THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 192
[2020 No. 459 J.R.]

BETWEEN

B

APPLICANT

AND
THE MENTAL HEALTH TRIBUNAL

RESPONDENT

JUDGMENT of Ms. Justice Creedon delivered on the 16th day of March, 2021;

Background

1. The Applicant is referred to only for the purposes of this judgment as B, to protect their identity. In this application for judicial review, the Applicant seeks *inter alia* an order of *Certiorari* quashing the decision of the Mental Health Tribunal (the tribunal) dated the 5th June 2020 which affirmed the Admission Order made on the 18th May 2020 (the Admission Order) which authorised the reception detention and treatment of the Applicant in the acute psychiatric unit of Tallaght University Hospital (the approved centre).

2. The Applicant further seeks a declaration that the tribunal misapplied s. 12 of the Mental Health Act 2001 (as amended) (the 2001 Act) when reviewing the validity of the Admission Order.

3. The Applicant, who has a history of mental health difficulties, was involuntarily detained on the 18th May 2020 pursuant to an Admission Order made under the terms of the 2001 Act. On that date, the Applicant was initially detained by Garda Elaine Markham of Tallaght Garda Station pursuant to s. 12 of the 2001 Act. Garda Markham ticked the box at the top of the prescribed Form 3 Application Form to indicate that the application was being made pursuant to s. 12 of the 2001 Act. In section 8 of the form recommending the involuntary admission of the Applicant, the reason noted by Garda Markham for the application was that she was *"concerned for mental health. Belief male is mentally unwell and in need of treatment".* She stated at section 9 of the form that the Applicant was observed "*In public in just a towel around his waist holding a lantern. Talking about wanting to be deported*". Garda Markham signed the Form 3 and indicated that she observed the person at 13:00hrs and she went on to sign Form 3 at 13:15hrs.

4. After being taken into custody on the 18th May 2020 the Applicant was examined by Dr. James Moloney, a general practitioner. In the Form 5 completed by Dr. Moloney he recommended that the Applicant be detained in the approved centre. Dr. Moloney formed the opinion that the Applicant was suffering from a mental disorder within the meaning of s. 3 (1)(b)(i) and (ii) of the 2001 Act, ticking the box on Form 5 which states: -

> *"Because of the severity of the illness disability or dementia the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of an appropriate treatment that could be given by such admission".*

Dr. Moloney described the Applicant's mental disorder as "*Thought disorganised. Delusional*". Dr. Moloney signed Form 5 recording the time of examination as 13:38hrs and the time of signing the form as 13:50hrs.

5. Later on the 18th May 2020, the Applicant was examined by Prof. Brendan Kelly, Consultant Psychiatrist at the approved centre. Following his assessment, Prof. Kelly approved the Admission Order by completing the prescribed Form 6, detaining the Applicant in the approved centre. Prof. Kelly concluded that the Applicant was continuing to suffer from a mental disorder within the meaning of s. 3(1)(b)(i) and (ii) of the 2001 Act. Prof. Kelly described the applicant's symptoms as "*Psychotic, delusional, thought disordered, very little insight"*. Prof. Kelly signed the Admission Order (Form 6) recording the time of examination as 15:30hrs and the time of completing the form as 15:50hrs.

6. On the 5th June 2020, the tribunal reviewed the Admission Order in accordance with s. 18 of the 2001 Act. A preliminary objection was made by the Applicant's solicitor that the Admission Order should not be affirmed because Garda Markham had failed to comply with s. 12 of the Act as there was no evidence to indicate that the Applicant was in danger of causing immediate and serious harm to himself or others. The Applicant's solicitor stated that the alleged non – compliance with s. 12 affected the substance of the Admission Order and caused an injustice to the Applicant. She alleged that there was a procedural flaw on the basis that Forms 5 and 6 recorded that the Applicant was suffering from a mental disorder within the meaning of the "need for treatment" grounds pursuant to s. 3(1)(b)(i) and (ii) rather than the "risk of harm" ground pursuant to s. 3(1)(a).

7. The tribunal noted the application but indicated that it would proceed to hear all the evidence and to rule on the application at the conclusion of the hearing. The Applicant's solicitor agreed to this approach. In its decision dated the 5th June 2020 the tribunal rejected the Applicant's submission that the requirements of s. 12 had not been met. The tribunal, having dealt with the procedural s. 12 objection, affirmed the Admission Order, concluding that the Applicant was suffering from a mental disorder within the meaning of s. 3 (1)(b)(i) and (ii). It is this decision of the tribunal of the 5th June 2020 which the Applicant seeks to impugn in the within proceedings.

8. On the 5th June 2020, Dr. McMonagle, Consultant Psychiatrist, authorised a Renewal Order to detain the Applicant for a period of up to three months. On the 12th June 2020, the Renewal Order was revoked and the Applicant was discharged. On the 13th July 2020 the Applicant was granted leave to bring this application.

9. The Applicant submitted that the issue for determination by this Court is whether the tribunal's treatment of the legal issue raised, in respect of compliance with s.12. was flawed with the consequence that *Certiorari* and/or a declaration should be granted regarding the decision of the Mental Health Tribunal of the 5th June 2020.

The legislative provisions

10. The relevant legislation is the Mental Health Act 2001 (as amended), hereinafter referred to as "the 2001 Act". The definition of mental disorder is set out in s. 3 of the Act which states as follows: -

"3. — (1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where—

(a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or

(b)(i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and

(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.

(2) In subsection (1)—

"mental illness" means a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons;

"severe dementia" means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression;

"significant intellectual disability" means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person".

11. "Best interests" is defined in s. 4 as follows: -

"4 .— (1) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made.

(2) Where it is proposed to make a recommendation or an admission order in respect of a person, or to administer treatment to a person, under this Act, the person shall, so far as is reasonably practicable, be notified of the proposal and be entitled to make representations in relation to it and before deciding the matter due consideration shall be given to any representations duly made under this subsection.

(3) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person) due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy.

12. The criteria for involuntary admission to approved centres is set out in s. 8 of the Act as follows: -

"8. — (1) A person may be involuntarily admitted to an approved centre pursuant to an application under section 9 or 12 and detained there on the grounds that he or she is suffering from a mental disorder.

(2) Nothing in subsection (1) shall be construed as authorising the involuntary admission of a person to an approved centre by reason only of the fact that the person—

(a) is suffering from a personality disorder,

(b) is socially deviant, or

(c) is addicted to drugs or intoxicants.

(3) The Commission shall, from time to time, issue guidelines for staff in approved centres in relation to the provisions of this section".

13. The making of a recommendation for involuntary admission is provided for under s. 10 of the Act as follows: -

"10. — (1) Where a registered medical practitioner is satisfied following an examination of the person the subject of the application that the person is suffering from a mental disorder, he or she shall make a recommendation (in this Act referred to as "a recommendation") in a form specified by the Commission that the person be involuntarily admitted to an approved centre (other than the Central Mental Hospital) specified by him or her in the recommendation.

(2) An examination of the person the subject of an application shall be carried out within 24 hours of the receipt of the application and the registered medical practitioner concerned shall inform the person of the purpose of the examination unless in his or her view the provision of such information might be prejudicial to the person's mental health, well-being or emotional condition.

(3) A registered medical practitioner shall, for the purposes of this section, be disqualified for making a recommendation in relation to a person the subject of an application

(a) if he or she has an interest in the payments (if any) to be made in respect of the care of the person in the approved centre concerned,

(b) if he or she is a member of the staff of the approved centre to which the person is to be admitted,

(c) if he or she is a spouse, a civil partner, or a relative of the person, or

(d) if he or she is the applicant.

(4) A recommendation under subsection (1) shall be sent by the registered medical practitioner concerned to the clinical director of the approved centre concerned and a copy of the recommendation shall be given to the applicant concerned.

(5) A recommendation under this section shall remain in force for a period of 7 days from the date of its making and shall then expire".

14. The powers of An Garda Síochána to take a person believed to be suffering from mental disorder into custody are provided for in s. 12 of the Act as follows: -

"12. — (1) Where a member of the Garda Síochána has reasonable grounds for believing that a person is suffering from a mental disorder and that because of the mental disorder there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons, the member may either alone or with any other members of the Garda Síochána—

(a) take the person into custody, and

(b) enter if need be by force any dwelling or other premises or any place if he or she has reasonable grounds for believing that the person is to be found there.

(2) Where a member of the Garda Síochána takes a person into custody under subsection (1), he or she or any other member of the Garda Síochána shall make an application forthwith in a form specified by the Commission to a registered medical practitioner for a recommendation.

(3) The provisions of sections 10 and 11 shall apply to an application under this section as they apply to an application under section 9 with any necessary modifications.

(4) If an application under this section is refused by the registered medical practitioner pursuant to the provisions of section 10, the person the subject of the application shall be released from custody immediately.

(5) Where, following an application under this section, a recommendation is made in relation to a person, a member of the Garda Síochána shall remove the person to the approved centre specified in the recommendation".

15. The referral of an Admission Order and Renewal Order to the Mental Health Tribunal is provided for in s. 17 of the 2001 Act, as amended by the Emergency Measures in the Public Interest (Covid 19) Act 2020. The relevant portions of s. 17 state as follows: -

"17. — (1) Following the receipt by the Commission of a copy of an admission order or a renewal order, the Commission shall, as soon as possible—

(a) refer the matter to a tribunal,

(b) assign a legal representative to represent the patient concerned unless he or she proposes to engage one,

(c) direct in writing (referred to in this section as "a direction") a member of the panel of consultant psychiatrists established under section 33 (3)(b) or a consultant psychiatrist, other than the consultant psychiatrist responsible for the care and treatment of the patient concerned to—

(i) (subject to subsection (6)) examine the patient concerned,
(ii) interview the consultant psychiatrist responsible for the care and treatment of the patient, and
(iii) review the records relating to the patient,

in order to determine in the interest of the patient whether the patient is suffering from a mental disorder and to report in writing within 14 days on the results of the examination, interview and review to the tribunal to which the matter has been referred and to provide a copy of the report to the legal representative of the patient.

(d) direct in writing the consultant psychiatrist responsible for the care and treatment of the patient concerned to give a report in writing to the tribunal to which the matter has been referred no earlier than the day before the date of the relevant sitting of the tribunal on his or her opinion as to whether the patient continues to suffer from a mental disorder and to give a copy of the report to the legal representative of the patient".

16. The review by the Mental Health Tribunal of Admission Orders and Renewal Orders is dealt with in s. 18 of the 2001 Act, the relevant provisions of which state as follows: -

"18. — (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".

And in subs. (3) it states: -

"(3) Before making a decision under subsection (1), a tribunal shall have regard to the relevant reports under section 17 (1)(c) and (d)".

Applicant's pleaded case

17. In his Statement of Grounds, the Applicant asserted *inter alia* as follows: -

18. That there was insufficient evidence based on the Garda member's observations as set out on the relevant application form of a reasonable belief or opinion as to any serious and immediate risk of the Applicant causing serious harm to either himself or others, that this affected the substance of the order and that consequently, the Order should be revoked.

19. The Applicant pleaded that a member of An Garda Síochána can also avail of s. 9 of the Act of 2001 to commence an involuntary admission process. The Applicant stated that this latter route does not require as a prerequisite the existence of the extreme circumstances of "*Serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons*".

20. The Applicant further asserted that a purported exercise of the s. 12 power is only lawful if it comes within the express terms of the provision and that given the effect of the provision's application, namely the deprivation of the constitutionally guaranteed right to personal liberty, a right also protected under Article 5 of the European Convention on Human Rights 1950 and the European Convention on Human Rights Act 2003, the terms of s. 12 must be construed strictly as against the party purporting to use them.

21. The Applicant further asserted that the use of the phrase "*serious likelihood*" envisages a standard of proof of a high level of probability one beyond the normal standard of proof in civil cases of being more likely to be true but below the standard required in a criminal case of beyond reasonable doubt. The Applicant asserted that for this high standard to be satisfied there must be available to be acted upon clear, cogent and compelling evidence capable of being safely acted upon and that same was lacking in the case the subject matter of this application.

22. The Applicant asserted that to arrive at its decision in respect of the triggering of s. 12, the tribunal acted solely on the terms of the Garda Form 3 and that there was no evidence upon which the tribunal could be satisfied that the relevant Garda had formed

the view that there were "*reasonable grounds for believing that a person was suffering from a mental disorder and that because of the mental disorder there was a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons".*

23. The Applicant further asserted that on the evidence at the tribunal as to the basis on which the Garda purported to invoke s. 12 to deprive the Applicant of his liberty, it was not open to the tribunal to draw the conclusions it did as recited in its decision. In this regard, the Applicant asserted that there was simply no evidence of a reasonable belief on the part of the Garda that there was any likelihood let alone "*serious likelihood*" of the Applicant causing immediate and serious harm to himself or others.

24. Moreover, the Applicant asserted that the tribunal erred in placing any reliance on the fact that after the arrest under s. 12, two further steps in the admission process had to take place, namely what is referred to as an examination by a medical practitioner and an examination by a consultant psychiatrist. The Applicant asserted that the Applicant's legal representative made submissions on s. 12 and the tribunal failed to vindicate the safeguards embedded into those provisions and give those safeguards life and real meaning. The Applicant asserted that regrettably the tribunal misconstrued the provisions of s. 12 applied an incorrect test, and/or deemed the test satisfied on inadequate evidence which could support findings that there was compliance with s. 12.

25. In his pleaded case at para. (xix) of his Statement of Grounds, the Applicant asserted that the tribunal, in its review of the admission, conflated its role with that of a responsible consultant psychiatrist to the prejudice and detriment of the Applicant, but at the hearing the Applicant confirmed that he was not pursuing this ground.

Respondent's pleaded case

26. In its Statement of Opposition, the Respondent, in the usual way denies all assertions in the Applicant's Statement of Grounds and stated *inter alia* that it relied on the facts contained in the affidavit of Darina Conlon, sworn on the 3rd of September 2020 as chair of the tribunal.

27. It further stated that at all times, it acted solely within its jurisdiction in its decision to affirm the Admission Order and that the tribunal was within jurisdiction and/or was correct in law in deciding that the provisions of s. 12 of the Mental Health Acts 2001 – 2020 had in all of the circumstances been complied with.

28. The tribunal asserted that it was entitled to have regard to the content of Form 3 as completed by the Garda concerned as sufficient evidence that the Garda was of the opinion that the Applicant was at an immediate and serious risk of harm to himself when she took him into custody and that the tribunal had sufficient evidence to reasonably conclude that the words used on the Form 3 were sufficient to inform the tribunal that the Garda concerned considered that the Applicant was at an immediate and serious risk of harm to himself.

29. Further, without prejudice to the foregoing and as a matter of general principle, the Respondent asserted that the tribunal does not agree with the proposition that the validity of an Admission Order is predicated on the validity of the initial action under s. 12 of taking the Applicant into custody. Further and without prejudice to the foregoing, the Respondent asserted that when considering whether or not to affirm the Admission Order, the tribunal was *inter alia* entitled to have regard to the totality of the admission process undertaken and to the protections afforded to persons such as the Applicant under the provisions of the Mental Health Acts 2001 – 2020.

30. The Respondent further asserted that if the Garda concerned acted in excess of jurisdiction when she detained the Applicant pursuant to s. 12 of the Mental Health Act 2001 (which is denied) such an act did not vitiate the process of admission to the approved centre that came thereafter and/or create a fundamental and jurisdictional flaw as alleged, as such action, had it occurred, which is denied, did not affect the substance of the Admission Order and/or cause an injustice to the applicant as the removal of the Applicant from the Garda station to the approved centre was authorised not by the completion of Form 3 but rather by the completion of Form 5 by Dr. James Moloney when he examined the Applicant and formed the opinion as set out by him in Form 5.

31. Further, the Respondent asserted that if the Garda concerned acted in excess of her jurisdiction when she detained the Applicant pursuant to s. 12 of the Mental Health Act 2001 (which is denied), such an act did not vitiate the process of admission to the approved centre that came thereafter and/or create a fundamental and jurisdictional flaw as such action (had it occurred, and which is denied) did not affect the substance of the Admission Order or cause an injustice to the Applicant as the Admission Order was signed by Prof. Brendan Kelly after he examined the Applicant on the 18th May 2020 and formed the opinion as set out by him in Form 6.

32. Further, the Respondent asserted that if the Garda concerned acted in excess of her jurisdiction when she detained the Applicant pursuant to s. 12 of the Mental Health Act 2001 (which the respondent denies) such an act did not create a fundamental and jurisdictional flaw and/or deprive the tribunal of its jurisdiction and/or duty to consider the totality of the evidence and/or the best interests of the Applicant in reaching its decision whether or not to affirm or revoke the Admission Order. The Respondent stated that the tribunal, having heard all of the evidence, lawfully decided that the Applicant did continue to suffer from a mental disorder within the meaning of s. 3 (1)(b)(i) and (ii) of the Mental Health Act 2001 and that it was in his best interests to continue to be involuntarily detained in the approved centre.

33. The Respondent further asserted that the tribunal is not a court of law but rather is an expert panel and it is entitled to use its experience to draw reasonable inferences from the totality of the evidence before it. In addition, at no stage did the Applicant seek an adjournment for the purposes of calling any additional witnesses such as for example, the Garda concerned.

34. The Respondent further denied that the phrase "*serious likelihood*" in the circumstances in which it appears in the statutory scheme for involuntary admission to an approved centre in s. 12 of the Mental Health Acts 2001 – 2020 envisages: -

> *"A standard of proof of a high level of probability one beyond the normal standard of proof in civil cases of being more likely to be true but below the standard required in a criminal case of beyond reasonable doubt. For this high standard to be satisfied there must be available to be acted upon clear cogent and compelling evidence capable of being safely acted upon".*

35. The Respondent asserted and pleaded that it properly discharged the functions and duties imposed upon it by the Mental Health Acts 2001 – 2020, at all times acted lawfully and that if any error was made by the tribunal (which the Respondent denies), it is submitted that same was made within jurisdiction and does not give rise to any basis for relief by way of judicial review.

The Applicant's oral arguments

36. At hearing, the Applicant confirmed that there was no issue as to whether the Applicant was suffering from a mental disorder as defined in the Act. The Applicant accepted that he was suffering from a mental disorder as defined. The Applicant further confirmed that no issue was being taken as to compliance with the various time frames set out in the 2001 Act. It was confirmed that what was at issue between the parties was that the way s. 12 of the Act was interpreted by the Mental Health Tribunal was flawed with the consequence that *Certiorari* and/or a Declaration should be granted with regard to the decision of the Mental Health Tribunal of the 5th of June 2020.

37. The Applicant opened s. 3 of the Mental Health Act 2001 and highlighted the fact that s. 3(1)(a), as opposed to s. 3(1)(b)(i), must be satisfied in order to invoke s. 12 of the act allowing a member of An Garda Síochána to take a person into custody. As set out above, s. 3 (1)(a) requires that because of the illness, disability or dementia there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons. The Applicant argued that if this provision is not met then the alternative open to An Garda Síochána is to invoke s. 3 (1)(b)(i) where they deem a person to have a mental illness but requiring therapeutic intervention, which allows them to proceed by way of s. 9 of the Act. The Applicant argued that there was no evidence that the applicant posed such a risk as set out in s. 3(1)(a) and that the only evidence was that he was at risk from other people.

38. The Applicant referred the Court to s.16 of the 2001 Act which sets out the statutory obligations of the consultant psychiatrist who makes an Admission Order or a Renewal Order and then opened s. 17 which sets out the statutory obligations of the Mental Health Commission on receipt by it of an Admission Order or Renewal Order to include referral of the matter to a mental health tribunal, assigning legal representation to the patient concerned, directing an independent psychiatrist to provide a report as outlined in the section and directing the treating consultant psychiatrist to provide a report in writing to

the mental health tribunal. The Applicant emphasised that this process is not triggered by the Applicant but is a statutory requirement of the commission.

39. The Applicant opened s. 18 and stated that this is a critical provision in this case as it sets out the statutory obligations of the Respondent when carrying out its review of any Admission Order or Renewal Order referred to it. The Applicant argued that in order to affirm the Order in this case the Respondent had to satisfy itself that firstly: -

    i. the Applicant was suffering from a mental disorder as defined in the 2001 act (which is not in dispute) and that the provisions of sections 9,10,12, 14, 15 and 16 where applicable had been complied with and: -

    ii. secondly that if there had been a failure to comply with any such provision, that the failure did not affect the substance of the order and did not cause an injustice.

    The Applicant confirmed the issue between the parties is how the tribunal interpreted s. 12 and the way it satisfied itself that the section had been complied with.

40. In this regard, the Applicant pointed to s. 49 of the Act which states that a tribunal shall hold sittings for the purpose of a review by it under this Act and that the sittings may receive submissions and such evidence as it thinks fit. The Applicant stated that this gives the tribunal extensive powers which it did not exercise on this occasion.

41. The Applicant said that the terms of s.12 of the 2001 Act imports a requirement for the Garda to believe that the taking of the person into custody was necessary to prevent harm either to themselves or others and that for the Mental Health Tribunal to validly find at a review hearing that that stage of the process was conducted appropriately there must be objective, reasonable grounds discernible from the entries on the form. It is in this regard that the Applicant argued that the tribunal's decision of the 5th of June 2020 is flawed.

42. The Applicant opened Form 3 as completed by Garda Markham and says that at both s. 8 and s. 9 of that form what the Garda recorded pointed to a therapeutic basis for involuntary admission but pointed to no risk such that it would invoke s. 12. Referring to what Garda Markham set out in both s.8 & 9 of Form 3 the Applicant argued that given the inroads the 2001 Act makes into personal liberty more than merely bizarre, strange or indeed worrying behaviour is required. The Applicant also pointed to the fact that in both Form 5, completed by Dr. Moloney, and Form 6, completed by Prof. Brendan Kelly, reference is made to the therapeutic needs of the Applicant but neither medical professional points to risk.

43. The Applicant went on to argue that the tribunal found that s. 12 had been complied with and did not rely on the curative provisions at its disposal under s. 18 of the Act. The Applicant argued that the tribunal did not feel it necessary to go on to consider whether it could waive any non-compliance of those sections on the basis that it did not go against the substance of the Order and did not cause the Applicant any injustice, but rather

decided that it was satisfied that the provisions of s.12 had been complied with and on that basis affirmed the Admission Order. The Applicant argued that the tribunal did not interpret s.12 correctly and was not entitled to come to that decision. The Applicant argued that in reaching its decision on the evidence before it, the tribunal made an unjustifiable leap and that it was an irrational finding.

44. The Applicant argued that it is not open to the tribunal not to look back at the original decision of Garda Markham to detain the Applicant in custody and to rely on the two further steps taken in the process namely that by the GP and the consultant psychiatrist. The Applicant argued that the tribunal could have called other evidence and should have done so to satisfy itself that the section had been complied with. The Applicant argued that it was not a matter for the Applicant to prove a negative. The Applicant argued that there is a high threshold for the exercising of a power of arrest and that the curative power available to the tribunal was not exercised by it. The Applicant argued that the decision has to be looked at in its own terms and in anticipation of the respondent's arguments references the Supreme Court case of *Talbot V |An Bord Pleanala* [2009] 1 IR 375,, at para 29 where Fennelly J said *"I am satisfied that a Judge is not entitled to presume in advance what the outcome of an application will be. That is exclusively a matter for the statutory bodies charged with those functions*"

45. Turning to the issue of "best interest", the Applicant argued that the Act is there to provide important legal safeguards and that if there is an illegality this cannot be overlooked by simply relying on the "best interests" of the patient to overcome an illegality.

46. The Applicant argued that each step in the process set out in the legislation is distinct and s. 18 requires the tribunal to be satisfied that s. 12 has been fully complied with. The Applicant argued that the statutory language of "*serious likelihood*" of the person causing harm to himself or herself or others imports a standard of proof of a high -level probability, one that is beyond the normal civil standard of proof, though below the standard of proof applicable in criminal cases. The Applicant submitted that to meet this high statutory threshold of proof in circumstances where the tribunal was happy to act on foot of this form, there must be clear and compelling evidence to allow the tribunal to be satisfied that s12 had been complied with. The Applicant argued that the circumstances in which the Garda found the Applicant, as described by her in the form, could not satisfy such a standard of proof that he was at risk of causing harm to himself or others. Accordingly, the Applicant argued that "the wrong test" was applied which unacceptably countenanced a less rigorous test.

Caselaw Opened by Applicant

47. The Applicant opened the case of *S.M. v. the Mental Health Commission*, *the Mental Health Tribunal and the Clinical Director of St. Patrick's Hospital Dublin respondents, and the Attorney General and Human Rights Commission,* [2009] IR 188. This judgment of McMahon J. was concerned with the statutory interpretation of the Mental Health Act 2001, in particular s. 15 of that Act. In that judgment, McMahon J. made reference to the

case of *Gooden v. St. Otteran's Hospital* (2001) [2005] 3 IR 617 and in particular to the short judgment of Hardiman J. in which he states at p. 369: -

> *"I believe however that in construing the statutory provisions applicable in this case in the way that we have, the court has gone as far as it possibly could without rewriting or supplementing the statutory provisions. The court must always be reluctant to appear to be doing either of these things having regard to the requirements of the separation of powers. I do not know that I would have been prepared to go as far as we have in this direction were it not for the essentially paternal character of the legislation in question here, as outlined in in Re Philip Clarke [1950] I.R. 235. The nature of the legislation, perhaps, renders less complicated the application of a purposive construction than would be the case with a statute affecting the right to personal freedom in another context. The overall purpose of the legislation is more easily discerned and, where the medical evidence is unchallenged, the conflicts involved are less acute than in other detention cases".*

48. In the same judgment, McMahon J. goes on to make reference to the case *of In A.M. v. Kennedy* [2007] IEHC 136 [2007] 4 IR 667, and to the judgment of Peart J. where he had to consider the meaning of a Renewal Order made pursuant to s. 189 which was stated to be for a fixed period of time i.e. six months from a specified date. In that judgment, in construing the endorsement, Peart J. indicated that he must be informed by the fact first that s. 189 (1) (a)(i) of the Act of 1945 provides for an endorsement which extends detention not for a period of six months, but rather for a period "not exceeding six months". In this context, Peart J. in that judgment went on to say at p. 676 as follows: -

> *"No purposive statutory interpretation can alter what is stated in the endorsement. The only way in which this Court could hold that the renewal order made . . .. endured (beyond what it stated) would be to decide that it does not matter what is stated on the form of endorsement, and that the only matter to be considered is the overriding interest of ensuring that the applicant is detained in his own and others' best interests. Such a manner of approaching the meaning of orders depriving a person of his or her liberty could not in my view be correct, as it would nullify the very purpose of inserting safeguards in the statutory procedures put in place. In matters involving the deprivation of liberty, and I place persons such as the applicant who are ill in no lesser a position than other persons whose liberty is in other circumstances curtailed or removed, the greatest care must be taken to ensure that procedures are properly followed, and it ill-serves those whose liberty is involved to say that the formalities laid down by statute do not matter and need not be scrupulously observed. That is not to say that where the meaning of a statutory provision is unclear or open to different interpretations the meaning which is consistent with a purposive interpretation of the legislature's intention is not the one which should be adopted. That is a different question altogether".*

49. The Applicant also referred the Court to the High Court case of *J.B. v. the Director of the Central Mental Hospital and Dr. Ronan Hearne, respondents, and the Mental Health*

Commission, notice party, and the Mental Health Tribunal, notice party [2007] IEHC 201, and to the judgment of MacMenamin J. dated 15th June 2007 where at para 62 he stated, obiter, as follows: -

> *"This Court having held that the detention of the applicant is in any case lawful, it is unnecessary to consider the meaning and effect of s. 18 (1)(a)(ii) which states that the tribunal reviewing the detention of a patient may affirm the order if it is satisfied that the patient is suffering from a mental disorder and that the provisions of ss. 9, 10, 12, 14, 15 and 16 where applicable have been complied with or 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.*
>
> *63. It is clear that the statutory provisions of this general type should be the subject of the purposive interpretation, see in re: Philip Clarke [1950] IR 235 and Gooden v. St. Otteran's Hospital [2005] 3 IR 617. I would apply that observation to the instant case if necessary in this interpretation of s. 15 (2) of the Act of 2001".*

He goes on to say at para 64 as follows: -

> *"One could not disagree with the views of O'Neill J. in W.Q. that the best interests of a person suffering from a mental disorder are secured by a faithful observance of, and compliance with the statutory safeguards put into the Act of 2001 by the Oireachtas and that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by such a tribunal.*
>
> *65. It is important too, to recollect the statement of McGuinness J. in Gooden (supra) that the sole issue before the courts in an application of this kind is whether or not the applicant is detained in accordance with law.*
>
> *66. As pointed out by Peart J. in A.M. v. Kennedy & Ors, 24th Apri,l 2007, a purposive interpretation as to the meaning of orders depriving a person of his or her liberty could not be correct as it would nullify the very purpose of inserting safeguards in the statutory procedures put in place".*

50. The Applicant further opened the case of *M.R., applicant, v. Cathy Byrne, Dr. Fidelma Flynn and Sligo Mental Health Services, respondents, Mental Health Tribunal, notice party* [2007] 3 IR 211, and the judgment of O'Neill J. This is a case which was concerned with the Mental Health Act 2001 and the Court was referred to the following extract from the judgment of O'Neill J. where he said at para 27: -

> *"Insofar as s. 3(1)(a) is concerned the threshold for detention in an approved centre by way of either an Admission Order or as in this case a Renewal Order is set high. There must be a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons.*

28. *In the course of argument in this case it became common case that the standard of "serious likelihood" was said to be higher than the ordinary standard of proof in civil actions namely balance of probability but somewhat short of certainty.*

29. *In my view what the Act envisages here is a standard of proof of a high level of probability. This is beyond the normal standard of proof in civil actions of "more likely to be true", but it falls short of the standard of proof that is required in a criminal prosecution namely beyond a reasonable doubt and what is required is proof to a standard of a high level of likelihood as distinct from simply being more likely to be true.*

30. *The harm apprehended must in the first instance be "immediate". This presents obvious difficulties of construction, in the context of mental illness, because of the unpredictability of when the person concerned may cause harm either to themselves or others.*

31. *In my view the critical factor which must be given dominant weight in this regard is the propensity or tendency of the person concerned to do harm to themselves or others. If the clinicians dealing with a person concerned are satisfied to the standard of proof set out above that that propensity or tendency is there then in my view, having regard to the unpredictability of when the harm would be likely to occur, the likelihood of the harm occurring would have to be regarded as "immediate".*

32. *Next one must consider what constitutes "serious" harm.*

    The word "harm" is a very general expression and clearly its use is intended to encompass the broadest range of injury. Thus physical and mental injury are included.

33. *The term "serious" is somewhat more difficult to fully comprehend. In this regard it may very well be that a somewhat different standard would apply depending upon whether the harm was inflicted on the person themselves or on others. Clearly the infliction of any physical injury on another could only be regarded as "serious" harm, whereas the infliction of a minor physical injury on the person themselves could be regarded as not "serious".*

51. The Court was further referred by the Applicant to the High Court case of *S.O. (applicant) v. Clinical Director of the Adelaide and Meath Hospital of Tallaght (respondent),* [2013] IEHC 132 and to the judgment of Hogan J. delivered on the 25th March, 2013, where he stated at para.1: -

    "The case-law which has followed the enactment of the Mental Health Act ("the Act of 2001") has endeavoured to strike a balance between the need to protect rights to personal liberty, due process and the rule of law on the one hand and the effective protection of the mentally ill, medical professionals and the patients'

family and friends on the other. It is not an easy balance to strike. If the courts veer in the direction of the paternalistic protection of the patient, important safeguards might suffer erosion over time to the point whereby the effective protection of the rule of law might be compromised. Yet, if on the other hand, the courts maintain an ultrazealous attitude to questions of legality and insist on punctilious adherence to every statutory formality, this might lead to the annulment of otherwise perfectly sound admission decisions, sometimes perhaps years after the original decision has been taken.

Again, further down in that judgment, Hogan J. states at para.12: -

"The Oireachtas clearly envisaged that no person should be involuntarily admitted to a mental hospital save on the recommendation of a registered medical practitioner. That recommendation in turn had to be preceded by an "examination" of the patient within the 24-hour period. These were deemed to be vital essential safeguards for the patient.

13. Further evidence of this is provided by s. 12 itself. This section provides for an arrest of person who a member of An Garda Siochána has "reasonable grounds" for believing that the person is suffering from a mental disorder and that there is a "serious likelihood" of the persons concerned causing immediate and serious harm to himself or others. Where this occurs, the member must forthwith apply to a registered medical practitioner for a recommendation. If, however, no such recommendation is made, the person concerned must then be released immediately: see s. 12 (4). If, however, a patient was to be arrested under s. 12 by a member of An Garda Síochána and conveyed directly to a psychiatric hospital without any such recommendation from a registered medical practitioner, could it be suggested that any subsequent admissions order was nonetheless valid?"

52. The Respondent also referred the Court to the Supreme Court judgment of Dunne J. in *I.F. v. the Mental Health Tribunal and the Mental Health Commission, Ireland and the Attorney General, and the Irish Human Rights and Equality Commission*, [2019] IESC 44 delivered on 29th May 2019. These proceedings arose out of an application for judicial review of a decision of the Circuit Court which declined to hear an appeal pursuant to s. 19 of the Mental Health Act 2001. In that judgment, Dunne J. stated at para.3: -

"It is important to ensure that a person who is involuntarily detained by reason of mental illness is able to avail of a legal mechanism to confirm that the procedures leading to their detention have been carried out appropriately and that the continued detention of the person concerned is subject to scrutiny. The provisions of the Mental Health Act 2001 are designed to provide the necessary safeguards".

And in para.35 of that judgment she went on to say as follows: -

"It is important to emphasise that the thrust of the 2001 Act is the creation of a significant protection for a patient who may be the subject of an involuntary

detention. It is always been a hallmark of a constitutional democracy such as ours that the deprivation of the liberty of an individual is not to be likely undertaken. This is so whether one is concerned with the situation of a person convicted of a criminal offence or a situation such as this where a person may be subject of an involuntary detention by reason of the state of their mental health. It is not therefore surprising that the structure of the 2001 Act is predicated on the need to ensure that no – one is deprived of their liberty without appropriate safeguards being in place which allows them to challenge the basis of their detention. Thus, the 2001 Act created for the first time the Mental Health Commission and provided for the creation of mental health tribunals. Every admission or renewal order must be referred to a mental health tribunal and thus a person detained on the basis that they are suffering from a mental disorder has an automatic right to have the decision of the consultant psychiatrist reviewed, no matter how eminent the consultant psychiatrist in question may be. That is the right of every patient. Even then the fact that the matter has been reviewed and the order affirmed is not the end of the matter as the patient has the right of appeal to the Circuit Court".

53. The Applicant also opened the case of *S.C. v. the Clinical Director of St. Bridget's Hospital,* [2008] IEHC 100, which was a High Court judgment of Dunne J., delivered on the 26th February 2009 which arose in the context of an Article 40 application. The Respondent opened this in the context of the detention under s. 12 and quoted from Dunne J.'s judgment at p. 18 as follows: -

> *"I now want to consider as to whether or not the Gardaí had reasonable grounds for the arrest of the applicant on the 19th February, 2009. The Gardaí acted on foot of two letters from Dr. O'Neill and Dr. McCauley. I have already set out in detail the terms of those letters. The first of those letters was from Dr. O'Neill and was dated the 13th February. It indicated that Dr. O'Neill was concerned that the applicant posed a significant risk to the general public and specifically to his father as a result of his psychotic symptoms. The second letter was dated the 17th February, 2009, and stated: -*
>
> *"I exhausted all avenues with Mr. C.'s family and have been unable to organise an admission. There are serious concerns about the risks he poses to his family and to the public."*

Later, she goes on at the same page to state as follows: -

> *"The issue is whether the Gardaí had reasonable grounds to carry out the arrest under section 12. In my view the answer to that question is in the affirmative. The Gardaí acted on the basis of the information contained in the letters. The letters both referred to the serious risk posed by the applicant as a result of his mental state. Therefore, it is not my view that there was a conscious and deliberate violation of the applicant's constitutional rights in the exercise by the Gardai of the power of arrest under s. 12 of the 2001 Act. The fact that Dr. McCauley on his examination on the 19th February did not tick the box at para. 8(a) of the*

involuntary admission order relating to serious likelihood of the person concerned causing immediate and serious harm does not mean that the Gardai did not have reasonable grounds to act under s. 12".

Again, at p. 20 of that judgment, she stated as follows: -

"I have indicated that I am satisfied that the arrest under s. 12 was a valid arrest. It is therefore not necessary for me to consider whether an illegal arrest which also amounts to a breach of the constitutional rights of an individual under Article 40.5 of the Constitution could, by analogy with the principles identified in the O'Brien case referred to above, taint the detention of an individual under s. 14 of 2001 Act. However, I should add that it seems to be clear from the authorities opened to me, namely, the cases of C.C. v. Clinical Director of St. Patrick's Hospital and The Mental Health Commission and R.L. v. The Clinical Director of St. Brendan's Hospital that as a general proposition a breach of the provisions of s. 12 of the 2001 Act, would not affect the subsequent process by which someone may be detained. Mr Rogers in the course of his submissions referred to the safeguards under s. 9 of the 2001 Act, which he said were set at nought by the exercise of the power of arrest under section 12. However, it has to be noted that under s. 12(2) a person arrested must be the subject of an application to a registered medical practitioner for a recommendation. If a recommendation is refused, then the person the subject of the application must be released from custody immediately. If a recommendation is made, that person must then be removed to an approved centre. Once received into the approved centre the person the subject of the recommendation must be examined by a consultant psychiatrist as soon as may be thereafter and it is only following that examination that an admission order can be made, if appropriate. There are in those circumstances and within the scheme of the act a number of safeguards that apply. I repeat the words of Hardiman J. in the Supreme Court in the case of R.L. at p. 6 where he said: -

> *"The court cannot see and it does not believe that there is any authority for the proposition that s. 14 cannot work at all, simply cannot be operated, if there is a defect in the execution of the removal under s. 13. There was no argument advanced as to why that proposition is true and it would appear to be contrary to the scheme and spirit of the Act.""*

In the circumstances I am satisfied that the applicant was lawfully detained on foot of the admission order made herein on the 19th February, 2009".

54. The Applicant again opened the case of *S.C. v. Clinical Director of St. Brigid's Hospital* [2008] IEHC 100 to support his proposition that it was not for the consultant psychiatrist to look at the lawfulness of the detention of the applicant by An Garda Síochána. This, the Applicant said, is a matter for the tribunal to consider under s. 18 of the Act. Further, the Applicant went on to argue that the judgment of Dunne J. in the case referred to above of S.C. is not binding on the Court for the following reasons, that what the court said was obiter, there was no evidence of unlawfulness of arrest, and she was satisfied that it was

perfectly lawful and there was ample evidence to sustain the reasonable grounds of the risk required. Additionally, the issue was as to whether the doctors should have inquired at admission stage if that arrest was lawful, and the Applicant does not make that argument and said that that argument is not sustainable and was correctly rejected. Dunne J. also referred to the case of *R.L. v The Clinical Director of St Brendan's Hospital* [2008] 3 IR 296, but the Applicant argued that this is not authority for the proposition that a breach of s. 12 on the arrest would not taint the Admission Order as it concerned s. 13 which is not part of the consideration which the tribunal has to consider under s. 18 of the Act. Section 13 relates to the manner in which somebody is brought to an institution received and not detained, in other words s. 13 is not a detention provision and has not been singled out in s. 18 as something that is important.

55. The Applicant argued that the flaw goes to the basis of the Applicant's detention and cannot be overlooked under the provisions of s. 18 or under the provision outlining best interests. They argued that the Applicant did challenge the matter in good time as it was challenged by the Applicant's solicitor at the hearing before the tribunal. The Applicant argued that s. 12 cannot be considered to be irrelevant by the time the matter gets to the Mental Health Tribunal.

56. The Applicant argued that the decision of the Mental Health Tribunal must be considered on its own terms. That there is no evidence of risk contained in the Form 3 which was before the tribunal for the purposes of this decision. The Applicant further argued that the consultant psychiatrist, Mr. McGonagle, gave no evidence of risk and even if he thought the Applicant may be at risk from the community, that does not fall within the terms of s. 12 of the Act.

Respondent's Oral Arguments

57. The Respondent opened its arguments at hearing to say that it maintains its position that there was no breach of s. 12 and that there was sufficient evidence in the Form 3 to allow the tribunal to be satisfied that the Section had be complied with. They argue that the words used in the form were sufficient. It refers the Court to the case of *M.R. v. Byrne* [2007] 3 IR 211 and para. 51 of that decision, in which O'Neill J. said as follows: -

> *"I propose to deal with the compliance issue first.*
>
> *In approaching an assessment of the decision of the Tribunal as revealed by the record of it, both as to substance and form, in my view, it is not appropriate to subject the record to intensive dissection, analysis and construction, as would be the case when dealing with legally binding documents such as statutes, statutory instruments or contracts. The appropriate approach is to look at the record as a whole and take from it the sense and meaning that is revealed from the entirety of the record. This must be done also in the appropriate context; namely the record must be seen as the result of a hearing which has taken place immediately before the creation of the record, and it must be read in the context of the evidence both oral and written which has just been presented to the Tribunal. The record is not to be seen as, or treated as a discursive judgment, but simply as the record of a*

decision made contemporaneously, on specific evidence or material, within a specific statutory framework. i.e. the relevant sections of the Act of 2001 as set out above".

58. The Respondent said that the decision of the tribunal was reasoned, carefully constructed with proper analysis given.

59. The Respondent argued that the Applicant was afforded legal representation and a hearing was heard in accordance with the terms of the legislation and that the Applicant received a fair hearing in accordance with the Statute and the Constitution. The Respondent argued that there was no want of jurisdiction and no error of law.

60. The Respondent referred to the evidence before the tribunal and indicated that there was no rebutting evidence or no medical evidence called by the Applicant.

61. The Respondent said that the tribunal did look at s. 12 and did not avoid it. The respondent is not arguing that s. 12 is not relevant and says that the tribunal had to look at the medical evidence which is all one way and that there is no contravening medical evidence. The Respondent opened the case of *S. C. v Clinical Director of St Brigid's Hospital* (supra) and stated that this case was cited by the tribunal in its decision in support of their finding that there was no breach of section 12 of the Act. The Respondent also argued that in her decision, Dunne J clarified the parameters of the Gardaí's powers under s.12. They further asserted that the legal issues in that case and the instant case were broadly similar as both matters concerned an Applicant seeking to challenge his detention by An Gardaí pursuant to s. 12. The Respondent said that Dunne J. approached the interpretation of s.12 as the Respondent has argued it should be approached that is that a breach of s.12 should not affect the subsequent process by which a person is detained

62. The Respondent said that there was a clear, comprehensive and fair hearing and that the tribunal put forward its reasoning in its decision and that it can be seen exactly why it came to the decision it did. The Respondent said that there was no want of jurisdiction or fairness and that at all times the Applicant received a fair hearing where his best interests were considered.

63. With regard to the burden of proof, it says what s. 12 requires is reasonable grounds for belief. It said the evidence showed that there were reasonable grounds to believe that the Applicant had a mental disorder and there was no improper motive on behalf of the Garda. Having a belief does not require proof, the decision had to be made by the Garda on the basis of belief and clearly on the evidence before the tribunal it was a reasonable belief. What was relevant was how the Applicant was presenting, where he was and all of the facts as they presented themselves to her.

64. The Respondent then outlined the role of judicial review, and the question the Court must ask is whether there was no evidence on which the tribunal could satisfy itself of the issue in question.

65. The Respondent contrasted the requirements under s. 12 with s. 10 of the Act, which sets out the decision that must be made by G.P when assessing whether a person should be voluntarily admitted. The Respondent argued that the requirements for the doctor were different to a member of An Gardaí, as the doctor had to be satisfied based on their clinical assessment and expertise and not simply hold a reasonable belief. The Respondent referred to para. 20 of its submissions. They stated that even if the higher level of proof was to be applied, Garda Markham had sufficient evidence upon which to form a reasonable belief that the Applicant was at risk. The Respondent further stated that the tribunal, having considered the words contained in Form 3 alone, was correct in finding that there had been no breach of s. 12.

66. The Respondent confirmed again that this is a judicial review not an appeal and that the Garda's belief was supported by the medical assessment that she didn't require proof but belief based on reasonable grounds and it cannot be elevated higher than this.

67. With regard to the standard of proof, the Respondent said that to raise the standard of proof above the civil standard was not the purpose of the Act and the Respondent disagreed with the Applicant that there is a higher degree of probability. The Respondent referred the Court to its own submissions where it referred to the decision of *J.M. v. HSE* [2018] 1 IR 688 and at p. 717 of that judgment where Kelly P. stated: -

> *"the decision will fall to be made only upon evidence which is clear and convincing".*

68. In summary, the Respondent said that the legislation has a very specific set of criteria to be met and that whichever way one looks at it there can be times where cases can be difficult and complicated but the Respondent said that this hasn't happened in this case and ultimately they said that this was a decision reasonably arrived at and made and that the standards applied and deployed were correct and that the law was applied correctly.

69. The Respondent said that *Talbot v An Bord Pleanála* [2009] 1 IR 375 case is entirely distinguishable from the instant case, this judgment arose from an appeal of the High Court decision, of Peart J. The Respondent highlighted that at pp.22 of that decision Peart J. exercised his discretion to refuse leave to apply for judicial review "*on the basis that no benefit can result in any event from success in the application at the end of the day*."

70. The Respondent highlighted that the Applicant is no longer an inpatient and in the circumstances of the instant case, they argued it was not clear what benefit would have come from the reliefs sought. They argued that even if the view was taken that s.12 had been misapplied (which is denied), everything else in the case is not impugned, in the sense that no evidence has been tested, challenged or overturned by any competing medical evidence. They argued that in this special area of statutory regulation and protection of people with mental illness/ disorder the best interest principle is always something which finds expression in the way in which the decision has been applied and the way in which the tribunal, Gardaí and doctors exercised their functions as conferred upon them by law.

71. The Respondent said that there was sufficient evidence to show that the tribunal acted within jurisdiction, had addressed itself correctly to the law, formed an expert view on the evidence which was made available to it, afforded fair procedures in every respect, decided the case on the basis of the s.12 evidence and did not apply a curative function because it was satisfied s.12 had been complied with.

Findings and Decision

72. The facts in the case are not in dispute between the parties and the Court finds the facts to be as follows. On the 18th of May, the Applicant was taken into custody by Garda Elaine Markham of Tallaght Garda Station pursuant to s.12 of the 2001 Act. Garda Markham completed the prescribed Form 3 recommending the involuntary admission of the Applicant. In that form she indicated at the top of the form that she was making her application pursuant to s12 of the 2001 Act and stated at section 8 of the form where she was asked to state her reason for making the application "*concerned for mental health belief male is mentally unwell and in need of treatment*". At part 9 of the form where the applicant is asked to set out the circumstances in which the application is made, Garda Markham stated "*in public in just a towel around his waist holding a lantern, talking about wanting to be deported*". She indicated that she observed the Applicant at 13.00 hrs and she signed the form at 13.15hrs.

73. The Applicant was examined by Dr Moloney, General Practitioner, shortly after at 13.38hrs who completed the prescribed Form 5 indicating his opinion in accordance with s.3 (1)(b) (i) and (ii) of the 2001 Act that the Applicant was suffering from a mental disorder where: -

> *"because of the severity of the illness, disability or dementia, the judgement of the person is so impaired that failure to admit the person to an Approved Centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission" and " the reception, detention and treatment of the person concerned in an Approved Centre would be likely to benefit or alleviate the condition of that person to a material extent".*

He completed the Form 5 at 13.50hrs.

74. Later the same day having been moved to the Approved Centre the Applicant was examined by Professor Brendan Kelly at 15.30hrs and Professor Kelly completed the prescribed Form 6 at 15.50hrs confirming his opinion that the Applicant continued to suffer from a mental disorder within the meaning of s.3(1) (b) (i) and (ii) of the 2001 Act and described the Applicant's symptoms as "*psychotic, delusional, thought disordered, very little insight".*

75. On the 5th of June 2020 the Mental Health Tribunal ("the Tribunal") reviewed the Admission Order in accordance with s18 of the Act. The tribunal consisted of a Chairperson, a Consultant Psychiatrist and a lay member. There is no argument raised by the Applicant in these proceedings as to the way the hearing was conducted. The tribunal

gave a unanimous decision on the 5th of June 2020 which is set out in writing and exhibited in these proceedings. The tribunal Chairperson also swore an Affidavit on the 3rd of September 2020.

76. It was set out in the tribunal's written decision that a preliminary objection was made by the Applicant's solicitor that the Order should not be affirmed as Garda Markham had failed to comply with s. 12 of the 2001 Act as the Applicant contended that there was no evidence to indicate that the Applicant was in danger of causing immediate or serious harm to himself or others. The Applicant's solicitor pointed out that the GP had made a recommendation less than an hour later on the basis of the Applicant suffering from a mental disorder within the meaning of s3(1)(b)(i) and (ii) of the 2001 Act and that this resulted in an injustice to the Applicant.

77. At that point, the tribunal heard evidence from Dr. Thomas McMonagle consultant psychiatrist that the Applicant had told him the previous day that he lives in a violent and unruly part of the city and feels the hostility of the local population. Dr. McMonagle stated that the Applicant walking around that part of the city in a semi naked state of dress would have made him very vulnerable. Under questioning from the Applicant's solicitor Dr. McMonagle accepted that he was not present when s.12 was invoked by Garda Markham but was relying on the Applicant's own views about the area in which he resides. It was also put to him that the Applicant was not wearing a towel but a religious garment. Dr. McMonagle confirmed that he could not express a view on that. The Applicant's solicitor asked the tribunal to rise to consider this preliminary objection. The tribunal indicated that it would hear all the evidence first and rule on the preliminary objection after hearing all of the evidence. The Applicant's solicitor agreed to that approach.

78. The tribunal heard further evidence from Dr. McMonagle who was cross examined by the Applicant's solicitor and heard evidence from the Applicant which is recorded on the face of the Tribunals exhibited decision. The Applicant maintained his position through his solicitor that the Admission Order should be revoked as he contended that the s12 application made by Garda Markham was flawed as there is no evidence of an immediate and serious risk of serious harm to the Applicant himself or others at the time that Garda Markham invoked the section. At that stage the tribunal rose to consider its decision.

79. The Tribunal set out its decision on the preliminary issue as follows:

> *"The Tribunal initially considered the submissions of Ms Stack in relation to the Application for a Recommendation made by Garda Elaine Markham. Form 3, completed by Garda Markham, shows that [B] was taken into custody having been arrested pursuant to s12 of the legislation. At Part 8, Garda Markham states the reason for the Application was that she was concerned for [B]'s mental health and that she had a belief that he was mentally unwell and in need of treatment. At Part 9, she states that [B] was in public with just a towel around his waist, holding a lantern and talking about wanting to be deported. We are aware from the chart that concerns had been raised by the community mental health team about [B]'s well-*

being before Garda Markham arrested him and we are also aware from the chart that [B] is very vulnerable in his community.[B] told Dr. McMonagle yesterday about living in a violent and unruly part of the city and that he feels hostility from the local population. Whilst this was disclosed to Dr. McMonagle yesterday, it clearly was something [B] had to deal with within his community whilst not in hospital.

Ms Stack also noted that an hour after [B] was detained under s12 the GP found [B] to be suffering from a mental disorder pursuant to section 3(1)(b)(i) and (ii) of the legislation and she questioned how this could have changed from section 3(1)(a) in a short period of time.

The C(S) case had a broadly similar legal issue and found that just because the detaining psychiatrist ticked section 3(1)(b)(i) and (ii) only does not mean that the Gardai did not have reasonable grounds to act under s12. A person arrested under section 12 has two legal safe guards in place – an examination by a Medical Practitioner and an examination by a Consultant Psychiatrist, and in this case, both Dr. Moloney and Professor Kelly found [B] to be suffering from a mental disorder pursuant to the legislation.

The Tribunal also considered the Form 3 on its face alone and we considered the words used by Garda Markham. It is clear that she formed an opinion that there was an immediate and serious risk of harm to [B] based on her clear belief that he was mentally unwell and in need of treatment and the fact that he was in public wearing only a towel around his waist and carrying a lantern and expressing a wish to be deported. It is our view that reading the form, on the face of it, the words used are in fact sufficient to convey that [B] was at an immediate and serious risk of harm to himself or others. We therefore do not accept Ms Stacks submission. The Tribunal is satisfied that the words used by Garda Markham do not affect the substance of the Admission Order and nor do they cause an injustice to [B].”

80. The Tribunal went on to affirm the Admission Order as set out in its written decision of the 5th of June 2020.

81. What is at issue between the parties is the way s.12 was interpreted by the Mental Health Tribunal. The Applicant contended that the Tribunal’s interpretation is flawed with the consequence that Certiorari and/or a Declaration should be granted in respect of the decision of the Mental Health Tribunal of the 5th of June 2020.

82. The relevant statutory framework is the Mental Health Act 2001 (as amended) (the 2001 Act) and the relevant provisions of that Act have been set out in detail earlier in this judgment.

83. There have been a number of judgments of the Superior Courts concerned with the interpretation of this Act which were opened to the Court and which are again set out earlier in this judgment.

84. The position of the Superior Courts has been that the Act should be the subject of a purposive interpretation and this view is encapsulated in the High Court decision of *J.B. v The Director of Central Mental Hospital* [2007] IEHC 132 where McMenamin J. stated at paras 63-66. :-

> *"It is clear that statutory provisions of this general type should be the subject of the purposive interpretation, see in Re Philip Clarke [1950] I.R. 235, Gooden v. St. Otteran's Hospital [2005] 3.I.R. 617. I would apply the observation to the instant case if necessary in this interpretation of s.15(2) of the Act of 2001.*
>
> *However, I would reserve for an appropriate case question as to how, and in what manner the requirements of the "substance of the order" and the term "injustice" are to be reconciled, particularly having regard to the jurisdiction of the Superior Courts to ensure that rights of patients are protected and safeguarded by way of enquiry under Article 40.4. One could not disagree with the views of O'Neill J in W.Q that the best interests of a person suffering from a mental disorder are secured by a faithful observance of and compliance with the statutory safeguards put into the Act of 2001 by the Oireachtas and that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by such a tribunal.*
>
> *It is important too, to recollect the statement of Mc Guinness J. in Gooden (supra) that the sole issue before the courts in an application of this kind is whether or not the applicant is detained in accordance with law.*
>
> *As pointed out be Peart J. in A.M. Kennedy and Others 24th April 2007, a purposive interpretation as to the meaning of orders depriving a person of his or her liberty could not be correct as it would nullify the very purpose of inserting safeguards in the statutory procedures put in place."*

85. It is also clear that the Superior Courts are aware of the careful approach required when interpreting the legislation to ensure a balance between competing rights as outlined by Hogan J. in the High Court case of *S.O. applicant v. Clinical Director of the Adelaide and Meath Hospital of Tallaght, respondent* [2013] IEHC 132 delivered on the 25th March 2013 where he stated at para.1: -

> *"The case-law which has followed the enactment of the Mental Health Act ("the Act of 2001") has endeavoured to strike a balance between the need to protect rights to personal liberty, due process and the rule of law on the one hand and the effective protection of the mentally ill, medical professionals and the patients' family and friends on the other. It is not an easy balance to strike. If the courts veer in the direction of the paternalistic protection of the patient, important safeguards might suffer erosion over time to the point whereby the effective protection of the rule of law might be compromised. Yet, if on the other hand, the courts maintain an ultra- zealous attitude to questions of legality and insist on punctilious adherence to every statutory formality, this might lead to the annulment*

of otherwise perfectly sound admission decisions, sometimes perhaps years after the original decision has been taken.

Again, further down in that judgment, Hogan J. states at para.12: -

"The Oireachtas clearly envisaged that no person should be involuntarily admitted to a mental hospital save on the recommendation of a registered medical practitioner. That recommendation in turn had to be preceded by an "examination" of the patient within the 24-hour period. These were deemed to be vital essential safeguards for the patient.

Further evidence of this is provided by s. 12 itself. This section provides for an arrest of person who a member of an Garda Siochána has "reasonable grounds" for believing that the person is suffering from a mental disorder and that there is a "serious likelihood" of the persons concerned causing immediate and serious harm to himself or others. Where this occurs, the member must forthwith apply to a registered medical practitioner for a recommendation. If, however, no such recommendation is made, the person concerned must then be released immediately: see s. 12 (4). If, however, a patient was to be arrested under s. 12 by a member of An Garda Síochána and conveyed directly to a psychiatric hospital without any such recommendation from a registered medical practitioner, could it be suggested that any subsequent admissions order was nonetheless valid?"

86. The Court is further assisted in its approach to interpretation by the case of *MR v. Byrne* [2007] 3 IR 211 and para. 51 of that decision, in which O'Neill J. said as follows: -

"I propose to deal with the compliance issue first.

In approaching an assessment of the decision of the Tribunal as revealed by the record of it, both as to substance and form, in my view, it is not appropriate to subject the record to intensive dissection, analysis and construction, as would be the case when dealing with legally binding documents such as statutes, statutory instruments or contracts. The appropriate approach is to look at the record as a whole and take from it the sense and meaning that is revealed from the entirety of the record. This must be done also in the appropriate context; namely the record must be seen as the result of a hearing which has taken place immediately before the creation of the record, and it must be read in the context of the evidence both oral and written which has just been presented to the Tribunal. The record is not to be seen as, or treated as a discursive judgment, but simply as the record of a decision made contemporaneously, on specific evidence or material, within a specific statutory framework. i.e. the relevant sections of the Act of 2001 as set out above".

87. There is no dispute between the parties that the Applicant was suffering from a "mental disorder" as defined in s.3 of the 2001 Act and so the Court does not propose to consider that section further.

88. S. 4(1) of the 2001 Act places the best interests of the person as the principle consideration in making a decision under this Act concerning the care or treatment of a person (including a decision to make an Admission Order in relation to a person), with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made.

89. S.12 of the 2001 Act, which is the section at issue in these proceedings, has been set out in full earlier in this judgement. It has two main components, firstly by virtue of s.12(1), a member of An Garda Síochána has the power to take a person believed to be suffering from a mental disorder into custody where that member *"has reasonable grounds for believing that a person is suffering from a mental disorder and that because of that mental disorder there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons*". Secondly by virtue of s.12(2) where a member of An Garda Síochána has taken a person into custody under subsection (1) an application must be made forthwith, in a form specified by the commission, to a registered medical practitioner for a recommendation.

90. The obligations placed on the registered medical practitioner by virtue of s.12(2) are set out in s.10(1) of the 2001 Act which obliges a registered medical practitioner to be satisfied following an examination of the person the subject of the application that the person is suffering from a mental disorder, before making a recommendation that the person be involuntarily admitted to a designated centre.

91. The requirement under s.10 for a medical practitioner "to be satisfied" before making a recommendation contrasts with s.12 which requires that a member of the Garda Síochána *"has reasonable grounds for believing*" before invoking s.12 of the 2001 Act.

92. What is at issue between the parties is the way s.12 was interpreted by the Mental Health Tribunal. More specifically what is at issue is the way the Mental Health Tribunal interpreted s.12 (1) as it was invoked by Garda Markham. No issue is being taken with the recommendation made by the registered medical practitioner under s.12(2).

93. It was pointed out to the Mental Health Tribunal and to this Court that while Garda Markham invoked s.12(1) on the basis of serious likelihood of serious harm by virtue of s.3(1)(a), the registered medical practitioner and later the psychiatrist made their recommendation and Admission Order respectively on the basis of the therapeutic needs of the applicant by virtue of s.3(1)(b)(i). The argument was not maintained before this Court that the fact that the medical practitioners based their decision on the therapeutic needs of the applicant of itself means that Garda Markham could not have a reasonable belief to invoke s.12(1) and Dunne J. confirmed this in S*.C. v the Clinical Director of St Bridget's Hospita*l [2008] IEHC 100 as set out above.

94. The Applicant contended that there was insufficient evidence based on the Garda member's observations as set out on the relevant application form of a reasonable belief as to any serious likelihood of the Applicant causing immediate and serious harm to either himself or others and that this affected the substance of the order such that it should be

revoked. The Applicant argued further that as the tribunal did not rely on the curative provisions at its disposal under s.18, it should not have placed reliance on the two subsequent steps i.e. examination by the general practitioner and consultant.

95. It is necessary therefore to look at the evidence which was before the tribunal when it was considering the invocation of s.12(1) by Garda Markham. This was raised as a preliminary issue before the tribunal when it sat on the 5th of June 2020 to consider the Admission Order made by Professor Kelly. The tribunal heard evidence from Dr. McMonagle on the preliminary issue who was cross examined on his evidence and then indicated that it would hear all of the evidence before determining the preliminary issue. The evidence given by Dr McMonagle on the preliminary issue is set out in the decision of the tribunal.

96. The Court agrees with Applicant that there is a statutory obligation under s.18 of the 2001 Act on the Tribunal when reviewing Admission Orders, if it is to affirm the order, to satisfy itself that s12 of the 2001 Act has been complied with or if there has been a failure to comply that the failure does not affect the substance of the order and does not cause an injustice.

97. The Court further agrees with the Applicant that in its decision the tribunal found that s. 12 had been complied with and did not rely on the curative provisions at its disposal pursuant to s.18(1)(a)(ii) of the 2001 Act.

98. The Court also notes the provisions of s.18 (3) which states

> *"(3) Before making a decision under subsection (1), a tribunal shall have regard to the relevant reports under section 17 (1)(c) and (d)".*

These are the reports of the independent consultant, in this case Maria P Moran and the treating psychiatrist Dr McMonagle.

99. Turning to consider the Applicant's argument that the applicable standard of proof is a standard of proof of a high -level probability, one that is beyond the normal civil standard of proof, though below the standard of proof applicable in criminal cases and that consequently to meet this high statutory threshold of proof in circumstances where the tribunal was happy to act on foot of this form, there must be clear and compelling evidence to allow the tribunal to be satisfied that s12 had been complied with.

100. The Respondent argued that what is contemplated by the statute is the civil standard of proof which should be clear and cogent. The Respondent referred to the decision of J.M v. HSE [2018] 1 IR 688 and the judgment of Kelly P. where he held at p.717 that the decision should be made only upon "clear and convincing evidence".

101. The Court agrees with the respondent that what is contemplated by the Act is the civil standard of proof. There is no third intermediary standard of proof between the civil standard and the criminal standard. The Court agrees that great care always needs to be taken in applying this standard to decisions of this nature and in that regard agrees with

the views expressed by Kelly P in the judgment of *J.M v. HSE* [2018] 1 IR 688 where he held at p.717 that the decision should be made only upon "*clear and convincing evidence."*

102. The statutory requirements as set out in s. 12(1) which had to be met by Garda Markham before she could invoke her power to take the applicant into custody have been set out in detail earlier as have the contents of the prescribed Form 3 as completed by Garda Markham and the relevant portions have been set out in full. What is required by s.12(1) is reasonable grounds for belief on the part of the detaining member of a Garda Síochána.

103. In invoking her power under s.12(1) Garda Markham completed the prescribed Form 3, firstly, by ticking the box on the top of the form to indicate she was invoking s.12 rather than s.9 and then stating at section 8 of the form where she was asked to state her reason for making the application "*concerned for mental health belief male is mentally unwell and in need of treatment".* At part 9 of the form where the applicant is asked to set out the circumstances in which the application is made, Garda Markham *stated "in public in just a towel around his waist holding a lantern, talking about wanting to be deported".*

104. In considering this judicial review, the Court must satisfy itself that the tribunal properly discharged the functions and duties imposed upon it by the Mental Health Act 2001 as amended and at all times acted lawfully and within jurisdiction such that it's decision does not give rise to any basis for relief.

105. In its decision set out in full above the tribunal in considering the preliminary issue firstly set out the contents of the Form 3, the evidence given by Dr. McMonagle on the preliminary issue, the statutory safeguards afforded to the applicant and then went on to address Form 3 on its face alone saying

> *"The Tribunal also considered the Form 3 on its face alone and we considered the words used by Garda Markham. It is clear that she formed an opinion that there was an immediate and serious risk of harm to [B] based on her clear belief that he was mentally unwell and in need of treatment and the fact that he was in public wearing only a towel around his waist and carrying a lantern and expressing a wish to be deported. In is our view that reading the form, on the face of it, the words used are in fact sufficient to convey that [B] was at an immediate and serious risk of harm to himself or others. We therefore do not accept Ms Stacks submission. The Tribunal is satisfied that the words used by Garda Markham do not affect the substance of the Admission Order and nor do they cause an injustice to [B]."*

106. The power to detain under s.12(1) was invoked by Garda Markham on the basis of the evidence set out by her in Form 3 as to the behaviour of the applicant and the circumstances that presented themselves to her as set out in the form.

107. The Court agrees that the jurisprudence requires a purposive and careful interpretation encapsulated in the views of O'Neill J in W.Q that the best interests of a person suffering

from a mental disorder are secured by a faithful observance of and compliance with the statutory safeguards put into the Act of 2001 by the Oireachtas and that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by such a tribunal.

108. Mindful of this careful approach to interpretation and having considered what was set out by Garda Markham on Form 3, the Court is satisfied that there was sufficient evidence before the tribunal discernible from the face of the prescribed Form 3 alone, without having to place any reliance on the two further steps in the admission process, of objective and reasonable grounds for a belief by Garda Markham of a serious likelihood of the Applicant causing immediate and serious harm to himself or others on which the tribunal could satisfy itself that s.12(1) had been complied with.

109. The Court does not agree that in considering the contents of Form 3 and in making its decision on the preliminary issue the Tribunal made "an unjustifiable leap" or an "irrational decision".

110. The Court is supported in its decision by the fact that the tribunal was statutorily obliged when considering the preliminary issue to take account of the two psychiatric reports it had received pursuant to s. 18(3) and was also entitled to take account of the evidence it had received from Dr. McMonagle on the preliminary issue and the "best interest principle" as provided for in s.4(1) of the 2001 Act.

111. Accordingly, the Court is satisfied that there was clear and convincing evidence before the tribunal in respect of the preliminary issue such that the tribunal acted lawfully and within jurisdiction in its consideration of the preliminary issue and that its decision does not provide any basis for the relief sought.

112. As a further safeguard, the Court looks to the whole of s.12 and notes that the requirements of s. 12(2) were fully complied with and the court is satisfied that there has been no compromise of the effective protection of the rule of law and that the admission decision is lawful.

113. The Court accordingly refuses the relief sought.

114. The attention of the parties is drawn to the Practice Direction issued on the 24th of March 2020 in respect of the delivery of judgments electronically as follows:

> *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the court is required to make will also be published*

on the website and will include a synopsis of the relevant submissions made, where appropriate."

115. The parties are requested to correspond with each other on the question of the appropriate form of Order, and on the question of costs. In default of agreement between the parties on these issues, short written submissions should be filed in the Central Office within 21 days of today's date.