THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 48

[2022 410 JR]

BETWEEN

L.W. AND R.L.

APPLICANTS

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 2nd day of February, 2023

Introduction

1. The facts that give rise to this application for judicial review are both tragic and compelling. Despite this, in addressing the issues raised the court must not find itself in a place where it has no jurisdiction, much less the necessary knowledge and competence. Even though the answers to the problems facing the first named applicant, L.W., may be clear, the court cannot "fill in the gaps" left as a result of a failure to provide for the provision of mental health services in the community for persons such as L.W.

2. As will be outlined in more detail below, L.W. has a long and troubled history of psychotic illness and recidivist type criminal offending often associated with substance abuse. Whilst serving a lengthy sentence in prison, L.W. received the appropriate medical treatment - apparently with positive effects. L.W. was released from prison in August 2019 and there is no

dispute that he required mental health services in the community. As will become clear, this treatment is only available to a limited extent and appears to consist of the giving of anti-psychotic injections (depot injections) and the provision of counselling and cognitive behaviour therapy.

3. The treatments required by L.W. are available in prison and were L.W. to be detained on an involuntary basis under the Mental Health Act 2001, he would receive such treatment. As matters stand there is no basis for L.W. to be so detained. L.W. is receiving treatment in the community on an "ad hoc" basis through the commendable efforts of a number of doctors. This situation led Mr. Micheál O'Higgins SC, on behalf of L.W. and the second named applicant, R.L., to describe L.W. as being in a "no mans land" concerning the treatment he requires.

4. The court was informed that in England and Wales L.W. would not find himself in his current situation in that "community treatment orders" are provided for. This is what I was referring to at para. 1 above. Were such a provision to be available in this jurisdiction, the treatment required by L.W. would be available on a formal basis without any deprivation of his liberty.

The Applicants

5. The facts of L.W.'s situation may be summarised as follows:

(i) L.W.'s parents had significant addiction and mental issues of their own and he was in a foster family at the age of three. His mental health problems started early in his life.

(ii) L.W. attended national school but he did not do well there and was frequently suspended. He stopped going to school at the age of twelve, ran away from his foster family and was effectively homeless from the age of thirteen.

(iii) L.W. was convicted for a number of offences as a juvenile including assault, criminal damage and robbery. As a result he was detained in Oberstown Detention

Centre when he was fourteen, followed by a two year period in Trinity House Detention Centre and in St. Patrick's Institution.

(iv) L.W.'s criminality escalated in his late teens, and he was sentenced to various periods of detention. L.W. stated that in April 2013 as a result of his deteriorating mental health and drug addiction he randomly attacked two men on Grafton Street with a knife, causing them serious harm. As a result, he was sentenced to a total of ten years in custody with four years suspended.

(v) Whilst he was in prison he was first diagnosed with Schizophrenia by a psychiatrist. This is a very serious mental illness requiring intervention in the form of depot injections and cognitive behaviour therapy on an ongoing basis. Whilst in prison he received such treatment and made considerable progress in that L.W. was taken off the most stringent highest-level security conditions.

(vi) L.W. was released from prison in August 2019 and it was accepted that he required ongoing mental health treatment. Despite this, there was no plan in place nor a formal system by way which such a plan could be put in place.

(vii) On release L.W. committed a number of public order offences. He states that he is currently facing the following criminal charges:

(a) Attempted robbery and s. 3 assault in Dublin City Centre on 29 October 2019. A Circuit Court trial date is set for October 2024.

(b) Section 3 assault on 1 June 2018 in Portlaoise Prison and three related but separate s. 2 assaults on prison officers and possession of an iron bar. A Circuit Court date for trial was set for 16 January 2023.

(c) Possession of a shard of glass and spraying a fluid in the course of a dispute, criminal damage and s. 3 assault of a prison officer on 12 January 2017. A Circuit Court trial is set for 24 April 2023.

(viii) In the course of a replying affidavit, which I will be referring to in some detail later in this judgment, Dr Robert Daly stated:

> "I am aware that (L.W.) was recently remanded to prison on 9 March 2022 charged with assault causing harm, possession of a firearm and breach of the peace."

6. The bright spot in L.W.'s life is his relationship with R.L., the second named applicant. R.L. became friendly with L.W. in January 2013 and remained friends whilst he was in prison. In the course of an affidavit, R.L. sets out that L.W. did make progress before his release from prison but that there are no proper supports in place for L.W. in the community where he could continue with the management of his illness. R.L. referred to the support which L.W. received from his general practitioner, Dr Vivienne Wallace. She also refers to the support and treatment received from Dr Anthony Kelly psychiatrist, who was giving L.W. three monthly interim muscular depot injections. Dr Kelly did not see L.W. between June 2021 and January 2022 and during this period R.L. had to provide L.W. with the depot injections even though she had absolutely no qualifications or training in providing same. She states that as L.W.'s partner she has suffered significant prejudice by the failure of the respondent to consider and determine his application for mental health services in the community.

7. On his release from prison L.W. was housed in Priorswood House, Clonshaugh Avenue, Dublin 17 by an accommodation service known as PACE. This is a housing charity and have been helpful and supportive. L.W.'s GP referred him to the North Dublin Community Mental Health Team (CMHT). CMHT is a multi-disciplinary team that comprises skilled professionals with the purpose of providing integrated care in the community for persons experiencing mental health difficulties.

CMHT

8. Though L.W. was referred to the CMHT, treatment was declined. The reasons for this are set out in some detail in an affidavit filed by Dr Robert Daly, consultant psychiatrist, and Executive Clinical Director of North Dublin Mental Health Services.

9. In the course of his affidavit Dr Daly stated that L.W. attended on various dates between September 2019 and February 2022 and received depot injections. Dr Daly states that L.W.'s schizophrenia cannot be cured but that he appears to have benefitted from participation in certain therapies whilst in prison. The provision of these services was only possible within the secure setting of the prison environment, but different circumstances pertain in a community treatment setting.

10. CMHT have a long history of providing care for individuals released from prison. However, L.W. is considered to have such a high-risk profile that he could not be offered treatment within the service. Dr Daly states that the risk of violence associated with L.W. remains at a very high level, to such an extent that the delivery of services is impossible. Dr Daly sets out in some detail L.W.'s history of violence. Dr Daly concludes:

> "As Executive Clinical Director of the service, I cannot permit the staff and users of the service that I am responsible for to be subject to such unacceptably high risks. To do so would in my opinion be a breach of my statutory responsibilities under health and safety legislation towards staff and my common law and ethical responsibilities towards other service users."

11. In further affidavits filed by L.W. and his GP, the opinion of Dr Daly is disputed. Though there is agreement amongst all the medical practitioners involved that L.W. does require ongoing treatment for his mental condition, there is a fundamental problem as to how such treatment is to be provided. As has been previously referred to in the place of an appropriate plan to treat L.W., a number of "ad hoc" arrangements have been put in place.

Indeed, on the morning this application opened in court reference was made to a letter sent by the solicitors of the respondent stating:

> "Our client has made arrangements for the continued administration of your client's depot injection for the following months of December and January .."

It was further stated in the letter that an appointment was being arranged with L.W. to explain the following:

"
- that your client present himself at the National Forensic Mental Health Service situated at Portrane for the administration of his depot injection at a healthcare facility on the grounds of the National Forensic Mental Health Service.
- Discuss with him the arrangements for (R.L.) and/or staff from Priorswood House to attend with him.
- To explain to him that there are certain security measures (security protocol) which will include the use of a metal detector scan to access the healthcare facility; and
- That he will be escorted by National Forensic Mental Health Service staff for the administration of the depot".

Application for Judicial Review

12. On 23 May 2022 the applicants applied to this Court and were granted leave to seek some twelve substantive reliefs by way of judicial review. Directions were sought, as was an early hearing date. The Court also directed that L.W. should reduce the number of reliefs being sought to the core reliefs necessary to determine the issues between the parties. The substantive reliefs being sought are:

1. An Order by way of judicial review quashing the continuing refusal of the respondent refusing L.W.'s application for community based mental health services. In the alternative, an order of mandamus compelling the respondent to

consider and determine L.W.'s application for community based mental health services.

2. A Declaration that the respondent erred in law and in excess of jurisdiction and/or had no legal basis for determining that L.W. was not entitled to community based mental health care.
3. A Declaration that the respondent has failed to vindicate L.W.'s rights to bodily integrity and equality due to its failure to provide a means by which L.W. can access the mental health supports and treatment that he needs, otherwise than by being admitted to a mental hospital as an involuntary patient or being returned to prison.
4. A Declaration by its refusal the respondent has discriminated against L.W. contrary to Article 14 of the European Convention on Human Rights, by treating him unequally before the law in an unjustified manner.
5. A Declaration that the failure of the respondent to provide L.W. with the urgent mental health supports and treatment that he needs, amounts to invidious discrimination against L.W., contrary to Article 40.1 of the Constitution and contrary to the respondent's obligations under s. 3 of the European Convention on Human Rights Act, 2003, to vindicate L.W.'s rights under Article 14 ECHR.
6. A Declaration that in the exceptional circumstances of L.W.'s case as outlined that he enjoys a constitutional right to community based medical care and/or a right to be assessed for same.

13. In seeking these reliefs L.W. is inviting the court to direct the respondent to provide a particular care plan for him in the form of community based mental health services. L.W. relies on his particular circumstances, which he states are "exceptional", and invokes his constitutional right to equality under Article 40.1 of the Constitution and his right to bodily

integrity. L.W. maintains that the respondent has acted contrary to its obligations under s. 3 of the European Convention on Human Rights Act 2003 to vindicate his rights under Article 14 ECHR. In dealing with this application it is necessary to consider the extent of such rights and the role of the court.

L.W.'s Constitutional Rights

14. Article 40.1 provides:

> "All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

15. On the matter of equality, it is difficult to see how L.W. can rely upon this constitutional provision. L.W. has failed to identify any other person in a situation similar to his who has been treated differently. Indeed, both in the course of submissions to the court and in the Statement of Grounds, specific reference has been made to L.W.'s circumstances as being "exceptional". I refer to the following passage from the judgment of O'Donnell J. (as he then was) in the *Minister for Justice and Equality v. Thomas O'Connor* [2017] IESC 21 where he stated:

> *"21. There are many cases presented as equality claims that are sometimes better looked at as claims to individual rights, and where the analysis of such claims through the prism of equality sometimes obscures rather than illuminates the issue. The essence of an equality claim is the sense of injustice that someone experiences when a person similarly situated is being treated differently and normally more favourably and in particular if the circumstances are suggestive of a discriminatory ground related to a person's human personality…"*

16. It does not seem to me that the unenumerated constitutional right to bodily integrity would extend to a right to a particular form of treatment, in L.W.'s case the right to be given

medical treatment by CMHT. A similar issue was raised in *State (C) v. Frawley* [1976] IR 365. In this case the prosecutor was convicted of a criminal offence and was sentenced to a term of imprisonment. The prosecutor referred to his mental illness and was described as being aggressive and hostile to any form of authority. During most of the period of his imprisonment he was kept in solitary confinement, was deprived of many normal day to day items such as cutlery, a bed with metal springs and a radio. There was no prison or mental hospital with facilities for coping with persons such as the prosecutor. Evidence was given that the only long term psychiatric treatment which would have a reasonable chance of success in the prosecutor's case would be his involuntary detention in a mental hospital. The prosecutor contended that his right to bodily integrity "imposes on the executive an obligation to protect his health as far as is reasonably possible in all the circumstances." (p. 371).

17. In giving judgment Finlay P. stated at p. 372:

> *"The real failure in this duty alleged against the respondent is that he has failed to provide the special type of institution and treatment which was recommended by Dr McCaffrey as a long-term treatment and that, to an extent, imprisonment in any other form is directly harmful to the progress of the prosecutor's condition of personality disturbance. A failure on the part of the Executive to provide for the prosecutor treatment of a very special kind in an institution which does not exist in any part of the State does not, in my view, constitute a failure to protect the health of the prosecutor as well as possible in all the circumstances of the case. If one were to accept in full all the assumptions upon which Dr. McCaffrey's opinion is based, it could be shown that there was a failure of an assumed absolute duty to provide the best medical treatment irrespective of the circumstances. I am satisfied, as a matter of law, that no such absolute duty exists…"*

18. In his application L.W. seeks to assert almost an absolute right to community based mental health services. The facts of the case disclose that L.W. was assessed for such services but following this was found to be unsuitable. L.W. has criticised the procedures adopted by the CMHT in its assessment of him. However, clinical assessments by qualified medical practitioners do not require such practitioners to follow the rules of fair procedures as is the case in court actions, disciplinary hearings and the like. The clinical decisions stand or fall on the accuracy or otherwise of the clinical findings.

19. I have already set out in some detail the contents of the affidavit of Dr Robert Daly, which states the reasons why L.W. was refused access to community based mental health services. This was not a blanket or arbitrary refusal. The requirements of L.W., which are not disputed, were considered. Regard was had to the medical and criminal record of L.W. The safety of both caregivers and those who might be receiving treatment at the same time as L.W. was taken into account. It seems to me that this was a rational and reasonable approach that resulted in the decision taken. Once again, the point must be made that these are judicial review proceedings not an appeal from the impugned decision of the CMHT. It is not open to the court to reconsider the matter and, possibly, substitute its decision for that of the respondent.

20. I have not found any breach of any constitutional right enjoyed by LW. Even if L.W. did enjoy such rights they would not be absolute. Any interference of such rights would have to be proportional. I refer to the oft quoted passage from the judgment of Denham J. (as she then was) in *Meadows v. Minister for Justice* [2010] 2 IR 701 where she states at p. 753 that:

> "*When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective."*

21. I am satisfied that the decision of the CMHT was reasonable and proportionate. The requirements of L.W. were outweighed by the requirement to provide for the security and safety of those giving the medical treatment and other persons who might be present when such treatment is being given. Further, although it is on an "ad hoc" basis, arrangements have been made for L.W. to continue to receive depot injections.

22. L.W. relied on the provisions of Article 8 of the European Convention on Human Rights (ECHR). This Article refers to the right to respect for private and family life. However, no authority was identified to support the proposition that the provisions of Article 8 would encompass the rights being asserted by L.W. Article 14 contains a prohibition of discrimination. Again, L.W. cannot assert that he is being discriminated against on any ground "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Rather, the impugned decision, for the stated reasons, could not be considered to be either irrational or unreasonable.

Statutory provisions

23. L.W. relies on the provisions of s. 7 of the Health Act 2004 (the Act of 2004) as amended which provides:

> "7.—(1) The object of the Executive is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public.
>
> (2) Subject to this Act, the Executive shall, to the extent practicable, further its object.
>
> …
>
> (5) In performing its functions, the Executive shall have regard to—
>
> (a) …
>
> (b) …

(c) …

(d) the resources, wherever originating, that are available to it for the purpose of performing its functions, and

(e) the need to secure the most beneficial, effective and efficient use of those resources…"

24. I am satisfied that these statutory provisions are engaged in this case. The mental health condition of L.W. and his propensity to violence comes within the object of the respondent to "promote and protect the health and welfare of the public." Though counsel for L.W. and R.C. accepted that the court could not devise or administer a treatment plan for L.W., mandatory orders directing the respondent to provide treatment were sought.

25. L.W. relied on two authorities. Firstly, the decision of the Supreme Court in *O'Donnell v. South Dublin County Council* [2015] IESC 28 and, secondly, the decision of Barrett J. in the High Court in *Y and X v. The Health and Safety Executive, Child and Family Agency and Anor* (unreported judgement 18 October, 2021). *O'Donnell v. South Dublin County Council* involved the interpretation of certain provisions of the Housing Act, 1966 and the Housing (Miscellaneous Provisions) Act, 1992. The O'Donnells were a travelling family and one of their children, Ellen, had cerebral palsy. The Supreme Court considered the constitutional and statutory duty owed towards Ellen O'Donnell. McMenamin J. stated:

"68. The preamble to the Constitution outlines the values of promoting the common good with due observance of prudence, justice and charity, so that 'the dignity and freedom of the individual may be assured'. It is clear that constitutional values established by our jurisprudence, specifically those of autonomy, bodily integrity and privacy, are engaged here … The position of Ellen O'Donnell is distinct by virtue of the evidence. Of course, in every family situation, and in all forms of accommodation, the constitutional values just identified are compromised by the inevitable activities of

other family members, or economics, or lack of space. But because of the exceptional overcrowding, and the destruction of the sanitation facilities, and in light of Ellen O'Donnell's disability, her capacity to live to an acceptable human standard of dignity was gravely compromised. Her integrity as a person was undermined. Her rights to autonomy, bodily integrity and privacy were substantially diminished. The Council was aware of the issue.

69. The situation, as known to the County Council in 2005, was truly, exceptional. That situation was, to my mind, sufficient as to impose a special duty upon the County Council towards Ellen O'Donnell. …"

And:

"71. There are abundant examples in our jurisprudence as to the approach applied by the courts when considering socially 'remedial' legislation such as this. Such statutes allow for a purposive interpretation and are to be constructed as widely as can fairly be done, subject to the Constitution itself, and within the constitutional limits of the court's interpretive role. See: Bank of Ireland v. Purcell [1989] I.R. 327 and Gooden v. St. Otteran's Hospital [2005] 3 I.R. 617. …"2001 4 IR 259

26. In my view L.W.'s situation can be distinguished from that of Ellen O'Donnell. Firstly, the legislation concerning the provision of housing is considerably more detailed than the statutory provisions relating the respondents set out above. Further, McMenamin J. specifically referred to "the constitutional limits of the court's interpretative role." I am satisfied that in the instant case this does not extend to the court making mandatory orders in these proceedings.

27. *Y and X v. the HSE* concerns an ongoing failure to provide care for an adolescent child with a disability over a period of several years. The HSE had known for a number of years that X required residential treatment for her medical condition yet, despite this, no residential place was arranged, and X was placed in room off a busy emergency department ward in a regional

hospital for close to 60 days. Barrett J. found that the child had been left "languished in long term semi-isolation". Barrett J. granted X a number of declarations, including a declaration to the effect that X's current and/or continued placement in (regional) Hospital was not in her best interests and is detrimental to her welfare.

28. Again, the facts of the instant case are somewhat different in that L.W. was assessed for community based mental health services but was refused for what I have found to be reasons that were rational and reasonable.

29. In *Y and X* there was little dispute but that the care being given by the respondent to X was entirely inappropriate. In the instant case the care that is being given to L.W. is not inappropriate but rather the problem is that it is being given on an unplanned "ad hoc" basis.

30. I have already indicated that the role of the court is limited, a fact accepted by L.W. Mr. Shane Murphy SC, on behalf of the respondent, submitted that the steps taken by the respondent were determined, to a considerable extent, by what resources are available. This is reflected in the wording of s. 7 of the Act of 2004, referred to above. Mr. Murphy submitted, and I accept, that the court does not have the jurisdiction, competence or knowledge to direct the respondent as to how it allocates its resources. The court cannot engage in "distributive justice" (see Costello J. in *O'Reilly v. Limerick Corporation* [1989] ILRM 181).

31. The respondent submitted, and I accept, that it is not open to the court in the circumstances of this case to make mandatory orders against the respondent. Reliance was placed on the oft cited passage from the judgment of Murray J. (as he then was) in *TD v. Minister for Education* [2001] 4 IR 259 where he stated at p. 336:

> *"In coming to the conclusions above I do not wish to determine that the Courts may never make a mandatory Order in any form as opposed to a declaratory or other Order, against an organ of State.*

In so far as McKenna-v-An Taoiseach (No. 2) [1995] 2 I.R.1, Crotty v An Taoiseach and District Judge McMenamin v Ireland [1996] 3.1.R. 100 might be said to be authority for the making of some form of mandatory Order where there is 'a clear disregard' by the State of its constitutional obligations, it must be borne in mind that in none of those cases was a mandatory Order granted. I have already made the distinction between 'interfering' in the actions of other organs of State in order to ensure compliance with the Constitution and taking over their core functions so that they are exercised by the Courts. For example a mandatory Order directing the Executive fulfil a legal obligation (without specifying the means or policy to be used in fulfilling the obligation) in lieu of a declaratory Order as to the nature of its obligations could only be granted, if at all, in exceptional circumstances where an organ or agency of the State had disregarded its constitutional obligations in an exemplary fashion. In my view the phrase 'clear disregard' can only be understood to mean a conscious and deliberate decision by the organ of State to act in breach of its constitutional obligation to other parties accompanied by bad faith or recklessness. A Court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory Order made by the Court."

32. In this case, I do not find that there was any "clear disregard" of the statutory duty owed by the respondent to L.W. Though I find L.W. is not entitled to a mandatory order, I now consider whether he has established grounds upon which relief by way of a declaration can be granted.

Declaration

33. As I have referred to on a number of occasions, there is no disagreement but that L.W. requires ongoing treatment for his mental condition. Nor is there any disagreement as to what

the appropriate treatment is. The problem is how that treatment is to be given. The respondent has taken a decision that the CMHT, who would normally give the mental health treatment required cannot, for stated reasons, treat L.W. For the reasons stated earlier, in my view, L.W. has not established any basis for challenging that decision.

34. In the absence of care being given by the CMHT the doctors involved, who are to be commended for their efforts, have devised an "ad hoc" system for giving L.W. the treatment he requires. The problem is that it is "ad hoc" and thus there must be a possibility that, for some reason that system may cease. Under s. 7 of the Act of 2014 and subject to its provisions L.W. has an entitlement that this will not happen. Thus, I am of the view that given the situation which L.W. finds himself in he ought to be granted the following declaration:

> "A Declaration that the respondent is under a continuing duty to provide L.W. with the appropriate mental health treatment and services in accordance with law, in particular the provisions of s. 7 of the Health Act 2004 (as amended)."

35. The making of this declaration and, indeed, these judicial review proceedings would not have been necessary had the relevant legislation provided for the making of orders for care in the community to cover cases such as L.W. As mentioned earlier, such community care orders are available in England and Wales.

36. I do not think that this is an appropriate case to make an award of damages sought by L.W. and RL. It is clear to me that the medical personnel involved by the respondent have acted in good faith and to the best of their professional abilities. I am satisfied that the making of the above declaration meets the case made by L.W.

Conclusion

37. By reason of the foregoing, I propose to make a declaration as set out at para. 34 above. As for costs, I would invite both parties to make short submissions concerning the issue of

costs (no more than 2,000 words) to be filed in court no later than 17 February. I will list the matter for final orders on 24 February 2023.