THE HIGH COURT

[2021] IEHC 502

Record No. 2021 956 SS

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

BETWEEN

RGF

APPLICANT

AND

THE CLINICAL DIRECTOR DEPARTMENT OF PSYCHIATRY MIDLAND REGIONAL HOSPITAL PORTLAOISE

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 19 July 2021

Summary

1. This case raises the net issue of when a patient may be considered a voluntary patient within the meaning of s. 23 of the Mental Health Act 2001 (the "2001 Act"). Section 23 permits a "voluntary patient" to be detained for the purpose of invoking the s. 24 procedure, which permits detention of a person suffering from a mental disorder for no more than 21 days. But s. 23 is only applicable to voluntary patients. Here, where the order detaining the applicant in the Department of Psychiatry in Portlaoise on an involuntary basis had been quashed by a Mental Health Tribunal, and where the applicant took immediate steps to leave thereafter, he argues that he was not a voluna;#tary patient, that s.23 and s. 24 could therefore not be invoked in respect to him and that his detention in the Department of Psychiatry was therefore unlawful. He accordingly brings *habeas corpus* proceedings seeking his release under Article 40.4.

2. I have concluded that despite the applicant's clearly stated desire to leave the Department of Psychiatry, he was being "treated" within the meaning of the Act for the reasons I explain in this judgment and therefore he comes within the definition of a voluntary patient. In the circumstances his detention is not unlawful.

Facts

3. Having come to the attention of An Garda Siochana, the applicant was taken to Our Lady of Lourdes Hospital in Drogheda on an unspecified date. He was subsequently detained on foot of an Admission Order on 21 May 2021 in Drogheda pursuant to s. 23 and 24 of the 2001 Act on the basis that he was suffering from a mental disorder and fulfilled the criteria in s. 3(1)(b)(ii). Although the affidavits do not refer to his voluntary admission, because he was detained under s. 23 he must have been a voluntary patient prior to his detention on foot of the Admission Order of 21 May 2021. That Order was affirmed by a Mental Health Tribunal on 10 June 2021.

4. It appears that at some point he was moved to the Department of Psychiatry in the Midland Regional Hospital in Portlaoise (the "approved centre"), although the date of that move is not given. On 10 June 2021, a Renewal Order was made pursuant to s. 15(2) of the 2001 Act, to come into effect on 11 June 2021.

5. On 30 June 2021 at 11.04am a Mental Health Tribunal convened to review the Renewal Order pursuant to s. 18 of the 2001 Act. Submissions were made on the applicant's behalf

to the effect that the Renewal Order and patient notification form were completed in the wrong name and both contained the wrong date of birth. The name given was [REDACTED] although the name of the applicant is RGF. His date of birth was given as [REDACTED] but it is in fact [REDACTED].

6. In a comprehensive and clear decision, all the more impressive for having been swiftly delivered at 2.16pm on the same day, the Tribunal concluded that the patient was suffering from a mental disorder. It noted that this mistake should not have been made in the Renewal Order, given that the approved centre had access to family members who could provide the patient's correct name. In the circumstances the Tribunal did not believe it would be appropriate to use its powers under s. 18(1) to cure the failure to correctly complete the Form 7 and patient notification form. The Tribunal were satisfied *"that affirming a renewal order made out with the wrong name and date of birth of the patient affects the substance of the order and would cause an injustice".*

7. Accordingly, the Tribunal revoked the Renewal Order of 10 June 2021.

8. The decision was read out in full to the applicant via telephone at 2.10pm. At 2.16pm Mr Carmody, solicitor for the applicant, received instructions that the applicant wished to leave the hospital. In the grounding affidavit sworn 1 July 2021, Mr. Carmody averred that he spoke with the staff nurse and related to him that the Renewal Order had been revoked and that the applicant was leaving the approved centre.

9. As discussed below, steps were then taken under s.23 and 24 to detain the applicant. Those steps were recorded in what is known as a "Form 13" entitled "Certificate and Admission Order to detain a voluntary patient". This Form records the applicant as having expressed a wish to leave the approved centre at 3.15pm on 30 June 2021. At 3.20pm, the Form records that s. 23 was invoked to prevent the applicant leaving the hospital on the basis that the applicant was *"very psychotic with religious delusions and lacks all insight".* The Form identifies that the professional who detained the applicant was Dr Moloney, the applicant's treating consultant psychiatrist. He is identified as having examined the patient at 3.30pm and detained him on the basis of s. 3(1)(b)(i) on what is known as the "treatment ground", i.e. that the patient requires treatment in an approved centre.

10. Part 2 of the Form refers to the certificate required by s. 24(2)(a) and states that the certificate is to be completed by another consultant psychiatrist, following referral by the consultant psychiatrist responsible for the care and treatment of the person. That psychiatrist was a Dr Daly who identifies that he is detaining the applicant on the basis of s. 3(1)(b)(i) and refers *inter alia* to his multiple religious delusions, poor insight and judgements. That certificate is signed at 3.46pm.

11. Part 3 of the Form is the Admission Order and it refers to a certificate having been issued under s. 24(2)(a) by the second consultant psychiatrist, being Dr Daly. The Admission Order is made by Dr Moloney and it directs the reception, detention and treatment of the applicant for a period of 21 days from the date of the making of the Order and is

identified as having been made at 3.50pm. It is this Admission Order of 30 June 2021 that is the subject of the *habeas corpus* application. The Order expires on 20 July 2021.

12. It may be seen from the above description that s.23 is used to detain the patient while an examination is being carried out to consider whether the conditions in s.24 are met. In this case, those conditions were considered to be met.

13. A patient notification form was given to the applicant. The form was signed by Dr Moloney with a time noted of 3.55pm. It states that the Admission Order would end on 20 July 2021. It identifies that the Admission Order is made under s. 24. The notification identifies that the patient is entitled to legal representation and that the Admission Order will be reviewed by a Mental Health Tribunal in accordance with s. 18 of the 2001 Act. Section 18 provides that where an Admission Order has been referred to a Tribunal, the Tribunal shall review the detention of the patient concerned.

14. Returning to the account given by Mr Carmody in his affidavit, he says that he received a call from the applicant at 3.51pm advising that he was prevented from leaving the approved centre. On 30 June 2021, Mr Carmody wrote to the respondent seeking the immediate release of the applicant on the basis that the Renewal Order had been revoked, the applicant wished to leave the approved centre, and was at no time a voluntary patient.

15. The applicant has also sworn an affidavit of 5 July 2021. I identify and address his evidence in some detail below when considering the question of treatment. In short, he identifies that at no time during the period between the Tribunal decision and being told that he was being detained, was he given or did he take any treatment and at no time did he agree to remain in the hospital as a voluntary patient.

Relevant statutory provisions

16. Section 2 of the 2001 Act defines the terms *"treatment*" and "*voluntary patient*" as follows:

> *"treatment", in relation to a patient, includes the administration of physical, psychological and other remedies relating to the care and rehabilitation of a patient under medical supervision, intended for the purposes of ameliorating a mental disorder;*
>
> *…*
>
> *"voluntary patient" means a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order.*

Section 4(1) of the Act provides that:

> *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.

Section 23(1) of the Act provides for the power to prevent a voluntary patient from leaving an approved centre:

Where a person (other than a child) who is being treated in an approved centre as a voluntary patient indicates at any time that he or she wishes to leave the approved centre, then, if a consultant psychiatrist, registered medical practitioner or registered nurse on the staff of the approved centre is of opinion that the person is suffering from a mental disorder, he or she may detain the person for a period not exceeding 24 hours or such shorter period as may be prescribed, beginning at the time aforesaid.

Section 24 of the Act provides for the power to detain voluntary patients:

(1) Where a person (other than a child) is detained pursuant to section 23 , the consultant psychiatrist responsible for the care and treatment of the person prior to his or her detention shall either discharge the person or arrange for him or her to be examined by another consultant psychiatrist who is not a spouse F29 [, civil partner] or relative of the person.

(2) If, following such an examination, the second-mentioned consultant psychiatrist—

(a) is satisfied that the person is suffering from a mental disorder, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that because of such mental disorder the person should be detained in the approved centre, or

(b) is not so satisfied, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that the person should not be detained and the person shall thereupon be discharged.

(3) Where a certificate is issued under subsection (2)(a), the consultant psychiatrist responsible for the care and treatment of the person immediately before his or her detention under section 23 shall make an admission order in a form specified by the Commission for the reception, detention and treatment of the person in the approved centre.

Section 29 of the Act provides in relation to voluntary admission to approved centres:

Nothing in this Act shall be construed as preventing a person from being admitted voluntarily to an approved centre for treatment without any application, recommendation or admission order rendering him or her liable to be detained under this Act, or from remaining in an approved centre after he or she has ceased to be so liable to be detained.

Relevant case law

17. The parties agree that there are three relevant cases considering s. 23, albeit in three very different situations. The one factor that unifies them all is that in each case, unlike in the present case, the patients were receiving treatments in a mental health institution as a voluntary patient for a substantial period of time prior to their detention. Here, on the other hand, the period of treatment was only 70 minutes from the revocation of the Renewal Order to the detention under s.23. The applicant lays particular stress on that as the basis for his argument that he was not being treated during that time.

18. In *E.H. v. Clinical Director of St Vincent's Hospital* [2009] 3 I.R. 774, the patient had been an involuntary patient, the Renewal Order was revoked and she then remained as a voluntary patient for 12 days until she sought to leave and was detained pursuant to s. 23 and s. 24 of the 2001 Act. An argument was made that she did not have capacity to decide to stay in the centre as a voluntary patient and that therefore s.23 could not be invoked as it only applied to voluntary patients. Kearns J. in the Supreme Court noted that the 2001 Act was designed with the best interests of persons with mental disorder in mind and referred to s. 4 (1). He quoted O'Neill J. in the High Court, who said that in considering *inter alia* whether the applicant was capable of understanding her status as a voluntary patient, the fact that she was suffering from a mental disorder requiring treatment had to inform and influence the manner in which the court resolved the issues arising in the inquiry. O'Neill J.'s consideration of the definition of "voluntary patient" was also quoted by Kearns J. with approval, where O'Neill J. noted that:

> *"It would seem to me that the definition was cast in the wide terms used in order to provide for the variety of circumstances wherein a person is in an approved centre receiving care and treatment, but not subject to an admission order or a renewal order, including, in my view, the type of situation which has indeed arisen in this case, namely, where a detention pursuant to an admission order or a renewal order breaks down, but where the patient is suffering from a mental disorder and receiving care and treatment. I say this, bearing in mind the clear linkage between the definition and ss. 23 and 24, which are designed to cater inter alia, for mishaps or unexpected developments which result in there being no admission order or renewal order in respect of a patient who is suffering from a mental disorder which requires treatment as an involuntary patient and who attempts to leave the approved centre" (paragraph 33).*

19. Kearns J. then considered the definition of "voluntary patient", noting that the terminology adopted in s. 2 (1) of the 2001 Act ascribes a very particular meaning to the term:

> *"41. … It does not describe such a person as one who freely and voluntarily gives consent to an admission order. Instead the express statutory language defines a "voluntary patient" as a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order. This definition cannot be given an interpretation which is contra legem …*

42. *Any interpretation of the term in the Act must be informed by the overall scheme and paternalistic intent of the legislation as exemplified in particular by the provisions of ss. 4 and 29 of the Act. Such an approach to interpretation in this context was approved by this court in the course of a judgment delivered by McGuinness J. in Gooden v. St. Otteran's Hospital (2001) [2005] 3 I.R. 617 when, in relation to s. 194 of the Mental Treatment Act 1945, she emphasised that a purposive construction of the section was appropriate …*

20. Importantly, in that case, Kearns J. concluded that the trial judge had ample evidence to find that the applicant was a voluntary patient for the 12 days in question in circumstances where the second respondent, as treating specialist, gave evidence on affidavit to that effect and was not cross-examined about her opinion at that time.

21. In *K.C. v Clinical Director of St. Loman's Hospital* [2013] 1 I.R. 772, the patient had been treated on a voluntary basis in St Loman's Hospital from 24 April 2013 to 7 June 2013 – a period of 43 days – before an application was made under s. 9 of the 2001 Act, which was followed by an admission on an involuntary basis of the applicant pursuant to s. 14. This approach was taken in the curious circumstance where the applicant was not seeking to leave but would not consent to any treatment. However, because the applicant did not indicate that she wished to leave the centre, s. 23 could not be invoked. The relevance of s. 23 is that it was argued that the s. 14 procedure could not be used in respect of a voluntary patient, because s. 23 was the only way a voluntary patient in a hospital could be the subject of an involuntary admission. That argument was roundly rejected by Hogan J. In the course of his consideration he reviewed certain aspects of s. 23 and the definition of a "voluntary patient" at s. 2 (1). He noted that Part 2 of the Act draws a clear distinction between involuntary and voluntary admission to an approved patient. He describes the purpose of s. 23 and s. 24 as follows:

"19. … The subsection rather endeavours to cater for the special case of where the voluntary patient who requires ongoing treatment may seek to leave the hospital, possibly in an unplanned and abrupt manner. If, therefore, a voluntary patient could leave at a moment's notice, it could mean that a person who might well be in need of urgent treatment could re-enter the community before the approved centre could put in place the necessary procedures enabling the patient to be admitted on an involuntary basis.

20. The Oireachtas has thereby sought to cater for this special case by allowing for the temporary detention of the patient in those circumstances. One cannot, however, infer from this special provision dealing with a particular set of circumstances that an application for the involuntary admission of a patient currently staying voluntarily in the approved centre and who has not expressed a wish to leave is thereby excluded."

22. The applicant notes that in *KC*, the High Court's conclusions were premised on what was common case between the parties, i.e. that the applicant in that case was a voluntary

patient. The applicant identifies this as a point of distinction between KC and the instant case.

23. Finally, the case of *P.L. v The Clinical Director of St. Patrick's University Hospital* [2019] 2 I.R. 266 is invoked by both parties. In this case, the applicant had been the subject of an involuntary Order that was revoked. He stayed in the hospital from 12 October 2011 until 21 November 2011. Even though he was then considered a voluntary patient, he was not permitted to leave the hospital. The applicant sought a declaration that the refusal of the first respondent to grant the applicant permission to leave was unlawful. It is important to understand that the decision to invoke s. 23 on the following day was not the subject of the challenge. Rather s. 23 was discussed by the Court of Appeal because it was argued by the hospital that it was implicit in s. 23 that hospital personnel could refuse to permit a voluntary patient to leave in order to persuade them to stay or to obtain an initial assessment that they are suffering from mental disorder and that it could do so <u>without</u> having to invoke the provisions of s. 23.

24. Hogan J. noted that s. 23 and s. 24 of the 2001 Act give the hospital's medical and nursing personnel the power to effect a short-term detention of a voluntary patient who expresses a desire to leave the hospital for a period not exceeding 24 hours. But he pointed out that s. 23 did not contain a provision for the interim detention of a patient's pending examination as to whether he was suffering from a mental disorder, in contradistinction to s. 14 (2). He noted the language of s. 23 was deliberately broader and more extensive than that of s. 24, being designed to deal with a short-term exigency and may be exercised by a broader range of medical and nursing personnel and without the need for prior examination of the voluntary patient's mental health status (paragraph 40). He concluded that absent the exercise of the s. 23 power, he could not agree the decision to restrain the applicant from leaving the hospital on 21 November 2011 was a lawful one as any other conclusion would empty s. 23 of all real meaning and undermine a careful and vital safeguard designed to protect the personal liberty of the voluntary patient.

25. In an important passage for the purposes of this case, he noted:

> *"It must be recalled that voluntarism remains a cornerstone of our system of medical treatment … there are, of course, exceptions provided for by statute and indeed the 2001 Act is itself one of the principal exceptions to that rule. But the legislative quid pro quo is always that compulsory medical treatment and attention is attended by appropriate safeguards".*

26. Ultimately, he declared the detention unlawful on the basis that any other conclusion would:

> *"not only be entirely at odds with the rule of law-based democracy envisaged by Article 5 of the Constitution, it would also contradict the fundamental constitutional premise of Article 40.4.1° of the Constitution, namely, that the deprivation of personal liberty must be "in accordance with law".*

Was the applicant a voluntary patient?

Arguments of the applicant

27. The applicant argues that he was not a voluntary patient because he wished to leave the hospital and because he was not receiving treatment from the time the Tribunal quashed the detention Order. The applicant submits that for a person to be a "voluntary patient" that person must consent voluntarily, or assent, to remain and receive treatment. To be a "voluntary patient" is predicated on a person being in an approved centre other than by being subject to an Admission Order or Renewal Order and receiving care and treatment. This is because the language used in s. 23(1) of the 2001 Act is in the present tense and refers only to a person who is being treated. A person who actively refuses to consent to remain or to remain in an approved centre when they are no longer subject to an involuntary detention process and who is not receiving care and treatment is not a "voluntary patient" subject to detention under s. 23 of the Act.

28. The applicant submits that the approach of the Supreme Court in *EH* does not justify the invocation of s. 23 in this case as the applicant was at no point in time a voluntary patient, *de facto* or *de jure*. The applicant argues that the evidence in the case does not support the narrative of him being a "voluntary patient" within the meaning of s. 2 of the 2001 Act between the revocation of the Renewal Order at 2.10pm and the detention pursuant to s. 23 at 3.20pm. The applicant argues that during those 70 minutes he was not consenting to treatment or being treated despite the fact that he was physically located in the approved centre.

29. The applicant further submits that the 2001 Act does not provide for situations in which an Admission Order or Renewal Order are revoked, and the person is no longer amenable to involuntary detention He argues that no canon of statutory interpretation can fill any lacuna in this regard, whether one adopts an interpretative approach to penal statutes affecting liberty, or the more benign, paternalistic approach exemplified in *Gooden v. St. Otteran's Hospital* [2005] 3 I.R. 617 and that neither paternalism, not the "best interests" provision in s. 4 of the Act is sufficient to justify what is not otherwise provided for in the Act.

30. The applicant concludes that the respondent proceeded, absent a proper consideration of the applicant's status as distinct from his physical location at the time, to wrongfully detain him under s. 23(1) of the Act, and therefore the applicant is in unlawful detention and has thus been deprived of his personal liberty in breach of Article 40.4 of the Constitution.

Arguments of the respondent

31. The respondent submits that the invocation of s.23 was appropriate and necessary in circumstances where the applicant is a person who suffers from a mental disorder and was receiving care and treatment at the hospital, and who otherwise was free to leave the hospital. It was and remains the view of the staff caring for and treating the applicant at the time when s. 23 was invoked that the applicant was a person who required inpatient treatment and care having regard to the extent of his mental disorder. The respondent

submits that this level of treatment was required for the applicant's own safety and for the safety of others.

32. The respondent argues that the applicant was in fact a "voluntary patient" at the time s. 23 was invoked as he was a "*a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order"* under s.2 and there is no medical evidence to suggest that he was not in need of medical care on 30 June 2021. The respondent argues that as the invocation of s. 23 for the period at issue in these proceedings was lawful, the applicant was not detained unlawfully.

33. The respondent looks to the decision in *PL* in support of the lawfulness in invoking s. 23 of the 2001 Act. The respondent argues that it used what was described by Hogan J. as the *"vital safeguard*" designed to protect the applicant, and was entirely lawful, and notes that it is not alleged that the section was exercised for an unduly long period of time, used onerously or that the applicant did not require to remain in hospital in this period.

34. The respondent also relies on the decision of *EH* in support of the argument that the concept of "voluntary patient" within the meaning of the 2001 Act is used to identify the status of the patient and is not connected with the patient's capacity to consent.

35. The respondent noted that the applicant had been informed that he was free to leave the approved centre on 30 June 2021 as his Renewal Order had been revoked and argues that it was at this point in time that the applicant's status transferred to that of a voluntary patient in both law and in fact. The fact that the applicant was making arrangements to leave hospital provides ample evidence to support the fact that he was a voluntary patient. He was also in receipt of treatment.

36. The respondent argues that its invocation of s. 23 in these circumstances is what was contemplated by Hogan J. in KC wherein he stated that s. 23*"endeavours to cater for the special case of where the voluntary patient who requires ongoing treatment may seek to leave the hospital, possibly in an unplanned and abrupt manner".*

37. Ultimately the respondent submits that the applicant is in lawful detention and has not been deprived of his personal liberty in breach of Article 40.4.

Relevance of applicant's desire to leave the hospital

38. The applicant has stressed the relevance of the fact that as soon as the Order of the Tribunal was made, he wished to leave the hospital and took steps to leave. Normally, in any consideration of whether a person had acted voluntarily, that person's intention would be paramount – what Hogan J. referred to as the principle of voluntarism in *PL.* However, when considering the definition of a voluntary patient and the deployment of section 23, the position is not so simple. First, there is the *dicta* in *EH* already quoted above, where Kearns J. made it clear that a voluntary patient within the definition of section 2 does not describe a person who freely and voluntarily gives their consent. Rather, it means a person receiving care and treatment in an approved centre. That finding is binding upon me and means that I cannot take into account the applicant's

desire to leave the centre in deciding whether he was a voluntary patient at the relevant time.

39. But there is a second reason why this does not appear to be the correct approach to the definition of a voluntary patient in respect of whom s.23 is invoked. Section 23 can only be invoked when a person signals their intention to leave the approved centre. Thus, by definition, a voluntary patient in respect of whom a s. 23 application is made will always wish to leave the centre. This is demonstrated *inter alia* by the case of *KC* where the necessity for the approved centre to have recourse to s.10 and s.14 rather than s.23 when seeking to detain a voluntary patient was caused by that patient's failure to indicate she wished to leave the centre (although she was refusing all treatment in the centre and thus a detention Order was required to administer that treatment).

40. An argument could be made (although was not in fact made by the applicant) that one must read s.2 and s.23 disjunctively. That would necessitate on the one hand taking into account a person's desire to leave the centre in deciding whether that person should come within the definition of a voluntary patient under s.2, and on the other accepting that s.23 requires as a necessary precondition that the voluntary patient is seeking to leave the centre.

41. But reading the sections in that way would mean the legislature had drafted s.23 to address the position of patients who want to leave the centre and are not detained pursuant to an order, yet s.2 would exclude from the application of s.23, patients who want to leave the centre and are not detained under any order. That is not a harmonious reading of the two sections and would leave s.23 largely unworkable. I am satisfied that was not the meaning intended by the Oireachtas. Nor is it in keeping with the *dicta* referred to above in EH. Accordingly, I conclude that a person's desire to leave the centre is a necessary precondition for the application of s.23 and cannot be relied upon to establish that the person is not a voluntary patient for those purposes.

Was the applicant receiving treatment?

42. I was initially strongly attracted by the simplicity of the applicant's argument to the effect that he had not received any treatment in these 70 minutes from the time of the Tribunal's decision to the commencement of the s. 23 and s.24 procedures.

43. Initially the respondent's argument that the applicant had in fact received treatment appeared somewhat artificial where, as detailed below, no medication had been administered, no scheduled sessions with any medical professional were taking place, the period of time was extremely short and the applicant was at all times taking steps to leave, whether that was contacting his solicitor, packing his bags, bringing his wife, or agreeing to meet with his psychiatrist who sought to persuade him to stay.

44. However, in deciding this question, it is necessary to drill into both the definition of "treatment" under s.2, and the purpose of s. 23, in some detail. I totally accept the submission of counsel for the applicant that one cannot use the best interest approach of the Act in s.4, or the paternalistic approach referred to by McGuinness J. in *Gooden*, to

override the wording of the statute. But it is permissible to look at the purpose and intention of s. 2 and s. 23 as judicially interpreted when considering the issues raised by this case.

45. Treatment is defined under s. 2 as including "*the administration of physical, psychological and other remedies relating to the care and rehabilitation of a patient under medical supervision, intended for the purposes of ameliorating a mental disorder".*

46. This is a wide definition. Any steps taken referable to the care of a patient which are intended to improve a mental disorder, are covered within the definition. Physical remedies are of course included but so are psychological and other remedies. Here, the only active treatment that one can discern during the 70-minute period was a sustained attempt by the medical staff, and in particular the consultant psychiatrist treating the applicant, to persuade him to stay.

47. This may be seen by the affidavit of the applicant of 5 July 2021. At paragraph 3 he says that following the call with his solicitor:

> *"I informed the staff nurse of my intention to leave the department. I was asked to speak with my consultant psychiatrist before I left and, having packed my bags, I did so a few minutes later. Over the course of an approximately 20-minute meeting with him, in the presence of a staff nurse, I was asked several times to stay in the hospital as a voluntary patient; each time I informed him that I did not want to stay, I would not stay and that I was leaving. I told him I would not stay in the department and that I wanted to go, the Tribunal had lifted the order and as far as I was concerned I could go and I was leaving. At the meeting, my consultant psychiatrist agreed that I could go. He asked me if I would take medication if I was to leave and I told him I would as I knew the hospital would require this and it would help me stay out of hospital".*

48. He then refers to being in contact with his wife who agreed to come and collect him. He further refers to waiting with his packed bag in the hallway to be collected and being approached after approximately 15 minutes by the consultant psychiatrist, who told the applicant he had bad news and that the applicant was not being let out. At paragraph 6 of his affidavit he says as follows:

> *"At no time during the period between the Tribunal decision and being told that I was being detained was I given or did I take any treatment. At no time did I agreed to remain in the hospital as a voluntary patient. At all times I was clear that I did not want to stay, I would not stay and that I was leaving."*

49. The clinical notes for the relevant time are exhibited at TC1 to the affidavit of Mr Carmody of 1 July. The first entry for 30 June 2021 records as follows: "*Seen today prior to Tribunal. Continues to believe strongly in his delusions and states nil changed. He is suffering from a mental disorder and needs to be in a hospital".* That is followed by the note "*query affective component add effexor 75".* The author and time are not identified.

50. The next entry refers to the Tribunal taking place at 11am and the results at 2pm and states:

> *"revoked because of wrong name as passport not with DOP prior to renewal. Advised the patient has a material disorder as defined by the act.*
>
> *In view of the severity of the illness and concerns raised by TUSLA and difficulty monitoring his mental health in the community as he has no home or income he was detained in consultation with legal and managerial staff and colleagues as being in his best interests."*

51. At 3.55pm there is a reference to a second opinion, a form F13 and that a patient notification was given to the patient.

52. The medication chart records that at 2pm, while the applicant was still the subject of the Renewal Order, he was administered Invera 6mg. No medication was administered during the 70 minutes between the revocation and the s.23 order.

53. Counsel for the applicant submitted that contrary to what had been said on behalf of the respondent, it was not sufficient that the applicant *needed* treatment; rather the requirement under s. 2 is that he is *receiving* care and treatment. I fully agree with that submission, although the need for treatment is the context within which it must be considered whether he received treatment.

54. I equally agree with the submission made on behalf of the applicant that, contrary to the respondent's submission, the presence of pharmacological products in the applicant's body during these 70 minutes in question due to the administration of same at 2pm when he was still a involuntary patient, cannot be considered "treatment", since its genesis arose during the period while he was an involuntary patient.

55. I also agree with the submission that, contrary to what was argued by counsel for the respondent, treatment post invocation of s.23 and 24 cannot be considered relevant to the question as to whether the applicant was being "treated" within the meaning of s.2 in the 70 minutes at issue.

56. Nonetheless, despite the absence of evidence of active treatment in the form of administration of drugs or scheduled therapy provided by a member of the hospital staff, I have concluded that the applicant was being treated during the relevant time on the basis of the evidence before me.

57. First, he was physically in the hospital as a patient. That is not determinative, but his situation is to be distinguished from the hypothetical one invoked by counsel for the applicant at the hearing, where he argued that if his solicitor was considered to be mentally unwell while attending a tribunal in the approved centre, he could not be considered to be a voluntary patient as he would not be receiving treatment. He argued that the applicant was in the same situation. That does not seem a good analogy since the applicant was in the hospital as a patient in circumstances where he had previously

been an involuntary patient. As such, his history and needs were known to the medical staff. The fact that this knowledge was gleaned in the context of a Renewal Order that was subsequently revoked does not mean that context can be ignored when deciding whether the applicant was being "treated" post revocation.

58. Indeed, as the applicant's counsel observed, treatment is referred to in the continuous present. That means the analysis of whether treatment is taking place is to be carried out by reference to all relevant factors, including the previous treatment of the person in question.

59. Second, the medical staff of the hospital continued to treat him after the revocation of the Renewal Order in the same way as he had been previously treated. His desire to leave the hospital and his wish not to be treated are not, for reasons already explained, relevant in this regard and cannot prevent a finding that he was being treated, if the evidence otherwise supports such a finding.

60. What then did his treatment consist of? His meeting with his treating psychiatrist and a staff nurse post the revocation decision is crucial in this respect. Having informed the nurse of his intention to leave, the applicant was asked to meet with his consultant psychiatrist and did so. Dr. Moloney and the staff nurse were both at the meeting. They sought to persuade the applicant to remain in the approved centre, having regard to what is apparent from the clinical notes i.e. that Dr. Moloney believed he was suffering from a mental disorder, that his illness was so severe that he would have difficulty monitoring his mental health in the community and that concerns had been raised by TUSLA.

61. I have already indicated that I do not believe that the need for medical treatment means that he was in fact being treated; however, the belief of the medical staff in respect of the need for medical treatment is relevant, because it contextualises a finding based on the evidence before me that the medical staff were indeed treating the applicant post the revocation of the Renewal Order. In other words, it explains why the treatment was being provided and the context in which it was being provided.

62. One can identify from the account of that meeting the care and concern of his treating team and their desire to ensure he remained in hospital for the purpose of ameliorating his mental disorder. As recorded in the Form 13, Dr. Moloney believed the applicant's discharge would likely lead to a deterioration in his condition or prevent the administration of appropriate treatment, and that his detention would alleviate his condition. He believed that remaining in hospital would be in his best interests. The evidence suggests that had the applicant agreed to remain in hospital, the medical staff would not have invoked s.23 as his best interests would not have required it.

63. Third, it is certainly true that, unlike the cases identified above, the treatment as a voluntary patient was short, being 70 minutes. But the question of whether treatment is being administered does not depend on the time over which the treatment was provided, although it is of course potentially relevant.

64. Finally, the purpose of s. 23 cannot be ignored when considering when deciding whether the applicant was receiving treatment. It has been identified that it is intended to be used to cater for mishaps or unexpected developments which result in there being no order in respect of a patient needing treatment *(EH),* or where a voluntary patient requiring ongoing treatment may seek to leave the hospital possibly in an unplanned and abrupt manner *(KC).*

65. This case is an example of this *par excellence*. A mistake was made in relation to the name of the applicant. Quite correctly the Tribunal revoked the Order and considered that, given the circumstances of the mistake, it was not appropriate that they cure the mistake under their statutory power to do so. Nonetheless, the applicant continued to be suffering from a mental disorder and required treatment in the approved centre for same. This is precisely the type of situation that s. 23 was adopted to cater for. Here, had the applicant not had any interaction with the medical staff post the revocation, the purpose of s.23 could not have prevented the conclusion on the basis of the evidence that he was not being treated within the meaning of s.2. But in considering whether in any given case a person is being treated in an approved centre for the purposes of s. 23, the purpose of s.23 must be borne in mind.

66. For the reasons set out above, I conclude that the applicant was being treated during the 70 minutes at issue.

Level of risk presented by the applicant

67. Finally, I should deal with a discrete argument made by counsel for the applicant. Counsel accepted that the applicant was suffering from a mental illness, noting that there was no other medical evidence other than that presented by the respondent which identified a mental illness. However, an argument was raised in relation to the level of risk that the applicant presented, having regard in particular to the averment at paragraph 12 of the affidavit of Dr Moloney of 6 July 2021. (I should note at this point that the applicant's counsel objected to this affidavit on the basis that it did not state that Dr Moloney was swearing the affidavit on behalf of the Clinical Director of the Department of Psychiatry. Article 40.4.2 applications must be generally be taken in a very short time and accordingly I am prepared to overlook the technical default in this respect and treat this affidavit on the basis that it was sworn on behalf of the respondent).

68. Dr Moloney describes the nature of the applicant's illness, stating that the applicant became very preoccupied with religion and developed multiple delusional beliefs relating to same. At paragraph 3 he referred to the fact that prior to admission the applicant expressed to his wife that he would need to kill his son because he was directed to by his beliefs. TUSLA were informed of this and liaised with Dr Moloney and his team about how concerned they were and wished to reassess the situation on the applicant's discharge. Dr Moloney referred to the applicant being admitted to the Department of Psychiatry in Portlaoise and refers to his diagnosis of a severe psychotic episode. He notes that it was too early to say whether it was an affective disorder or whether schizophrenia was the underlying condition. At paragraph 7 he identifies that since the applicant's admission to the Department of Psychiatry he has required ongoing treatment, medication observation

and care. He identifies that the treatment was required on 30 June 2021 and the days leading up to this and continues to date. At paragraph 10 he identifies that despite treatment *"his core religious delusional beliefs and lack of insight persisted strongly however and very worryingly he failed to engage in discussion about his direction to kill or sacrifice his son. He remains very unpredictable in this regard and a real risk".*

69. At paragraph 12 of his affidavit of 6 July 2021, Dr Moloney avers that if the applicant is released, *"given the progress of his disorder to this point, a very tragic outcome is a more than likely outcome given his rigid fixed delusions and guardedness around his threats to his son".*

70. Counsel identified that, despite this averment, in none of the Admission Order of 21 May 2021, the Renewal Order of 10 June 2021 or the Admission Order of 30 June 2021 was the patient stated to be suffering from a mental disorder because of the likelihood of the person causing immediate and serious harm to himself or other persons (described as the "risk/harm ground"). Only the "treatment ground" was identified, i.e. because of the severity of the illness, failure to admit the person would be likely to lead to a deterioration in his condition and detention in the centre would be likely to alleviate that condition.

71. It was argued that I should take this inconsistency of approach into account when deciding how much weight to give to paragraph 12 of Dr Moloney's affidavit set out above. In reply, counsel for the respondent submitted that there had been no cross-examination of Dr Moloney, that Dr Moloney is the treating psychiatrist and that I must give weight to the affidavit evidence that he has put before the court including paragraph 12.

72. It seems to me that the respondent's approach is correct in that the most up-to-date evidence is that of Dr Moloney in his affidavit of 6 July 2021. It is true that that evidence differs from that identified in the various admission and renewal orders, and in that respect the evidence is inconsistent. However, I must accept the most recent uncontroverted evidence and that is therefore the approach I have taken in considering the evidence.

Protections under s.23 and 24

73. Finally, it should be noted that the applicant, coming as he does under s.23 and s. 24, is entitled to receive all the protections built into those sections. This is vital since as Hogan J noted, the *quid pro quo* for departing from the usual approach of voluntarism in respect of hospital admission is that compulsory medical treatment and attention are attended by appropriate safeguards. By coming within the definition of a voluntary patient, the applicant benefits from all the protections afforded to a voluntary patient sought to be detained. That is of course quite separate from the question as to whether a person is or is not a voluntary person in any given circumstance. The existence of these protections could not justify treating a person as coming within the definition of a voluntary patient if the criteria were not met.

74. In the circumstances of this case, those protections mean that in respect of the initial s.23 detention the consultant psychiatrist, registered medical practitioner or registered nurse on the staff of the approved centre must be of the view that the person is suffering from a mental disorder. Here, the s. 24 process commenced immediately after the applicant was held pursuant to s.23.

75. Under s.24, the person must be examined by two consultant psychiatrists and they must certify that they are of the opinion that, because of such mental disorder, the person should be detained in the approved centre. Both consultant psychiatrists (Dr Moloney and Dr Daly) certified in this case that they were of the opinion that, because of such mental disorder, the applicant should be detained.

76. The applicant's detention may last no longer than 21 days and will expire on 20 July 2021. If his detention is renewed under relevant provisions of the Act, that detention must be confirmed by a Tribunal.

Conclusion

77. For the above reasons, I conclude that the applicant was being treated within the meaning of s.2 during the relevant 70-minute period between the revocation of the Renewal Order and the invocation of s.23, and therefore comes within the definition of a voluntary patient. This means the respondent was entitled to invoke the procedures under s. 23 and s. 24.

78. The applicant's detention is on foot of an Admission Order of 30 June 2021 made pursuant to those sections. Accordingly, his detention has not been shown to be unlawful and I refuse the Order of *habeas corpus.*