Neutral Citation Number: [2022] EWCOP 52

Case No: 14018449

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2022

Before :

MR JUSTICE MOSTYN

- -

In the matter of SV

Between :

THE HEALTH SERVICE EXECUTIVE OF IRELAND	**Applicant**
- and –	
FLORENCE NIGHTINGALE HOSPITALS LIMITED	**Respondent**

- -
- -

Mr Henry Setright KC (instructed by **Bindmans LLP**) for the **Applicant**
The Respondent did not appear and was not represented

Hearing date: 24 November 2022

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that in any publication of it the protected person may be referred to only as "SV" but otherwise her anonymity is to be strictly preserved. All persons, including representatives of the media, must ensure that this condition is complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. This case concerns an application for an order recognising and declaring enforceable protective measures made in respect of a protected person ("SV") by the High Court of the Republic of Ireland on 16 November 2022. Those measures require SV's placement at a specialist eating disorder unit in London, there being no comparable unit in Ireland. I granted the application at a hearing on 24 November 2022 for reasons to follow in writing. This is my judgment giving those reasons.

2. The Hague Convention of 13 January 2000 on the International Protection of Adults ("the 2000 Convention") was signed by the United Kingdom on 1 April 2003 and by the Republic of Ireland on 18 September 2003. It has not been ratified by the Republic of Ireland. Curiously, it has been ratified by the UK only for Scotland (on 5 November 2003, the first country to ratify the Convention) where it entered into force on 1 January 2009. Scotland is now a member of a group of 14 European countries where the 2000 Convention operates. The 2000 Convention is implemented in Scotland by the Adults with Incapacity (Scotland) Act 2000.

3. Article 22 of the Convention requires a protective measure in respect of a protected adult ("P") issued in a contracting state ("State A") to be recognised by operation of law in another contracting state ("State B"). An application may be made by "any interested person" under Article 23 for recognition by State B of a protective measure issued by State A.

4. The 2000 Convention contains the familiar strictly limited grounds, such as public policy, where recognition of an incoming measure can be withheld by State B. But the merits of the measure made by State A cannot be reviewed by State B (Article 26), and findings of fact by State A establishing its jurisdiction are binding on State B (Article 24).

5. It is important to recognise that the role of the receiving court of State B is subsidiary and ancillary to the primary role of the issuing court of State A. So, to be clear, in common with the 1996 Hague Convention on Parental Responsibility and Measures for the Protection of Children, recognition by State B of a measure made by State A is intended to be almost automatic unless one of the very limited grounds for non-recognition can be shown. Those limited grounds categorically do not include State B disagreeing with the measure on its merits. However, once a measure has been recognised by State B then the conditions of its implementation are governed by the law of State B (Article 14).

6. The same principles apply where a measure has been declared enforceable or registered for enforcement in State B. An enforcement application can be made under Article 25(1) and may only be refused on those same grounds where recognition may be withheld (Article 25(3)). All contracting states must offer a simple and rapid procedure for determining an enforcement application (Article 25(2)).

7. Upon the grant of the enforcement application, the measures shall be enforced in State B as if they had been made by the authorities of that State B (Article 27). Enforcement takes place in accordance with the law of State B, to the extent provided by such law (ibid).

8. The Convention essentially provides a regulated process for obtaining a reciprocal order.

9. When State B determines a reciprocal order application, it recognises the *sui generis* nature of the scheme of the 2000 Convention, and on most substantive (as opposed to procedural) issues refrains from deploying its own domestic legal principles in their determination. There are a number of exceptions of which the most prominent is the requirement of State B to satisfy itself that the measure in question conforms to the standards and principles deriving from Article 5 of the European Convention on Human Rights.

10. Similarly, as indicated above, the domestic law of State B has to be applied in determining whether the implementation of a proposed reciprocal order would be lawful. Plainly, it would be manifestly contrary to the public policy of State B for it to recognise a protective measure made by State A if the implementation of that very measure would be unlawful in State B.

11. In the case before me the Health Service Executive of Ireland ("the HSE"), a state body in the Republic of Ireland, seeks a reciprocal order from me which recognises and declares enforceable in England and Wales certain protective measures in respect of SV. Those protective measures were issued by Hyland J in the High Court of the Republic of Ireland in a judgment and order issued on 16 November 2022 (which was supplemented, amended and clarified for technical reasons, but without altering their substance, by two further orders made by the same judge on 23 November 2022).

12. Given that neither jurisdiction operates the 2000 Convention on the Protection of Adults, how is this application possible?

13. The answer is that the United Kingdom Parliament implemented the 2000 Convention for England and Wales in Section 63 of and Schedule 3 to the Mental Capacity Act 2005.

14. Section 63 provides:

> "**International protection of adults**
>
> Schedule 3:
>
> (a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (in so far as this Act does not otherwise do so), and
>
> (b) makes related provision as to the private international law of England and Wales."

Schedule 3 reproduces, almost verbatim, the terms of the 2000 Convention, and came into force on 1 October 2007.

15. In doing it this way Parliament bypassed the procedures for ratification at the Hague. Importantly, giving effect to the Convention in this way meant that it would apply in England and Wales as a receiving country in respect of qualifying incoming protective measures wherever made. Therefore it does not matter whether State A is, or is not, a contracting state under the 2000 Convention. The disadvantage is that implementing the 2000 Convention by this route did not, of course, give rise to reciprocity. It did not have

the effect that protective measures made here would be automatically recognised and enforced overseas, even in those countries operating the Convention.

16. An order reciprocating a protective measure made by a foreign court may be sought under Schedule 3 from the Court of Protection by one or more of the following processes:

    i) An application for a declaration under para 20(1) that the measure is recognised in England and Wales;

    ii) An application for a declaration under para 22(1) that the measure is enforceable in England and Wales;

    iii) An application for a declaration under para 22(1) that the measure is to be registered in England and Wales in accordance with Court of Protection Rules.

17. The Court of Protection Rules 2017 do not provide for registration of foreign protective measures, so the third option is inapplicable in this jurisdiction. In theory there are circumstances where all that is needed is a declaration of recognition. But where the measure in question is a foreign protective measure relating to welfare rather than property, recognition alone will never suffice as the terms of the measure will invariably require positive action to be taken, and this in turn requires "enforcement"[1].

18. In my experience, the declaration made by this Court normally conflates recognition and enforcement. Thus, my order made on 24 November 2022 contains a declaration which states:

> "The protective measures contained in the Order of the High Court of the Republic of Ireland dated 16 November 2022 … as supplemented and amended pursuant to the further Orders of the said Irish High Court dated 23 November 2022 … are to be recognised in England and Wales and enforceable in this jurisdiction"

19. Although Schedule 3 has been in force in England and Wales for over 15 years, applications made under it are replete with legal complexity. They are invariably made by the HSE. There are a considerable number of reported authorities of length and depth filled with legal learning.

20. Omitted from Schedule 3 is Article 25(2) of the 2000 Convention. This requires State B to "apply to the declaration of enforceability or registration a simple and rapid procedure." Although the case before me was not contested, and there was no likelihood of the declaration of enforceability being withheld, the steps that had to be adopted to bring the case before me were certainly not simple. I was given a bundle of evidentiary material, excluding case law and legislation, amounting to 445 pages. In addition I was given a bundle of case law and legislation amounting to 145 pages. The applicant was represented

[1] In contrast, under the Adults with Incapacity (Scotland) Act 2000, Schedule 3, para 8(1) & (2) a foreign measure recognised under para 7 can only become "as enforceable as a measure having the like effect granted by a court in Scotland" if it is registered in Scotland in accordance with rules of court. I do not know if any such rules have been passed.

by leading and junior counsel (although junior counsel could not in fact attend the hearing). It took me half a day to read the material and the hearing lasted nearly one hour.

21. The principal reason why these cases are so demanding of public and judicial resources, is that, notwithstanding the superficial simplicity of the scheme, the Court of Protection has to be satisfied of numerous conditions before the declarations can be made. I have worked out that the Court has to ask in the right order, and receive the correct answers to, 22 separate questions.

22. I wish to record that I am greatly indebted to Mr Setright KC and Ms Barnes who in written and oral submissions assisted me considerably in distilling the logical and navigational demands made by the terms of Schedule 3.

23. For my own benefit I have prepared a checklist or questionnaire detailing the 22 questions, the answers to which must be given correctly and in the right order. The objective of the checklist is not only to ensure the avoidance of any technical pitfalls by me, but also to serve as a judgment writing tool.

24. I supplied a copy of an early draft of the checklist to Mr Setright KC, leading counsel for the HSE. He took soundings not only from his client but also from Mr Ruck Keene KC (Hon), and made suggestions for improvement, which I gratefully adopted.

25. I attach as Annex A to this judgment the blank checklist in its final form.

26. The *sui generis* principle applicable to proceedings under the 2000 Convention referred to in [9] above applies equally to a Schedule 3 application. Schedule 3 should be regarded as including within its four corners most of the relevant factual and evaluative criteria necessary to determine such an application. However the Court of Protection has to apply domestic law to five specific issues, to which I briefly turn.

27. The first issue is the joinder of P.

28. Whether P should be joined to the Schedule 3 application has to be considered with care, applying our domestic law. However, where (as here) the application is proceeding without opposition it will be a very rare case where the joinder of P to the proceedings will be considered to be necessary: see *Health Service Executive of Ireland v CNWL* [2015] EWCOP 48 at [35]. In my opinion, necessity is only likely to be shown where P is not only actively contesting the application but where there are other valid reasons to review the process of the foreign court. This is because mere active opposition to the application is likely to amount to a prohibited attack on the merits of the primary decision of the foreign court. A plausible argument therefore needs to be advanced by or on behalf of P in support of her/his application for party status that there has been some fatal procedural defect in the foreign proceedings and/or that there are good reasons justifying non-recognition within the terms of Schedule 3.

29. The party status of P before the foreign court, which is of course the primary court, and P's position in those proceedings, will naturally be relevant to the joinder decision.

30. In answering the question whether it is necessary to join P, domestic law principles apply (although there will not be much law involved in making the decision). If the answer is that P should be joined, the next question is whether P has capacity to conduct the Schedule

3 litigation. That question is to be answered applying our domestic principles in ss. 2 & 3 Mental Capacity Act 2005 (see COPR r.23.6(2)). If the answer is no, then the Court of Protection must either appoint an Accredited Legal Representative for P under COPR r.17.1 or a litigation friend for P under COPR r.17.4.

31. The second issue is whether P was heard in the foreign proceedings.

32. If the foreign proceedings were not being held on an urgent basis and if P was denied the opportunity of being heard in them, then para 19(3)(c)) allows recognition to be withheld on the ground of natural justice. I suspect that this will very rarely, if ever, arise but if it did the assessment of the standards of natural justice will be made in accordance with our domestic law.

33. The next question is whether P has capacity under ss. 2 and 3 of the Mental Capacity Act 2005 to make the material decision(s).

34. In *Health Service Executive of Ireland v PA & Ors* [2015] EWCOP 38 at [98] a scenario was posited whereby a protective measure is made in the foreign court in respect of a person who satisfies the test in para 4(2)(a) (in that she is a person who as a result of an impairment or insufficiency of her personal faculties cannot protect her interests) but nonetheless that person has the capacity under ss. 2 and 3 of the Mental Capacity Act 2005 to make the relevant decisions about her care and treatment. In such a case very careful consideration will need to be given to whether recognition of the foreign measure would be manifestly contrary to public policy under para 19(4)(a).

35. Again, I suspect that this will very rarely, if ever, arise. I struggle to conceive of a case where a capacitous, but nonetheless vulnerable, adult is sought to be sent here from Ireland for invasive treatment which constitutes a deprivation of liberty. The Irish Court would surely know that in such circumstances it would be probable that a refusal of recognition on the ground of public policy would be the outcome[2].

36. In determining whether for this, or any other reason, recognition of the foreign measure is manifestly contrary to public policy, this Court applies its own domestic law.

37. Next is the question whether the measure is inconsistent with a mandatory provision of the law of England and Wales.

38. Again I suspect that this will very rarely, if ever, arise. However, I agree with Mr Setright KC that where the applicant alone is represented, the Court will need to be satisfied that sufficient material has been placed before it to support the averment that there is no inconsistency. The issue is formally determined by applying domestic law.

39. Finally, there is the question whether the measure entails a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights ("ECHR").

40. It is well-established that the Court of Protection must adhere to and apply the principles and safeguards developed in our domestic law deriving from Article 5 to a Schedule 3

[2] This improbable issue could not arise under the Adults with Incapacity (Scotland) Act 2000. There, under Schedule 3, paragraph 7(1), a foreign protective measure can only be recognised by the law of Scotland if it has been taken for an "adult with incapacity" which is defined for all purposes, domestic or otherwise, in section 1(6).

application which if granted would result in a deprivation of liberty for the purposes of Article 5 of the ECHR.

41. To that end, this Court must be satisfied that:

    i) Objective medical expertise has established that P's medical disorder is of a type and degree that warrants P's compulsory confinement. See *Winterwerp v Netherlands* (1979) 2 EHRR 387 at [39], *Health Service Executive of Ireland v PA & Ors* at [89] and [96], *Health Service Executive of Ireland v CNWL* at [17], and *Health Service Executive of Ireland v Moorgate* [2020] EWCOP 12 at [35];

    ii) P has the right in the foreign country to challenge the detention: see *Health Service Executive of Ireland v PA & Ors* at [97];

    iii) The detention is regularly reviewed by the foreign court (ibid).

42. In reaching its decision the Court of Protection is entitled to conduct a limited review, and to apply a light touch: *Health Service Executive of Ireland v PA & Ors* at [96].

43. It is very important that the Court of Protection, applying our own law, is satisfied of these matters. If there is even one negative answer then the declaration of recognition and enforcement cannot be made until the problem is resolved.

44. I turn to the facts of this case.

45. I attach to this judgment:

    i) Annex B, the checklist as completed by me in relation to SV;

    ii) Annex C, the judgment of Hyland J given on 16 November 2022, anonymised to obscure the identity of SV; and

    iii) Annex D, a copy of the order made by me on 24 November 2022 redacted to obscure SV's identity.

46. The position of SV, and the reason for seeking treatment for her in this country, are set out with great clarity in the judgement of Hyland J. That judgment eloquently tells the full story, and I cannot improve on it.

47. In short, SV is a 20-year-old female Irish citizen. She has been diagnosed with anorexia nervosa and symptoms of bulimia nervosa, and as a result of these conditions, has been admitted to hospital in Ireland multiple times over the last 18 months. Her most recent admission was to Our Lady of Lourdes Hospital in Drogheda on 15 September 2022 where she remains as stipulated by orders of the Irish High Court which has adjudged her to lack mental capacity to consent to medical treatment.

48. The view of the healthcare professionals treating SV is that the seriousness of her condition means that she requires placement at a specialist eating disorder unit, which is not available in Ireland. Accordingly, the HSE has found SV a suitable placement in England, at Nightingale Hospital in Lisson Grove, Marylebone, and this new placement was authorised by the Irish High Court on 16 November 2022.

49. This application before me is to facilitate SV's transfer to Nightingale Hospital. Specifically, the HSE seeks the urgent implementation of the protective measures contained in the order of the Irish High Court dated 16 November 2022.

50. The application is urgent because SV is extremely unwell and in a placement which is unsuitable for her extensive and complex needs. As such, it is plainly imperative that SV is moved to a suitable placement as a matter of urgency. That urgency is recognised by the Irish High Court.

51. At the hearing on 24 November 2022 I was fully satisfied that the order of the Irish High Court made on 16 November 2022 should be implemented by being recognised and declared enforceable. Annex B shows that all the relevant questions were answered correctly. In such circumstances it would not have been lawful to withhold a grant of recognition and a declaration of enforceability. Accordingly, I made the order on that day. It is attached as Annex D, redacted to obscure SV's name.

52. I was clear in my mind that were the declarations of recognition and of enforceability to be granted they would amount to much more than dry legal entitlements in favour of the HSE. In my estimation, they would have a weighty moral content. Making the declarations was therefore a matter of imperative necessity provided that all of the Schedule 3 conditions were satisfied. I was indeed satisfied, and I was therefore very pleased to be able to make the order there and then, with my reasons to be expressed in this judgment.

53. I conclude this judgment by making some procedural and allied points.

    i) If the foreign court has given a fully reasoned judgment explaining the nature of the measure it has issued, and has summarised the evidence relied on in reaching its decision, then normally it will be unnecessary to place any other written evidentiary material before the Court of Protection when seeking recognition and enforcement. To present this Court with all the evidence which was before the foreign court, as has happened here, is a perilous practice as it implies that this Court should conduct its own review of the merits of the measure. As I have explained above, such a review is impermissible.

    ii) If the foreign court can be persuaded to address all the matters in the checklist in its primary judgment then that is likely to make the task of this Court appreciably easier. For example, in this case, Question 5 would have been more unambiguously answerable by me had Hyland J dealt with SV's incapacity using additionally the language of Article 1(1) of the 2000 Convention and para 4(2)(a) of Schedule 3 and had held explicitly that SV cannot protect her interests as a result of an impairment or insufficiency of her personal faculties.

    iii) Similarly, Questions 8, 9 and 10, dealing with SV's habitual residence, would have been more easily answered by me if the judgment had explicitly dealt with this factor. A pedant might object that the declaration in the Irish order recording that SV is "domiciled and habitually and ordinarily resident in this State" does not reflect a finding made in the judgment to that effect. My response to such pedantry would be that it reflects an implied finding. For the future I would suggest that the better course is to try to persuade the foreign court when giving the primary judgment to cover all of the matters in the checklist.

iv) The reciprocal order sought will almost invariably authorise the deprivation of P's liberty. In view of the seriousness of such a decision, as well as the international aspects, I agree with Mr Setright KC that such orders should be only be made by a Court of Protection Tier-3 judge (i.e. a permanent or deputy High Court judge), following an attended hearing in court. If the application is definitely proceeding by consent I would have thought that a listing of one hour would be appropriate. But if the application is not proceeding by consent, or there is doubt as to whether it is or is not contentious, then in my opinion the application should be listed for a day with an interim hearing of one hour being urgently fixed to consider making an interim order permitting the implementation of the foreign measure *pro tem*.

v) It would be perilous, in my opinion, for applications under Schedule 3, to be routinely directed to be heard in open court but subject to a "transparency" order made under COP PD 4C para 2.1 containing reporting restrictions. That would be an example of us applying our own insular domestic standards to this stand-alone piece of legislation which incorporates an International Convention. In this case, it would be singularly inappropriate to do so in circumstances where the primary proceedings, the result of which has been afforded near automatic recognition here, were heard *in camera* in Dublin. Further, I personally am very reluctant to make routine orders of this nature in circumstances where I have serious doubts as to whether the present arrangements are "correct": see my decision in *Re M* [2022] EWCOP 31 at [40] – [45]. In my opinion that issue needs to be resolved urgently either by the Rule Committee or by legislation.

vi) Consistently with my opinion in [44] of that decision, I suggest that the hearings of future Schedule 3 applications should be listed to be heard in private in accordance with COPR r. 4.1(1) but that a direction is issued on the filing of such an application permitting journalists and legal bloggers (but not the general public) to attend the hearing. That direction should be copied to Mr Farmer of the Press Association by the applicant. At the hearing the Court should, subject to submissions made by the press or any party, relax the prohibition in s. 12(1) of the Administration of Justice Act 1960 (and curtail the freedom in s.12(2) to publish fully the terms of the final order), to permit anonymous publication of the proceedings, the judgment and the order. In my opinion it is strongly in the public interest that decisions on applications under Schedule 3 are not rendered secretly. I consider that my suggestion fairly reflects (i) the *in camera* nature of the primary proceedings in Ireland; (ii) the need for at least some open justice in the despatch of the consequential Schedule 3 application in England; (iii) the decision of the House of Lords in *Re S (a child)* [2004] UKHL 47, [2005] 1 AC 593; and (iv) the terms of s. 12(2) of the Human Rights Act 1998 and the right of the press to be heard where orders are made that engage Article 10 of the ECHR (see *In re the Will of HRH Prince Philip, Duke of Edinburgh (decd)* [2022] EWCA Civ 1081 at [17]).

vii) For the reasons given in *Re M* at [34] – [39], at the hearing I declined to endorse the draft order which had been supplied to me which throughout referred to P acronymically as SV. Of course, this judgment anonymises P. There is no reason why the world should know her identity. Of course, the judgment of Hyland J annexed to this judgment has been anonymised by me for the same reason. Of course, her identity will be redacted from the copy of the order annexed to this judgment, again for the same reason. But the actual sealed order which gives effect

to my decision, and which regulates matters between SV, the HSE and the Irish court should unquestionably bear her name. The order made by Hyland J bore SV's name and it would be bizarre, to put it mildly, if we decided to anonymise our reciprocating order when the primary court did not do so in the principal order.

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Annex A

Blank checklist

Checklist for cases proceeding under Part 4 of Schedule 3 to the Mental Capacity Act 2005 seeking recognition and enforcement of a foreign measure (where no previous order has been made in relation to P in England or Wales)

Basic details

Name of Protected Adult (P)	
Date of birth of P	
Foreign Court	
Name of foreign judge	
Date of foreign protective measure	
Copy of foreign order provided?	
Summary of terms of foreign measure	
Copy of foreign judgment provided?	
Does foreign measure require deprivation of P's liberty?	
Did foreign judgment address checklist?	
Date of Schedule 3 application	
Date of COP 24	
Has applicant completed checklist?	

Instructions and key to symbols:

- Answer the questions in the order that they are set out keeping in mind the General Principles below.
- The Questions are in black script.
- Instructions are in red script.
- ¶ used before a number denotes exclusively a numbered paragraph in Schedule 3.
- § used before a number denotes exclusively a numbered paragraph in an authority.
- P is the Protected Adult.
- † denotes Questions to be answered directly (see below).
- ⁋ denotes Questions where findings of fact of the foreign court are conclusive (see below).
- ‡ denotes Questions where Anglo-Welsh law applies (see below).

General principles:

- COPR PD23A para 12 contains a list of the matters to be included in, or attached to, the COP 24 witness statement accompanying the Schedule 3 application. This checklist does not derogate from that list. Rather, it is intended to complement that list to seek to ensure that all of the requirements of Schedule 3 and of the Human Rights Act 1998 are complied with.
- In answering the Questions regard may only be had to the merits of a foreign measure in order to establish whether the measure complies with the criteria in Schedule 3 (see ¶24).

- Questions 1, 2, 5, 7, 8, 9, 10, 11, 12, 20 should be answered directly without applying principles or concepts of English-Welsh law or the law of the foreign court. These Questions are marked † in the YES/NO column.
- Any finding of fact made by the foreign court is conclusive as regards Questions 9 – 12 (see ¶21). These Questions are marked ⁋ in the YES/NO column.
- Principles of English-Welsh law should be applied when answering Questions 3, 4, 6, 13, 14, 15, 16, 17, 18, 19, 22. These Questions are marked ‡ in the YES/NO column
- The answer to Q21 will be a mixture of the above.

QUESTION	Ref	ANSWER	REASON
Recognition 1. Is P under 16? If yes, Schedule 3 does not apply. If no, go to Question 2.	¶4(1)(b)	YES/NO †	
2. Where P is 16 or 17: is P habitually resident in a country that has adopted the 1996 Hague Convention? If yes, Schedule 3 does not apply. If no or N/A, go to Question 3.	¶4(2)(a)	YES/NO (or N/A) †	
3. Is it <u>necessary</u> that P is joined as a party? (Normally, necessity will be shown only where P is actively contesting the application <u>and</u> where there are other valid reasons to review the process of the foreign court.) If yes, go to Question 4. If no, go to Question 5.	*HSE v CNWL* [2015] EWCOP 48 §35	YES/NO ‡	
4. Does P have capacity to conduct the Schedule 3 litigation? (Note: this question is to be answered applying ss.2 & 3 Mental Capacity Act 2005) If yes, join P and go to Question 5. If no, join P, either appoint an Accredited Legal Representative for P under COPR r.17.1 or a litigation friend for P under COPR r.17.4, and then go to Question 5.	COPR r. 23.3(2)	YES/NO ‡	
5. Is P a person who as a result of an impairment or insufficiency of their personal faculties, cannot protect their interests? If yes, go to Question 6. If no, Schedule 3 does not apply.	¶4(2)(a)	YES/NO †	
6. Does P nonetheless have capacity to take the material decision(s) applying ss.2 & 3 Mental Capacity Act 2005? If yes, note that this factor must be specifically considered under Question 14. Now go to Question 7. If no, go to Question 7.	*Re PA* [2015] EWCOP 38, §98	YES/NO ‡	

7. Does the foreign measure provide for any of the following: a. the determination of incapacity and the institution of a protective regime b. placing P under the protection of an appropriate authority c. guardianship, curatorship or any corresponding system d. the designation and functions of a person having charge of the P's person or property, or representing or otherwise helping him e. placing P in a place where protection can be provided f. administering, conserving or disposing of P's property g. authorising a specific intervention for the protection of the person or property of P? If yes to any of these, go to Question 8. If no to all of these, the measure cannot be recognised and/or enforced.	¶5(1)	YES/NO †	
8. Was the foreign measure taken on the ground that P was habitually resident in that country? If yes, go to Question 9. If no, the foreign measure cannot be recognised.	¶19(1)	YES/NO †	
9. Did the foreign court find as a fact that P was habitually resident in that country as at the date of the measure?" If yes, go to Question 11. If no, go to Question 10.	¶21	YES/NO †⁋	
10. Is there is any reason to doubt that the measure was taken on the basis that the adult was at that date habitually resident in that country? If yes, adjourn the case to obtain clarification from the foreign court. Once clarified go to Question 11. If no, go to Question 11.	¶21	YES/NO †⁋	

11. Was the foreign case urgent? If yes, go to Question 14 If no, go to Question 12.	¶19(3)(a)`	YES/NO †⁋	
12. Was P given the opportunity to be heard? If yes, go to Question 14. If no, go to Question 13.	¶19(3)(b)	YES/NO †⁋	
13. Was the omission to give P the opportunity to be heard contrary to natural justice? If yes, the foreign measure cannot be recognised. If no go to Question 14.	¶19(3)(c)	YES/NO ‡	
14. Would recognition of this specific measure, on the facts of this specific case, be manifestly contrary to public policy? Note: if answer to Question 6 is that P has the mental capacity to make the material decisions, then P will be a capacitous albeit vulnerable adult. Very careful consideration will need to be given as to whether to recognise the foreign measure in these specific circumstances would be manifestly contrary to public policy. If yes, the foreign measure cannot be recognised. If no, go to Question 15.	¶19(4)(a)	YES/NO ‡	
15. Is the measure inconsistent with a mandatory provision of the law of England and Wales? Note that where the applicant alone is represented, the Court will need to be satisfied that sufficient material has been placed before the Court to support this answer. If yes, the foreign measure cannot be recognised. If no, go to Q16.	¶19(4)(b)	YES/NO ‡	

Article 5 ECHR *In answering Questions 16 – 18 a light touch is to be applied* 16. Does the measure provide for the compulsory placement and treatment of P, therefore amounting to a deprivation of liberty for the purposes of Article 5 of the ECHR? If yes, go to Question 17. If no, **the foreign measure is to be recognised and a declaration made to that effect.** Then go to Question 20.	*Re PA*, §96 *HSE v EM* §35	YES/NO ‡	
17. Has objective medical expertise established that P's medical disorder is of a kind and degree that warrants compulsory confinement? If yes, go to Question 18. If no, the foreign measure cannot be recognised.	ibid	YES/NO ‡	
18. Does P have the right in the foreign country to challenge the detention? If yes, go to Question 19. If no, the foreign measure cannot be recognised.	*Re PA*, §§9 6-97	YES/NO ‡	
19. Will P's detention in the foreign country be regularly reviewed? If yes, **the foreign measure is to be recognised and a declaration made to that effect.** Then go to Question 20. If no, the foreign measure cannot be recognised.	ibid	YES/NO ‡	
Enforcement 20. Has an application been made for a declaration as to whether a foreign measure is enforceable in England and Wales? If yes, go to Question 21. If no, go to Question 22.	¶22(1)	YES/NO †	

21. Is the foreign measure entitled to be recognised under Questions 16 or 18? If yes, a declaration that the foreign measure is enforceable in England and Wales **must** be made. Now go to Question 22.	¶22(2)	YES/NO †⁋ ‡	
Implementation 22. Is the Court satisfied, applying ss.1(5) and 4 MCA 2005, that implementing the order in England & Wales would not be contrary to the adult's best interests?" If yes, no further action If no, adjourn case for remedial steps to be taken in accordance with directions.	¶12 *Re MN* [2010] EWHC 1926 (Fam) §§31, 35	YES/NO ‡	

Annex B

SV's completed checklist

Checklist for cases proceeding under Part 4 of Sch 3 to the Mental Capacity Act 2005 seeking recognition and enforcement of a foreign measure (where no previous order has been made in relation to P in England or Wales)

Basic details

Name of Protected Adult (P)	**[Redacted]**
Date of birth of P	**[Redacted]**
Foreign Court	**High Court of Republic of Ireland**
Name of foreign judge	**Ms Justice Hyland**
Date of foreign protective measure	**16 November 2022 as amended in two orders made on 23 November 2022**
Summary of terms of foreign measure.	**Placement of P at a specialist eating disorder unit in London.**
Copy of foreign order provided?	**Yes**
Copy of foreign judgment provided?	**Yes**
Does foreign measure require deprivation of P's liberty?	**Yes**
Did foreign judgment address checklist?	**No**
Date of Sch 3 application	**23 November 2022**
Date of COP 24	**22 November 2022**
Has applicant completed checklist?	**No**

QUESTION	Ref	ANSWER	REASON
Recognition 1. Is P under 16? If yes, Sch 3 does not apply. If no, go to Q2.	¶4(1)(b)	NO	
2. Where P is 16 or 17: is P habitually resident in a country that has adopted the 1996 Hague Convention? If yes, Sch 3 does not apply. If no or N/A, go to Q3.	¶4(2)(a)	N/A	N/A
3. Is it <u>necessary</u> that P is joined as a party? (Normally, necessity will be shown only where P is actively contesting the application <u>and</u> where there are other valid reasons to review the process of the foreign court.) If yes, go to Q4. If no, go to Q5.	*HSE v CNWL* [2015] EWCOP 48 §35	NO	P does not contest the proposed placement. There are no reasons to review the processes of the Irish court.
4. Does P have capacity to conduct the Schedule 3 litigation? (Note: this Question is to be answered applying ss.2 & 3 Mental Capacity Act 2005) If yes, join P and go to Q5 If no, join P, either appoint an Accredited Legal Representative for P under COPR r.17.1 or a litigation friend for P under COPR r.17.4, and then go to Question 5	COPR r. 23.3(2)	N/A	
5. Is P a person who as a result of an impairment or insufficiency of their personal faculties, cannot protect their interests? If yes, go to Q6. If no, Sch 3 does not apply.	¶4(2)(a)	YES	See Hyland J judgment at [8]-[17] which amply satisfies this test.

6. Does P nonetheless have capacity to take the material decision(s) applying ss.2 & 3 Mental Capacity Act 2005? If yes, note that this factor must be specifically considered under Q14. Now go to Q7. If no, go to Q7.	*Re PA* [2015] EWCOP 38, §98	NO	The findings of Hyland J amply satisfy the MCA test for incapacity.
7. Does the foreign measure provide for any of the following: a. the determination of incapacity and the institution of a protective regime b. placing P under the protection of an appropriate authority c. guardianship, curatorship or any corresponding system d. the designation and functions of a person having charge of the P's person or property, or representing or otherwise helping him e. placing P in a place where protection can be provided f. administering, conserving or disposing of P's property g. authorising a specific intervention for the protection of the person or property of P? If yes to any of these, go to Q8. If no to all of these, the measure cannot be recognised and/or enforced.	¶5(1)	YES	Q7(e) applies. P is being placed in a hospital where protection will be provided.
8. Was the foreign measure taken on the ground that P was habitually resident in that country? If yes, go to Q9. If no, the foreign measure cannot be recognised.	¶19(1)	YES	Although the judgment of Hyland J does not specifically refer to habitual residence, the order of 16 November 2022 declares that SV is "domiciled and habitually and ordinarily resident in this State".

9. Did the foreign court find as a fact that P was habitually resident in that country as at the date of the measure?" If yes, go to Q11. If no, go to Q10.	¶21	NO	There is no finding of fact in the judgment to this effect. The declaration in the order is probably not a finding of fact for the purposes of ¶21.
10. Is there is any reason to doubt that the measure was taken on the basis that the adult was at that date habitually resident in that country? If yes, adjourn the case to obtain clarification from the foreign court. Once clarified go to Q11. If no, go to Q11.	¶21	NO	There is no reason to doubt that the declaration in the order correctly records that the Irish court made its order on the basis that P was habitually resident in Ireland.
11. Was the foreign case urgent? If yes, go to Q14 If no, go to Q12.	¶19(3)(a)	YES	This case is exceptionally urgent. It is no exaggeration to say that P's life depends on swift action.
12. Was P given the opportunity to be heard? If yes, go to Q14. If no, go to Q13	¶19(3)(b)	N/A	Although this is not applicable (the case was urgent) P was represented by a guardian at litem at the hearing on 16 November 2022 in Dublin. Through the guardian ad litem her voice was heard clearly by Hyland J.
13. Was the omission to give P the opportunity to be heard contrary to natural justice? If yes, the foreign measure cannot be recognised. If no or N/A go to Q14.	¶19(3)(c)	N/A	

14. Would recognition of this specific measure, on the facts of this specific case, be manifestly contrary to public policy? Note: if answer to Q6 is that P has the mental capacity to make the material decisions, then P will be a capacitous albeit vulnerable adult. Very careful consideration will need to be given as to whether to recognise the foreign measure in these specific circumstances would be manifestly contrary to public policy. If yes, the foreign measure cannot be recognised. If no, go to Q15.	¶19(4)(a)	NO	There is nothing to suggest that the Irish order of 16 November 2022 would be contrary to public policy in this jurisdiction.
15. Is the measure inconsistent with a mandatory provision of the law of England and Wales? Note that where the applicant alone is represented the Court will need to be satisfied that sufficient material has been placed before the Court to support this answer. If yes, the foreign measure cannot be recognised. If no, go to Q16.	¶19(4)(b)	NO	Mr Setright fully addressed the Court demonstrating that there was no such inconsistency.
Article 5 ECHR *In answering Questions 16 – 19 a light touch is to be applied* 16. Does the measure provide for the compulsory placement and treatment of P, therefore amounting to a deprivation of liberty for the purposes of Article 5 of the ECHR? If yes, go to Q17. If no, **the foreign measure is to be recognised and a declaration made to that effect.** Then go to Q20.	*Re PA* §96 *HSE v EM* [2020] EWCOP 12, §35	YES	See the judgment of Hyland J *passim*. It is indisputable that SV is being detained for the purposes of Article 5.

17. Has objective medical expertise established that P's medical disorder is of a kind and degree that warrants compulsory confinement? If yes, go to Q18. If no, the foreign measure cannot be recognised.	ibid	YES	The judgment of Hyland J recounts the evidence of Dr O'Connell and Dr McCabe which establishes this beyond doubt.
18. Does P have the right in the foreign country to challenge the detention? If yes, go to Q19. If no, the foreign measure cannot be recognised.	*Re PA* §§96-97	YES	The memo from Ms Hickey, the Irish General Solicitor and SV's Committee confirms this right.
19. Will P's detention in the foreign country be regularly reviewed? If yes, **the foreign measure is to be recognised and a declaration made to that effect.** Then go to Q20. If no, the foreign measure cannot be recognised.	ibid	YES	Ibid.
Enforcement 20. Has an application been made for a declaration as to whether a foreign measure is enforceable in England and Wales? If yes, go to Q21. If no, go to Q22.	¶22(1)	YES	
21. Is the foreign measure entitled to be recognised under Questions 16 or 18? If yes, a declaration that the foreign measure is enforceable in England and Wales **must** be made. Now go to Q22.	¶22(2)	YES	Declaration made accordingly.

Implementation 22. Is the Court satisfied, applying ss.1(5) and 4 MCA 2005, that implementing the order in England & Wales would not be contrary to the adult's best interests?" If yes, no further action. If no, adjourn case for remedial steps to be taken in accordance with directions.	¶12 *Re MN* [2010] EWHC 1926 (Fam) §§31, 35	YES	There is no evidence whatsoever suggesting that the implementation of the order in the way of describing the evidence would be contrary to P's best interests. On the contrary, were the order not to be implemented this would be seriously contrary to her best interests.

ANNEX C

Anonymised Judgment of Hyland J

16 November 2022

RE SV

JUDGMENT OF HYLAND J

(ANONYMISED)

16 NOVEMBER 2022

1. This is an application made by way of Notice of Motion of 10 November 2022. That Notice of Motion seeks various reliefs but, in particular, a relief that the respondent, who is SV, a 20 year old woman, be transferred to Nightingale Hospital in London and that when she is in Nightingale Hospital that the responsible clinician and other associated persons be permitted to detain her and to treat her, pending further Order of the Court.

2. There are many other associated Orders, including that the Nightingale Hospital be permitted to administer nasogastric tube feeding, despite the absence of consent on the part of respondent, as well as other linked reliefs, such as the use of reasonable force and/or restraint to the extent which it may be necessary.

3. In those circumstances, it will be necessary that the Court of Protection of the United Kingdom (*sic, semble* England & Wales) considers the terms of the Order that I am going to make and the reasons for my Order. Therefore, I am going to set them out in a little bit of detail. I should say that this is a hearing that is being heard in camera pursuant to s.45 Courts (Supplemental Provisions) Act 1961 and, therefore, it is not a hearing that the public are able to access.

4. I should say, first, that this is a case where there has not yet been an inquiry held into the question of Wardship for the respondent. She has not yet been made a Ward of Court, pursuant to the procedures set out in the Lunacy Regulation (Ireland) Act 1871 Act but, nonetheless, I am exercising my protective Wardship jurisdiction, as identified by the Supreme Court in the case of *AC v Cork University Hospital* [2019] IESC 73 in 2019, under the provisions of s.9 of the Courts (Supplemental Provisions) Act 1961, and also pursuant to the inherent jurisdiction of the Court. In the case of Ireland, that inherent jurisdiction derives from Article 40.3.2 of the Constitution and the power of the Courts to protect the property and person of every citizen. In those circumstances, I'm quite satisfied I have the jurisdiction to make the Orders sought.

5. Now, turning to the particular issues arising in respect of this application. I should say, first, that I must consider the capacity of the respondent and whether or not she is capacitous because obviously if she is, then I would not have any jurisdiction to make the type of Orders that have been made.

6. This case has, I suppose, a relatively short but intense history in this Court. An application was first made to me on 28 September 2022, in relation to Orders which would necessitate SV staying in hospital and being detained in hospital for the purposes of weight restoration. There was a further Order made on the 30 September by Mr Justice O'Connor. There was a further Order made by me on 19 October 2022, after hearing the evidence of Dr O'Connell and, indeed, I heard the evidence of Dr O'Connell, consultant psychiatrist, on the earlier occasion. There was a further Order on 2 November 2022 and I made an inquiry

Order directing an inquiry hearing and the steps necessary for that on the 2 November 2022.

7. SV has now been served with the Notice of Inquiry. In this particular case that was done by her Guardian ad litem, Ms. Parte. I should add that, of course, a Guardian ad litem has been appointed in order to make sure that her voice is heard. In fact, in this particular case, on each occasion that the matter has been before me, SV has been able to attend the hearing remotely and has made submissions to me, and on each occasion I have been able to hear her particular views, as well as having the assistance of Ms. Parte, who has given detailed affidavit evidence in relation to her discussions with SV.

8. Returning to capacity, I should say that I have had evidence up to today and prior to today's date in relation to a lack of capacity on the part of the respondent in relation to matters relating to her eating disorder. In particular, I am going to refer to the report of 12 October 2022 of Dr O'Connell. In that report she identifies the reasons for which SV was taken into hospital and I'm going to come to those shortly. She also assesses her capacity issues and says that SV has the cognitive inflexibility and thinking mistakes inherent in eating disorders, such as anorexia nervosa, and that they continue to interfere with her ability to understand the information given to her, particularly regarding the risks to her health and life. She said that she did not appear to appreciate the risks to her physical health were she to continue to engage with self-induced vomiting, and to severely restrict her oral intake, and she did not appear to appreciate the risks to her physical health due to medical complications associated with starvation and severely low BMI. She said she did not demonstrate the ability to understand the information given to her at the time of assessment or, indeed, the previous information she had been provided with to date regarding the risks to her physical health.

9. Then today 16 November, Dr O'Connell gave relatively extensive evidence of the current state of play. SV has been in the hospital now for 60 days since she entered in September. Dr O’Connell identified that she was of the opinion that SV is still lacking capacity in respect of the issues relating to her eating disorder and, in particular, she said that SV does not have the ability to understand the risks that she is presenting including that to her physical health, the risk of starvation, of the vomiting, of the electrolyte abnormalities. She has identified certain actions that took place when SV was recently on leave in respect of the taking of medication that was not prescribed for her and how that demonstrated a disregard for her cardiac risk. She identified that there has been no change in her thinking in relation to treatment. She identified that SV has never said to her that she wants treatment. She is agreeing to go to the United Kingdom because she believes that the Court will tell her to do so. There is no evidence that she understands the risks that she is facing.

10. Dr O'Connell also identified the repeated requests for leave by SV so that she could go home, and she considered that those requests were driven by her eating disorder whereby she wanted to lose weight under the guise of wanting to prepare for her trip to London. She noted that, in fact, SV hasn't actually packed a bag or prepared for the trip on the trips home. In those circumstances she indicated that she did not believe that SV had capacity.

11. Now, the Court has the facility of obtaining independent medical evidence from a medical visitor. In this particular situation that was availed of and Dr Rachael Cullivan of the Department of Psychiatry in Cavan General Hospital went and met with svand she reviewed her on 27 October 2022, and she says her assessment was of approximately an

hour.

12. Dr Cullivan goes through the various requirements of capacity that are now identified in the Assisted Decision-Making (Capacity) Act 2015, which is not yet in force but, nonetheless, these tests are being used frequently by medical practitioners when assessing capacity. She identifies that the first requirement of the test of capacity is the ability to understand the information relevant to a decision. She comes to the conclusion that SV was superficial in her considerations and not able to fully understand or distinguish between short-term, long-term or evidence-based versus non-evidentially based issues. She, therefore, failed on this aspect of the test.

13. In the course of that consideration, Dr Cullivan identified in particular that in the past before SV was admitted on this occasion, she had been admitted to hospital nineteen times in the previous ten months on a voluntary basis but had continually discharged herself. She also noted that SV had been admitted voluntarily to St. John of God's Hospital for treatment in March 2022 but, again, had discharged herself after three weeks.

14. She then considered the second requirement, the ability to retain information relevant to the decision and she noted that while SV was unable to fully understand or appreciate the information relevant to her decision, she was not cognitively impaired and she was satisfied that she had the ability to retain relevant information, although not able to fully understand. She concluded she did not, therefore, fail on that aspect of the test.

15. She then noted that the third requirement was the ability to weigh information in order to reach a decision and that because SV was unable to fully understand the relevant information, it was not possible for her to weigh up, balance, or appreciate the potential interactions or consequences of her decision, specifically the pros and cons of her receiving treatment at a specialist centre. She could not meaningfully balance or weigh up evidence from her experiences of her illness and its treatment to date. She identified that given the mortality rate of this illness and the serious risks already identified to her life, it was significant she placed little or no weight on this information in her considerations and she, therefore, failed the third aspect of the test.

16. She identified in relation to the fourth aspect, i.e. the ability to communicate a decision, that SV was able to do that. In all of those circumstances, it was concluded that she did not have capacity in relation to the question of her eating disorder.

17. So I am quite satisfied here that there is evidence before me in relation to a lack of capacity and, therefore, I am going to proceed to consider now whether it is in SV's best interests to grant the reliefs that are sought in the Notice of Motion and, in particular, the transfer to the United Kingdom. In this respect I am going to summarise some of the evidence of Dr O'Connell and also some of the evidence that has been used by Dr McCabe in grounding this application. A lot of that evidence is not just coming from today's hearing but is coming from the very beginning of SV's interaction with the Court process in September.

18. SV is a 20 year old woman. She has a severe eating disorder. That is also linked with binging and purging behaviours. She has been in hospital for 60 days. It was a medical admission and the aim of it was weight restoration and medical stabilisation. She made progress in the first number of weeks but there has been a notable drop in weight in recent weeks. Her weight now is lower than at any time other than four days post admission.

19. Dr O'Connell, very helpfully, did a chart identifying the days she has been in hospital and the weight over those days; and one can see a particular pattern whereby her weight first increased, then declined and then there was a steady climb upwards until she had reached a BMI of about 14. At that point her weight then dropped, then peaked again, then dropped and then peaked again and the same pattern repeated itself three times and now it has dropped very significantly again, and she is now at a weight of just about 35.5 kilos.

20. Those peaks and drops (*sic, semble* troughs) were associated with her leave home, where on three occasions she was given leave to go home but on occasion when she went home, her weight dropped. Then she would go back to the hospital, her weight would be restored to a certain extent and then it would drop again. Dr O'Connell also said that it was likely that the weight drop was not just because of her leave home but was also because at a certain BMI, which she identified as 14, it would become very difficult for SV to see herself putting on weight and reaching that level of BMI.

21. She has also noted that at present she is now back to having daily bloods and ECG's, which was the approach taken at the start and that SV is reasonably stable, from a medical point of view, but that she has not made any progress in relation to her thinking, that she is very inflexible. She then has identified some of the issues in relation to her home leave and she has also identified for me the state of play in respect of nutrition. There is at present a nasogastric tube in place. It is, from time to time, pulled out by SV but usually she will allow it to be replaced. She is taking oral food and there are certainly restrictions around that. Again, Dr O'Connell identified the very rigid thinking on the part of SV in relation to how she deals with that.

22. Turning then to the evidence in relation to transfer, Dr O'Connell has made it clear that the hospital admission has not been a success in that they have not been able to achieve a weight restoration and to maintain it. The hospital is not able, being a general hospital, to provide SV with the kind of specialist care that she needs. Dr O'Connell has also identified that she spoke to Dr Helen Murphy of Nightingale Hospital and that she, Dr O'Connell, was impressed with the course of treatment described in Nightingale and she has confidence that Nightingale would be able to adequately treat SV, given her complex needs.

23. I want to now turn to the evidence of Dr McCabe. Some of that evidence derives from Dr O'Connell's reports but she also, at paragraph ten, identifies the evidence of Dr Waheed, Consultant Psychiatrist, who assessed the respondent on 3 November 2022. He confirmed that the respondent continued to lack capacity regarding her treatment and care. In relation to the respondent's wishes, Dr McCabe has addressed that. I think I have already noted that Ms. Parte is the Guardian ad litem and that she has provided evidence to this Court.

24. Now, in relation to the approach of the respondent to the transfer. It is fair is to say that there is a mixed approach. At certain points she has said she does not wish to go to London, but she has also said, most recently to me today, that she is willing to go to London. It seems to me that her rationale is that she wishes to go to the hospital in London so that she can start her treatment there. She is impressed by the range of options that will be available to her in respect of addressing the psychological causes of her illness and she wants to, as it were, get going on that treatment.

25. Therefore, I am faced with a situation where there is an application to move the respondent and it's not being opposed at this point in time by the respondent, although I think it's fair to say she does have considerable reservations about the proposed course.

26. In relation to the suitability of Nightingale and the position in Ireland, at paragraph 18 Dr McCabe identifies that: "It is the view of the Respondent's treating community psychiatry team and her own opinion that her needs have exceeded that which is available within the mental health services in Ireland.". That is a very important averment because obviously if SV's needs could be met in Ireland, they should be met in Ireland. It is more challenging in many different ways for her to be treated abroad and it also means she won't be able to see her family in the same way as she can at present. Nonetheless, I have been given that evidence that there isn't the possibility of treating her complex situation in Ireland and I have to give that significant weight.

27. There is also an averment by Dr McCabe that the Nightingale Hospital has accepted the respondent for inpatient eating disorder treatment, that the treatment is multidisciplinary based, including medical, nursing, dietician, acute medical treatment as needed and psychotherapy, including family therapy, and that on arrival Dr Murphy will outline with the respondent a treatment plan which is based on a multidisciplinary initial assessment of the respondent, her status at that time and needs identified.

28. I have had careful regard to the Care Quality Commission Report for Nightingale Hospital and it's certainly true that in many areas that report identified that there were certain aspects of the care at the hospital that needed improvement and the report went into some detail in respect of the different headings. One of those was in relation to the facilities provided for nasogastric feeding, including the room and the chair that was being used and Dr McCabe has identified that this has now been addressed and there are now suitable facilities in place.

29. So, in all of the circumstances, it seems that the Nightingale Hospital is a suitable placement. It is clear that an assisted admission will be required but, again, that is one of the issues that is identified in the Orders sought.

30. Finally, in relation to the view of the respondent, Dr McCabe has identified that the respondent has said she is unwilling to engage and that she wishes to be discharged home. As I already said there has been conflicting evidence from SV in that respect but, I think, overall the state of play at the present certainly is that she is willing to go, if not enthusiastic about it.

31. I'm going to turn to the detail of the Orders. There is just one issue that I should address that is the relief that is sought at paragraph 6(i). What that identifies is that notwithstanding the respondent's lack of capacity to consent, that the director manager and/or responsible clinician would deliver such care and medical and/or psychiatric assessment as they consider to be appropriate, including nasogastric tube feeding and other PEG feeding and/or feeding by intravenous total parenteral nutrition.

32. I am satisfied that there is sufficient evidence before me that it is necessary that the hospital have the possibility of a nasogastric tube feeding. That is, unfortunately, a common way of administering nutrition to patients in this situation. It has been used in the hospital since SV has been admitted, although happily I think it has not been necessary to use it on a non-

consensual basis where restraint is needed. Nonetheless, it is clearly an important part of the treatment regime and I will authorise that. But I'm not satisfied in relation to PEG feeding or TPN. Both of those would require admission to a general hospital. I am told that there is a general hospital right beside the Nightingale Hospital but, nonetheless, I do not have any evidence as to why it would be necessary for such a draconian form of relief, without any further recourse to this Court. Given the nature of the relief sought, it seems to me that I would have to have more evidence than simply a generalised statement, which I think is what Dr McCabe provided, which was that it would be better for them to have a full suite of available ways of feeding the respondent.

33. I think both Dr McCabe and Dr O'Connell made it clear in their evidence that they were not familiar with these particular types of measures in the context of eating disorders, that they had not seen them used, that they were extremely rare indeed. They certainly had not only not been used in the admission to date, but I do not think ever considered in the admission to date. There was concern raised by Dr McCabe that if it became impossible to feed the respondent by any other means but PEG feeding or TPN, that it might be necessary to resort to them. But if that is the case, of course the parties have liberty to apply here. Certainly, the situation is a little more complex because any Order would have to be recognised by the Court of Protection but, again, I'm quite sure that Court has measures to deal with extreme emergences. In any case, given that SV will be closely monitored, and she will be in Nightingale Hospital, it will become clear if she has stopping eating and, it seems to me, that I have not been given sufficient evidence that the measures sought are necessary in all the circumstances. So, I will not grant liberty in respect of those measures.

34. Turning to the Notice of Motion. I'm going to make an Order pursuant to paragraph 3 of the Notice of Motion, paragraph 4, paragraph 5, paragraph 6, save in relation to PEG and TPN, paragraph 7, paragraph 8 and paragraph 9, paragraph 10, paragraph 11, paragraph 12, paragraph 13. Obviously, paragraph 13 is of particular importance because it provides that: "The Respondent shall be the subject of regular intensive welfare reviews during the currency of her detention at Nightingale Hospital to enable the Court to ascertain whether there persists a basis for the continued treatment of the Respondent."

35. I will hear from Counsel shortly as to when the review date should be. Then I'm going to make an Order pursuant to paragraph 14, paragraph 15 and, obviously paragraph 16, liberty to apply at short notice and paragraph 17. That's my Order and I will just hear submissions now as to whether there are any other matters that I have not dealt with that need to be addressed.

ANNEX D
Redacted Order of Mostyn J
24 November 2022

Order

Case No. 14018449

IN THE COURT OF PROTECTION

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

AND IN THE MATTER OF [REDACTED]

BETWEEN

THE HEALTH SERVICE EXECUTIVE OF IRELAND

Applicant

-and-

FLORENCE NIGHTINGALE HOSPITALS LIMITED

Respondent

ORDER

This order shall take effect forthwith notwithstanding that the seal of the Court of Protection may not be impressed upon it until a later date

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BEFORE Mr Justice Mostyn in private
AT the Royal Courts of Justice, Strand, London WC2A 2LL
ON 24 November 2022

(A) UPON the application of the Health Service Executive of Ireland for the recognition and enforcement pursuant to the provisions of Schedule 3 to the Mental Capacity Act 2005 of the Order of the Irish High Court made in respect of [redacted] ("SV") on 16 November 2022 including as amended and supplemented by two further orders of the Irish High Court made in respect of SV on 23 November 2022 – the said Irish Orders being annexed to this order marked 'A', 'B', and 'C' respectively and

(B) UPON consideration of the court bundle provided by the Applicant

(C) UPON hearing Leading Counsel for the Applicant, with the Respondent and the subject of the proceedings, SV, not in attendance or represented

(D) UPON the High Court of the Republic of Ireland having appointed a Guardian ad Litem on SV's behalf by Order dated 20 September 2022 (but having subsequently replaced that Guardian and appointed the General Solicitor, Patricia Hickey, to act at SV's Committee upon SV being made a Ward of the Irish High Court by the said Orders of 23 November 2022)

(E) UPON the High Court of the Republic of Ireland having made an Order dated 16 November 2022 containing protective measures including for the detention and treatment of SV at Nightingale Hospital ("Nightingale Hospital") (11-19 Lisson Grove, Marylebone, London, NW1 6SH)

(F) UPON Nightingale Hospital being operated by Florence Nightingale Hospitals Limited

(G) UPON the High Court of the Republic of Ireland having made the following findings and orders in the Order of 16 November 2022:

i. That by reason of SV's mental condition she lacks capacity to make decisions about her treatment and care.

ii. That SV is domiciled and habitually and ordinarily resident in the Republic of Ireland.

iii. That SV is to be transferred to Nightingale Hospital where she shall remain until further Order for the purposes of receiving specialised assessment and treatment.

iv. That Nightingale Hospital is a suitable institution for the purposes of providing SV with medical treatment.

v. That in the existing circumstances, SV's life, health and welfare is at risk as a result of which it is in her best interests to become an inpatient at Nightingale Hospital for assessment and treatment.

vi. That SV's views have been presented to the Court through her Guardian Ad Litem.

(H) UPON the Court noting the email of SV's Guardian of 17 November 2022, indicating that SV does not object to her transfer to Nightingale Hospital

(I) UPON a COP9 application having been made by the Applicant dated 22 November 2022 by which the Applicant seeks recognition and enforcement in England and Wales of the protective measures in the Order of the High Court of the Republic of Ireland dated 16 November 2022

(J) UPON the High Court of the Republic of Ireland having as aforesaid made SV a Ward of Court and having appointed the General Solicitor, Patricia Hickey, to act at SV's Committee in Wardship by Orders dated 23 November 2022 (thus replacing the Guardian ad Litem)

(K) UPON SV's Committee confirming that she supports this application

(L) UPON SV's Committee confirming that she will ensure an advocate based in England is appointed to visit SV on a regular basis and to keep her as SV's Committee regularly appraised as to SV's wishes and progress and that she has liberty to apply to the Irish High Court at any time on notice to the Health Service Executive to remit SV's case to Court, that she may bring any matter of concern to the Court and that the matter will be listed for directions to include review or discharge as appropriate of all or part of the order relating to SV's detention and treatment.

(M) UPON the Applicant confirming that it will ensure SV's case is brought before the High Court of the Republic of Ireland for intensive review at least once every six months, and

(N) UPON THE COURT OF PROTECTION BEING SATISFIED THAT:

(a) SV is an adult for the purposes of Schedule 3 to the Mental Capacity Act 2005 ("MCA 2005").

(b) The protective measures of the High Court of Ireland contained in the Order of 16 November 2022 ("the Protective Measures") including as reconstituted following SV's becoming a Ward of the Irish High Court and as amended following the appointment of Ms Patricia Hickey as SV's Committee in replacement of her Guardian by the Orders of 23 November 2022 stand as protective measures in respect of SV for the purposes of Schedule 3 to the MCA 2005.

(c) The Protective Measures were taken on the basis that SV was habitually resident in Ireland.

(d) SV has had a proper opportunity to be heard before the High Court of Ireland for the purposes of paragraph 19(3)(b) of Schedule 3 to the MCA 2005.

(e) The criteria under Article 5(1)(e) for the European Convention on Human Rights ("ECHR") are satisfied in respect of the detention of SV.

(f) SV will be afforded a regular right of review in the Irish High Court of her detention so as to comply with Article 5(4) ECHR.

(g) Recognition of the Protective Measures:
(i) would not be manifestly contrary to public policy; and
(ii) would not be inconsistent with a mandatory provision of the law of England and Wales.

(O) AND UPON THE COURT OF PROTECTION NOTING THAT should SV's clinicians be in any doubt as to that which constitutes appropriate treatment for SV, in the first instance guidance may be sought from the High Court of the Republic of Ireland, via an application by the Applicant
For reasons which the Court will further set out in a Judgment to be handed down following the making of this Declaration and Order,

IT IS DECLARED PURSUANT TO PARAGRAPHS 20 AND 22 OF SCHEDULE 3 TO THE MCA 2005 THAT:

1. The protective measures contained in the Order of the High Court of the Republic of Ireland dated 16 November 2022 (annexed hereto marked 'A') as supplemented and amended pursuant to the further Orders of the said Irish High Court dated 23 November 2022 (annexed hereto marked 'B' and 'C' respectively) are to be recognised in England and Wales and enforceable in this jurisdiction.

2. For the avoidance of doubt, the protective measures, being enforceable within this jurisdiction, stand as authority for the Respondent to detain and treat SV at Nightingale Hospital, with such treatment as the Respondent considers clinically appropriate to be provided in the absence of SV's consent.

3. For the further avoidance of doubt, the protective measures, being enforceable within this jurisdiction, stand also as authority for the Respondent, whether directly or through others (including the police), to bring about the return of SV to Nightingale Hospital in the event that she absconds, including by the use of such reasonable force and/or restraint as is required for such purposes.

4. For the further avoidance of doubt, paragraphs 1-3 above shall apply to further orders made in Ireland to the extent that they extend the duration of the protective measures contained in the said Order of 16 November 2022 as supplemented and amended as aforesaid pursuant to the Orders dated 23 November 2022, without need for further application to the Court of Protection.

5. For the further avoidance of doubt any change in the identity or title of the person responsible for SV at the Respondent will not necessitate further application to the Court of Protection in order to vest that person or the Respondent with continued authority pursuant to paragraphs 1 – 3 above.

IT IS ORDERED THAT

Notification of return to Ireland

6. The Applicant shall notify the court forthwith in the event that the Irish High Court determines that SV should return to Ireland. Pending SV's return to Ireland, there shall be liberty to any party to apply for the purposes of implementation of any part of the protective measures. Upon SV's return to Ireland, the Applicant shall notify the Court forthwith and the provisions of this Order shall cease to apply upon such notification.

7. The Applicant shall further notify the court forthwith in the event that the Irish High Court does not review SV's case for a period in excess of 6 months, so that consideration can be given by this Court to the matter being restored.

Liberty to apply

8. There is liberty to the Respondent and to SV to apply to vary or discharge any provision in this Order within 14 days of service of this Order.

9. Any further applications for recognition and enforcement of protective measures taken in Ireland in relation to SV shall be reserved to Mr Justice Mostyn if available and may be made on the papers in the first instance the court having (for the avoidance of doubt) the discretion to restore the matter for an attended oral hearing if so advised.

10. In the event that the Applicant, the Respondent or SV's Committee come to understand that SV is objecting to the continued recognition and enforcement of the said Orders made by the Irish High Court, the Applicant shall take steps to ensure that the matter is returned to the Court of Protection for further directions (including, but not limited to, the joining of SV as a party and the appointment of a litigation friend to act on her behalf).

Disclosure

11. There be permission to disclose a copy of this Order and any documents filed in these proceedings to the Irish High Court and the parties in this matter in Ireland.

Costs

12. There shall be no order for costs.

By the Court dated: 24 November 2022