THE SUPREME COURT

[S:AP:IE:2019:000136]

Clarke C.J.

McKechnie J.

MacMenamin J.

Charleton J.

Baker J.

Between/

M. C.

Applicant/Appellant

- And -

The Clinical Director of The Central Mental Hospital

Respondent

- And -

The Mental Health (Criminal Law) Review Board

Notice Party

JUDGMENT of Ms Justice Baker delivered on the 4th day of June, 2020

1. On 29 July 2002, Ms C took the life of her infant son and attempted to drown her young daughter. She was 27 years old at the time of these events, and having been found guilty of the killing and attempted murder on 20 January 2006, was committed to the Central Mental Hospital ("CMH") with a diagnosis of schizoaffective disorder. In June 2006, following the enactment of the Criminal Law (Insanity) Act 2006 ("the 2006 Act"), she was reclassified as a person found not guilty of the crimes by reason of insanity.

2. Ms C is now 45 years of age, she was at the time of the events, and remains, married to her husband and the couple have four surviving children. She is a member of the Travelling Community.

3. Ms C responded very well to the treatment afforded to her in the CMH and at the date of the hearing of the appeal was living an orderly and full life in the company of her husband and children in their home in the west of Ireland. She has, it should be noted, a very good relationship with her daughter, whose life she attempted to take in 2002.

4. Ms C's detention was kept under review by the notice party to these proceedings, the Mental Health Review Board ("the Review Board"), under s. 13 of the 2006 Act, and following the fifteenth such review, on 9 August 2012, the Review Board permitted her release from the CMH subject to conditions.

5. The conditions imposed at that time were sought to be varied by Ms C, and on 12 December 2013, the Review Board acceded to her application for a variation of the conditions concerning her choice of residence attaching to her release.

6. It is the events following the decision by the Review Board in December 2013 that gave rise to an application for judicial review, an appeal from the decision of the High Court refusing judicial review to the Court of Appeal, and subsequently, the granting of leave to appeal to this Court by its determination on 23 October 2019, *M. C. v. Clinical Director Central Mental Hospital* [2019] IESCDET 237.

7. The issue in dispute concerns the place of residence of Ms C. Until the Review Board made its determination in December 2013, the decision as to where Ms C would reside remained vested in her treating psychiatrist in the CMH, albeit in consultation and discussion with her. The variation decided by the Review Board in December 2013 was that Ms C herself could thenceforth decide her place of residence. As part of that process, by letter of 13 December 2013, the Review Board directed the Clinical Director of the CMH ("the Clinical

Director"), to assess and then confirm the making of certain arrangements to facilitate the proposed variation, and for the ongoing supervision and enforcement of the revised conditions.

8. By his letter of 19 December 2013, the Clinical Director declined to assess and then put in place the arrangements necessary to facilitate the variation in the conditions of release.

9. Leave to apply for judicial review was granted by the High Court on 30 July 2014 in which Ms C sought *certiorari* of the decision of the Clinical Director, *mandamus* directed to him to make such arrangements, and a declaration that the refusal to make the arrangements to facilitate the proposed variation were in breach of her rights or were unreasonable, unlawful, and an unwarranted interference with the exercise of the statutory powers and functions of the Review Board.

10. The application for judicial review came on before Eagar J., but by that time, the Review Board had unconditionally discharged Ms C from the CMH, as a result of which she no longer needed to pursue a claim for *mandamus* or *certiorari* and some, but not all, of the declarations pleaded.

11. Ms C sought to maintain her application for declaratory relief, and for damages for breach of her constitutional rights and rights under the European Convention on Human Rights Act 2003 ("the 2003 Act"). The proceedings were dismissed as moot, and the Court of Appeal agreed.

12. The following matters arise in this appeal:

1. Whether the claim for declaratory relief and for damages is moot, either because there was no live controversy between the parties, or because the claim was "insubstantial", the test applied by the Court of Appeal;
2. Whether the refusal by the Clinical Director to make the necessary arrangements to facilitate the operation of the decision of the Review Board was lawful, and for that purpose, the question for consideration is the respective roles of the Review

Board and of the Clinical Director in the light of the provisions of s. 13 of the 2006 Act;

3. Whether Ms C is entitled to damages and on what basis.

The statutory provisions

13. The CMH is a "designated centre" under s. 3 of the 2006 Act for the reception, detention, care, and treatment of persons committed or transferred there under the provisions of the Act.

14. The Clinical Director is defined by s. 71 of the Mental Health Act 2001 as follows:

> "(1) The governing body of each approved centre shall appoint in writing a consultant psychiatrist to be the clinical director of the centre.
>
> (2) Nothing in this section shall be construed as preventing a consultant psychiatrist from being the clinical director of more than one approved centre."

15. The Clinical Director was at all material times, professor Henry G. Kennedy, a consultant forensic psychiatrist and clinical professor of Forensic Psychiatry at University of Dublin, Trinity College. At all material times, Ms C was under the care of Dr Helen O'Neill, consultant forensic psychiatrist.

16. The Review Board is a statutory body established by s. 7(1) of the 2006 Act and s. 11(2) of the Act, as amended by s. 6 of the Criminal Law (Insanity) Act 2010, identifies its role as an independent body:

> "The Review Board shall be independent in the exercise of its functions under this Act and shall have regard to the welfare and safety of the person whose detention or conditions of discharge it reviews or whose application for unconditional discharge it determines under this Act and to the public interest."

17. The Review Board is independent from the detainer, and acts in the interests of the welfare and safety of the person detained, and in the public interest, and following legislative amendment in 2010, the Review Board has the power to determine the conditions of discharge

of any person detained under the Act, and to determine whether to grant an unconditional discharge.

18. The Review Board is required by the 2006 Act to review the detention of a patient at least every six months and the decision which gave rise to the present litigation was the fifteenth such review of the detention of Ms C. Section 13(7) of the 2006 Act, as renumbered by s. 197(2)(a) of the Criminal Justice Act 2006, provides that a patient detained in a designated centre may himself or herself apply to the Review Board for a review of his or her detention, and the Review Board has an independent power to commence a review on its own initiative.

19. The powers of the Review Board are set out in s. 12 of the 2006 Act, a detailed section running to ten sub-sections. In summary, the Review Board has the power to hold hearings for the purposes of a review under the Act, it has extensive powers as to the mode of hearing and may direct persons whose evidence is required, including the patient, to appear before it, and has the power to direct the production of any documents specified in any direction. A person who fails or refuses to attend before the Review Board or to answer its questions shall be guilty of an offence under the Act.

A conditional discharge

20. The Review Board may make an order for the discharge of the patient, subject to such conditions as it considers appropriate. Such a discharge order, referred to as a "conditional discharge order", was made in respect of Ms C on 9 August 2012. The order required that decisions as to her place of residence were to be made by her consultant psychiatrist, Dr O'Neill, and, as a condition of the order, Ms C was to inform her treating team of any verbal or physical abuse directed against her or against her children by her husband.

21. Section 13A(2), inserted by s. 8 of the Criminal Law (Insanity) Act 2010, makes provision for the arrangements to support the conditions imposed by a conditional discharge order:

> "The Review Board shall not make a conditional discharge order in respect of a patient until it is satisfied that such arrangements as appear necessary to the clinical director of the designated centre concerned have been made in respect of the patient, and for that purpose, the clinical director concerned shall make such arrangements as may be necessary for —
>
> (a) facilitating compliance by the patient who is the subject of the proposed order with the conditions of the order,
>
> (b) the supervision of the patient, and
>
> (c) providing for the return of the patient to the designated centre under section 13B in the event that he or she is in material breach of his or her conditional discharge order."

22. On a plain reading of that sub-section, the Review Board may not make a final conditional discharge order unless certain practical supports are identified and unless the Review Board is satisfied that all necessary steps have been taken to provide these practical supports. The tension between the role of the Review Board and that of the Clinical Director forms the backdrop to the present appeal, as the Clinical Director expressed himself unable to make the arrangements necessary to support the supervision of Ms C and to facilitate her in complying with the conditions proposed following the review in November 2013.

23. It is Ms C's argument that because the Clinical Director did not assess and then facilitate the provision of those supporting services, she was denied a fundamental right to personally determine her living arrangements.

The conditional discharge order

24. Following the review hearing on 23 July 2012 the Review Board issued a conditional discharge order on 9 August 2012, by which Ms C was discharged from the CMH subject to a condition that her place of residence would be determined "by the legally responsible

consultant psychiatrist" or by another forensic psychiatrist nominated by the Clinical Director. It is worth noting that extensive other conditions were imposed regarding her medication, review by the local mental health services, requirements that she engage with any prescribed occupational therapy, social work, or psychological or other therapeutic interventions or activities, that she would inform the treating teams if her husband resumed drinking or of any deterioration in their marital relationship and "any expression of disrespect, verbal or physical abuse, intimidation or threat of violence by her husband" towards her or their children. Ms C was also to inform the treating teams of any difficulties or deterioration in her relationship with her children, and of any significant changes in her social circumstances, in her relationship with her mother, siblings, or other extended family members, if she was subject to victimisation in the form of bullying, verbal threats, or harassment in any social situation. She was to "co-operate with and permit members of the treating team to have contact with occupational/ vocational, social care, healthcare or criminal justice system agencies" with which she might have had contact and to "allow the treating teams to meet with family members." Ms C had no history of drinking alcohol or abusing illicit prescription drugs and was to agree to continue to abstain from all such intoxicants and to comply with random drug level tests and with breathalyser tests, if requested.

25. Some months after that order was put into effect, in June 2013, Ms C notified Dr O'Neill and the local Gardaí that her husband had been verbally abusive to her and had threatened their younger son with violence and steps were taken to protect her at that time, including directions that she reside with her mother. She lived primarily with her mother and her sister thereafter but was permitted to progressively resume residence with her husband and children.

26. Ms C sought a variation of the conditions regarding her place of residence and by letter of 6 August 2013 her solicitors sought on her behalf a hearing of the Review Board to consider

her request. That led to the decision in December 2013 that she be permitted to make her own decisions regarding her place of residence and to the impasse that led to these proceedings.

Are the proceedings moot?

27. The first question for consideration on the appeal is whether the proceedings seeking declaratory relief and damages are moot.

28. Leave to apply for judicial review was granted by the High Court on 30 July 2014. On 12 December 2014 the Review Board made an order unconditionally discharging Ms C from the CMH. Counsel correctly accepted that by the time the proceedings came on for hearing on 26 January 2016, relief by way of *certiorari* and *mandamus* was neither necessary nor appropriate but Eagar J., for the reasons stated in his written judgment, *M. C. v. Clinical Director - Central Mental Hospital* [2016] IEHC 341, refused the balance of the claims for declaratory relief and damages on the grounds that the proceedings were moot in their entirety.

29. It seems that Eagar J. did not treat the proceedings as moot in the true sense, as he did make a determination regarding the alleged breach of duty and a determination that an award of damages was not appropriate having regard to the fact that "the respondent had acted in the interest of the applicant and the public at large", at para. 33 of his judgment, although he later noted, in the last paragraph, that his observations or findings regarding the alleged breach of duty and the claim for damages were *obiter*.

30. Peart J., with whose decision the other members of the Court of Appeal agreed, dismissed the appeal in a written judgment delivered on 18 January 2019, *M. C. v. Clinical Director - Central Mental Hospital* [2019] IECA 4, and considered that the proceedings were moot, although he came to that conclusion on different grounds. Peart J. considered that the claim for damages for breach of constitutional or rights under the European Convention of Human Rights ("the Convention") was "so minimal, tenuous and insubstantial as to not warrant the conclusion that there was a breach of those rights by the Clinical Director", at para. 41. He

went on to say that in the "unlikely event of some success" regarding that claim, any damages would be "purely nominal", and later that, in substance, the claim for damages was "a purely theoretical case for damages". Peart J. considered *obiter*, at para. 44 of his judgment, that he would have had "great difficulty" in coming to a view that the Clinical Director was in breach of his statutory obligation. He said that while the legislation appeared to contain a lacuna by reason of making no provision for the circumstances where the Clinical Director cannot, from a clinical point of view, put in place the necessary arrangements to assist compliance and enforcement by a patient with any conditions imposed in a conditional discharge order, such difficulties *"*would be capable of resolution informally by way of continuing discussion", and that the absence of a legislative provision suggested to him that the Oireachtas intended such informal arrangements and discourse to resolve any such difficulties.

The test for mootness

31. This Court recently considered the test for mootness in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 IR 274, at para. 51, where McKechnie J. reviewed the authorities and summarised the legal principles as follows:

> "(i) A case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing.
>
> (ii) Therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a *lis*, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined.
>
> (iii) The rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain

a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model.

(iv) It follows as a direct consequence of this rationale, that the court will not - save pursuant to some special jurisdiction - offer purely advisory opinions or opinions based on hypothetical or abstract questions.

(v) That rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness.

(vi) In conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice.

(vii) Matters of a more particular nature which will influence this decision include:

(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;

(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;

(c) the type of relief claimed and the discretionary nature (if any) of its granting, for example *certiorari*;

(d) the opportunity for further review of the issue(s) in actual cases;

(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the

former, how and in what way any decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) the impact on judicial policy and on the future direction of such policy;

(h) the general importance to justice and the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the status quo;

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework."

32. To summarise the principles relevant to the present case: the question is whether there remains a live controversy between the parties following the grant of an unconditional discharge from the CMH before the proceedings came on for hearing. The issue must not be merely theoretical. A question can arise in a suitable case following the commencement of proceedings regarding the costs to date and where the relief is no longer necessary following an action taken by a defendant or a respondent. That particular question does not arise for consideration in the present case. Ms C has sought to pursue the balance of the relief, including declaratory relief and claim for damages, and whether there is a *lis* depends on whether the foundations of the action had disappeared, *i.e.* the factual and legal basis on which the action was commenced no longer present as matters of controversy or conflict, and whether there remains some concrete matter to be resolved. The concrete matters asserted in the present case are the claims for declaratory relief concerning the alleged violation of constitutional and Convention rights, and the claim for damages.

33. Relief by way of *mandamus* and *certiorari* were undoubtedly moot by the time the proceedings came on for full hearing before Eagar J. in January 2016, as, by then, it would not only have been pointless but also unnecessary to make directions that the Clinical Director take steps on foot of the statutory powers or duties contained in s. 13A of the 2006 Act. I use the expression "statutory powers or duties" carefully as the precise nature of the role envisaged by s. 13A of the Act will be considered in more detail below, and that general phraseology will suffice for the purposes of this part of the discussion.

34. The passage of time and intervening events meant the claims for those reliefs were genuinely no longer in need of resolution, and any order would have been in the form of "advisory opinions on abstract, hypothetical or academic questions of the law", the language of Murray C.J. in *Irwin v. Deasy* [2010] IESC 35, at para. 6 of the available unapproved version of the judgment. Quite apart from the obvious practical effect that a court should not, for reasons of efficiency and because court resources are limited, enter upon unnecessary hearings, for a court to hear an action where there is no matter of controversy on which it is required to adjudicate would fail to respect the central purpose of the administration of justice to resolve disputes in concrete and actual conflicts where the parties themselves cannot come to a resolution and not to act as lawmakers or advisory bodies.

35. Inevitably, there is a delay between commencement of proceedings and trial and the principle has evolved so that not only must a live controversy exist between the parties at the date the proceedings are instituted, but one must exist when the proceedings are heard and come to be determined by a judge. In that paragraph from the judgment in *Irwin v. Deasy*, Murray C.J. quoted from the judgment of Hardiman J. in *G. v. Judge Collins* [2004] IESC 38, [2005] ILRM 1, where this principle was identified.

36. Exceptions do exist, primarily where it can be shown that the point of law in contention is one of exceptional public importance, such as the question arising for determination in *Irwin*

v. Deasy itself, but I do not believe that the circumstances of this case make it exceptional, nor of the type of litigation where an advisory opinion is required. The relationship between the Review Board and the Clinical Director may be considered in many cases concerning the making by the Review Board of conditional orders, and equally the correct interpretation of the statutory provisions is a matter of legal importance. However, I am not satisfied that the proceedings meet the threshold identified in *Irwin v. Deasy* or that the case can be described as one raising matters of exceptional public importance. No argument was made by counsel for Ms C that the proceedings are exceptional in that sense.

37. Thus, the present proceedings are to be considered on their merits for the purposes of assessing mootness.

Mootness on the facts?

38. It should be said at the outset that there exists an unresolved factual dispute between Ms C and the Clinical Director regarding her precise living arrangements between January 2014 and May 2014. The Clinical Director avers in his affidavit of 8 July 2015 that after June 2013 there was an incremental increase in the number of overnight stays that Ms C was permitted in her family home and that by January 2014 she was spending six nights a week there and the seventh in her mother's house and that by 28 May 2014 she was "residing on a full-time basis in the family home" with her husband and children. The Clinical Director contends that the alleged interference with the rights of Ms C continued for a relatively short period of time, as Ms C was living at home with her husband and children from May 2014. It was also said in the statement of opposition that only approximately two weeks after she commenced the application for judicial review and obtained leave, she had applied for an unconditional discharge which happened in December 2014, and she was thereby given the right to personally make the choice regarding her living arrangements.

39. It would be fair to say that the argument of the Clinical Director, and indeed those adopted by the Review Board regarding mootness, focussed almost entirely on the factual nexus and, as I have noted, that factual dispute was never resolved because of the decision by the High Court, and on appeal by the Court of Appeal, that the proceedings were moot. Thus, this Court cannot take the facts as found as a starting point. However, it seems to me that this Court, for the purpose of deciding the mootness question, must accept that, on any reading of the facts, there was some interference with the ability of Ms C to make a choice as to where she lived, that there was a gradual phasing out of the requirement that she would live with her mother for some nights in the week imposed after the events in her home in June 2013, and a gradual reduction of those restrictions, but that it was not until December 2014 that she herself was legally in a position to determine her place of residence.

40. The relevant factual backdrop to the mootness question is not, in my view, how many nights and for how many months Ms C actually did spend living at home with her husband and children, but rather by whom the choice regarding her living arrangements was to be made. I will return later in this judgment to consider the facts, but it does seem to me, as a matter of principle, that, as in this appeal where there have been no findings of fact, a court considering whether proceedings are moot must take the case pleaded by a plaintiff at its height, and approach the factual circumstances on the basis that the plaintiff could have established the material facts at trial.

41. 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.

42. 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.

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

44. 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.

45. In the present case Ms C seeks to vindicate her constitutional and Convention rights by two means: a claim for a declaration that there has been a violation or infringement of the rights; and a claim for damages for infringement. 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.

46. 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.

47. That was the approach suggested by the European Court of Human Rights ("ECtHR") in *Biržietis v. Lithuania*, No. 49304/09, 14 June 2016. There the Court was considering whether the complaint had met the "significant disadvantage" admissibility criterion under article 35 of the Convention. The case concerned the prohibition on prisoners growing beards and the Court considered that the government of Lithuania had failed to demonstrate the existence of a pressing social need to justify an absolute prohibition on a prisoner growing a beard whilst in prison, and a violation of article 8 was found. On the question of damages, the Government of Lithuania had argued that the claim of the applicant was unsubstantiated and excessive, and

the Court held that the finding of the violation itself constituted "just satisfaction for any non-pecuniary damages sustained by the applicant".

48. By the time the case came on for hearing before the ECtHR the applicant had been released from prison on probation and was therefore no longer subject to any restriction on growing a beard. The Court expressed the view that, absent an acknowledgment either express or in substance that there had been a breach of the Convention, and an offer of redress, the applicant had not lost his status as a "victim", that his grievances were "genuine", but that, however real "from a purely legal pint of view" a violation of rights might be, some level of "severity" had to be met to warrant admission to the Court. The applicant had not claimed that he had suffered any financial disadvantage but that he had been subjected to mental suffering, and that subjective perception taken together with "an important matter of principle" concerning restrictions on the personal rights of prisoners, meant that the threshold requirement was met.

49. Whilst the ECtHR was applying the test for admission of a complaint, a test that has regard to an applicant's subjective perceptions and of what is objectively at stake in a particular case is a useful approach to the argument that the present proceedings are moot, as the admissibility criteria sufficiently mirror the principle of mootness to offer some assistance in the analysis. Thus, the test might include an assessment of the subjective and objective importance of the issue at stake.

50. Assistance can be found too in the judgment of Clarke J., as he then was, in *Omega Leisure Ltd v. Barry* [2012] IEHC 23 concerning the test applicable to the grant of declaratory relief :

> "In approaching claims for declaratory relief, the court must first be satisfied that there is a good reason for so doing. Second, there must be a real and substantial, and not merely a theoretical, question to be tried. Third, the party with carriage of the

> proceedings must have sufficient interest to raise that question and finally, that party must be opposed by a proper contradictor. It should, of course, be borne in mind that, by its very nature, a declaration is a discretionary relief and involves a jurisdiction which must, therefore, be circumspectly exercised and in accordance with the circumstances of the case", at para. 4.4.

51. Clarke J. was considering the applicable test for the grant of declaratory relief, and that is logically a subsequent question to that of whether a claim for declaratory relief is or could be moot. Nonetheless, his analysis is useful in pointing to the requirement that litigation identify sufficiently concrete, real, and not theoretical questions. He also points to the requirement that the applicant have sufficient interest, and this is not merely a question of standing, but one that the applicant subjectively be able to demonstrate that the issue in the proceedings is one that matters, and the answer to which has yet to be provided. This third element of the test identified by Clarke J. mirrors, to a large extent, the test identified by the ECtHR in *Biržietis v. Lithuania*, where that Court said that the approach had to encompass both the subjective interest in the assertion of the right, and whether an objectively ascertained issue arises for consideration.

52. 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.

53. Further, the importance of the family in the constitutional social order means that a claim for a declaration that there has been an infringement of those rights is not a matter to be treated as objectively insubstantial or lacking in substance, and the proceedings therefore raise an objectively important issue.

54. It could not be said that an action founded on an alleged violation of a constitutional right is never moot, but a claim which is sufficiently particularised in concrete and credible complaints regarding an alleged infringement of these constitutionally protected rights which have an undoubted centrality in the constitutional scheme must be regarded as carrying sufficient importance to not readily be characterised as insubstantial.

55. To borrow the language of Hogan J. in *X. A. (An Infant) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 397, at paras. 15 and 33, the judicial branch of government must ensure that fundamental rights protected by the Constitution "are to be taken seriously" so that they be given "life and reality".

56. On that basis, I do not consider that the proceedings are moot. However, the Court of Appeal regarded the claim as deriving from so minimal a breach as to justify dismissal on the grounds of mootness, and I turn now to examine the test it applied.

The *de minimis* principle

57. The argument before the Court of Appeal seems to have focussed, to a large extent, on the application of the principle that *de minimis non curat lex*, loosely translated as "the law will not concern itself with matters of minimal significance or trifles". The language used by the Supreme Court in *Monaghan Urban District Council v. Alf-a-Bet Promotions Ltd* [1980] ILRM 64 finds an echo in the conclusion of Peart J. in the Court of Appeal. The Supreme Court was concerned with the question whether a statutory requirement had been met or met in substance, and where the Court considered that there may be a departure or deviation from a statutory requirement which is "so trivial, or so technical, or so peripheral, or otherwise so insubstantial

that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially and therefore adequately, complied with", at p. 69.

58. The Supreme Court was not there considering whether proceedings were moot, but the quite different question of whether compliance with a statutory provision had been met in substance. In itself, that does not mean that the Court of Appeal was not entitled to dismiss the proceedings as moot on account of a view that the claim was insubstantial, if it found the analogy useful.

59. The ECtHR recognises the importance of the *de minimis* rule and an argument that the proceedings ought not to be admitted because they did not meet the threshold test was made and rejected in *Biržietis v. Lithuania*.

60. In *Leander v. Sweden*, No. 9248/81, 26 March 1987, the Court suggested that arguability is a more correct approach to the question of admissibility.

61. The Court of Appeal made no reference to any of these principles, nor to the elaboration on the principles underpinning the mootness argument contained in the judgment of McKechnie J. in *Lofinmakin v. Minister for Justice, Equality and Law Reform*. It incorrectly, in my view, considered the likely quantum of damages, one that was "minimal tenuous and insubstantial", and at para. 41 said the following:

> "It seems to me that even if there was a breach of statutory duty (which is denied strenuously, and which in any event was found by the trial judge not to be the case), the present claim that her constitutional or Convention rights were breached is so minimal, tenuous and insubstantial as to not warrant the conclusion that there was a breach of those rights by the Clinical Director. At very best, if at all, in the unlikely event of some success, any award of damages would be purely nominal."

62. I do not agree with this assessment by the Court of Appeal which, in my view, mistakenly omitted to have regard to the subjective importance of the claim for declaratory relief and to

the issues at stake. I cannot agree that the claim by Ms C that her rights were breached is itself insubstantial, tenuous, or minimal. The claim is one founded in fundamental and central constitutional and Convention rights, and even were a court to award minimal damages for a breach of those rights, the claim is not a claim that is insubstantial. It is wrong, in my view, to assess the mootness question by reference to a test of whether the claim is insubstantial, where the effect is to deny a right to pursue relief in respect of an alleged breach of rights which are very substantial indeed.

63. For these reasons, I consider that the claim is not moot, and the Court of Appeal did not adopt the correct approach.

The meaning of s. 13A of the Act

64. As originally enacted, the 2006 Act permitted the Review Board to make conditional discharge orders, but made no provision for any arrangements that might be necessary for the compliance with or enforcement of the conditions contained in a proposed order. The lacuna was considered in the High Court in *J. B. v. Mental Health (Criminal Law) Review Board* [2008] IEHC 303, [2011] 2 IR 15. There, the applicant had responded well to treatment in the CMH and no longer required in-patient treatment. In those circumstances the Review Board made a determination to discharge him from the CMH subject to conditions. The Board was concerned that, absent some means by which the conditions could be enforced, the practical effect of its order would be that the release would be unconditional, and therefore, refused to make a final discharge order. The application for judicial review failed and Hanna J. rejected the argument that an effective treatment and supervisory regime to support and enforce a conditional discharge order could be inferred from s. 13 of the 2006 Act.

65. The Oireachtas then enacted s. 13A, which creates express compliance and enforcement powers. The statutory scheme now in place provides that the Review Board may not make a conditional order for discharge unless arrangements for the facilitation of compliance by the

patient, the supervision of the patient, and enforcement arrangements for the return of the patient to a designated centre in the event of material breach, are identified and are, or will be, in place. From a practical point of view, the Review Board, not being a clinical body, will not have the knowledge of the needs of the patient and the available resources to enable it to identify what arrangements are necessary and be satisfied that these can be met, supervised, and enforced before a final discharge order containing conditions is made. Thus, a conditional discharge order can be made only and insofar as the conditions can be concretely met and enforced, if necessary up to and including enforcement by return to the designated entre and detention thereafter.

66. The language of s. 13A of the 2006 Act is mandatory and the Review Board may not make a conditional discharge order unless it is satisfied that all of these elements are in place. The Oireachtas chose to fix responsibility for making these arrangements on the Clinical Director. That this is so might seem self-evident as the Clinical Director will have sufficient information regarding the patient, his or her clinical and other needs, and can also be expected to know the structures and support services required, what facilities are available, and where and how they can be put in place.

67. The Clinical Director, when exercising the statutory obligation to make arrangements, does so at the direction of the Review Board and again the language of the sub-section is mandatory: the Clinical Director *shall* make the arrangements. The language of the sub-section directly links the making of a conditional order and the purpose for which the arrangements are made: to facilitate the conditional order proposed, and the arrangements are those identified as being necessary for that purpose.

68. It is useful to set out the sequence of events that led to the decision of the Clinical Director that he would not assess or put in place the arrangements to support the proposed conditions of discharge.

The sequence of evets leading to the impasse

69. The Review Board made the conditional discharge order on 9 August 2012 (on the fifteenth review of Ms C's detention), and Ms C made an application a year later for a variation of those conditions. A formal hearing took place on 14 and 21 November 2013, but before this, an amount of correspondence had passed between the solicitors for Ms C and the Review Board, and also with the Clinical Director. The variation sought was to conditions 1.1 and 1.2, those regarding the place of residence of Ms C.

70. The first meeting of the Review Board was on 11 October 2013 and the solicitors for Ms C were assigned as her legal representative "in accordance with the Board's Legal Aid Scheme." The Review Board requested the attendance of the Clinical Director and Dr O'Neill at the hearing and a clinical report in advance. In the event, the hearing happened on 14 and 21 November 2013.

71. The report from Dr O'Neill available for the hearing referred to the letter of 5 July 2013, exhibited by Dr O'Neill in her affidavit of 12 March 2015, sent after the episode in June to a mental health centre in the west of Ireland town near Ms C's home and the direction by Dr O'Neill that she move her place of residence from her family home to the home of her mother. It referred to a "very acute and florid relapse of her psychotic illness" in February 2013, following which Ms C was admitted to the acute psychiatric treatment unit of a local hospital, where she spent approximately two months as an in-patient and from which she was discharged having made a good recovery.

72. At the hearing on 14 November 2013 the Review Board produced a draft of the order it was proposing to make, furnished "to facilitate discussion at a second hearing". It proposed two alterations: that condition 1.1 be amended to provide that Ms C would reside at the home she shared with her husband and children, and would "liaise with the National Forensic Mental Health Service treating team in relation to her accommodation and keep them informed of her

domestic and social situation". The proposed revised condition 1.2 was that her place of residence would be determined by her after consultation with Dr O'Neill or another nominated consultant psychiatrist. Condition 2.9 was to be varied to provide for admission of Ms C to the local psychiatric service or other appropriate facility in the event of any relapse of her mental illness which required in-patient treatment, and that, in such case, the Clinical Director could apply to the Review Board to vary conditions 1.1 and 1.2 regarding the place of residence of Ms C.

73. Ms C was positively disposed to the conditions and agreed through her solicitor, by letter of 29 November 2013, to abide by any recommendation of Dr O'Neill regarding her gradual and phased return home over the following months. She was, at that point in time, still living with her mother, and the main concern was overnight stays in the home she shared with her husband and children. At the time of the correspondence in November 2013, she had increased her visits home to twelve hours per day and one overnight stay per week.

74. Dr O'Neill's concern at that time was her perceived difficulty that were Ms C to have the ultimate choice about where she lived, she would not be "legally responsible" for Ms C in the community.

75. The final draft order prepared after these hearings was sent on 13 December 2013 to the solicitor for Ms C and to the Clinical Director. At that time, the proposed varied conditions were as follows:

> "1.1 Ms. [C] will liaise with the National Forensic Mental Health Service treating team in relation to her accommodation and keep them informed of her domestic and social situation in accordance with the conditions of her discharge. For the time being she should reside at [the home she shares with her husband and children].
>
> 1.2 Subject to Condition 2.9 hereof, place of residence will be determined by Ms. [C] after consultation with her Consultant Psychiatrist, Dr. Helen O'Neill, or in her absence

another Consultant Psychiatrist nominated by the Clinical Director of the National Forensic Mental Health Service and the local Consultant Psychiatrist and Community Mental Health Team."

76. Condition 2.9 provided as follows:

"Ms. [C] will be admitted to the local psychiatric service or other appropriate facility in the event of a relapse of mental illness that requires in-patient treatment. In such case the Clinical Director of the National Forensic Mental Health Service may apply to the Review Board on notice to Ms. [C] to vary Conditions 1.1 and 1.2 regarding the place of residence of Ms. [C] on her discharge in such manner as he may think fit."

77. On 13 December 2013, the Review Board formally sent its decision to professor Kennedy and requested him, using the language of s. 13A of the 2006 Act, to confirm in writing "that such arrangements as appear necessary to you have been made" to:

(a) facilitate compliance by the patient with the proposed conditions;

(b) supervise the patient;

(c) provide for the return of the patient to the CMH in the event that she was in material breach of the conditional discharge order.

78. The Review Board left to the Clinical Director discretion as to what arrangements were required, but mandated him to confirm in writing that the arrangements had been put in place.

79. Professor Kennedy replied by his letter of 19 December 2013 expressing his "regret" that he was unable to make the arrangements necessary to facilitate compliance by Ms C with the conditions, to supervise her in accordance with the conditions, or to provide for her return to the CMH in the event of a material breach. He noted that the proposed variation of the material conditions was contrary to the advice of Dr O'Neill and that he himself agreed with her advice. He pointed out that "all risk assessments" indicated that Ms C "would be vulnerable if living under the same roof as her husband", that those living arrangements had been the "source of

high expressed emotion leading to relapses of her illness" which in the past had been "directly relevant to risk" of harm to herself or to her husband. He noted also certain factual matters that led him to believe that those risks were still operative.

80. He dealt specifically with the proposed variations of the conditions, and in regard to condition 1.1., said that he did not consider it to be "useful", as if Ms C did inform the health service treating team of her condition from time to time she would be in compliance, but that the risk would remain. In regard to condition 1.2, professor Kennedy's view was that, in essence, the practical consequence of that condition was akin to an absolute discharge, and that the condition did not "represent a condition that would either ameliorate risk or allow an intervention."

81. Professor Kennedy then suggested that the Review Board would consider whether Ms C had the capacity to make a decision regarding where she lived, and that her decision ought to be analysed from that perspective. It was suggested that if she were capacitous, there seemed to be no reason why she would not be unconditionally discharged. Professor Kennedy presented two opposing scenarios, neither of which required that the Clinical Director take any steps to assess and then ensure compliance, supervision, or enforcement of the arrangements. This then led the Review Board to reconsider the matter.

82. Dr O'Neill, in a letter of 20 February 2014 provided further details of the background and observed that, as treating consultant, she had legal responsibility for the compliance by Ms C with any conditions. She said that the consensus among clinicians was that the main potential destabiliser to her mental health was "marital/domestic disharmony and violence", and that this view was based on the clinical history and her own "structured professional judgment". Dr O'Neill said that it remained her opinion that she should retain the authority to determine where Ms C should live and have the power to request that Ms C move to alternative accommodation if, in her view, a risk assessment suggested this approach. She confirmed that the place of

residence would be discussed with Ms C, that a decision would be made "in so far as practical, by agreement" with Ms C, but that decisions in relation to her place of residence "would be based on clinical reasons". Dr O'Neill said that she would be unable to continue "to take legal responsibility in this case, under the Criminal Law (Insanity) Act 2010", if the conditions were varied as proposed.

83. The final letter of substance from professor Kennedy was sent on 4 March 2014 to the Chief Executive Officer of the Review Board, where he said that he was "not in a position to make such arrangements" as appeared necessary to permit the making of the varied conditional discharge order. He expressed a clinical view that the current conditions enabled Dr O'Neill and her team to "act flexibly" in response to any crisis or assessment of risk, and that the net effect of the proposed variation of the conditions was that the clinical team would have to wait until Ms C "showed signs of relapse or had breached some other condition." He was of the view that condition 2.9 would not be sufficient to remedy this defect and that he had no power to oblige the local team to admit Ms C to local psychiatric services should that be required.

84. His final position was that he was unable to facilitate compliance since the varied conditions "would in my view be impossible to use for the benefit of Ms. [C]." Again, he reiterated that an absolute discharge might be the preferred option.

85. The Review Board, by its letter of 18 March 2014, acknowledged in response that there was a "fundamental and legitimate disagreement in relation to the management of risk in this case", but that under the 2006 Act the Clinical Director has an obligation to make the necessary arrangements and quoted directly from s. 13A(2), highlighting the mandatory language of the sub-section.

86. In legal terms, the Review Board was unable therefore to conclude the making of its proposed order although it had made a final decision as to the appropriate order and as to the variation of the conditions. The proposed variation would have allowed Ms C to choose where

she would live, albeit subject to consultation with her clinical team, and also subject to the various safety net provisions already in place which seemed not to have given rise to any great practical difficulty.

87. In the letter of 3 June 2014, the Review Board replied to the solicitors for Ms C that it remained prepared to vary the conditions as previously advised but that it was not legally entitled to do so absent confirmation from the Clinical Director that the necessary arrangements had been put in place.

The role of the Clinical Director under s. 13A

88. The approach taken by the Review Board was, in my view, a correct reading of the legislation in a number of respects. The Review Board could not make a final conditional discharge order unless the necessary practical arrangements were in place for the enforcement of the conditions and to provide positive supports to the patient for the purposes of compliance. In his replying affidavit, at para. 25, the Clinical Director suggests that the variation of conditions (and *ipso facto* the making of a conditional order) must be "by arrangement with the clinical director", and "should be with the consent of the treating consultant who will carry out 'the supervision of the patient'." That presentation of the structure of the decision-making process fails to have regard to the plain language of the legislation by which the Review Board is given an independent function to make a decision for the discharge of a patient subject to conditions, and to itself make the decision regarding those conditions. This is clear from s. 13A(1) of the 2006 Act.

89. The constraint on the power of the Review Board contained in s. 13A(2) reflects the obviously sensible requirement that the conditions be enforceable, that a conditional discharge order could be revoked, and the patient recalled, and also that the patient be, insofar as necessary, facilitated in complying with those conditions. That is not to say that the making of conditions is "by arrangement" with the Clinical Director, and that phrase connotes a

requirement that there be an agreement between the Clinical Director and the Review Board. Rather, the independent function of the Review Board is to determine the conditions of discharge, albeit it leaves to the Clinical Director the assessment of the precise directions and administrative measures necessary to meet the three-fold requirement of compliance, supervision, and enforcement. The function of the Clinical Director at that stage of the process is to assess the arrangements that are necessary, to put those in place, and then to satisfy the Review Board that the arrangements are in place or can be put in place at the appropriate time.

90. I am satisfied that the Clinical Director did not, in his correspondence or his affidavits, identify any impossibility in putting in place the arrangements. Rather, it seems that the Clinical Director disagreed with the proposed conditions, in particular in the light of the view of Dr O'Neill, the treating consultant psychiatrist, which I have briefly outlined above. The Review Board had heard evidence from Dr O'Neill and was aware of her clinical view that the proposed variation was not in the best interests of Ms C, as it would remove an important protection against a perceived immediate and real risk in the light of relatively recent events at Ms C's family home. Professor Kennedy conferred with Dr O'Neill before he engaged with the Review Board concerning their proposed variations, and his position was, not that arrangements could not possibly be made, but rather that they were not suitable from the clinical perspective and in the light of the identified risks.

91. In para. 37 of his replying affidavit, professor Kennedy gives three reasons why, in his words, it was not possible for him to facilitate the varied conditions:

(a) in general, he could not oblige any consultant colleague to comply with an order that was contrary to his or her clinical judgment;

(b) the order was contrary to his own personal clinical judgment; and

(c) he could not allocate the case to another consultant without determinately impacting upon the positive therapeutic relationship and trust that had built up between Ms C and her treating team.

92. His view was that the proposals were not in the best interests of Ms C, were not in the public interest, and did not further the aims of risk management and harm reduction. His view was that the Oireachtas could not have intended him to operate in a way that compelled him to put in place arrangements that were against his best and conscientious clinical judgment.

93. Equally, Dr O'Neill, in her affidavit of 12 March 2015, confirmed her view that in her clinical assessment, while the applicant no longer required continued care, treatment, or rehabilitation in conditions of therapeutic security, she did require conditions to support her continued recovery and successful transition to community living, and that there remained a continued risk of relapse in the light of the prevailing conditions in the family home and the potential stressors in her relationship with her husband. Dr O'Neill was particularly concerned that there had been a psychotic relapse of a serious nature in February 2013, and that this had happened notwithstanding that Ms C was fully compliant with the conditions then imposed on her discharge and that she had maintained a good therapeutic alliance and availed of the available support services. Dr O'Neill's clinical view, at the date of her affidavit of 12 March 2015, was that the personal involvement of the therapeutic team in the decision concerning where Ms C was to live remained the correct clinician's approach, notwithstanding that Ms C found the constraints personally difficult. Dr O'Neill's final observation in this affidavit is as follows:

> "I say and believe that the proposed removal of conditions 1.1 and 1.2 would have led to a clinically unacceptable situation in which your deponent and the Forensic Mental Health Service would not be able to discharge our clinical functions in a way that we considered clinically appropriate."

94. On the facts of the case, therefore, the Clinical Director did not contend that the assessment and making of the necessary arrangements was impossible in a technical or practical sense, but rather, that the making of the arrangements would be contrary to his clinical opinion and that of Dr O'Neill and the other members of the treating team in the CMH. Insofar as professor Kennedy argues that the making of the arrangements was impossible, he means by this that, from a professional point of view, he would have been placed in an invidious, and therefore theoretically impossible, position of having to make arrangements which he personally and professionally could not countenance.

95. I do not discount the possibility that more complex circumstances might arise were there to be a genuine impossibility and more complex questions might then arise for consideration which did not need to be argued in this appeal.

96. The role of the Review Board is to hear the evidence and determine, in its independent statutory function, whether a conditional release is to be granted and the nature of those conditions. If there is a disagreement regarding the best clinical practice, it is for the Review Board to resolve that conflict of evidence and opinion, and if agreement cannot be reached, the decision of the Review Board prevails. To that extent, the judgment of Peart J., while it anticipated that in most cases an agreement or accommodation would be reached between the opposing views and might reflect the reality in the majority of cases, does not reflect the legal position that the statutory function of determining whether a conditional discharge order would be made and the conditions to be imposed is entirely a matter for the panel of the Review Board. The Review Board was correct, in its letter of 3 February 2014, that the Clinical Director had an obligation to assess and make the arrangements to practically support the conditions it intended to impose.

97. The question for consideration is the net one of how the provisions of s. 13A of the 2006 Act are to be interpreted and whether the Clinical Director could be, and was, obliged to put in

place administrative arrangements and to add the necessary support, supervision, and enforcement structures to enable the proposed conditions to be incorporated into the new conditional discharge order.

98. In my view, the literal meaning of s. 13A of the 2006 Act does create such a mandatory obligation. Whether the word "shall" be truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question: *per* Henchy J. in *State (Elm Developments Ltd) v. An Bord Pleanála* [1981] ILRM 108, at p. 110. The proper interpretation of mandatory provisions may, in certain cases, give way on an application of a *de minimis* rule, where an insubstantial trivial or technical deviation from an statutory obligation may be excused, as explained also by Henchy J. in *Monaghan Urban District Council v. Alf-a-Bet Promotions Ltd.*

99. As discussed above, the provisions of s. 13A of the 2006 Act were inserted to provide an essential framework for the enforcement of compliance by a patient with conditions imposed in a conditional discharge order, that precise lacuna identified by Hanna J. in *J. B. v. Mental Health (Criminal Law) Review Board*. The making of arrangements is essential for the three purposes explained in s. 13A(2): the compliance, supervision, and enforcement of those conditions and the arrangements identified in the sub-section as being those necessary to meet three separate aims, which, in turn, must be seen as necessary to protect the patient and the public interest in general. The desire to protect both Ms C, her family, and the persons with whom she might come in contact were specifically in the fore of the consideration by the Clinical Director in his correspondence with the Review Board, and I do not think it can be doubted but that the motives of the Clinical Director and the matters he took into consideration were framed with the interests of Ms C and of the broader public in mind. But that does not mean that the section is to be seen as anything other than imposing a mandatory condition, and the purpose of the administrative measures and the statutory purpose or aim which permits the

Review Board to direct the happening of certain things do not always lead to the same uniform, uncontroversial, or straightforward consequence.

100. The section is neither obscure or ambiguous, but if a purposive interpretation is necessary, an approach that treats the directions given by the Review Board to the Clinical Director as creating obligations meets the purpose of the legislation to create a structure within which enforcement of the conditions could occur in the manner found to be not permissible under the legislation considered by Hanna J. in his decision in *J. B. v. Mental Health (Criminal Law) Review Board*.

101. In essence, the decision as to whether conditions are to be imposed and the nature of those conditions is one expressly left to the Review Board. The Oireachtas has chosen to vest the power in the Review Board, which is independent of the detainer, and once it has that power, its directions as to the assistance that is required and the structures to be put in place to give practical effect to the conditions must be seen as supportive of the independent function, and insofar as there may be a difference of opinion, the ultimate power must lie with the Review Board.

102. For these reasons, it seems to me that the directions to the Clinical Director from the Review Board create a mandatory obligation to first determine what arrangements are necessary to meet the three-fold purposes of the directions, and to then make those arrangements. I agree with the argument made by counsel for the Review Board that the first part of this role may involve issues of judgment as to what arrangements are necessary, and the exercise of that judgment is a discretionary role vested in the Clinical Director. Once those arrangements have been identified as necessary, the Clinical Director must put them in place, and at that stage his role is managerial or administrative, and no discretion exists to refuse to put the arrangements in place.

103. On the facts of the present case, the Clinical Director did not make any clinical decision as to what arrangements were necessary, and did not therefore come to the second stage of putting those in place. His correspondence expressed the view that it was "not possible" to put the arrangements in place, and that he was "not in a position" to do so. The reason was that the planned variation in the conditions were regarded by professor Kennedy and Dr O'Neill as not being clinically appropriate or in the best interests of Ms C. I do not consider that the legislation permitted the Clinical Director to refuse to assess what conditions were necessary or to refuse to take steps to support the compliance with, supervision of, and enforcement of the conditions. A direction was given to him by the Review Board and he ought to have taken steps to come to a decision as to what arrangements were necessary and then take steps to put those in place.

104. It is not a question of whether the Clinical Director had reasons or good reasons, whether they be clinical or otherwise, for not putting the conditions in place or for taking the logically prior step of asserting what conditions were necessary. It must be recalled in that context that the decision of the Review Board was arrived after hearing evidence and argument concerning the then current detention conditions and the result of the decision-making process by the Review Board was a decision as to what arguments and evidence it preferred and whether it should, in the circumstances, accede to the application by Ms C. The Clinical Director had ample opportunity to make submissions to the Review Board which he did, and Dr O'Neill's evidence was also heard by it. The Clinical Director makes no argument that the decision of the Review Board was not founded on a proper analysis of the clinical evidence before it, but rather, that he thought the end result of its deliberations was an inappropriate regime which was not in the interest of Ms C.

105. I am fortified in this conclusion by the fact that under s. 13A(6) of the 2006 Act, the Clinical Director, as well as the other persons identified in the sub-section, may apply to the

Review Board to amend, alter, or otherwise vary the conditions attached to a conditional discharge order. The Clinical Director, therefore, was not left without remedy, but the remedy or the solution available to him was not to refuse to assess the circumstances and come to a conclusion as to what arrangements were necessary, but rather to make application for a variation of those conditions. Clearly, the time scale in the present case would suggest that it might have been pointless for the Clinical Director to have moved under s. 13A(6) to vary the conditions when the variation was proposed by the Review Board after a full hearing and where there had been no material change in circumstances that might have warranted an application to vary. But that statutory power is the appropriate means by which the Clinical Director could, in the exercise of his clinical functions and in the interests of the patient, apply to vary the conditions.

106. The Clinical Director argues that nothing in s. 13A(2) of the 2006 Act could oblige him to make arrangements to facilitate a decision of the Review Board that would lead him to take steps that were contrary to his conscientious clinical judgment. It is argued that this is implicit in any reading of the legislation, as the Clinical Director is a consultant psychiatrist, and it is his status, expertise, and training in that discipline that identifies his position in the statutory scheme. That argument involves reading an implication into the sub-section for which no justification has been provided. More fundamentally, to read such an implication could leave a decision of the Review Board in a limbo, and would deny the centrality of the independence and finality of the decision of the Review Board, such that the Clinical Director could, in a suitable case, and in the exercise of his or her clinical judgment, simply refuse to assess what arrangements are necessary or, as the case may be, decline to put them into place.

107. I accept the argument of counsel for the Review Board that the effect and purpose of the amended provisions in s. 13A of the 2006 Act could be defeated by such an approach, and in an extreme case could lead to the continued detention under unsuitable conditions of a patient

notwithstanding a decision by the Review Board that he or she should be conditionally discharged.

108. The purpose of the creation of the Review Board and the vesting in it of an independent statutory function to make the final determination as to whether, and under what conditions, a person would be or would remain detained do not permit that interpretation. It was empowered to, and did, in fact, hear evidence from the relevant clinicians before it made its decision. The decision of the Review Board is one made by a panel of legal and medical professionals as well as a member of the general public and it and it alone has the adjudicative function.

109. The Review Board has the statutory power to determine from time to time and, on an application either by the patient, the Clinical Director, or the other persons for whom provision is made in the legislation, to vary the elements of those restrictions and that power is exercised in the interests of the patient and the community at large. The power of the Review Board is central to the continued suitability of the conditions and whether they meet the constitutional requirement that the detention be proportionate, suitable and not excessive.

110. The Review Board, also because of its particular independent role in the centre of the power of detention, must keep to the fore the question of whether the needs of the patient are met in a humanely and therapeutically suitable manner, having regard at all times to the interest of the public generally and those of the patient herself. The adequacy and suitability of the conditions of detention are scrutinised, adapted, and varied in accordance with the statutory regime, and it could be said that the fundamental rights and freedoms of the patient are protected by the availability of this ongoing assessment and the possibility of variation in the conditions of detention.

111. The Review Board has an independent adjudicative function which balances clinical considerations, the personal rights of the patient, and the public interest generally. Its decision is final, subject only to any challenge by way of judicial review or otherwise. It is not true to

say, as suggested by the Clinical Director in his letter to the Review Board of 4 March 2014, that the document sent on 13 December 2013 was no more than a "draft decision". The true position in the light of the statutory provision is that the Review Board had expressed the final determination and decision, but because of the statutory scheme, it could not issue a conditional discharge order which would have practical import until such time the arrangements were identified and made.

112. In short, the decision of the Review Board, as a matter of statute, has legal effect and its directions to the Clinical Director must equally be seen as having legal effect and compelling him to take the steps mandated.

113. None of this means that the Clinical Director must cease to act in a manner which he issued to be in the best interests of the patient. As Bingham L.J. said, at para. 9 of his decision in *R (Von Brandenburg) v. East London and the City Mental Health NHS Trust* [2003] UKHL 58, [2004] 2 AC 280, the conscientious doctor may adhere to his original opinion and "cannot be obliged to suppress or alter it." That opinion does not have to coincide with that of the Review Board, but insofar as the Clinical Director is given directions to make an adjudication or determination on the necessary administrative arrangements, and to put those in place, he cannot be said to be put in the position of having to agree with the judgment of the Review Board and alter his own clinical view in the light of that judgment, but he must accept that the ultimate decision does not lie with him.

114. The detention of Ms C involved a restriction on her liberty and on her ability to exercise her family and personal rights. The context of her detention, however, must be seen also in the light of the therapeutic environment offered by the CMH and the legislative choice which led her to be found not guilty because of insanity arising from her psychiatric illness.

115. The obligations of the CMH towards Ms C are therefore subject to the supervisory control of an independent body and this ensures that the rights of Ms C were, and were capable of

being, respected in the light of changing circumstances and of her positive response to treatment while detained in the hospital.

116. The conclusion of this analysis leads me to the view that the Clinical Director wrongly refused to put in place the arrangements necessary to give practical effect to the proposed conditional order that the Review Board intended to make.

117. I would propose, in the circumstances, that this Court should grant a declaration that the legislation requires the Clinical Director to put those arrangements in place, and that he failed to perform that statutory duty. There is no argument that the Clinical Director acted negligently or in any way *mala fide*, and counsel for Ms C acknowledged that the Clinical Director took the view he did in his best clinical judgment and with the best interests of Ms C, her family, and the wider public in mind. For the reasons explained earlier in this judgment that was not an appropriate response, as the role of determining how best these different interests were to be protected and enhanced lays with the Review Board.

The cause of action

118. The claim for damages is framed as a claim for breach of constitutional and Convention rights. No claim is pleaded or sought to be advanced for negligence, breach of statutory duty, and/or misfeasance in public office.

119. In the light of the analysis above, it seems to me that Ms C has made out a case that the Clinical Director did breach the statutory duty imposed upon him by s. 13A of the 2006 Act, and therefore, acted unlawfully. The harm alleged to have been suffered by Ms C, including the humiliation, loss of dignity, and of her right to determine where she would live flowed from the failure by the Clinical Director to assess and then put in place the necessary arrangements in accordance with the directions of the Review Board. However, the case as made out does not establish all of the elements of the tort of breach of statutory duty or misfeasance in public office and, in the absence of *mala fides* and having regard to the reasons behind the refusal by

the Clinical Director to assess the necessary arrangements and put them in place, counsel for Ms C accepts that one of the essential elements of these torts cannot be met in the case. This is a prudent concession in the light of the decision of the majority of this Court in *Cromane Seafoods Ltd v. Minister for Agriculture* [2016] IESC 6, [2017] 1 IR 119, as the actions of the Clinical Director were done in the course of his administrative duty. Equally, no claim would lie for misfeasance in public office, the appropriate cause of action identified in *Cromane Seafoods Ltd v. Minister for Agriculture*, at para. 166 *et seq*. of the judgment of MacMenamin J., because the necessary elements of malice or actual knowledge are missing.

120. The law is well established, starting with the analysis in *Pine Valley Developments v. Minister for the Environment* [1987] 1 IR 23, at p. 38, where the Supreme Court, *inter alia*, analysed the good policy reasons, stemming from the common good, why

121. bodies would have a conditional immunity from claims of compensation, an immunity linked broadly to a requirement that the decision maker have acted *bona fide* and without negligence.

122. That analysis was developed in *Glencar Exploration Plc v. Mayo County Council (No. 2)* [2002] 1 IR 84, where the applicants had successfully challenged a mining ban and sought damages for interference with constitutional rights, breach of statutory duty, negligence of breach of legitimate expectation. They failed in that claim because of the fact that malice or personal knowledge that the action was *ultra vires* could not be shown.

123. In Collins and O'Reilly, *Civil Proceedings And The State* (3rd ed., Round Hall, 2019) at p. 267, the writers identify these elements as necessary to establish the tort, and counsel for Ms C accepts this to be a correct statement of the law. It is not necessary in the present case to analyse whether the appropriate cause of action is one for breach of statutory duty or for misfeasance of public office, as neither cause of action is neither pleaded nor relied on by Ms C in her claim for damages.

124. There is no argument made by Ms C in the present case that the public policy reasons which have identified the limits of the tort of misfeasance in public office and that of breach of statutory duty (insofar as they may differ) do not operate in the present case. Thus, it is not necessary to examine the analysis of Clarke C.J. in *Cromane Seafoods Ltd v. Minister for Agriculture*, as those public policy reasons deriving from the balancing factors identified by him in his judgment do not fall to be considered.

125. Thus, apart from the pleadings, and no plea is contained that the actions of the Clinical Director were taken *mala fide*, the factual nexus does not contain, even on a *prima facie* basis, those necessary elements. In the circumstances, it seems to me that a claim for damages for breach of statutory duty or misfeasance in public office would fail, even if it had been pleaded, or were an application to be made to amend the pleadings to add this element to the claim.

126. There is nothing in the 2006 Act or the scheme by which the Review Board was given authority to determine whether a conditional discharge order was to be made and the appropriate conditions to be imposed, which envisages compensation in a case where the necessary final administrative steps had not been put in place on account of a breach of duty by the Clinical Director, and counsel was unable to identify any case where damages were awarded in those circumstances.

127. Instead, Ms C relies directly on a claim that there has been a breach of her constitutional rights and those under the Convention *simpliciter*. I propose in this part of the judgment to deal with her claim that there has been a breach of her constitutional rights and that damages should flow. There is no impediment under O. 84 of the Rules of the Superior Courts to the granting by a court, in a suitable case, of damages in proceedings commenced and prosecuted by way of judicial review.

A constitutional remedy?

128. Ms C has confined her claim in damages to a claim founded on a breach of her constitutional and/or Convention rights and for the reasons I will more fully outline below, the correct sequence involves first an analysis of whether a cause of action for breach of constitutional rights exists in the present case.

129. The starting point must be that a claim for damages can lie for breach of constitutional rights, and that the constitutional order recognises the right to a remedy for such breach: see *Meskell v. Córas Iompair Éireann* [1973] IR 121 and *Kennedy v. Ireland* [1987] IR 587. The jurisprudence suggests that a claim for damages for breach of constitutional rights may be maintained only if established nominal torts do not provide an effective remedy, and if there exists no form of action at common law, in equity, or under statute to provide an effective or sufficient remedy, even in a case where all the essential factual ingredients can be established.

130. The matter was recently considered in some length by the judgment of McKechnie J. with which the other members of this Court agreed, in *Blehein v. Minister for Health and Children* [2018] IESC 40, which unequivocally sets the parameters for when a claim may be brought for breach of constitutional rights. While recognising the principle of *ubi jus ibi remedium* ("for every wrong the law provides a remedy"), a court will fashion a remedy founded in a breach of constitutional rights only when this is necessary and in "very rare circumstances", or, to use the language of MacMenamin J. in *Simpson v. Governor of Mountjoy Prison*, at para. 121, "only where strictly necessary".

131. The analysis of McKechnie J. in *Blehein v. Minister for Health and Children* offers the most recent and authoritative discussion, especially that from para. 40 to para. 50 regarding the remedies available for the protection or enforcement by action of the breach of a constitutional right, and in particular the early analysis in *Byrne v. Ireland* [1972] IR 241 and *Meskell v. Córas Iompair Éireann*, and the broad statement of principle by Walsh J. at p. 133 that:

> "Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right."

132. The broad nature of that remedy as analysed in later judgments in the context of the separation of powers derives, *inter alia*, from the decision of this Court in *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd* [1988] ILRM 629, at p. 636, where Henchy J. said:

> "A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskell v. C.I.E.* 1973 I.R. 121) but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right."

133. The question for consideration in the present appeal is therefore, in the light of the evolution of the principle, whether the existing remedies can or are capable of providing a remedy for breach. Judicial restraint and the separation of powers suggest that the claim should be dealt with under that or those causes of action and it is only if an action at common law "is not available", or does not provide an "adequate vehicle by which to vindicate the antecedent constitutional breach", to quote the language of McKechnie J. in *Blehein v. Minister for Health and Children*, and if, as a result, the right may not be effectively, effectually, or adequately vindicated, that a court will fashion a remedy deriving from the breach of constitutional rights.

134. The substance of the present claim is for damages for breach of statutory duty and for misfeasance in public office, even if it is not so pleaded. The facts relied on by Ms C to ground her claim for damages fall within these recognised categories, even though she cannot on those facts establish an essential ingredient or element of the torts. It is only when, to use the language of McKechnie J., the suggested cause of action "cannot attract an appropriate or effective remedy" that a court would fashion a remedy or right. What is "effective" in that

sense is not tested by reference to whether a plaintiff can establish the case, but whether the elements of the tort or what McKechnie J. calls its "parameters", are present, and would establish a cause of action. When a remedy does exist under common law, under statute, or in equity, and no new alternative or exceptional remedy is required.

135. To take a simple analysis of the facts of the present case, Ms C alleges correctly that the Clinical Director breached his statutory duty, and that she suffered loss, humiliation, distress, and loss of personal dignity by reason of the fact that, for a number of months, she was unable to personally choose and determine where she would live. A cause of action exists for damages for this breach of statutory duty, but on the facts, she cannot bring her case within the elements of the tort because she cannot establish either that the Clinical Director knew his actions to be unlawful and would cause injury, or had acted with malice. In that regard, the *dictum* of Costello P. in *W. v. Ireland (No. 2)* [1997] 2 IR 141, at p. 169 is apposite: "it is necessary to consider why the plaintiff's claim has failed". The claim of Ms C fails because the facts do not warrant the award of damages under the nominate torts.

136. Hogan J. sitting in the Supreme Court agreed with the analysis of McKechnie J., in *Blehein v. Minister for Health and Children* but came to a different conclusion that the plaintiff did not have a cause of action under any of the identified nominate torts. The claim was what he described as a "pure *Meskell* style claim for an infringement of a constitutional right, namely the right of access to the courts", at para. 10 of his judgment, and proposed the award of damages measured by reference to the time and expense incurred by the plaintiff who, as a litigant in person, had pursued two applications under s. 260 of the Mental Treatment Act 1945, provisions later found to be unconstitutional.

137. The actions complained of against the Clinical Director fall, quite clearly in my view, within the recognised category of misfeasance in public office or breach of statutory duty: the Clinical Director failed to take steps required of him by the statutory regime under which he

could be, and was, directed by the Review Board to assess and then make the necessary arrangements to support the compliance, supervision, and enforcement by Ms C of the altered conditions. In doing so the Clinical Director breached his statutory obligations, and what is in issue is whether that breach by him offers a sufficient legal basis on which a cause of action could be maintained by Ms C. The answer to this question must be 'yes', and therefore the action against the Clinical Director is to be assessed in the light of the constituent elements of those torts. One element cannot be established on the facts, that element might broadly be called *mala fides*, and therefore while a cause of action exists, Ms C cannot succeed.

138. The conclusion that follows from the case law I have analysed must be that Ms C is not entitled to frame her action as one for breach of constitutional rights as she has available to her an effective remedy at common law, albeit she was unable on the facts to establish either *mala fides* or knowledge by the Clinical Director that his actions were in breach of his statutory powers and obligations.

139. Counsel for Ms C argues that the effect of the analysis means that no effective remedy is available at law to vindicate, protect and offer a remedy to her for a breach of her rights. I do not agree. A robust cause of action exists, but she cannot bring the facts of her case within the elements of that cause of action. She is in no different situation than she would be were she to have pleaded negligence and failed to show on the facts that a duty of care was owed to her or was breached by reason of an absence of the necessary nexus required to establish the tort of negligence.

140. It is not the remedy that is defective, but rather the facts do not meet the elements of that remedy.

141. It would therefore, in my view, be inappropriate for this Court to posit a new constitutional tort with strict liability, as the inaction by the Clinical Director was one capable of being the subject matter of a claim for breach of statutory duty and/or misfeasance in public

office. I would adopt the comment in MacMahon and Binchy, *Law of Torts* (4th ed., Bloomsbury Professional, 2013), at p. 47, quoting from Budd J. in *An Blascaod Mór Teo v. Commissioners of Public Works* [1994] 2 IR 372, that there is "little justification for a regime of strict liability for infringement of constitutional rights" and that "in such circumstances the principle of *ubi ius, ibi remedium* was too simple a formula and strict liability would, in many cases, be too low and easy a threshold to reach."

142. In summary, the claim for damages against the Clinical Director is for failing to do something which, under statute, he was obliged to do. His decision not to take steps to identify and then put in place the arrangements sought by the Review Board did not flow from recklessness, *mala fides*, or negligence, but from his clinical view that the proposed variation in the conditions were not suitable for the personal clinical needs of Ms C and her safety and that of her family.

143. Because, however, there was no evidence that it was not practically or clinically impossible for the Clinical Director to assess and put in place the necessary arrangements, there was a failure by the Clinical Director, one capable of attracting remedy were the final necessary element in the nominal torts to be found. His view that he could not perform these tasks was a personal view which has under the scheme of the Act to give way to that of the Review Board in the case of a difference in approach.

Another remedy?

144. In the course of the hearing and in the written submissions of the parties it was argued that insofar as this Court might consider that the Clinical Director had acted in breach of his statutory duty, and that the interpretation for which he contended was incorrect, a sufficient and adequate remedy would be to make a declaration and thereby represent to the world an unequivocal vindication of the position of Ms C. This is the language used at para. 80 of *Blehein v. Minister for Health and Children* by McKechnie J. and that approach is one which

finds favour frequently in the ECtHR. Ms C describes in some detail the embarrassment and shame she felt by reason of having to live under her mother's roof and by reason of being deprived of her right to live with her husband and children, particularly in the light of the centrality of married and family life in the Traveller Community. A declaration arguably goes some way towards providing a remedy for that wrong and enables Ms C to say to the world at large, and to her community in particular, that her personal and family rights were breached and that a declaration was made by the Supreme Court to that effect. The mores of her Community, as she describes them, might suggest that a declaratory remedy would enable her to hold her head high in her community and may be sufficient.

145. The corollary might also be true: she suffered an indignity and the loss of the community of her husband and children which was unnecessary, unlawful, and caused her distress and upset. By reason of her illness she is a vulnerable person.

146. In *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 IR 635, this Court held that claims under the 2003 Act should be heard after constitutional claims, and that particular approach is consistent with the general approach that one exhaust domestic remedies, including domestic constitutional remedies before taking a claim to the ECtHR. Much of the academic discussion has centred on the correct sequence where what is sought is a declaration of incompatibility, either with the Constitution or with the Convention, as the case may be, although in *Simpson v. Governor of Mountjoy Prison* the Supreme Court considered that the right in question was one protected by the Constitution and that the Convention did not add any material element to the claim. The court did not therefore deal with the claim in damages under the 2003 Act.

147. More recently, in *O'Donnell v. South Dublin County Council* [2015] IESC 28, on appeal from the decision of Edwards J. in the Court of Appeal, the Supreme Court approached the question of the suitability of the accommodation of the plaintiff, described by the Supreme

Court as "unfit for human habitation", and considered that the conditions were so exceptional as to warrant a remedy for breach of constitutional rights of autonomy, bodily integrity and privacy protected by Article 40.3.1 of the Constitution. MacMenamin J. regarded the circumstances as degrading and exceptional, and the fact that the circumstances deprived a young person of even basic sanitation, and in the light of her serious physical disability.

148. For the reasons explained earlier in this judgment, the award of damages for breach of constitutional rights is not appropriate in the present appeal, and therefore it seems to me that this Court ought to consider the final element of her claim: that her rights under the Convention have been breached, that Irish law does not provide an effective remedy for that claimed breach, and that damages be awarded under s. 3 of the 2003 Act.

The European Convention on Human Rights Act

149. The power to award damages is contained in s. 3 of the 2003 Act, and the material part is as follows:

> "(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.

150. Damages then may be awarded if no other remedy is available, and the measure of damages must, because of the provisions of sub-s. (3), reflect to an extent the damages that might be awarded in a tort claim in the Circuit Court.

151. It would be possible for this Court to remit to the High Court the question of whether damages lie but counsel for Ms C at the commencement of the hearing indicated that Ms C had found the judicial process difficult and stressful, and that for that reason, she was unable to attend the hearing even though she had wished to do so. That would suggest to me that it would be unfair and burdensome on her to send the question of damages back to the High Court for further hearing as she there would be subjected to all of the stress which her counsel said had upset and distressed her coming up to the Supreme Court hearing.

152. For that reason, I am of the view that this Court should consider further the question of whether damages should be awarded to Ms C under the 2003 Act, what Convention rights are alleged to have been breached, and how the quantum of damages is to be assessed. The recent analysis of MacMenamin J. in *O'Donnell v. South Dublin County Council* notes that regard is to be had to the Strasburg jurisprudence.

153. The submissions at the hearing and the written submissions did not explore the rights alleged to be engaged, the possible remedy, or as to any useful authority of Irish courts or of the ECtHR, and I would propose that the parties be invited to make further submissions and, if necessary, oral argument on these questions.