



**THE COURT OF APPEAL
CIVIL**

UNAPPROVED JUDGMENT

Neutral Citation Number [2022] IECA 71
Court of Appeal Record No. 2021/101
High Court Record No. 2020/459 JR

McCarthy J

Murray J

Binchy J

BETWEEN/

G.B.

APPLICANT/APPELLANT

-AND-

THE MENTAL HEALTH TRIBUNAL

RESPONDENT

JUDGMENT of Mr Justice McCarthy delivered on the 24th day of March 2022

1. This is an appeal against the refusal by Creedon J for an order of certiorari (and a related application for declaratory relief) quashing a decision of a Mental Health Tribunal dated the 5th of June 2020. That decision affirmed an Admission Order made on the 18th of May 2020 under the provisions of section 14(1) of the Mental Health Act 2001 as amended (“the Act”). The Admission Order authorised the reception, detention and treatment of the applicant on an involuntary basis at Tallaght University Hospital, an “*approved centre*” within the meaning of the Act. The order was made by a Dr Kelly.

2. The Mental Health Commission must, under section 17 of the Act, refer an Admission Order to a Mental Health Tribunal. Its role is addressed in section 18 of the Act. So far as is material, that provision is as follows: -

“18(1) Where an Admission Order or a Renewal Order has been referred to a Tribunal under s. 17 the Tribunal shall review the detention of the patient concerned and shall either –

- (a) if satisfied that the patient is suffering from a mental disorder, and*
 - (i) that the provisions of s. 9, 10, 12, 14, 15 and 16, where applicable, have been complied with, or*
 - (ii) if there has been a failure to comply with any such provision, that the failure does not affect the substance of the order and does not cause an injustice,*
 - (iii) affirm the order, or*
- (b) if not so satisfied, revoke the Order and direct that the patient be discharged from the approved centre concerned.”*

3. It will be seen that such a tribunal will review the detention and must affirm the order if it is satisfied that the patient is suffering from a mental disorder (as defined by the Act) and that the provisions of the sections to which reference is made therein *“where applicable”* have been complied with; in the event of non-compliance it must be satisfied that *“the failure does not affect the substance of the order and does not cause an injustice”* before the order can be affirmed.

4. There is not any doubt here but that at all material times the applicant was suffering from such a mental disorder. The focus accordingly is not on whether or not the Tribunal was right to conclude that the applicant was suffering from such disorder but, rather, whether or not it acted within jurisdiction in purporting to be satisfied, as it was, that the provisions

of *inter alia* section 12 of the Act (being the section applicable) had been complied with and thereafter whether or not the Tribunal could or did rely upon the saving provisions of subparagraph 18(1)(a)(ii). As can be seen this allows an Admission Order to be affirmed notwithstanding non-compliance in limited circumstances.

5. Section 12 of the Act was applicable because a member of An Garda Síochána (here, a Garda Markham) may in certain circumstances detain a person for the purposes of the Act.

The section is in the following terms: -

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

(a) take the person into custody, and

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

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

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

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

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

6. Garda Markham detained the applicant on the 18th of May at one o'clock and thereafter made an application pursuant to section 12(2) of the Act in a form prescribed by the Commission (a so-called Form 3) to a registered medical practitioner for a recommendation by the latter for the involuntary admission of the applicant to an approved centre. Form 3 is in part printed so that the Garda making the application to a registered medical practitioner can see what information should be set out therein. The material part is as follows: -



APPLICATION (TO A REGISTERED MEDICAL PRACTITIONER) BY A MEMBER OF AN GARDA SIOCHÁNA FOR A RECOMMENDATION FOR INVOLUNTARY ADMISSION OF AN ADULT (TO AN APPROVED CENTRE) **FORM 3** Mental Health Acts 2001 to 2018 Section 9 OR 12

PLEASE COMPLETE IN BLOCK CAPITALS

1. This application is made pursuant to: Section 9 OR Section 12

2. Full name of person to be admitted to an Approved Centre: [REDACTED]

3. Full address of person to be admitted to an Approved Centre: [REDACTED]

4. Date of birth OR age (if date of birth not known): 21/02/1979 Age: 41 Gender: M F

5. Applicant's full name: First name: ELAINE MARKHAM Surname: [REDACTED]

6. Applicant's telephone number: 01-6666020

7. State any connection of applicant with person: NONE

8. State reason for making application: I am applying for a recommendation for the involuntary admission of the above named person because:
CONCERNED FOR MENTAL HEALTH BELIEF MALE IS MENTALLY UNWELL AND IN NEED OF TREATMENT

9. Circumstances in which application is made: IN PUBLIC IN JUST A TOWEL AROUND HIS WAIST HOLDING A LANTERN TALKING ABOUT WANTING TO BE DEPORTED

10. Name and address of Approved Centre for admission: ACUTE PSYCHIATRIC UNIT TALLAGHT UNIVERSITY HOSPITAL TALLAGHT DUBLIN 24

11. Name and address of Garda Station: I am a member of An Garda Síochána based at: ELAINE MARKHAM TALLAGHT GARDA STATION

12. Date: 18/05/2020 Time: 13:00

For use only in accordance with the Mental Health Acts 2001 to 2018. Penalties apply for giving false or misleading information. NOTE: For information in relation to the legislation, please refer to www.mhicd.ie/legislation. For information in relation to the Section of the Mental Health Act 2001 to which this form refers, please click [here](#).

7. As appears from this, the recommendation was sought on the grounds that the Garda was: -


“Concerned for mental health. Believe male is mentally unwell and in need of treatment.”

The circumstances in which the application was made are described in these terms: -

“In public... just a towel around his waist, holding a lantern, talking about wanting to be deported.”

8. Following an examination of the applicant by a Dr Moloney, he set out his recommendation in a so-called Form 5, which I set out in full: -

18/05/2020 16:20 4143588 PSYCH TUH PAGE 06/08

 **MHC**
Ceimisiún Meabhair-Shláinte Mental Health Commission

RECOMMENDATION
(BY A REGISTERED MEDICAL PRACTITIONER)
FOR INVOLUNTARY ADMISSION OF AN ADULT
(TO AN APPROVED CENTRE)

Revised March 2020
FORM 5
Mental Health
Acts 2001 to 2018
Section 10

PLEASE COMPLETE IN BLOCK CAPITALS

1. Full name of person the subject of recommendation [REDACTED]

2. Full address of person the subject of recommendation [REDACTED]

3. Date of birth OR age (if date of birth not known) 21/02/1979 Age: _____ Gender: M F

4. Full name of Registered Medical Practitioner JAMES MOLONEY

5. Professional address of Registered Medical Practitioner 4, TALLAGHT GARDA STATION DUBLIN 24

6. I am the person's General Medical Practitioner Yes No

7. Name and address of Approved Centre for admission ACUTE PSYCHIATRIC UNIT TALLAGHT UNIVERSITY HOSPITAL TALLAGHT DUBLIN 24

8. Name of Applicant ELAINE MARKHAM

I last examined the person on:

9. Date: 18/05/2020 Time: 13:38 (24 hour clock e.g. 2:45pm to written as 14:45)

which was within 24 hours of receipt of the application for involuntary admission which was made on: 18/05/2020

10. In my opinion this person is suffering from a mental disorder 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 judgement 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.

OR

(a) (as above) and (b) (as above).

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NOTE: For information in relation to the legislation, please refer to www.mhcirl.ie/legislation.
For information in relation to the Section of the Mental Health Act 2001 to which this form refers, please click [here](#). 6



RECOMMENDATION
 (BY A REGISTERED MEDICAL PRACTITIONER)
 FOR INVOLUNTARY ADMISSION OF AN ADULT
 (TO AN APPROVED CENTRE)

FORM 5
 Mental Health
 Acts 2001 to 2018
 Section 10

PLEASE COMPLETE IN BLOCK CAPITALS

My opinion above is based on the following grounds:

11. Give clinical description of the person's mental disorder

Thought Disorder
DELUSIONAL

12. I recommend that the above named person be admitted to the above named approved centre.

Yes No

13. I have informed the above named person of the purpose of the examination:

Where "No" is indicated, I confirm that such information has been withheld because the provision of such information would be prejudicial to the person's mental health or well-being or emotional condition.

14. I am not a person disqualified from making a recommendation for reasons set out in Section 10(3) of the Mental Health Acts 2001 to 2018.

15. I shall give a copy of this Form to the applicant as per Section 10(4) of the Mental Health Acts 2001 to 2018.

Signature of Registered Medical Practitioner

[Handwritten Signature]

MCRN:

Date:

Time:

(24 hour clock e.g. 24:00 is written as 00:00)

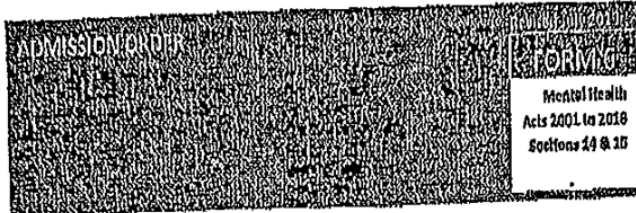
For use only in accordance with the Mental Health Acts 2001 to 2018. Penalties apply for giving false or misleading information.
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 For information in relation to the Section of the Mental Health Act 2001 to which this form refers, please click [here](#).

9. As appears therefrom Dr Moloney's **opinion** was (pursuant to section 10) that because of the: -

“...severity of the illness and disability or dementia the judgement of the person concerned is so impaired that failure to admit the person [the applicant] to an approved centre would be likely to lead to a serious deterioration of his or her condition or would prevent the administration of appropriate treatment that could be given only by such mission.” [my emphasis].

10. In that Form, Dr Moloney similarly set out (in the portion thereof which required him to “*give clinical description of the person’s mental disorder*”) that the applicant was “*thought disordered*” (*sic*) and “*delusional*” – this under the heading pertaining to the basis of the opinion.

11. As the Gardaí were entitled to do under section 12(5), the applicant was then taken by them to Tallaght Hospital where he was seen by Dr Kelly who made the Admission Order (in accordance with Form 6) timed therein at 15.50 and it is as follows: -



PLEASE COMPLETE IN BLOCK CAPITALS

1. Full name of person the subject of recommendation

2. Full address of person the subject of recommendation

3. Date of birth (Age) 21/02/1979 Gender M F

4. Name and address of Approved Centre: ACUTE PSYCHIATRY UNIT, JAMES SPENCER HOSPITAL, DUBLIN 24

5. Date and time of person's arrival in Approved Centre 18/05/2020 Time 15:05

6. I, BRANDAN KELLY (Consultant Psychiatrist) (Print name)

examined the person on Date: 18/05/2020 Time 15:30

- 7. In my opinion this patient continues to suffer from a mental disorder 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) because of the severity of the illness, disability or dementia, the judgement 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 institution. AND (i) 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. OR (ii) as above and (b) as above.

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ADMISSION ORDER	FORM 6 Mental Health Acts 2001 to 2018 Sections 14 & 15
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PLEASE COMPLETE IN BLOCK CAPITALS

My opinion above is based on the following grounds:

8. Give clinical description of the person's mental disorder

PSYCHOTIC
DELUSIONAL
THOUGHT-DISORDER
VERY LITTLE INSIGHT.

9. Pursuant to Section 14(1)(a) and Section 15(1) of the Mental Health Acts 2001 to 2018, I make an Admission Order for the reception, detention and treatment of the above named person for a period of 21 days from the date of the making of this Order.
10. I certify a person disqualified from making an Admission Order for reasons set out in Section 14(3) of the Mental Health Acts 2001 to 2018.
11. I shall within 24 hours of making this Order
- Give to the patient a notice in writing as required by Section 16(1)(b) and 16(2) of the Mental Health Acts 2001 to 2018;
 - Send to the Commission a copy of this Order as required by Section 18(1)(a) of the Mental Health Acts 2001 to 2018.

Signed: Brendan Kelly (Consultant Psychiatrist)

MentH: 020005

Date: 18/05/2020 Time: 15:50

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 For information in relation to the Section of the Mental Health Act 2001 to which this form refers, please click [here](#).

12. As appears from that document Dr Kelly's **opinion** was that the "...applicant [continued] to suffer from a mental disorder..." [my emphasis].

13. Thus, the applicant was in Garda custody from the time of his arrest to the time when he was taken to the hospital. An Admission Order remains in force for a period of 21 days and may be renewed (this was done here but the applicant was released relatively soon after renewal and is not relevant to the issues here). Accordingly, there are four stages to the process under consideration in these proceedings commencing with the arrest and request by the Garda to a doctor for a recommendation, that recommendation itself, the Admission Order and the consideration of such order by the Tribunal.

14. In its written decision the Tribunal refers to the fact that it was submitted by the applicant at the hearing before it that: -

“... the order [should be] revoked on the grounds that [the applicant] was detained by the Gardai pursuant to section 12 of the legislation and the fact that he was in public wearing just a towel around his waist, holding a lantern and asking to be deported was not evidence of causing immediate and serious harm to himself or others. It was her submission as there is insufficient evidence to this (sic) that it does affect the substance of the Admission Order and does cause an injustice to [the applicant]. She also noted that the Recommendation was made less than an hour later, and the GP found [the applicant] to be suffering from a mental disorder pursuant to section 3 (1)(b)(i) and (ii) of the legislation.”

15. The Tribunal addressed the issue thus raised in these terms: -

“...A person arrested under Section 12 has two legal safeguards in place – an examination by a Medical Practitioner and an examination by a Consultant Psychiatrist, and in this case, both Dr Moloney and Professor Kelly found [the applicant] to be suffering from a mental disorder pursuant to legislation.”

Furthermore, the Tribunal went on to say: -

“The Tribunal also considered the Form 3 on its face and we considered the words used by Garda Markham. It is clear and she formed the opinion that there was an

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

16. On the 13th of July 2020, Meenan J granted leave to the applicant to seek the orders of certiorari and the declaration respectively. The terms of the order were as follows: -

- (i) *An order of certiorari quashing the decision of the Mental Health Tribunal ("the Tribunal") in respect of the applicant dated 5th June 2020 which affirmed the Involuntary Admission Order of 18th May 2020.*
- (ii) *A declaration that the Tribunal when reviewing the involuntary detention of the applicant misapplied the provisions of s. 12 of the Mental Health Act, 2001 (as Amended) ("the 2001 Act") and/or erred in law.*

That leave was given "on the Grounds set out at paragraph (e) of the statement [of grounds]".

17. Paragraph (e) effectively sets out the entirety of the history of this matter, asserting various grounds on which it is claimed the decision is bad. This portion of the statement ran to 22 paragraphs and the grounds of opposition effectively *inter alia* traverse them. The following grounds, having regard to the decision of the High Court and the core issue which arises here, are relevant (enumerated in accordance with the original statement): -

- (viii) *As the Tribunal convened to review the applicant's decision his solicitors submitted that there was insufficient evidence based on the garda member's observations as set out on the relevant application form, of a belief or an opinion as to any serious and immediate risk of the applicant causing serious harm to either himself or others, [and] that this affected the substance of the order and that consequently the order should be revoked.*
- (x) *A purported exercise of the s. 12 power is only lawful if it comes within the express terms of the provision.*
- (xii) *The use of the phrase "serious likelihood" envisages a standard of proof of a high level of probability, one beyond the normal standard of proof in civil cases of being more likely to be true but below the standard required in a criminal case of beyond a reasonable doubt. For this high standard to be satisfied there must be available to be acted upon, clear, cogent and compelling evidence capable of being safely acted upon. Same was lacking in the case the subject of the application.*
- (xiii) *To arrive at its decision in respect of the utilisation of section 12 the Tribunal acted solely on the basis of the Garda Form 3. However all that document said about the circumstances/ reasons for the garda commencing this particular admission route, via section 12, was that firstly the garda member was applying for a recommendation for involuntary admission because she was "concerned for mental health, belief male is mentally unwell and in need of treatment" (see part 8 of the form which requests "state reason for making application") and subsequently at part 9 of the form after being requested to set out the "circumstances in which the application is made", there appears the entry "in public in (sic) just towel around his waist holding a lantern. Talking about wanting to be deported".*

- (xiv) *There was no evidence upon which the Tribunal could be satisfied that the relevant garda had formed the view that there were “reasonable grounds for believing that a person was suffering from a mental disorder and that because of the mental disorder there was a serious likelihood of the person causing immediate and serious harm for himself or herself or other persons”.*
- (xvi) *On the evidence at the Tribunal as to the basis on which the garda purported to utilise section 12 to deprive the applicant of his liberty, it was not open to the Tribunal to draw the conclusions it did, as recited in its decision. In this regard there was simply no evidence of a belief on the part of the garda that there [was] any likelihood, let alone a “serious likelihood” of the applicant causing immediate and serious harm to himself or others.*
- (xvii) *Moreover, the Tribunal erred in placing any reliance on the fact that after the arrest under s. 12, two further steps in the admission process had to take place, namely what is referred to as an examination by a medical practitioner and an examination of a consultant psychiatrist. The applicant’s legal representative made submissions on section 12 and the Tribunal failed to vindicate the safeguards embedded into those provisions, the statutory prerequisites relied [upon] therein and give those safeguards life and meaning. Rather, regrettably, the Tribunal misconstrued the provisions of section 12 and applied an incorrect test and/or deemed the test satisfied on inadequate evidence which could support findings that there was compliance with section 12.*

18. The respondent’s Grounds of Opposition *inter alia* affirmatively pleaded as follows (enumerated in accordance with that document): -

“6. There was no ‘error’ in the process leading up to the making of the Admission Order. Without prejudice to the forgoing, the information contained in the Form 3

was sufficient evidence to justify the initial taking into custody of the Applicant by the Garda pursuant to section 12 of the Mental Health Act 2001 as amended for safeguarding the Applicant as she acted on a reasonable belief that there was a serious likelihood of the Applicant causing immediate and serious harm to himself. In the premises, the invocation of a power of detention under section 12 of the Mental Health Act 2001 by the Garda concerned was lawful and not otherwise.

7. Further and/or without prejudice to the foregoing, as a matter of general principle, the Tribunal does not agree with the proposition that the validity of an Admission Order is predicated on the validity of the initial action under Section 12 of taking the Applicant into custody.

8. Further and/or without prejudice to the foregoing, when considering whether or not to affirm the Admission Order, the Tribunal was inter alia entitled to have regard to the totality of the admission process undertaken and to the protections afforded to persons such as the Applicant under the provisions of the Mental Health Acts 2001 to 2020.

9. Further and/or without prejudice to the foregoing, if the Garda concerned acted in excess of jurisdiction when she detained the Applicant pursuant to Section 12 of the Mental Health Act 2001 (which is denied), such an act did not vitiate the process of admission to the Approved Centre that came thereafter and/or create a fundamental and jurisdictional flaw as alleged as such action (had it occurred and which is denied) did not affect the substance of the Admission Order and/or cause and injustice to the Applicant as the removal of the Applicant from the Garda Station to the Approved Centre was authorised not by the completion of Form 3 but by the completion of Form 5 by Dr James Moloney when he examined the Applicant and formed the opinion...

10. Further and/or without prejudice to the forgoing, if the Garda concerned acted in excess of her jurisdiction when she detained the Applicant pursuant to Section 12 of the Mental Health Act 2001 (which is denied), such an act did not vitiate the process of admission to the Approved Centre that came thereafter and/or create a fundamental and jurisdictional flaw as such action (had it occurred and which is denied) did not affect the substance of the Admission Order and or cause and injustice to the Applicant as the Admission Order was signed by Dr Brendan Kelly after he examined the Applicant on the 18th May 2020 and formed the opinion...

11. Further and/or without express prejudice to the foregoing, if the Garda concerned acted in excess of her jurisdiction when she detained the Applicant pursuant to Section 12 of the Mental Health Act 2001 (which is denied), such an act did not create a fundamental and jurisdictional flaw and/or deprive the Tribunal of its jurisdiction and/or duty to consider the totality of the evidence and/or the best interests of the Applicant in reaching its decision whether or not to affirm or revoke the Admission Order. In the premises, the Tribunal having heard all the evidence lawfully decided that the Applicant did continue to suffer from mental disorder within the meaning of Section 3(1) (I) & (II) of the Mental Health Act 2001 and that it was in his best interests to continue to be involuntarily detained in the Approved Centre.

12. The Tribunal is not a court of law but rather is an expert panel and it is entitled to use its experience to draw reasonable inferences from the totality of the evidence before it, in addition, at no stage did the Applicant seek an adjournment for the purpose of calling any additional witnesses, such as the Garda concerned.”

19. The trial judge disposed of the core issue as to whether or not there was any or any sufficient evidence before the Tribunal to allow it to reach the conclusion that there had been compliance with section 12(1), in the following terms: -

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

101. The Court agrees with the respondent that what is contemplated by the Act is the civil standard of proof. There is no third intermediary standard of proof between the civil standard and the criminal standard. The Court agrees that great care always needs to be taken in applying this standard to decisions of this nature and in that regard agrees with the views expressed by Kelly P in the judgment of J.M v. HSE [2018] 1 IR 688 where he held at p.717 that the decision should be made only upon “clear and convincing evidence.”

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

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

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

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

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

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

107. The Court agrees that the jurisprudence requires a purposive and careful interpretation encapsulated in the views of O'Neill J in *W.Q* that the best interests of a person suffering from a mental disorder are secured by a faithful observance of and compliance with the statutory safeguards put into the Act of 2001 by the

Oireachtas and that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by such a tribunal.

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

20. On this appeal two propositions were advanced. The first was that there was not any or any sufficient evidence before the Tribunal to allow it to reach the conclusion that it did, namely, that the provisions of section 12 had been complied with and in particular that Garda Markham had “*reasonable grounds for believing that [the applicant] is suffering from a mental disorder and that because of the mental disorder there is a serious likelihood of the person causing immediate and serious harm to himself or herself or other persons ...*”. The second (and it is plain that this was a secondary point – which was not pressed) was that insufficient reasons had been given by the Tribunal for its decision; no leave was granted on that ground and accordingly I am not prepared to entertain it.

21. As will appear from section 18 if *inter alia* the provisions of section 12 were not complied with the Tribunal might proceed, obviously on evidence, to conclude that such a failure did not affect the substance of the order and did not cause an injustice. As pointed out by Creedon J in her judgment and as is the fact (at para. 71) the respondent’s position was that there was sufficient evidence to show that the Tribunal acted within jurisdiction, and addressed itself correctly in law, formed an expert view on the evidence which was made available to it, afforded fair procedures in every respect, decided the case on the basis of the

section 12 evidence and did not apply the saving or curative provision [*i.e.* that at section 12(1)(b)] because it was satisfied section 12 had been complied with.

22. Much was said in the High Court, the judgment of that court and at least in the written submissions here about the interpretation of the Act, including the issue of whether or not the so-called purposive approach to construction is relevant. I do not think that that principle of construction arises because the sole issue is a straightforward one involving the application of traditional principles of judicial review by reference to perfectly plain and equally straightforward statutory provisions.

23. Before proceeding to address what I have described as the core issue directly, a number of issues have arisen of what I might term as a subsidiary kind but with which I consider it necessary to deal.

24. It has been submitted that when adjudicating *inter alia* on whether or not a member of An Garda Síochána had, at the time of arrest, reasonable grounds for believing that an individual was suffering from a mental disorder and that there was a serious likelihood that he would cause immediate and serious harm to himself and others, being an essential prerequisite for a lawful arrest, the Tribunal could not have regard to the contents of the so-called Form 3. This proposition was advanced as one of general application. I further understood this contention to be based upon the proposition that such a form is not directed to the issue of whether or not such “*reasonable grounds*” for an opinion do exist but is directed to a registered medical practitioner. There is little doubt but that the proposition is wrong; I am of the view that such a document can in principle be used, with other evidence, by an administrative tribunal such as the Mental Health Tribunal where the laws of evidence do not apply as in courts. Such a document will invariably be contemporaneous, or nearly so, with an arrest and whilst it is not in the law of evidence, in principle, probative of the facts stated therein, its contemporaneity gives it a high level of reliability as to what might have occurred; in the relatively informal, and, and I mean informal by comparison with a

court, of a tribunal of the present kind it seems to me that that must be so. Valuable factual material may be found therein. The weight to be given to the contents of the document will needless to say, be dependent on the facts and circumstances on a case by case basis. What is important is that in principle regard may be had to it. However, in the event that a dispute arose as to whether or not the statements made therein were to a greater or lesser extent accurate (when a Tribunal was seeking to, or at least considering, reliance upon them as to their substance for the purpose of adjudicating on the facts) it might well be inappropriate to rely upon such a document, whether wholly or in part.

25. I think that the applicant is wrong also in contending that the Tribunal could not have regard to the medical evidence, with special reference to that of Dr Moloney (but extending to doctors such as Dr Kelly) who saw the applicant within an hour or thereabouts of his arrest. It seems obvious to me that a tribunal of this kind could have regard to the applicant's state, as found by them, in making a judgment as to whether or not somewhat earlier, and in particular at the time of arrest, the applicant might have been displaying symptoms of mental illness to the extent necessary to ground a properly held opinion. Indeed, all will depend upon the facts.

26. I might add also at this juncture that an issue has arisen as to the standard of proof upon which a tribunal would reach its decisions. In this regard, reference was made to the judgment of O'Neill J in *M.R. v Byrne & Flynn* [2007] 3 IR 211. There, he was considering the meaning of section 3(1)(a) of the Act. That defined "*mental disorder*" as, to put the matter shortly, an illness, dementia or intellectual disability which "*because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons...*". The Act contemplates extensive limitations on persons with mental disorder and O'Neill J addressed the issue of the standard of proof in that context in these terms (at p. 222, paras. 27 – 29): -

“27. Insofar as s. 3(1)(a) is concerned the threshold for detention in an approved centre by way of either an admission order or as in this case a renewal order is set high. There must be a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons.

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

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

This conclusion was rejected by Creedon J in the following terms: -

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

100. The respondent argued that what is contemplated by the statute is the civil standard of proof which should be clear and cogent...

101. The Court agrees with the respondent that what is contemplated by the Act is the civil standard of proof...”

27. I am satisfied that the trial judge was right in this regard; there is no authority for the approach taken by O'Neill J. At common law this standard is unknown. The ordinary standard of proof in civil matters, namely, proof on the balance of probabilities applies – there is no reason to suppose that because of the importance of the issues a different standard pertains.

28. Turning then to the main (core) issue, it seems to me that there was indeed no or no sufficient evidence upon which the Tribunal could have reached the conclusion that there had been compliance with the provisions of section 12(1) and in particular on the basis of which it could have properly reached the conclusion that the Garda held the requisite opinion on reasonable grounds.

29. Moreover, there was no evidence as to what, or indeed any, opinion might have been held by Garda Markham. The Tribunal simply inferred, from the contents of the Form 3 completed by her, that Garda Markham must have held the necessary opinion. I do not suggest that in a procedure of this kind it will invariably be the case that, in terms, the opinion be stated (say, by written statement) as it would be in a court. Nor am I suggesting that the opinion which an arresting Garda must hold for the purposes section 12(1) be one which would withstand forensic analysis. Of its very nature, the opinion which the Garda must form is one based on a non-medical behavioural observation of a person, and the threshold for the formation of the reasonable opinion necessary for the purposes of section 12(1) is low. The evidence that that opinion has been formed does not have to be recorded in any particular way and can be established informally by – for example – a signed statement by the Garda in question or a record to that effect on the relevant forms. Nonetheless, compliance with the relevant provision involves a tribunal in addressing whether or not the necessary opinion was actually so held by the officer concerned on objective grounds. It might in theory be possible to draw an inference from facts of which a tribunal was satisfied to the effect that a particular opinion has been formed even though not stated but in my view

on any analysis of the material a conclusion that the relevant opinion existed is untenable; as characterised by counsel for the applicant at the hearing it was a “*leap too far*” (if indeed a “*leap*” would ever be lawful). As can be seen from Forms 5 and 6 provision is made therein for doctors to state their opinions; there is no reason why such opinion could not be stated similarly in, say, an amended Form 3 or the Garda asked to make a brief statement in a proper case. No criticism can be made of the applicant’s solicitor for not seeking an adjournment or “*calling*” the Garda (in point of procedure counsel told us this latter course was not possible and he stressed the inquisitorial nature of the procedure).

30. Since the Tribunal acted without any or any sufficient evidence upon which it could rationally reach the conclusion that there had been compliance with section 12 of the Act, I think that the decision is void. Having regard to the fact that the applicant has long been at liberty, I would hear counsel as to the relief to be granted.

31. Since the applicant has been wholly successful in his appeal, he is entitled to an order for his costs (with adjudication in default of agreement) both in this Court and the High Court unless either party requests an oral hearing on the issue of costs within 14 days.

32. Mr Justice Binchy and Mr Justice Murray concur with this judgment.