2021 to consider and review the admission order made on the 26 May 2021. It decided that because there was a conflict in the evidence which required witness evidence from the Gardaí, it should exercise its powers pursuant to s.18(4) of the 2001 Act to extend by 14 days the time within which it was required to make a decision as to whether to affirm or revoke the admission order, and adjourned the hearing to enable the necessary witness(es) to attend.

4. On the 23 June 2021 the tribunal reconvened and heard evidence and submissions. It made a decision to affirm the admission order. It may be noted that the tribunal decision expresses the view that the appellant "is suffering from a mental disorder" within the meaning of the legislation in respect of which he continued to remain symptomatic in the form of ongoing delusional persecutory beliefs. It said that his insight and judgment "remain impaired to such an extent that ongoing treatment as an involuntary patient is necessary".

The tribunal said that the treatment being given to the appellant had benefited him to date and that its continuation would be likely to benefit or alleviate his condition to a material extent. It said that given his lack of insight and non-acceptance of the need for treatment, it would not be possible to treat him in a less restrictive manner outside the hospital setting. It was also accepted that there was a risk of non-compliance leading to a serious deterioration in his condition. I observe in passing that it is clear from these comments that the tribunal was looking at his condition not merely at the time of admission but at the time of its review.

5. On the 28 June 2021, five days later, the consultant psychiatrist signed a renewal order extending the detention for a further period, to end on the 27 September 2021.

6. The central submission made on behalf of the appellant is that the renewal order was made by the consultant psychiatrist *after* the lawful period of detention had expired. He contends that his lawful detention expired either (a) 14 days from the date of the tribunal's decision to extend (here, as the decision to extend was made on 11 June, 14 days later would come out at 25 June); or (b) on the date of the tribunal's decision (the 23 June). Since the renewal order was made on the 28 June, this was, he submits, *after* the lawful period of detention had expired, whether that is option (a) or (b). The respondent contends that the 14 days referred to in s.18(4) is added on to the 21 days following the date of admission, which in this case is a total of 35 days from the 26 May, so that the date of the renewal order falls *before* the expiry of lawful detention.

Relevant provisions of the Mental Health Act 2001

7. The provisions with which we are concerned in this judgment fall within Part 2 of the 2001 Act which is concerned with involuntary admissions to approved centres. S.14 deals with admission orders:-

“(1) Where a recommendation in relation to a person the subject of an application is received by the clinical director of an approved centre, a consultant psychiatrist on the staff of the approved centre shall, as soon as may be, carry out an examination of the person and shall thereupon either—

(a) if he or she is satisfied that the person is suffering from a mental disorder, make an order to be known as an involuntary admission order and referred to in this Act as “an admission order” in a form specified by the Commission for the reception, detention and treatment of the person and a person to whom an admission order relates is referred to in this Act as “a patient”, or

(b) if he or she is not so satisfied, refuse to make such order.

...”

8. S.15 provides -

“(1) An admission order shall authorise the reception, detention and treatment of the patient concerned and shall remain in force for a period of 21 days from the date of the making of the order and, subject to *subsection (2)* and *section 18(4)*, shall then expire.

(2) The period referred to in *subsection (1)* may be extended by order (to be known as and in this Act referred to as “a renewal order”) made by the consultant psychiatrist responsible for the care and treatment of the patient concerned for a further period not exceeding 3 months.

(3) The period referred to in *subsection (1)* may be further extended by order made by the consultant psychiatrist concerned for a period not exceeding 6 months beginning on the expiration of the renewal order made by the psychiatrist under *subsection (2)* and thereafter may be further extended by order made by the psychiatrist for periods

each of which does not exceed 12 months (each of which orders is also referred to in this Act as “a renewal order”).

(4) The period referred to in *subsection (1)* shall not be extended under *subsection (2)* or *(3)* unless the consultant psychiatrist concerned has not more than one week before the making of the order concerned examined the patient concerned and certified in a form specified by the Commission that the patient continues to suffer from a mental disorder.

...”

9. S.18 deals with the review of an admission order or a renewal order by a mental health tribunal and provides, in relevant part as follows:-

“(1) 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.

(2) A decision under *subsection (1)* shall be made as soon as may be but not later than 21 days after the making of the admission order concerned or, as the case may be, the renewal order concerned.

...

(4) The period referred to in *subsection (2)* may be extended by order by the tribunal concerned (either of its own motion or at the request of the patient concerned) for a further period of 14 days and thereafter may be further extended by it by order for a period of 14 days on the application of the patient if the tribunal is satisfied that it is in the interest of the patient and the relevant admission order, or as the case may be, renewal order shall continue in force until the date of the expiration of the order made under this subsection.

...”

10. S.28 places an obligation on the treating psychiatrist to discharge the patient if and when he or she is of the opinion that the patient is no longer suffering from a mental disorder:-

“ (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.”

11. S.28(3) provides also for certain notification requirements upon discharge under that section:-

“ 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.”

12. S.28(5) envisages that any review of the admission or renewal order that has been commenced may, at the election of the patient, proceed to conclusion, even if the patient has been discharged:-

“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.”

The judgment of the High Court

13. By Order dated the 19 July 2021, the High Court (Barr J.) stated that it was satisfied that the applicant was being detained in accordance with law on the 9 July 2021 (the date of the High Court hearing) and declined to direct his release pursuant to Article 40.4 of the Constitution. The judgment indicates that the enquiry was heard by the court on the 9 July 2021 but that by agreement the court was permitted a number of days to consider its judgment.

14. Barr J. noted that the key dates were the 26 May 2021 (the date of the admission order), the 11 June 2021 (the date on which the tribunal extended the period by 14 days), the 23 June 2021 (the date of the tribunal hearing and affirmation of the admission order), and the 28 June 2021 (the date of the renewal order by the consultant psychiatrist). He noted that the applicant submitted that he had not been in lawful detention after the 23 June 2021 or on the date when the psychiatrist purported to make the renewal order on the 28 June 2021.

15. The trial judge set out a description of the facts in some further detail than has been described above. He went on to deal with the relevant statutory provisions, noting that a

number of provisions of the 2001 Act had been amended to deal with the difficulties caused by the Covid-19 pandemic but that these amendments were not of relevance to the case.

16. The trial judge observed that the appellant had submitted in the first instance that the issue in the case had already been determined by the High Court in *J.B. v. The Director of the Central Mental Hospital & Anor.* [2008] 3 IR 61. He also noted that the appellant submitted that, once a tribunal exercised the power to extend, that 14-day period operated from the date on which the extension order had been made and expired 14 days later, which in this case was the 25 June 2021, from which date onwards the appellant was in unlawful detention. The appellant had also submitted, in the alternative, that if the extension operated from the end of the 21-day period, it expired on the making of the decision of the tribunal on the 23 June 2021. Otherwise, the appellant submitted, the appellant would have to be kept in detention on the basis of an extended period, the balance of which was not required by the tribunal for the purpose of reaching its decision. Such detention would not be based on the opinion of the treating doctor because the admission order would have expired, but on foot of an order made by the tribunal in circumstances where it has already made its decision, and would therefore be unlawful. It was submitted that the psychiatrist ought to have made a renewal order at any time prior to the time or on the date at which the tribunal had reached its decision in relation to the admission order. There was nothing to prevent the psychiatrist from making the renewal order at any time prior to the tribunal reaching its decision.

17. The trial judge noted the respondent's submission that the *J.B.* case was not binding on the court, applying the principles in *David Hughes v. Worldport Communications Inc* [2005] IEHC 189 as applied in *Kadri v.. the Governor of Wheatfield Prison* [2012] IESC 27

and *A., S. & I. v. Minister for Justice and Equality* [2020] IESC 70. It was submitted that it was not clear that the arguments raised in the present case had been raised before the court in the *J.B.* case; that it was not clear how the judge in the *J.B.* had reached the conclusion he did; and that the decision in *J.B.* was an *ex tempore* one given on the same day as the enquiry held by the court.

18. The trial judge noted that the respondent submitted that the wording in s.18(4) was entirely clear, namely that time was extended from the end of the 21-day period and had the effect of extending the life of the admission order (or renewal order if that were the case) for that period. It was suggested that the appellant's argument, if correct, would mean that periods of extended detention would vary from case to case, whereas the respondent's interpretation would lead to a clear, transparent and consistent scheme for reviewing such orders. In relation to the alternative submission, namely that the validity of the detention lasted only for so long as was actually needed by the tribunal to reach its decision, it was submitted that this was neither logical nor in accordance with the wording of the section itself.

19. He noted that the respondent took the position that if the tribunal had revoked the admission order, the patient would have to be immediately discharged and had never argued that the patient could continue to be detained lawfully until the end of the extended period if that eventuality arose. This was a hypothetical case raised in argument by the appellant, but it did not arise on the facts of this case and it was not the respondent's position that this is what would occur in that eventuality.

20. The trial judge referred in the first instance to the decision of *R.T. v. Director of the Central Mental Hospital* [1995] 2 IR 65, in which Costello P. discussed the reasons for depriving people suffering from mental disorder of their liberty, but also emphasised that the State's duty to protect the citizens' rights "*becomes more exacting in the case of weak and vulnerable citizens, such as those suffering from mental disorder*" and that this constitutional imperative required the Oireachtas to be "*particularly astute when depriving persons suffering from mental disorder of their liberty and that it should ensure that such legislation should contain adequate safeguards against abuse and error in the interests of those whose welfare the legislation is designed to support*".

21. The trial judge also referred to *A.M. v. Kennedy & Ors* [2013] IEHC 55, where Peart J. made it clear that the concept of "the best interests of the patient" could not be used to justify what would otherwise be an unlawful detention, as such an approach would "*nullify the very purpose of inserting safeguards in the statutory procedures put in place*". He also referred to *S.M. v. The Mental Health Commissioner* [2008] IEHC 441, where McMahon J. drew attention to the fact that what was at stake was the liberty of the individual and that statutory provisions which attempt to detain a person and restrict his liberty must be narrowly construed. Barr J. accepted that this was the general legal backdrop against which the court should determine the issues in the case.

22. Barr J. indicated that he proposed to depart from the judgment in *J.B.* for a number of reasons:

- 1) It was not clear that the arguments now being put forward had been advanced or considered by the court in the *J.B.* case;
- 2) The reason the court adopted the interpretation it did was not clear;

- 3) The conclusion reached was not supported by ordinary and natural meaning of the words in the section; and,
- 4) It was of some significance that the decision was given on an *ex tempore* basis on the same day as the enquiry was held into the legality of the applicant's detention. He added that the decision was "now of some antiquity".

23. Barr J. went on to express his view that the correct interpretation of s.18(4) was that the 14-day extension operates from the end of the 21-day period within which the tribunal was allowed to consider the order permitting the detention of the patient. This was in accordance with the words used in the section, and it was also sensible and in accordance with the general scheme provided for in the Act. He said that when it became apparent that further witnesses would be necessary, it would not be known when those witnesses would be available. An extension of 14 days from the period of 21 days made sense, rather than the extended period operating from the date on which the extension order was made. In the latter situation, this could result in only a very minimal extension of the period. He gave the example of a situation where the extension order was made on Day 9, which would give the tribunal only two extra days within which to consider the matter. The tribunal may not have known when the relevant witnesses had become available. It was entirely reasonable that the 14-day period should commence at the expiry of the initial 21-day period. He was also satisfied that the combined wording of ss.15 and 18 made it absolutely clear that the extension of the period was for 14 days on top of the 21 days that was allowed for the tribunal to reach its decision on the validity of the admission order. This meant that the renewal order in the present case was not made out of time.

24. He rejected the argument to the effect that the 14-day period could not render the detention lawful for any period after the tribunal had reached its decision. He said that the tribunal could extend the time for its deliberations by 14 days and that this had the effect of extending a life of the admission order (or renewal order, whichever was the case). The wording of s.18(4) “could not be clearer”. Those words had the effect of extending the detention order made by the consultant psychiatrist. He noted that the respondent had accepted that if a revocation order was made by the tribunal, the patient would have to be discharged and there was no question of the person being retained in detention after the order was revoked. He also said that the proposition put forward by the applicant was untenable because any revocation order made by the tribunal would trump the original admission order and would bring to an end the lawful basis for the patient’s continued detention.

25. Barr J. also said that the argument of the applicant appeared to lose sight of a key point, namely that any time a consultant psychiatrist comes to the view that a person is no longer suffering from a mental disorder or no longer requires in-patient treatment, there is a statutory obligation to discharge the patient from in-patient treatment. Therefore, there was in reality no possibility of the patient being detained without the sanction of the treating psychiatrist, during the period after a decision to affirm the admission order had been made, but prior to the expiry of the extended period. Thus the mischief suggested by the appellant did not in his view arise as a possibility. Barr J. was satisfied that the interpretation advocated by the respondent and favoured by him was clear, transparent and did not lead to any infringement of a patient’s rights.

26. Accordingly, Barr J. concluded that the correct interpretation of the relevant provisions was that the period of the admission order was extended by 14 days from the

expiry of the initial 21-day period. This meant in the present case that the applicant was in lawful detention when the renewal order was made on the 28 June 2021.

Mootness: Submissions and Decision

27. By the time the appeal was heard, the respondent was no longer in detention. In its written submissions (although not raised in response to the notice of appeal), the respondent submitted that the appeal was moot and referred to the decision in *M.C. v. Clinical Director of the Central Medical Hospital* [2020] IESC 28. In that case the Supreme Court had, in turn, summarised the principles arising from *Lofinmakin and Ors. V. Minister for Justice, Equality and Law Reform and Ors.* [2013] 4 IR 274.

28. The appellant submitted that this was one of those situations where it might be appropriate to relax the mootness doctrine because the issue was capable of arising again and yet might evade judicial review and oversight by reason of the short time periods involved. It was also submitted that the issue, being one of statutory interpretation relating to the lawfulness of involuntary detention under the mental health legislation, was of systemic importance and relevance. The appellant referred to *Farrell (aka Regan) v. Governor of St. Patrick's Institution* [2014] 1 IR 699 where these two points were mentioned by Denham C.J. as reasons why a moot appeal might nonetheless be heard by a court. It was submitted that the proper interpretation of s.18(4) had the potential to affect many involuntary detentions, and indeed could become relevant for the appellant himself once more sometime in the future. It was also submitted that there were now two conflicting High Court decisions on how the statutory provisions operate and that the Court should clarify which of those interpretations was correct.

29. At the appeal hearing, counsel on behalf of the respondent submitted that the case was not of systemic importance or of such significance as was being urged on the court by the appellant. It was submitted that this was precisely because of the very interpretation that was being urged by the respondent on the merits, namely that no person would be detained if there was not a continuing basis for doing so, grounded upon the clinical opinion of a psychiatrist that the person continued to require detention under the criteria set down by the Act.

30. The appellant, in reply at the oral hearing, pointed out that he had in fact been released between the time the case was heard and the delivery of judgment by the High Court, and that the respondent had consented to the judgment of the High Court being delivered nonetheless.

31. In my view, the latter point is particularly important. In circumstances where one party has consented to the trial judge delivering judgment notwithstanding that the matter has become moot since the hearing of the case, the other side should in general be entitled to appeal in the event that the outcome is adverse to him or her. There is no doubt that the respondent would have asked for the Court to decide the case on the merits if the decision of the High Court had gone the other way. It is only fair that the appellant should obtain a decision on the merits from this Court in those circumstances. Further, it is a case where the interpretation of the relevant statutory provisions is of some general importance. Accordingly, we will proceed to hear the appeal in respect of the High Court judgment.

The interpretation of s.18(4): the submissions of the parties

32. The appellant, naturally enough, takes no issue with the trial judge's setting of the legal backdrop as that established in the cases of *R.T.*, *A.M.* and *S.M.*, described earlier in this judgment. The appellant stands over the decision in *J.B.* concerning the interpretation of s.18(4), saying that, in light of the general approach described in the earlier cases, the subsection should be interpreted in the manner most in keeping with the proportionate use of the power to extend time, and the period of extension should therefore be construed as the minimal period of time required for the tribunal to do its job. It is submitted that this should not pose any practical problems because if the tribunal affirms the decision under review on the adjourned date, the hospital can simply organise to have in place a renewal order which could extend the detention. The alternative interpretation, he submits, is that a person could have his period of detention extended for a significant period of time where such detention is not required either by the tribunal or the consultant psychiatrist for any purpose identified in the Act. He submits that the *J.B.* interpretation is wholly in keeping with the principle that the right to liberty under the Constitution should be interfered with as little as possible.

33. In response to the respondent's point that if the tribunal were to revoke the admission order, the patient would be discharged immediately, the appellant says: "the fact that the respondent may have administrative systems to ensure that somebody is not kept in detention longer than the period for which they should be detained on medical grounds does not speak to the proper interpretation to be given to the section".

34. The appellant maintains that as the trial judge's interpretation means that 14 days (and indeed perhaps 28 days, if a tribunal further adjourns) is "tagged on to" either the 21 days of an admission order or a 3-month or 6-month renewal order, it would follow that there could be significant additional periods of time of detention which are not sanctioned by a

consultant psychiatrist following a personal examination. Various examples are given. One is where a consultant psychiatrist had decided to make a renewal order for four weeks only (thus having *rejected* the need to sign a renewal order for a longer period). It is said that for the tribunal to “tag on” 14 days in such circumstances would be to do precisely what the consultant psychiatrist had decided not to do, and for no good medical/psychiatric reason. Other examples are given to show that the decision of the tribunal might fall well before the expiration of the 14-day “tagged on” period, and yet the person’s detention would continue to be authorised, but again (it is argued) for no good medical/psychiatric reason.

35. The appellant also submits that if any ambiguity arises then the principle favouring the liberty of the individual falls to be applied, citing *Mullin v. Harnett* [1998] 2 ILRM 304 where O’Higgins J. referred to a passage from *Bennion on Statutory Interpretation* (2nd edn) to the effect that the principle against doubtful penalisation comes into play when an enactment requires the infliction of a detriment. The appellant submits that with the detriment in the instant case being the deprivation of liberty, the application of this principle must be correspondingly powerful.

36. In short, the appellant submits that the *J.B.* interpretation does no more than require the detention to continue for the least amount of time required by the tribunal to do its work. If the decision of the tribunal is to affirm, those detaining the patient should ensure that when the admission order period expires, there is in place a renewal order signed by a psychiatrist.

37. At the oral hearing, the appellant submitted that there were, in effect, two different timelines under the 2001 Act. The first could be termed a “clinical timeline” (or “detention timeline”), which was the period for which a person was clinically indicated on psychiatric

grounds to require hospitalisation and during which involuntary detention was lawful, while the other was merely an administrative timeline concerning the time period within which the tribunal would make its decision. He submitted that the two timelines should not be conflated. He again relied on various hypothetical examples to show that a person could find himself in detention beyond the date of the tribunal's decision notwithstanding that there was no clinical basis for his detention.

38. Counsel for the appellant drew attention to s.28(5), which explicitly envisages that a patient may ask for a review by a tribunal to be completed even if he has already been discharged. This showed that it was not necessary for a person to be in detention for a tribunal to proceed, and disposed, he submitted, of any suggestion that an extension of deadline for hearing by the tribunal necessarily meant an extension of the 'detention' deadline.

39. Counsel for the appellant also drew attention to the notification requirements within the legislation. There were statutory requirements that a detainee be notified of any renewal order made a consultant psychiatrist, and any tribunal decision on the need for detention; but there was no equivalent notification requirement in respect of a tribunal decision to extend the time for its decision by 14 days. This absence was, he submitted, very telling. Even if notification was in fact given of such decisions as a matter of practice, the absence of any statutory requirement for notification of a tribunal decision to extend time for decision was important and should weigh in the balance when interpreting the statute. The absence of any such notification supported the view that this particular extension of time was not intended to impact on the detention timeline.

40. For its part, the respondent makes clear that its central submission is that the period referred to in s.18(4) clearly and on its face refers back to the period in s.18(2), which is the 21-day period from the making of the admission order. Therefore, what is added is a further period of 14 days on top of the 21-day period, amounting to a total of 35 days. It maintains that this is the plain and manifest meaning of the words used in the statute.

41. The respondent says that the appellant seeks to advance a number of hypothetical scenarios which are not accepted by the respondent as capable of arising in reality having regard to the overall framework of the Act, which in particular requires that a person be discharged once the treating psychiatrist is of the opinion that the person is no longer suffering from a mental disorder. The respondent says that it does not suggest that this period continues to authorise detention, even if the tribunal decides to revoke the admission order. No such interpretation was ever supported by the respondent in any of the previous cases or in the High Court in the present case. Further, such a situation does not arise in the context of these proceedings.

42. The respondent points out that an admission order or renewal order can be revoked at any time during the course of its temporal life span if the medical evidence so determines or a decision is made to revoke by a tribunal. Such a decision to revoke has immediate effect regardless of whether the admission or renewal order is at the beginning, middle or end of its temporal life span. In this regard the respondent draws attention to the language of s.15(1) of the Act, which it says is identical to that in s.18(4). The phrase “*shall remain in force*” does not mandate that an admission order must run its temporal course before a revocation order made during the same period becomes effective. This would be an incorrect interpretation of both s.15(1) and s.18(4) of the Act.

43. The respondent points out that s.18(4), which does permit of a second extension such that there could be an extension of a total of 28 days, also contains specific safeguards to avoid an unregulated and unsupervised period of extension of an admission or renewal order. The second period of extension referred to is permitted on the application of the patient only and if the tribunal is satisfied that it is in the interest of the patient. Thus, any such second period must be (i) at the request of the patient; and (ii) in circumstances where the tribunal is satisfied that it is in the interest of the patient.

44. At the oral hearing, counsel on behalf of the respondent again emphasised that their position was that the plain and ordinary meaning of the words in s.18(4) was that the period referred to therein was the 21 days from the making of the admission order. It was said that much of the appellant's case was based upon hypothetical examples which had no application to his own case. Counsel emphasised the overall structure and framework of the Act which provided, among other things, at s.4 for the "*best interests of the person*" to the forefront in all decision making, as well the s.28 obligation for the person to be discharged whenever a consultant psychiatrist was of the opinion that the person no longer required hospitalisation.

45. Counsel for the respondent rejected the concept of a bifurcated set of timelines, one governing the detention and the other governing the jurisdiction of the tribunal to make a decision. He submitted that this conceptualisation implied that the tribunal was not keeping the person's medical condition and need for hospitalisation under review, which was incorrect. Reference was made to the phrase "is suffering" (in the present tense) within s.18. Reference was also made to the precise language and content of the tribunal's actual decision

in the appellant's case, the wording of which made it clear that it was considering the appellant's current, as well as past, condition. Again, it was emphasised that the respondent's position was that any decision by a tribunal to revoke would bring the period of detention to an end and a tribunal decision to extend could not override that.

46. In reply, counsel for the appellant made the point that under s.28 the obligation to discharge relates only to a patient who is in detention pursuant to an admission or renewal order, and that it does not apply to a tribunal order.

The interpretation of s.18(4): Decision

47. In my view, the correct interpretation of s.18(4) is such that in the present case, the 14-day extension of time ordered by the tribunal operated to extend the period of 21 days from the date of the admission order to a total period of 35 days from that date, which was 35 days from the 26 May 2021. This period ended on or about the 30 June. Therefore, the renewal order made on the 28 June 2021 was made while the appellant was still in lawful detention.

48. In my view, this is because of the plain wording of s.15(1) and s.18(4). The first of these, s.15(1), provides that "*An admission order shall authorise the reception, detention and treatment of the patient concerned and shall remain in force for a period of 21 days from the date of the making of the order and, subject to subsection (2) and section 18(4), shall then expire.*" S.18 deals with the decision of tribunals and subsection (4) says: "*The period referred to in subsection (2) may be extended by order by the tribunal concerned (either of its own motion or at the request of the patient concerned) for a further period of 14 days*". What is the period referred to in subsection (2)? The latter subsection says: "*A decision under subsection (1) shall be made as soon as may be but not later than 21 days*

after the making of the admission order concerned or, as the case may be, the renewal order concerned.” A decision under subsection (1) is a decision to affirm or revoke an admission order (or renewal order). To my mind, a plain reading of these provisions means simply this; in the case of a tribunal review of an admission order, the tribunal must make its decision to revoke or affirm within 21 days of the date of the making of the admission order *or* “21 plus 14” days of the date of the making order if the tribunal has extended that 21 day period by 14 days.

49. Confining ourselves to admission orders only, the following may help to illustrate my understanding of the provisions. If the tribunal has extended the 21-day period by 14 days, and its decision ultimately is to *affirm* the admission order, the lawful period of detention expires 35 days after the date of the admission order. If the person is to continue being detained after those 35 days, there must be an appropriate renewal order by a consultant psychiatrist in place on or from the last day of that 35 days. On the other hand, if the tribunal has extended the 21-day period by 14 days, and its decision is ultimately to *revoke* the admission order, the lawful period of detention expires upon the making of that decision to revoke and not at the end of the total 35-day period. The same would happen if there had been no 14-day extension by the tribunal and it had made its decision to revoke within the 21 days provided for by s.15(1): the person would have to be discharged upon the making of the tribunal decision even if the decision was made during or within the 21-day period. For example, if we take the date of admission as Day 1, and imagine a situation where a tribunal decision to revoke is delivered on Day 18, the latter is the date on which lawful detention comes to an end, and not Day 21. Similarly, if we take the day of admission as Day 1, and the tribunal decision to extend is delivered on Day 18, and the tribunal decision to revoke on Day 27, the latter is the date on which lawful detention come to an end, and not

Day 35. However, to vary the last example, if the tribunal decision is to affirm the admission order, then the lawful period of detention ends on Day 35.

50. My view is based on the plain wording of the provisions, in particular the wording of s.18(4) and its reference to an extension of the period referred to in subsection (2) which in turn is the 21-day period (from the date of the admission order or, as the case may be, a renewal order). There is not in my opinion any ambiguity or uncertainty in the wording of the relevant provisions such that it is appropriate to rely upon the principle of doubtful penalisation or anything akin to it. As McMahon J. said in his judgment in *S.M. v. Mental Health Commission*, when discussing the purposive approach to legislative interpretation: -

“I have little difficulty in accepting the appropriateness of using the purposive interpretive technique, perhaps more generously in the context of legislation which is paternal in nature, but where the rights and protection of the patient are specifically dealt with in the legislation itself, the occasions where this paternal approach comes into play are limited. The first obligation of the court in such a situation is to interpret the section and give effect to the plain meaning of the provision when it is clear. The paternalistic approach is not intended to rewrite the legislation.”

Similarly, the principle of doubtful penalisation should not be applied to alter the clear and obvious meaning of words if this is apparent from those words on their face.

51. One of the arguments advanced by the appellant was that the obligation of the consultant psychiatrist under s.28 was confined to a situation where a person was detained on foot of an admission or renewal order. Therefore, he argued, the obligation did not operate to protect or provide a safeguard for a patient who was the subject of an extension order

pending a review decision of a tribunal. This would be significant if it were a correct interpretation of s.28, but I am not persuaded this it is. My interpretation is that an extension order made by a tribunal merely serves to prolong the life-span of the admission order (or renewal order, as the case may be), but does not supplant or replace the admission (or renewal) order itself. The admission or renewal order continues to exist, albeit with a longer time-span, and the admission or renewal order continues to constitute the basis of the detention. Therefore, the s.28 obligation continues to apply to the admission order during its extended temporal life-span. In this regard, I think the relationship between the admission order and a tribunal extension order is analogous to the relationship between an admission order and a renewal order, which was described in *I.F. v. Mental Health Tribunal and Ors.* [2019] IESC 44 in the following terms by Dunne J: “*Thus, the original admission order is thereby extended. It is not that it ceases to be valid. It is not that it ceases to be expired. It is extended*”. In my view, similarly, where a tribunal extends the lifespan of an admission order by 14 days, it is still the admission order which forms the basis for the lawful detention; but its lifespan has been extended. This being so, it seems to me that the obligation s.28 continues to apply.

52. S.28 therefore contains a significant protection for a detainee such that if the consultant psychiatrist considered that the person should be discharged even while review is pending and after a 14-day extension of time has been ordered, then the person should be discharged. As McMahon J. said in *S.M.* :

“Section 28 gives the treating consultant psychiatrist power at any time to release the patient when he/she concludes that the patient is no longer suffering from a mental illness. It is clearly a power which, when it operates, trumps the existing admission or

renewal orders. It operates without reference to, and is independent of, s. 15. It is important to note, however, that it is a section that only operates for the benefit of the patient: it grants the treating psychiatrist the power to revoke existing renewal orders and discharge the patient.”

It is also of interest that McMahon J. in the *S.M.* case specifically linked the “best interests of the patient” principle in s.4 with the obligation to discharge in s.28(4): -

“By placing the best interests of the patient (s. 4) at the centre of the decision-making process and by imposing a statutory obligation on the treating consultant to revoke detention orders when the patient no longer suffers from a mental illness (s. 28), the Act of 2001 now ensures that due respect will be given to the patient's rights, including his right to dignity and bodily integrity. The procedural scheme set up in Part II of the Act spells out in greater detail how these values are to be respected in relation to admission orders and renewal orders. It is important to bear in mind the structure of the Act and its history when interpreting the provisions in Part II...”

53. An example may illustrate my understanding of the interaction between s.18(4) and s.28. On Day 1, a person is detained pursuant to an admission order. She seeks a review and on Day 18, the tribunal grants a 14-day extension, and fixes Day 25 as the date for hearing and review decision. On Day 22, her treating consultant psychiatrist decides that she is no longer in need of hospitalisation and should be discharged. The obligation applies to the psychiatrist under s.28 and the latter must revoke the detention. Whether or not the tribunal review will take place depends on whether the detainee wishes this to happen or not, in

accordance with the provision of s.28(5). However, the patient must be released on Day 22, the date of the s.28 revocation decision.

54. Further, I do not accept the appellant's argument that it is a mere administrative practice that people who are the subject of a revocation decision by a tribunal are released, even when the 21 days (or the 21-plus-14 days, if there has been an extension) have not expired. In my view of the provisions, this is a requirement of the legislation and not a question of a mere administrative practice. This is because, as I have already said, an extension order made by a tribunal serves to prolong the lifespan of the admission order (or renewal order, as the case may be) but does not supplant or replace the admission (or renewal) order itself. Therefore, if the tribunal decides to revoke the admission order, there is no longer any order in existence justifying or authorising the detention.

55. Finally, I wish to address the appellant's argument in which he uses the example of a renewal order rather than an admission order, and hypothesises facts whereby the consultant psychiatrist has chosen as a specific period of time for the renewal order but the 14-day extension of the tribunal leads to (in his submission) an extra period of authorised detention which is not underpinned by clinical opinion that the person requires the detention. For example: on Day 1, an admission order is made; on Day 21 a renewal order is made for 10 days only; on Day 25 the tribunal authorises an extension of 14 days, the end-point of which is Day 45. The argument is to the effect that it cannot be correct that the person is lawfully detained after Day 31 because all that has been clinically indicated as appropriate for that person by the psychiatrist is hospitalisation/detention up to Day 31. The extra 14 days between Day 31 and 45, the argument runs, cannot amount to further days of authorised detention because there is no medical requirement (within the meaning of the Act) for such

detention, and there must always be a medical requirement if the detention is to be justified. This argument is in effect the same as that in respect of an admission order as distinct but the example of a renewal order which is specifically chosen to be of a shorter rather than a longer duration serves to emphasise the appellant's argument, because in the case of a renewal order, the period of detention is not an automatic 21-day statutory period, but one specifically chosen (whether a specific period of weeks or months) by the psychiatrist. By choosing a specific period, the psychiatrist is thereby choosing *not to* designate a longer period for the renewal order. However, again, I think this example, like all the others produced by the appellant, falls at the hurdle of s.28 and the obligation of the psychiatrist to discharge the person if the latter is considered no longer to require hospitalisation or suffer from a mental disorder within the meaning of the Act. If at any time between Day 31 and Day 45, the psychiatrist considers the person should be discharged, he or she has an obligation to discharge.

56. I have taken into account the appellant's argument concerning the notification requirements in the legislation, but I am of the view that it cannot lead to an interpretation of s.18(4) which is contrary to the plain meaning of the words in that sub-section.

57. In all of the circumstances, I am of the view that the plain meaning of s.18(4) is that a tribunal order extending the period for 14 days runs from the date of expiry of the admission order (or the renewal order, as the case may be). Importantly, the obligation in s.28 upon the psychiatrist to discharge in the circumstances therein described continues to apply and this provides an important safeguard for the patient against detention in circumstances where such detention is not clinically required, as the person would have to be discharged in accordance with that section even if the 14-day extension period had not expired but the psychiatrist had formed the view described in s.28(1). I would therefore uphold the decision

of the trial judge. It follows that insofar as the decision in *J.B.* does not accord with this interpretation of s.18(4), it should not be followed.

Conclusion

For the reasons set out above, I would dismiss the appeal.