COURT OF APPEAL

CIVIL

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Court of Appeal Record Number: 2021/184

Donnelly J. **Neutral Citation Number [2022] IECA 290**

Ní Raifeartaigh J.

Binchy J.

BETWEEN/

F.C.

APPELLANT

- AND –

MENTAL HEALTH TRIBUNAL

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 15th day of December, 2022

Nature of the case

1. This judgment concerns whether or not the respondent gave sufficient reasons when expressing its conclusions on a renewal order in respect of the appellant. The impugned decision is dated the 12 February 2021 and affirmed a renewal order dated the 25 January 2021

authorizing the detention of the applicant as an involuntary patient in the relevant hospital for a six-month period ending on the 26 July 2021.

2. The following reliefs were originally sought:

(a) A declaration that the decision was made in breach of the respondent's statutory duty to give reasons, pursuant to s. 18(5) of the 2001 Act;

(b) A declaration that the decision was unreasonable and irrational because it failed to engage with the evidence before it as it relates to the statutory criteria for a person's involuntary detention pursuant to s. 3(1)(b)(i) and (ii) of the 2001 Act.

(c) *Certiorari* quashing the decision.

(d) Damages for breach of statutory duty and/or pursuant to Section 3 of the European Convention on Human Rights.

3. On appeal, the respondent has raised an issue of mootness because the appellant has been discharged from hospital since the events the subject of the proceedings. The appellant concedes that his claim for *certiorari* has become moot since the proceedings were commenced but maintains that his claims for declaratory relief and damages are still live.

Chronology of events

4. The appellant has a long history of mental ill-health and it is not in dispute that he suffers from paranoid schizophrenia. On the 7 April 2019, an admission order pursuant to s. 14 of the Act was made, on the basis that he was suffering from a mental disorder as defined in s.3(1)(a) and 3(1)(b)(i) and (ii). Thereafter a series of renewal orders was made pursuant to s. 15 of the Act. On the 25 January 2021, his responsible consultant psychiatrist extended his detention for a period ending on 6 July 2021 pursuant to the provisions of s.15(3)(a) of the Act, subject to his right to seek a further review after three months pursuant to s.15(3)(b) of the Act. On the

12 February 2021, the respondent affirmed the renewal order. One member of the respondent dissented from this decision. At this stage, the appellant had been detained for nearly two years.

5. On the 12 April 2021 the appellant obtained leave for judicial review proceedings on the basis that the respondent had failed to give any, or any adequate or proper, reasons, and that the decision was unreasonable and irrational. On the 1 July 2021, the High Court refused the relief sought.

6. After the High Court decision, on the 23 July 2021, a further renewal order was made for another six months. On the 4 August 2021, the respondent revoked the order and the appellant was discharged. As a result of that development, the respondent has raised an issue of mootness. The appellant accepts that the relief of *certiorari* is moot but continues to seek the remaining declaratory reliefs as well as damages which were sought pursuant to s. 3 of the European Convention on Human Rights Act 2003. He also submits that even if it is moot, the Court should exercise its discretion to rule on the merits.

The medical reports before the respondent

7. There were three consultant psychiatric reports in respect of the appellant. The report of Dr. Angela Noonan, his treating psychiatrist, is dated the 11 February 2021. In describing his history, she said that the appellant –

> "has had many admissions with relapses of schizophrenia. He has always discontinued antipsychotic medication. Weeks have passed between my becoming aware of his relapse and involuntary admission. His family have contacted me but have not been able to access his home. He has changed the locks because of beliefs that nurses copied his keys

when he was in hospital and family members have not had keys. Authorised officers cannot access [F] and when I asked gardai to go to his home they were not prepared to forcibly enter. [F] sent a text message to his father wondering if he should burn down his apartment building. [F] previously set fire to his father's home, while his father and brother were in it and caused €30,000 worth of damage. He was never charged. When he set the fire he was experiencing auditory hallucinations and delusions…"

8. Dr. Noonan gave the appellant's diagnosis as that of schizophrenia. She referred to the appellant as having "a *very significant history of discontinuation of medication*" and that "*Relapse of psychosis always follows discontinuation of medication. His delusions and hallucinations are persecutory and have led to arson and could have led to arson or violent assault in 2019*." She said that the appellant wished to go home and had said that he was taking the medication because he was being "*forced to do so*". She said the appellant did not believe he had schizophrenia and had stated that he only heard voices when coming off the medication. She concluded that the appellant met the criteria for mental disorder pursuant to s.3(1)(a) and 3(1)(b)(i) and (ii) of the Act.

9. The second report was that of Dr. Cosgrave, an independent psychiatrist appointed by the Mental Health Commission. Dr. Cosgrave reported that when she spoke with the appellant, he did not appear to have any overt psychotic thoughts, no depression or anxiety, and said he had no intention of harm to self, others or property. When she asked him about setting fires, he said that he had contacted his father about setting the apartment block on fire at one time but that this was averted and that he was "*coming down off medication at the time*". She noted that he failed to speak about the episode of breaking through the roof of his apartment to get access

to the upstairs neighbour or his thoughts of harming a co-tenant on the floor above. He said that he would sometimes hear voices.

10. She also recorded that the appellant said he would take his medication if discharged but had said that he did not agree with Dr. Noonan's opinion that he needed it. She commented that the appellant had no insight into his illness or that his relapses were leading to behaviour that could cause serious harm to self, others or property.

11. Dr. Cosgrave noted that the appellant had schizophrenia for many years and with many admissions. She noted that the appellant had a "*consistent history of stopping medication and acting out causing harmful consequences".* She said that he did not accept the need to stay on the unit, and takes medication only "because he has to while he is there". She referred to the opinion of Dr. Noonan that the appellant would stop medication and relapse if discharged, which would lead to further illness-related risk to himself, other persons or property, but that the appellant did not believe Dr. Noonan in relation to the diagnosis or need for medication.

12. Dr. Cosgrave concluded that based on the history of very serious acting out on delusions and the actual documented events, together with the history of ongoing non-compliance with medication, she agreed with Dr. Noonan's assessment that the appellant satisfied the criteria for detention under s.3(1)(a) and 3(1)(b)(i) and (ii) of the Act.

13. The third report was that of a consultant psychiatrist commissioned by the appellant's legal adviser, namely Dr. Frazer. The report of Dr. Frazer is dated the 9 February 2021 and runs to 36 pages. Dr. Frazer was of the view that the appellant "*is currently suffering with partially treated symptoms of chronic paranoid schizophrenia*", that he continued to experience

auditory hallucinations even though he did not disclose these to nursing staff, and that his psychotic experiences included a belief that he was under threat from his neighbours which was caused by his experiencing a high frequency sound. At the time of his admission in 2018, the appellant had said he wished to set a fire to destroy his property and harm his neighbours. He wrongly believed his family had had him admitted to hospital and admitted to having sent texts stating that he would set fire to his flat. This echoed previous references to fire setting in the context of hallucinations and delusions experienced in 2014. Dr. Frazer, commenting that "*previous behaviour predicts current behaviour*", said he believed there was a substantial risk of fire-setting in response to hallucinations the appellant experienced at the time he was admitted in 2018, and that his previous admissions had happened as a result of him being non-compliant with medication. Dr. Frazer also noted that weight gain in hospital was an ongoing concern for the appellant and increased the risk of him being non-compliant with antipsychotic medication in the community.

14. Dr. Frazer said that in the United Kingdom, a patient such as the appellant would be "*eminently suitable for discharge under the terms of a Community Treatment Order*". However, due to the absence of legislation in Ireland to ensure treatment for patients such as the appellant in the community, he was not safe to discharge. He cited the substantial risk of non-compliance and a recurrence of his substantial risks to himself and others. He said that he shared the concern of Dr. Noonan and considered that he was correctly detained under the terms of the legislation, and that his illness "*is of both of a degree and nature to warrant ongoing detention in hospital*". He expressed the fear that if the appellant were to be released from detention, he would rapidly become non-compliant with medication and this would escalate the risk he posed to himself and others, which was the pattern of his previous admissions. Importantly, Dr. Frazer said that, given the the absence of a system of community

treatment orders such as those utilised in the United Kingdom, there was "*no real prospect of him ever being safely discharged into the community"* and that there was "*a real possibility that [the appellant] may have to be detained for the rest of his life*".

The proceedings of 12 February 2021

15. The respondent convened on the 12 February 2021 *via* remote telephone hearing because of the pandemic. Dr. Noonan gave oral evidence as detailed in the 'Record of Mental Health Respondent Proceedings', which outlined the appellant's history of schizophrenia, his experience of delusions and hallucinations, and his admission to hearing voices when hospitalised. She confirmed that the appellant satisfied the criteria for mental disorder within the terms of s.3(1)(a) and (b) (i) and (ii) as of that date. She noted that the effect of the appellant taking anti-psychotic medication in the hospital was that he was "*well settled*", with "*excellent self-care and good social functioning*". She noted the appellant's past experiences in the community which resulted in his ceasing to take his medication and ultimately being re-hospitalised.

16. The record notes that the appellant also gave oral evidence, stating that he would take medication on discharge or in the community.

17. It appears that a submission was made on behalf of the appellant (by his legal representative) as follows:

> "…that the current inpatient treatment in circumstances where insight is not improving and where patient functions well on medication but this only being provided as an inpatient at present, with no facility for a community treatment order is disproportionate on a constitutional basis and also under Articles 5 and 8 ECHR."

18. The decision impugned in these proceedings is at the conclusion of the record of the proceedings, and states:

> "By dissenting decision, it was decided to revoke the order. In support of this decision, the RCP stated that Mr. [C] had benefitted fully from treatment in all aspects of his illness except still appears to have no insight. Mr. [C] disputes this and acknowledges he has a psychotic illness and would take his medication on discharge.
>
> By majority decision the Respondent is satisfied that Mr. [C] suffers from a mental disorder & affirms the renewal order under s.3(i)(b)(i) and (ii) of the Mental Health Act 2001."

The decision of the High Court

19. The appellant brought judicial review proceedings as already described and by order dated the 1 July 2021, the High Court (Heslin J.) dismissed the application. Adopting the approach taken by O'Neill J. in *M.R. v. Byrne* [2007] 3 I.R. 211, he acknowledged that an "*element of paternalism*" was "*woven into the fabric of the 2001 Act*", such that in cases such as these, the applicant's best interests may differ from the applicant's expressed intentions. He quoted with approval the following paragraph from the *M.R.* decision, which was itself a decision in which the reasons furnished by the respondent were deemed to be adequate:

> "[51]
>
> …
>
> In approaching an assessment of the decision of the respondent 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 legal 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 respondent. 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."

20. Heslin J. said that the decision of the 12 February 2021 must be read in the context of the evidence given to the respondent, both orally and in writing by means of medical reports. He held that the the respondent properly interpreted and applied the statutory criteria for involuntary detention and that the reasons given for its decision were sufficient and in compliance with the respondent's obligations under law. He disagreed that the case was distinguishable from *M.R.* in terms of the adequacy of reasons given. He said that the medical reports gave a "*clear picture*" that if the appellant were to be released, he would become non-compliant and would fail to take the medication he needed.

21. Counsel for the appellant had sought to distinguish the decision in this case from that in the *A.X. v. Mental Health Respondent* [2014] 1 I.R.188, in which *M.R.* was cited with approval. The judge, however, found that there was no "*material difference in the quality of the decision, including the reasons*" given in *A.X.* and the present case. Furthermore, he noted that the decisions in both *A.X.* and *M.R.* were upheld despite having not specifically referred to whether s. 3(1)(a) or (b) applied, whereas the decision in this case had explicitly referred to these

provisions in affirming the renewal order. The judge said he believed the respondent in the present case had gone further than the respondents in both of those cases.

22. The judge held that the applicant in this case had not established that the respondent had before it no relevant material which would support its decision, applying the test set out by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at para. 70; on the contrary, the evidence before it overwhelmingly supported the decision it ultimately made.

Relevant Statutory Provisions

23. S.3 of the 2001 Act provides as follows:

(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.

24. S.4 provides for the “best interests of the patient” test as well as the right of the person to dignity, bodily integrity, privacy and autonomy:

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.

……

25. S.14 provides for admission orders in the following terms:-

14.—(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.

(2) A consultant psychiatrist, a medical practitioner or a registered nurse on the staff of the approved centre shall be entitled to take charge of the person concerned and detain him or her for a period not exceeding 24 hours (or such shorter period as may be prescribed after consultation with the Commission) for the purpose of carrying out an

examination under subsection (1) or, if an admission order is made or refused in relation to the person during that period, until it is granted or refused.

26. S.15 provides for renewal orders in the following terms:-

15.—(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.

[…]

27. S. 18(5) of the 2001 Act provides that the Respondent is under a statutory obligation to give reasons for its decision reviewing an admission or renewal order and that notice of the decision and the reasons for it shall be given to the Commission, the consultant psychiatrist responsible for the care and treatment of the patient, the patient and his or her legal representative and any other person to whom, in the opinion of the Respondent, such notice should be given. S. 49(6)(j) provides that "a sufficient record of the proceedings of the respondent" should be provided for.

28. S.19 provides for an appeal to the Circuit Court on the grounds that he or she is not suffering from a mental disorder. The court on such an application may affirm or revoke the order.

Mootness

29. Although an order was made on the 4 August 2021 discharging the appellant (subsequent to the bringing of the judicial review proceedings, and indeed subsequent to the High Court decision herein), counsel for the appellant submits that there is still a live issue in relation to the declaratory relief and damages sought. The appellant cites *M.C. v. Clinical Director of the Central Mental Hospital* [2021] 2 IR 166. He submits that by reason of the respondent's failure to make a lawful decision, he was unnecessarily involuntarily detained for a period of some 5 ½ months. Therefore, he contends, his claims were not trivial, insubstantial or inconsequential.

30. He also submits that even if the case is moot, the strict application of the rule should be relaxed, given the matters already referred to, and the fact that the respondent is a body exercising statutory functions and powers, and where the determination may impact on other cases. The appellant also submits that in circumstances where the maximum period of involuntary detention is six months, a person challenging such detention is unlikely as a matter

of practicality to be able to prosecute to the Court of Appeal within the lifespan of any such order. He refers to the principle that an appellate court may hear a moot appeal if the issue might escape review if the court did not exercise a discretion to hear it: *Farrell v. Governor of St. Patrick's Institution* [2014] IESC 30, [2016] 1 IR 699, per Denham CJ at 709 and O'Donnell J at 718.

31. In response, the respondent cites inter alia *G v. Collins* [2005] 1 ILRM 1 and *W v. Health Service Executive* [2014] IESC 8. It points out that the appellant's involuntary detention has completely come to an end and there is "*no practical remedy*" that the appellant can now achieve. It contends that a claim for damages would not reasonably be determined by this Court even if the appellant's argument were to succeed in his argument that the reasons given were insufficient.

32. The respondent contends that there is nothing exceptional about the appeal and that the controversy arises from the particular language used by the respondent in its decision on this particular occasion in this particular case. Therefore, there is no compelling reason for the Court to consider the matter further in the circumstances.

33. Counsel for the respondent also referred to the appellant's failure to bring a s.19 appeal to the Circuit Court as a matter to the exercise of the Court's discretion if that were to arise.

Discussion and Decision on Mootness

34. Although there are many decisions in recent years on the issue of mootness, it seems to me that the Supreme Court decision in the *M.C.* case is of particular importance. In the *M.C.* case, the Supreme Court reversed decisions of both the High Court and this Court, and rejected a mootness argument advanced by the respondent. The circumstances were that Ms. C had

challenged a decision by the respondent not to assess or put in place arrangements necessary to facilitate her choice of residence at a time when the Review Board had given her the choice as to where to reside during her conditional release from the hospital. By the time the judicial review proceedings were heard, Ms. C had been unconditionally discharged from the Central Mental Hospital. It was therefore unnecessary for her pursue a claim for mandamus or *certiorari* and some of the declarations originally sought. She maintained nonetheless that her claims for the remaining declaratory relief and for damages were not moot.

35. Having set out in her judgment the summary of principles concerning mootness as articulated by McKechnie J. in *Lofinmakin* [2013] 4 IR 274, Baker J. accepted that this was not a case involving a point of law of exceptional public importance. However, she went on to consider the relevance to the mootness of argument of the existence of a claim for damages as well as the nature of the rights underlying the claim and ultimately held that the case was not moot.

36. As to the claim for damages, she said:

> 45 I agree with the proposition stated by counsel for the Clinical Director that, in general, the mere addition of a claim for damages to a judicial review which might otherwise be moot would not always, or perhaps usually, save the proceedings from an argument of mootness. The question of mootness may arise before the facts are determined, as happened in the present case. The quantum of damages that might be awarded were a breach of rights to be established could not, it seems to me, form the basis of a decision that proceedings are moot. An approach which takes the likely damages as its starting point risks being a pre-judgment of the quantum aspect of the

case, and that must be inappropriate particularly in circumstances where the factual backdrop to a claim in damages contains some element of dispute.

46 Furthermore, a court can award damages on a nominal basis, and this is not infrequent as may be illustrated by the decision of this Court in Simpson v. Governor of Mountjoy Prison [2019] IESC 81, [2020] 1 ILRM 81, and of Costello J. in Kearney v. Minister for Justice [1986] 1 IR 116.

47 That nominal damages are appropriate in a given case does not make the proceedings moot.

48 The test for mootness is more properly whether there is or remains at the date of hearing a live, unresolved, and concrete legal dispute between the parties, or whether the action is speculative or seeks an advisory decision from the court which could be of no practical effect. An award even of nominal damages is a practical consequence of litigation, and the award of nominal damages may reflect the view of the court as to the extent of injury, and may also, in a suitable case, reflect a degree of disquiet or even disapproval by the court of the actions of a plaintiff, or of the merits of litigation.

37. As to the point that fundamental personal rights were involved, Baker J said:

49. …Whilst I would be reluctant to say that every claim which seeks a declaration that there has been a violation of constitutional and/or Convention rights would pass a threshold test if an argument of mootness was raised, the present case is one where Ms C seeks to assert a breach of established and fundamental rights. In particular, she seeks declarations regarding an alleged loss of personal and individual dignity, a breach of her right to marital and personal privacy, a breach of her rights of autonomous decision-making, and a breach of her right of self-determination. These are not abstract, vague or insubstantial claims. What is at stake is her personal right to make decisions as to where

she would live, to live in her family home and, within her family unit as she chose, to enjoy the company of her children and her husband, and to have an untrammelled right to care for her children within the family unit. Rights to family and marital life and the right of a mother to be involved in the day to day care of her children are rights recognised in the constitutional order, and Ms C makes the further argument that the centrality of family life and of the family unit based on marriage within the Traveller Community adds an additional element of arguable prejudice and loss which might not be present in every case. They are credible claims, and even taking the factual scenario for which the Clinical Director contends, the claims are sufficiently borne out by the facts.

50 I return below to more fully consider the rights asserted by Ms C, but for the present purpose, it seems to me that an element of the test that is to be applied in coming to a conclusion that proceedings are moot must involve this Court looking at the relief sought and if what is at stake are rights which are as fundamental as the rights of self-determination to personal and family autonomy, it is difficult to see how proceedings claiming that those rights have been violated could be moot.

38. Baker J went on to refer to the decision of the European Court of Human Rights in *Birzietis v. Lithuania* No. 49304/09, 14 June 2016 (a case concerning a prohibition on prisoners growing beards while in prison, in which the prisoner had been released by the time of the hearing), and that of Clarke J (as he then was) in *Omega Leisure ltd v. Barry* [2012] IEHC 23, and continued:

"The dignity of the individual and the right to personal autonomy are a central element of the human personality as understood in our law, and therefore, the claims asserted are not trivial claims and could not be described in any sense as being insubstantial or

> inconsequential. The present case raises an important question to be determined, subjectively important from the point of view of Ms C because of the embarrassment and humiliation she says she suffered, and she makes a complaint of violation of those rights supported by credible evidence, and, so long as it remains in dispute and is reflected in a concrete and unanswered claim for redress, is not, in my view, moot because of the nature of the claims asserted, and the central importance of the rights in the constitutional and Convention legal order."

39. In my view, the decision in *M.C.* is of most assistance in determining the present case. In the *G* case, relied upon by the respondent, where the Supreme Court held that the applicant's judicial review proceedings were moot in circumstances where she was seeking to quash a protection order which had already been discharged by a subsequent agreement between the applicant and her husband, there was no reasonable expectation that the applicant would again be subject to the making of an ex parte protection order. Nor was there any fundamental issue at stake such as the right to liberty. In the *W* case, also relied upon by the respondent, the applicant was a minor who brought Article 40 proceedings in respect of his detention pursuant to an emergency care order made by the District Court. This order was superseded by a further order restoring him to the care of his parents (subject to a supervisory order). The High Court refused the original application and the second order was made before the appeal was determined. Denham CJ said that the case was fact based, that it was not a test case, and that wider issues did not arise. Accordingly, there was no reason to consider the case and the usual mootness rule applied. Again, there was no suggestion that the matter might arise again in respect to of the minor, and the removal of the child from its parents was extremely temporary in nature.

40. In contrast, the *M.C.* case concerns, as does the present case, the interests of a mentally ill person and questions concerning their release from involuntary detention; indeed, if anything, the issues are even starker in the present case because of the risk that the appellant's lack of insight could potentially deprive him of liberty (and all the related rights identified by Baker J. in her judgment) for a very long period of time (and potentially forever) by virtue of repeated extensions of his detention. The words of Baker J. are therefore very apt, and I am of the view that the Court should address the issues raised by the appellant both in view of the fundamental interests at stake for him and the real possibility that the issue of further detention by reason of lack of insight might arise again for him in the future. I also take account that there is a claim for damages and having regard to the views expressed by Baker J. with regard to a claim for damages in what was, in essence, a similar type of case.

The parties' submissions on the merits

Submissions on behalf of the appellant

41. The appellant points out that at the date of the decision, he had already been detained involuntarily in the hospital for almost two years. His responsible consultant psychiatrist was of the opinion that he was, at that time, as well as he would get, and had said that that there was a real possibility that the appellant might remain detained for the remainder of his life. The appellant submits that in those circumstances the decision significantly impacted on his personal rights, including liberty, privacy, and bodily integrity, because he was at risk of detention for a prolonged, and possibly indefinite period (subject to review). Accordingly, it was important that the decision reach the standard required by law, the Constitution and the European Convention on Human Rights. He submits that while a discursive judgment was not required from the Respondent, it was incumbent upon it to provide a decision that made clear what conclusions were reached, how it reached those conclusions with reference to the

evidence, and how the conclusions fulfilled the statutory criteria in s.3(1) of the Act. In the present case, he submits, the respondent fell below the standards required of it in respect of the giving of reasons.

42. The appellant refers to s.18(5) and 49(6)(j) in respect of the statutory duty to give reasons. He refers to a large number of authorities concerning the duty to give reasons (including leading authorities such as *Connelly v. An Bord Pleanala & ors* [2018] IESC 31, [2018] 2 ILRM 453; *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701, *Balz v. An Bord Pleanala* [2019] IESC 90, [2020] 1 ILRM 637, *Mallack v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2021] 3 IR 297. He points to certain authorities specifically concerning the position of mentally ill persons and involuntary detentions or hospitalisations. He refers to *M.D. v. Clinical Director of St. Brendan's Hospital* [2007] IESC 37, [2008] 1 IR 632, where Hardiman J. referred to the provision of reasons by a mental health respondent as "*an absolutely essential part of the Respondent's functions*" which was "*necessary because of the Respondent's very considerable powers to affect directly the rights of the patient, including his right to liberty*". He refers to *H.K. v. Llanarth Court Hospital* [2014] UKUT 410, where it was stated that, given that detention is a serious interference with the right to liberty, the respondent should set out its reasons by reference to the relevant criteria for detention, and that the reasons should be clear and unambiguous. The respondent should also address how it has dealt with any disputes as to the law or evidence; *"[i]f this is not done, the unsuccessful party might believe that the respondent has ignored important issues*". Rehearsing what each witness told the respondent without more is likely to be insufficient because the respondent is required to explain what facts were found and what conclusions on those facts the respondent reached. While it is not necessary for the respondent to mention all of the evidence, it must identify and resolve evidence and applications which are in dispute.

43. The appellant also relies on authorities from the European Court of Human Rights, including *Hodzic v. Croatia Application* No. 28932/14, where the court said that Article 6(1) should not be interpreted strictly, and "*the Court would stress that in cases related to the mentally ill defendants their very weakness should enhance the need for supporting their rights*…".

44. He also refers to authorities concerning the principle that the criteria for the detention of a person on grounds of mental illness must be strictly and carefully observed: *Winterwerp v. The Netherlands*, application no. 6301/73, 24 October 1979; *S.M. v. Mental Health Commission* [2008] IEHC 441, [2009] 3 IR 188, and *W.Q. v. Mental Health Commission* [2007] IEHC 154, [2007] 3 IR 755.

45. He refers to the reasons underpinning the requirement to give reasons, including that it shows the parties that the case has been truly heard and therefore contributes to a greater acceptance of the decision; that it shows to the parties that the respondent has directed its mind adequately to the issues before it; that it enables the person to judge for himself whether the exercise of authority over him is justified; enables third parties (such as, in the present context, the Commission) to know the basis of the decision; and fundamentally, that it serves the imperative that justice must be seen to be done.

46. The appellant submits that the authorities make clear that drawing an inference as to what was decided is not appropriate, particularly where more than one conclusion was possible, citing authorities such as *Deerland Construction v. Aquaculture Licence* [2008] IEHC 289,

[2009] 1 IR 673, and *EMI Records (Ireland) (Ltd) v. Data Protection Commissioner* [2013] IESC 34, [2013] 2 IR 669.

47. The appellant's counsel submits that an important feature of the facts of this case was that the appellant had given evidence to the effect that he would take his medication and that the decision did not address his evidence at all. The appellant submits that while the decision recites the medical opinion that the appellant fell within the statutory criteria, the mere recording of medical opinion does not amount to the giving of reasons. While mental health respondents must show appropriate deference to medical opinions before it, the review is a fact-finding inquiry where determination of the ultimate issue is reserved solely to the respondent; it must not be reduced to what he characterises as a *pro forma* endorsement of the medical view, ignoring the evidence of the detained person without explanation (citing *Basma v. Manchester University Hospitals NHS & anor* [2021] EWCA Civ 278). It is unclear, he submits, what basis on which the majority decided that the statutory criteria were fulfilled. He criticises the High Court view that, in view of the unanimity of the medical evidence on the question of insight, it was a clear matter of inference that the majority reached the conclusion that the appellant was unlikely to take his medication if discharged. He says that in view of the appellant's evidence, it was necessary to indicate how the dispute on this key issue had been decided. He points to the fact that one member of the respondent dissented, which underlines the fact that there was a dispute to be ruled upon. He criticises the High Court's decision that the "*gist*" of the decision was understandable, saying that the "*gist*" was not objectively speaking ascertainable, but that in any event such a low threshold is wholly inadequate where a person's liberty is in issue.

48. He also submits that it is unclear what grounded the conclusion that the detention and treatment of the appellant would be likely to benefit or alleviate his condition. There was, he submits, a real issue as to whether he could or should be potentially subjected to indefinite detention on a preventative basis on treatment grounds (not risk or danger). He was being detained with no real prospect that treatment would improve his insight.

Submissions on behalf of the Respondent

49. The respondent does not take issue with the authorities cited by the appellant but submits that the reasons given must always be read in context. It cites, *inter alia*, the judgment of Charleton J. in *Marques v. Minister for Justice and Equality* [2019] IESC 16 where he said that "*reasons…must…be adequate to the situation in which these are required*"; and *Mallack* [2012] IESC 59*,* where Fennelly stated that "*there may be situations where the reasons for the decision are obvious*".

50. The respondent submits that the trial judge was entirely correct to place emphasis on the decision in *M.R.*, in particular paragraphs 51, 53, and 55-63. The respondent also submits that the trial judge was correct in referring to the approach in *A.X. v. Mental Health Tribunal* [2014] IR 88, which endorsed *M.R.* The respondent seeks to distinguish many of the authorities relied upon by the appellant.

51. The respondent submits that the reasoning and rationale underpinning the decision are readily ascertainable from its written record and that the decision was a properly reasoned one on the evidence heard by it. The respondent points out that the medical evidence before it described in some detail the thought disorder, lack of insight, pattern of refusal to take medication due to a lack of insight, and the dangers posed when the appellant was off his

medication, with repeated examples of harm to self, to others and to property. It submits that the medical evidence was all one way, and that when such evidence is presented to a respondent and "*no counterfactual evidence is advanced*", the rules of evidence establish that the evidence is admitted and accepted. No expert evidence was advanced to the contrary. It rejects the suggestion that there was any conflict of evidence between the parties on the matters relevant to the respondent's decision. It submits that the appropriate inference to draw is that the reasoning of the majority members of the respondent was the same as the reasoning of the clinicians.

52. The respondent also submits that reasons may be given in an accompanying or subsequent document and that it is not necessary that everything be contained within the decision itself; referring to a number of asylum decisions which trace the expression of this principle back to the judgment of Hardiman J in *F.P. v. Minister for Justice* [2002] 1 IR 164.

53. The respondent also relies on the existence of an appeal to the Circuit Court pursuant to s.19 of the Act and submits that if the appellant wished to dispute that he had a mental disorder, he could have availed of this statutory remedy.

54. The respondent also submits that it is necessary to take into account that a review under the legislation is not an adversarial dispute but a decision in which the best interests of the person is to be the principal consideration under s.4 of the Act.

Decision

55. It is not in dispute that, in principle, adequate reasons should be given for the respondent's decision. In addition to the requirement for reasons at common law and/or as a matter of natural or constitutional justice, s.18(5) of the Act requires notice of the decision "and

the reasons therefore" to be communicated to various identified parties. The question is whether the reasons given by the respondent on this occasion were adequate.

56. The answer to this question is not only context-specific, in the sense of the legal context in which the decision is being made, but also case-specific in the sense that the issue turns on the specific language used in communicating the particular decision in the context of the hearing which has gone before, including the evidence adduced and the submissions made. Accordingly, while the parties have cited an abundance of caselaw on the adequacy of reasons in particular cases, including many which arise in the context of planning law or immigration and asylum decisions, the Court must keep to the forefront of its consideration of the present case the two matters identified above: (a) the particular legal context in which the decision was being made; (b) the language and immediate circumstances of the decision in question.

57. Regarding the first of these matters, it is important to remember that the present context is one in which the decision in issue, involving as it does the involuntary detention of a mentally ill person, is a decision which involves a serious restriction upon the fundamental right to liberty in respect of a vulnerable person. I note that in *M.D. v. Clinical Director of St. Brendan's Hospital* [2007] IESC 37, [2008] 1 IR 632, Hardiman J. referred to the provision of reasons in the context of involuntary hospitalisation or detention as "*an absolutely essential part of the Respondent's functions*" which was "*necessary because of the Respondent's very considerable powers to affect directly the rights of the patient, including his right to liberty*". As the ECtHR said in *Hodzic*, "*in cases related to mentally ill defendants their very weakness should enhance the need for supporting their rights*" and that the authorities "*must show requisite diligence in ensuring their effective participation in the proceedings…*". Moreover, on the facts of this case, the appellant was at risk of enduring indefinite detention by reason of the combination of

his mental illness and his lack of insight into its degree, thus indicating a need for particular care and rigour with regard to the detention decision and its attendant safeguards, which include the giving of reasons.

58. As to the second matter, concerning the language used in the decision itself in the context of the evidence adduced at the preceding hearing, there is a balance to be struck. It is of course ultimately a question of substance and not form, and there must be an element of common sense and practicality in approaching the question of adequacy of reasons. As O'Neill J said in *M.R.*-

> "In approaching an assessment of the decision of the Respondent 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 Respondent. 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."

59. However, I also agree with what was said in the *Llanarth Court Hospital* case where an "aide memoire" to the matters which should be covered was suggested in the following terms:-

> "12. First, it would be helpful if respondents were to set out their reasons by reference to the relevant criteria for detention…Using headings within the statement of reasons makes it easier to show that the respondent has dealt with each of the legal criteria it has to address…
>
> 13. Second, the respondent's reasons should address how the respondent dealt with any disputes as to either the law or the evidence. If this is not done, the unsuccessful party might believe that the respondent has ignored important issues. In particular, failing to address explicitly any applications made by one or other of the parties may render a set of reasons inadequate. Such an omission certainly makes it more difficult for a party to know why they have been unsuccessful and additionally raises doubt as to whether the respondent has dealt fairly with that party's case…
>
> 14. Third, the reasons themselves must be clear and unambiguous. It is not for a party to deduce the reasons for a decision.
>
> 15. Fourth, rehearsing what each witness told the respondent is, without more, liable to render a set of reasons erroneous in law. What is required is to explain (i) what facts the respondent found as a result of that evidence and (ii) what conclusions on those facts the respondent reached.
>
> 16. Fifth, it is not necessary for the respondent's reasons to mention all the evidence in a case. It is entitled to be selective in its references to evidence in its reasons although it should, as I have indicated in paragraph 13 above, identify and resolve evidence and applications which are in dispute."

60. The giving of reasons must be done within the parameters of what was said in both of the above cases. In the present case, there was no dispute as to the fact that the appellant had a long-standing mental illness, namely paranoid schizophrenia. The only issue in dispute was

that of the appellant's degree of insight into his condition and the related question of whether it was likely that he would comply with his medication regime if released. In my view, what is of significance in this case is that although the appellant had actually given evidence himself on the key issue of whether he would take his medication, the respondent did not mention his evidence at all in its terse decision.

61. The respondent argues that the expert evidence was all one way. This is true, but if that submission is intended to suggest that the appellant's personal evidence was entirely irrelevant, this cannot be accepted. There was evidence from the individual whose liberty was at stake on the key issue which fell for decision and this undoubtedly had to be taken into account. Whether the respondent accepted his evidence or not, or the degree of weight that should be placed upon the appellant's evidence, is a different matter. In my view, the respondent (majority decision) should have referred to his evidence and given some indication that it had considered it and why it was rejecting it. Moreover, the dissenting member of the tribunal disagreed on this precise point, which renders the majority's silence on the subject of his evidence all the more inexplicable.

62. The respondent also argues that the respondent's conclusion (or at least of the respondent's majority) can be drawn by way of inference, namely that the appellant's evidence was indeed taken into account but ultimately rejected. The trial judge was persuaded by this submission. However, I consider it unsatisfactory that the conclusion of the respondent on the key issue to be determined in a matter of six-month involuntary detention, and further an issue upon which the appellant himself gave evidence, was left to be drawn by inference. In this regard, I would draw attention to paras 13 and 14 of the *Llanarth County Hospital* case as quoted above.

63. To this I would add that it would have taken little more by way of explanation for the respondent to have explained that it was not accepting the appellant's evidence and that it preferred the unanimous view of the psychiatrists, rather than doing what it did: simply describing what the psychiatrists had said on the issue of insight without actually indicating that this expert evidence was being preferred over the evidence of the appellant. In this regard, it seems to me that the former is precisely what the respondent did in the *A.X.* case and that it is therefore distinguishable from the record of decision in the present case.

64. In *A.X.,* the High Court (Keane J.) upheld the validity of the respondent's review decision affirming the applicant's admission to involuntary detention. It was held that the respondent's decision clearly established the three essential elements for making a finding that the patient was suffering from a mental disorder within the meaning of s.3(1)(b) of the Act and that the reasons were sufficient. The report of the independent psychiatrist indicated that the applicant had a long history of mental illness as well as a long history of poor insight and non-compliance with treatment. She gave evidence to the respondent and indicated her view that if the admission order were revoked, the applicant would initially stay in hospital but that if she were to leave, she would be a risk to herself and others. She did not think the applicant would be able to cooperate with treatment because of her limited insight. The applicant challenged the consultant on this point, saying that all of her previous admissions had been voluntary, and that she had never left the hospital against medical advice. However, the consultant maintained the opinion she had expressed. The judgment records that the applicant "*then addressed the respondent in terms that might well have given rise to some additional concern*". She accepted she had a mental illness but expressed disagreement with her treatment plan and preference for some "*talk therapy*" instead. In its decision, the respondent said that the patient lacked insight

into the severity of her symptoms and that "*the respondent shares the opinion of the responsible consultant psychiatrist that it would be premature to discharge the patient from the carefully controlled environment of the approved centre at this time*." It added that it was of the opinion that "*the patient is benefitting from the treatment currently being administered to her, and that she is benefitting to a material extent*" and therefore was "*satisfied that the affirmation of the admission order is in the best interests of the patient*". This expression of reasons may be contrasted with the present case insofar as (a) it expresses a clear conclusion on the insight issue, by expressing *agreement* with the consultant's opinion (and not merely describing the expert opinion); and (b) also links this with the 'treatment benefit' criterion in the legislation, thus explicitly linking the factual conclusion on the evidence with the legal criteria under the legislation.

65. The record of the tribunal's decision in the *M.R.* case may also be contrasted with that in the present case. At paragraph 24 of its decision, the tribunal recorded as follows:

> "(1) there was clear evidence from Dr. O'Neill's report and the patient's own responses that the patient continues to suffer from a mental disorder persecutory delusions and schizophrenia;
>
> (2) the patient benefits from the structured environment which her involuntary status ensures. She herself accepts that she is not ready for discharge and also that the treatment she is receiving has been beneficial to her;
>
> (3) in the event of her being changed to voluntary status compliance with medication and occupational therapy would not be guaranteed."

66. In analysing this decision, from paragraphs 58 of his judgment onwards, O'Neill J. referred to the first condition for detention as being that the illness, disability or dementia

causes impairment of the judgment of the person concerned and that the tribunal had made "a clearly expressed finding, both in para. 24 and also in the brief statement of the decision on form 8, to the effect that the applicant was suffering from persecutory delusions and schizophrenia and impairment of insight" and that this aspect of the decision was entirely valid "both in substance and in form". As to the second condition, he observed that the tribunal in its decision at subparagraph (3) of paragraph 24 had concluded that if the applicant was changed to voluntary status, compliance with her medication and occupational therapy could not be guaranteed, and that at subparagraph (2) of paragraph 24 it had said that the applicant benefited from the structured environment which her involuntary status ensured and that she was benefiting from the treatment she was getting. Taking these together, he said,

> "the clear sense emerging from the two is that the tribunal concluded that if she was not an involuntary patient she would not adhere to her medication and occupational therapy and as a consequence having regard to the clear findings made in respect of her underlying condition that this condition would deteriorate and that, in the result, as a voluntary patient she would end up not getting the treatment she needed and that the inexorable conclusion deriving from this, is that she would only get the treatment she needed if she was an involuntary patient."

67. As to the third condition, O'Neill J considered that subparagraph (2) of paragraph 24 of the record of the decision "makes it absolutely clear that the tribunal considered this element and it was clearly determined that the applicant was benefiting from the treatment she was receiving as an involuntary patient, that she was not ready for discharge and was continuing to benefit from that treatment". Thus, while the decision in *M.R.* was to uphold the adequacy of the decision both in form and substance, the decision itself may be contrasted with that in the present case.

68. I am satisfied, therefore, that adequate reasons were not given in the present case albeit that only a little more by way of explanation would have been sufficient to satisfy the "adequate reasons" requirement. Nonetheless, in a matter of such significance for the liberty of a vulnerable individual such as the appellant, an explanation should be explicit and unambiguous even if it is simple and short, in order to demonstrate that all the evidence was properly considered and ruled upon, and that the respondent was clearly satisfied from its conclusions on that evidence that the relevant legal criteria were fulfilled. Where persons suffering from mental illness participate in proceedings of the respondent by giving evidence, respect for not only their liberty but also their dignity, self-determination and autonomy requires that the decision-maker engage with their evidence and to explain, if it be the case, why it has not been accepted. Leaving inferences to be drawn is not sufficient. Accordingly, I would allow the appeal and grant a declaration that the decision was made in breach of the respondent's statutory duty to give reasons, pursuant to s. 18(5) of the 2001 Act. I am not satisfied that the existence of a Circuit Court appeal is a reason for refusing the declaration in circumstances where the central point in these proceedings was the communication of the reasoning of the tribunal and not the ultimate merits of the decision on the detention.

69. As to the issue of damages which were claimed by way of relief, it featured little in the submissions of the appellant other than in the context of the arguments on mootness. There was no discussion of the jurisprudence concerning the issue of damages in public law proceedings, nor of whether and how much damages are appropriate where declaratory relief is granted in respect of a decision depriving an individual of liberty on the grounds that the decision insufficiently communicated that deprivation of liberty. The appellant appeared to suggest in argument that the question of damages was a matter to be addressed in the event that he was

successful in persuading the Court that the reasons given were inadequate. In the circumstances, I am of the view that the appellant should indicate within 21 days whether he wishes to pursue the issue of damages. In this regard, I would ask the appellant to note that the precise basis upon which the declaratory relief is granted is confined to the manner in which the reasons for decision were expressed and is not directed to the underlying merits of the decision itself. If the appellant wishes to pursue damages, the Court will give directions as to submissions and/or a hearing in due course. In the event that no further decision is required from the Court, my provisional view is that the appellant is entitled to the costs of the appeal. If the respondent wishes to contend for a different order, they have liberty to apply to the Court of Appeal Office within 14 days for a brief hearing on the issue of costs. If such a hearing is requested and results in an order in the terms I have suggested, the respondent may be liable for the additional costs of that hearing. In default of receipt of such application within 14 days, an order in the terms proposed will be made.

70. As this judgment is being delivered electronically, I wish to record that my colleagues Donnelly J. and Binchy J. have indicated their agreement with it.