THE HIGH COURT

WARDS OF COURT

[2023] IEHC 565

Record No: WOC10692

IN THE MATTER OF KK

JUDGMENT of Ms. Justice Niamh Hyland delivered on 6 October 2023

Introduction

1. This judgment follows on from my decision in the above matter of 7 June 2023, where I considered whether there continues to be a power inherent in a Wardship Court under s.9 of the Courts (Supplemental Provisions) Act 1961 ('the 1961 Act') and/or s.56(3) of the Assisted Decision-Making (Capacity) Act 2015 ("ADMCA") to make new detention orders in respect of existing wards post the commencement of the ADMCA. Having concluded that no such power exists, I referred to the inherent jurisdiction of the High Court to detain persons lacking capacity, and indicated that I would adjourn the case for further submissions to be made on the appropriateness of making the detention type Order sought in relation to KK under the inherent jurisdiction power. My judgment acknowledged that the inherent jurisdiction to detain persons lacking capacity had not been affected by the commencement of the ADMCA, in particular having regard to s.4(5) of the ADMCA. This section provides that nothing in the Act affects the inherent jurisdiction of the High Court to make orders for the care, treatment or detention of persons who lack capacity. Nonetheless, the ADMCA has impacted the manner in which a court will evaluate an application for detention pursuant to the inherent jurisdiction and I discuss that impact below.

2. After the hearing but shortly before that judgment was delivered, Rules of Court were adopted providing, *inter alia* for applications to be made under the inherent jurisdiction to the Central Office (see Order 67A, Rule 19, as inserted by S.I. No. 261 of 2023 (Assisted Decision-Making (Capacity) Act 2015, 15 May 2023). That rule came into force on 25 May 2023. It specifies that any application to the Court, otherwise than under the ADMCA, in which relief is sought concerning the care, treatment or detention of a person who is alleged to lack capacity may be made by originating Notice of Motion grounded on affidavit. The Court is given the most general power to make directions and orders as may appear convenient for the determination of the matter in a just, expeditious and cost minimising fashion.
3. On 2 October 2023, a Practice Direction on Inherent Jurisdiction (Capacity) Applications HC123, 2 October 2023, was adopted setting out the procedural requirements in relation to such applications. It emphasises that such applications are entirely distinct from wardship applications and should be made through the Central Office and not the Office of the Wards of Court by way of an originating Notice of Motion.
4. The current application, brought by way of Notice of Motion of 22 May 2023 prior to the entry into force of Order 67A Rule 19, is one made through the Office of the Wards of Court in the context of the wardship of KK. The applicant cannot therefore pursue the reliefs sought under the inherent jurisdiction in these proceedings and must start again by issuing a Notice of Motion in the Central Office. I therefore refuse the reliefs sought. Nonetheless, assuming that the applicant intends to make the application through the inherent jurisdiction procedural route, it is appropriate to specify the types of proofs that are likely to be required in any such application, as well as some specific issues that will, in my view, require to be identified in the instant case, namely medical

evidence from a party other than the CFA in respect of the capacity of KK to enter safe romantic and sexual relations and, assuming KK lacks such capacity, medical evidence from a party other than the CFA whether the proposed detention type restrictions are required to vindicate her constitutional rights. KK remains a Ward of Court for the time being i.e., until a discharge application is moved, and the General Solicitor acts as her Committee. It may be appropriate that the additional medical evidence referred to above will be provided by her Committee but that is ultimately a matter for the parties to any application.

5. To recap, the nature of the Orders sought by the Child and Family Agency ("CFA") are as follows: (i) an Order directing and/or permitting An Garda Síochána to search for, arrest without warrant, and detain in their custody, KK for a reasonable period of time and deliver and/or return as soon as practicable KK to her placement in the event that she is at large and/or has absconded and/or has failed to return from leave (ii) an Order that, if deemed appropriate in KK's best interests by a Consultant Psychiatrist, KK may be admitted to and detained at an Approved Centre as defined under the Mental Health Act 2001 for the purposes of providing care and therapeutic services to KK (iii) an Order that, if deemed clinically appropriate in KK's best interests by a registered medical practitioner, KK may be admitted to and detained at an Acute Hospital for the purposes of providing care and therapeutic services there.

Factual background

6. As identified in my judgment of 7 June 2023, KK was born in 2003. She was brought into the care of the CFA shortly after she was born. KK presents with a borderline mild intellectual disability, low adaptive functioning, and a history of self-harm. Before she turned 18, wardship proceedings were instituted and interim detention orders were secured providing, *inter alia*, that she could be returned to her placement, being a house

supervised by carers in the event she absconded. She was taken into wardship on 27 July 2020 by Heslin J. who appointed the General Solicitor for Minors and Wards of Court as the Committee of the Person and Estate. The detention orders were continued.

7. KK has been in her current placement in Offaly since July 2021 and at that time, there was a reduced level of concern as regards her potential to abscond and as such the detention orders were discharged. In December 2021, a man KK met online attended at her placement, she had sexual relations with him, and it was determined that she was put at risk. The man displayed aggressive behaviour and staff had to resort to calling the Gardaí to remove him.

8. Subsequently, in June 2022 the CFA secured a further detention Order and additional orders restricting KK's access to her smartphone and social media, predicated on the medical evidence of Dr. M. These orders were extended in October 2022 following an application identifying further medical evidence from Dr. M of 15 August 2022. The matter returned before the Court on 7 February 2023, and I adjourned the application for evidence to ground a further extension of the detention orders, as no medical evidence was presented with the initial application. On 28 February 2023, despite the adjournment, no medical evidence was provided to justify the restrictions sought. In the circumstances, an extension of the orders was refused.

9. On 21 April 2023, Dr. M provided a report recommending that detention orders and those restricting access to smartphones and social media be put in place. She summarised matters as follows:

> *"[KK] does not have the capacity to meet her own needs and make informed decisions about herself. Her judgment is poor and she continues to require support in most areas of her life. This includes the activities of daily living such as managing money, cooking and cleaning. She has made limited progress in*

acquiring these skills in the past year. She does not have the capacity to live independently. She has no insight into her limitations or vulnerabilities. She is functioning at a lower level than her chronological age of 20 and in her behaviours and attitudes is more like a 12/13 year old. She does not have the capacity to take up paid employment. She does not have the capacity to enter safe platonic and sexual relationships. She has shown by her behaviour in the recent past that her judgement in this area is poor, that she lacks awareness of the need to keep herself safe and she is vulnerable as a result.

… She remains vulnerable to exploitation as she has a naïve and unrealistic view of the world and does not appreciate the risks involved using social media…. She does not have the ability to regulate her emotions and continues to present challenges to staff when she becomes aroused. She is still impulsive and unpredictable…. I agree the current order allowing KK to be returned to [residential placement] if she absconds is required. I agree the current order allowing KK to be treated in an approved centre if necessary is required".

10. A supplemental Notice of Motion for 25 May 2023 was filed, grounded on a supplemental affidavit of Sarah O'Connell, after-care worker of the CFA. The CFA sought an Order permitting the manager of the residential placement to regulate and if necessary, terminate the ward's use of the landline telephone at the placement to ensure the ward was not exposed to exploitation by any third-party. I granted that relief at the hearing on 25 May 2023.

11. The affidavit of Ms. O'Connell is of some importance in the context of the reliefs that I am now considering. She refers to KK's borderline mild intellectual disability, her low adaptive functioning and her history of self-harm. She refers to the incidents in

December 2021 where KK invited a man whom she had met on social media to attend at the residential placement. At paragraph 6 Ms. O'Connell avers as follows:

> *"I was notified last week that KK has recently been discovered to be using land lines own in [residential placement] to contact Mr K. … Staff's challenging of KK on this resulted in an incident where KK broke a car window when staff plugged out the land lines at the mains switch. There is a noticeable increase in KK trying to make contact with Mr K. She has asked family to collect him so she could see him when visiting in Cork. When they refused she cancelled her visit…. In light of this the Agency agrees with the recommendations made by Dr. M and that KK will continue to put herself at risk with no understanding of this."*

Detention on the basis of inherent jurisdiction

12. There are a number of judgments of the High Court and the Supreme Court that discuss the inherent jurisdiction of the High Court to make orders detaining people deemed to lack capacity. This judgment applies the principles established in those decisions in the context of the ADMCA.

13. In *D.G. v Eastern Health Board* [1997] 3 IR 511 ('*DG*') the Supreme Court made an Order for the detention of a minor at risk with a view to protecting his constitutional rights. Hamilton C.J. described the inherent jurisdiction of the Court as follows at p. 522:

> "*The jurisdiction of the High Court is such jurisdiction as:*
>
> *(1) is conferred by the Constitution,*
>
> *(2) may be imposed by statute, and*

(3) is necessary to fulfil the obligations imposed on it to defend and vindicate the personal rights of the citizen

Article 40 s. 3 subs. 1 provides that –

> *'The State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizens'.*
>
> *...*

It is part of the courts' function to vindicate and defend the rights guaranteed by article 40, s. 3.

If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights".

14. In *SS (a minor) v Health Services Executive* [2008] 1 IR 594 MacMenamin J. considered the majority and minority judgments from *DG*, observing *inter alia*:

> "*[45] While the issue was not argued in DG v Eastern Health Board [1997] 3 I.R. 511, it is implicit in the judgments of the majority that in exercising such inherent jurisdiction an order for detention was necessary for the vindication of the rights to life, welfare and protection of that child, even where such order involved a temporary abrogation of the right to liberty of such a minor. The paramount rights to life and welfare may therefore temporarily outweigh the right to liberty in the circumstance where such important rights cannot always be harmonised."*

15. In *Health Services Executive v JO'B* [2011] IEHC 73, Birmingham J., referencing *DG* and other ECHR and English judgments, commented:

"*However, in more limited cases, where an adult lacks capacity and where there is a legislative lacuna so that the adult's best interests cannot be served without intervention by the Court, I am satisfied that the Court has jurisdiction, by analogy with cases like D.G. and the several High Court decisions from different judges of the High Court there referred to, to intervene".*

16. In *Health Services Executive v VE* (unreported, 26 July 2012), Feeney J. held:

> *"There is a legislative lacuna where it truly can be said that Mr E's well-being and best interest and indeed his very safety and well-being cannot be served without the intervention of this Court. This Court is satisfied that there is an inherent jurisdiction to be used in rare and exceptional cases where the subject of an application can be shown that the person lacks a critical capacity and where the individual's wellbeing cannot be met other than by the intervention of the Court by order".*

17. Submissions have been made by the HSE arguing for the necessity of flexibility in this area and the dangers of being over-prescriptive. On the other hand, the HSE fairly quotes from the decision of McMenamin J. in *HSE v. A.M.* [2019] 2 IR 115 where he observed, albeit in the context of deprivation of liberty orders in wardship, as follows:

> *[103] More generally, for Constitution and ECHR compliance, any law in this area which has the effect of a deprivation of liberty must be precise. It must be clear in its application. The clarity must be such that a citizen, or other person, can ascertain what will be the circumstances in which a procedure will be invoked and how that procedure will be applied.*

18. The very existence of this debate in my view emphasises the difficulties that arise when a court is prescribing the conditions under which a subgroup of persons may be detained by way of Court Order, in this case persons lacking capacity. Because the legislature

has not legislated to provide for the detention of persons lacking capacity, it falls to the judiciary to identify the circumstances in which its inherent jurisdiction should be invoked in order to detain such people. The drawbacks of such an approach were identified almost 10 years ago by McDermott J. where he observed as follows in *HSE v. VF* [2014] IEHC 628:

> *In making this order the court does not wish it to be understood that an order may be made as a matter of course. It is a rare and exceptional order… as noted in S.S. (A Minor) v. Health Service Executive [2008] 1 IR 594 this type of application should not be allowed to evolve into a preferred option. I respectfully agree with MacMenamin J. in that case in respect of a lacuna in children's legislation which required a similar application that: –*
>
> > *"The subject requires a legislative framework to remove the potential for over subjectivity in interpretation and application. The frequent invocation and exercise of exceptional constitutional powers, absent principles of application or any statutory or regulatory framework is undesirable""*

19. The background to this gap in the legislation has been explained as follows in an article relied on by the parties by Ciara Dowd B.L. in the Medico-Legal Journal of Ireland, 2022, 28(2) 48-52, entitled "Orders for involuntary treatment, care and detention; the interaction of the Assisted Decision-Making (Capacity) Act 2015 and the High Court's inherent jurisdiction":

> *"However the Government could have legislated for a framework for making appropriate orders subject to relevant safeguards. Placing such a framework in legislation, as opposed to relying on inherent jurisdiction, would be better off for transparency, democratic oversight, and legal certainty.*

Indeed, in 2019 the Government published a Report on the public consultation it carried out in respect of the Deprivation of Liberty Safeguards legislation. Had this legislation been enacted, this would have addressed detention issues in respect of persons who lack capacity and provided safeguards against unlawful deprivations of liberty. In this regard, the Minister for State at the Department of Children, Equality, Disability, Integration and Youth has stated that his legislation was delayed due to the Covid-19 pandemic, but once enacted it will replace the inherent jurisdiction in respect of detention, at least. Accordingly, the inherent jurisdiction saver is an 'interim arrangement':

20. A similar situation prevailed in relation to the detention of children some years ago, where no legislation existed to provide for their detention and the lacuna was required to be filled by the courts. Ultimately, the legislature acted, and Part IVA of the Child Care Act 1991 established a detailed legislative regime for the detention of children. It is hoped that the legislature will act in this important area sooner rather than later.

21. Pending the adoption of such legislation, applications such as the present are required to be made under the Court's inherent jurisdiction. Section 4(5) of the ADMCA puts it beyond doubt that the jurisdiction has survived the enactment of the ADMCA. Returning to the tension between flexibility and certainty raised by the HSE, I am of the view that it cannot be the case that persons can be deprived of their liberty, often for significant periods of time, without being made aware of the circumstances in which that may take place and the conditions that will govern that detention. Accordingly, although I acknowledge the inherent flexibility of the Court's inherent jurisdiction, nonetheless, insofar as is required for the determination of these proceedings, I think it important to identify approaches that will, subject to exceptions and the particular

circumstances of any given case, apply to the exercise of inherent jurisdiction when used to detain persons lacking capacity.

Capacity

22. I should emphasise that this judgment only addresses the instant fact situation i.e., a person alleged to lack capacity by reason of her medical conditions. It does not address the position of persons not lacking capacity who may be the subject of an application to detain or treat them pursuant to the inherent jurisdiction of the Court (see in this regard Baker J. in *Governor of X Prison v. PMcD* [2016] 1 ILRM 116).
23. Submissions were made as to how capacity is to be evaluated in the context of an application to detain on the basis of inherent jurisdiction. The ADMCA identifies at s.3(1) and (2) the way in which capacity is to be evaluated in the context of that Act, identifying at ss.(1) that a person's capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time, and, at ss.(2), that a person lacks the capacity to make a decision if he or she is unable—

- to understand the information relevant to the decision,
- to retain that information long enough to make a voluntary choice,
- to use or weigh that information as part of the process of making the decision, or
- to communicate the decision.

24. The ADMCA makes it clear that, contrary to the approach in wardship, capacity is no longer to be evaluated on a global basis i.e., whether a person has capacity in general but rather on a decision specific basis i.e., capacity must not be evaluated across the board but rather in relation to specific decisions. A person might, for example, have capacity to decide where to reside and who to associate with, but not have capacity in relation to financial decisions. The ADMCA distinguishes between personal welfare decisions and decisions relating to property and affairs. In fact, this approach had been articulated long before the ADMCA. In *Fitzpatrick v F.K.* [2009] 2 IR 7, Laffoy J. recognised a common law test of capacity that was functional, decision-specific and required consideration of four limbs essentially identical to those identified in s.3(2).

25. The parties agree that the approach identified in the ADMCA is the appropriate way to assess capacity, certainly where no capacity analysis has previously been carried out. That approach has two obvious benefits. First, it satisfies the requirement that the law be clear and ascertainable. The test identified in the Lunacy Regulation (Ireland) Act 1871 ('the 1871 Act') to decide whether a person lacked capacity i.e., whether they are of unsound mind and incapable of managing their affairs, is less transparent and therefore less satisfactory. Second, the functional approach adopted in the ADMCA i.e., considering whether a person has decision specific capacity rather than looking at capacity globally, is more consistent with the principle of respect for the autonomy of persons potentially lacking capacity, as it endeavours to identify the precise areas where a person lacks capacity and limits any outside intervention to those areas.

26. Nonetheless, it seems to me there is sufficient flexibility within the inherent jurisdiction regime to accommodate people who have already been deemed to lack capacity using a different method of analysis i.e., that prescribed by the wardship regime. In the instant case, KK was made a Ward of Court on 27 July 2020 by Heslin J. and therefore by

definition has been found to lack capacity by reference to the wardship test i.e., being a person of unsound mind and incapable of managing her affairs. There was some discussion at the hearing as to whether a court which is asked to detain an existing ward on the basis of the inherent jurisdiction should analyse capacity afresh. In many instances, this may be unnecessary as the analysis of capacity carried out under the wardship test will be sufficient.

27. However, in this particular case, there is one aspect of KK's capacity that I would like to see revisited and that is her ability to enter safe romantic and sexual relations. The core reason relied upon by the CFA for the Order permitting the Gardai to arrest and detain her and return her to her placement if she absconds, is to ensure that she is not exploited by engaging in unsuitable romantic and sexual relationships. She is, for example, permitted to visit her friend in Cork and stay over and has done so on a number of occasions. But when she invited a man to her placement in 2021 and engaged in sexual relations with him, the Gardai were called to remove him, and an application was made for detention type orders. In her report of April 2023, Dr. M. finds that KK lacks capacity to enter safe platonic and sexual relationships. That finding effectively forms the basis for this application. I have also been furnished with a detailed report from Dr. H. of 2020 that formed the basis for the application to make KK a Ward of Court. He touched very briefly on the question of her capacity in this respect, simply observing that "*She presents as having very little understanding of sexual issues, or the risk involved in the way she presents herself to others*". I have not been furnished with the medical visitor's report on capacity that must have been before the Court when an application was made to admit her to wardship, and I do not know whether that considered KK's capacity to consent to sexual relations.

28. The finding made by Dr. M has very serious consequences for KK. It means that, if the Orders sought are granted, she is entirely prevented from forming any romantic or sexual relations or taking any steps to do so, such as trying to contact the man who she invited in 2021. For a young woman aged 20, that is a very significant restriction indeed.

29. At present, where a capacity analysis takes place under wardship, the Court will have at least two sets of medical reports as to capacity available to it – one or more from the party seeking to establish a lack of capacity and one from the Court's medical visitor. It seems to me that any application brought under the inherent jurisdiction should generally proceed on the same basis, unless there are particular reasons why a court should proceed on a different basis. In those circumstances, I think it desirable that in any application under the inherent jurisdiction, the Court will be provided with medical evidence as to KK's capacity to form romantic and sexual relations from a party other than the CFA.

Justification for detaining a person lacking capacity

30. Assuming a court determines a lack of capacity of KK in relation to her ability to form romantic and sexual relations, it is necessary to consider the circumstances in which detention might be considered necessary to defend and vindicate her constitutional rights. At its simplest, that requires an identification and analysis of (a) the type of restrictions on the liberty of the person proposed; (b) the constitutional rights negatively impacted by the proposed detention under threat; (c) the constitutional rights sought to be protected by the proposed detention; (d) the carrying out of a balancing exercise to identify what rights ought to prevail and (e) a consideration of the proportionality of the measure proposed. This approach to conflicting rights was identified in *AG v. X*

[1992] 1 I.R. 1, as quoted by Hamilton C.J. in *DG*, referred to above, where Finlay C.J. stated at p.57:

> *"I accept that where there exists an interaction of constitutional rights the first objective of the courts in interpreting the Constitution and resolving any problem thus arising should be to seek to harmonise such interacting rights. There are instances, however, I am satisfied, where such harmonisation may not be possible and in those instances I am satisfied as the authorities appear to establish, that there is a necessity to apply a priority of rights".*

31. The rights impaired by an application to detain are most obviously the constitutionally protected right to liberty, as well as the right to autonomy and self-determination. On the other side of the ledger, case law has variously identified the right to life, the right to bodily integrity, the right to be free from inhuman or degrading treatment and punishment and from torture *State (C) v. Frawley* [1976] 1 IR 365. The right to freedom from inhuman treatment has been held to include a positive obligation to protect children from ill-treatment, including sexual ill-treatment. The CFA points out that the rationale for protecting children from sexual conduct with adults is the presumption that a child cannot consent to sex. It argues that, based on Dr. M.'s report, a similar position pertains in KK's case.

32. The nature of the balancing exercise may be seen in various judgments. In *DG*, one sees in the judgment of Denham J. an analysis of the interaction between the various constitutional rights at play in that case. In *HSE v. J.O'B* [2011] IEHC 73, Feeney J. quotes Birmingham J. in *J O'B* as follows:

> *"Mr E continues to enjoy individual rights and the Court fully acknowledges his dignity. But where his very wellbeing and safety is at risk and where he cannot, on the evidence, make a real decision about his own safety and*

accommodation and has no capacity to do so, the legal protection of Mr. E and the vindication of his rights requires the Court, on the facts of this case to invoke its inherent jurisdiction to provide him with protection".

33. In *HSE v VF* [2014] IEHC 628, McDermott J. carried out the balancing exercise in the following fashion:

> "*39. The declarations sought involve a serious intrusion on Ms. F's right to liberty. In order to justify deprivation of her liberty, the HSE must demonstrate on the balance of probabilities that this exceptional measure is justified in order to maintain and preserve her health and life. In this case, there is overwhelming evidence of the threat posed to Ms. F's life and personal safety and security by her return to the community and that it is essential due to her lack of insight and capacity that she be placed in a secure unit because of her complete inability to take care of her most basic needs. The object of the detention is to provide that care and thereby protect her life, and bodily integrity in accordance with the obligation imposed on the State under Article 40.3.2. The Court must strike a balance between the applicant's right to personal liberty and the danger posed by her condition to her right to life and personal safety, and the personal safety of others. The latter would be preserved and vindicated by the restriction of the former. The court considers the deprivation of liberty in those circumstances to be rationally connected to the pressing and substantial need to ensure her life, health and safety. It considers that detention in a secure unit is the least restrictive way of ensuring her wellbeing, care and safety and that the order sought is proportionate to that objective. It is also an order that has due regard to the nature and hierarchy of the rights in issue, and the paramount importance of her right to life".*

34. In her submissions, the General Solicitor stresses the principles of autonomy and self-determination, stating that ADMCA places a greater emphasis on the need to respect the autonomy of all persons including those whose capacity is impaired, and arguing that those legislative choices inform how and when the inherent jurisdiction can now be used to protect such persons. This approach may clearly be seen at s.8(6) of ADMCA which provides as follows:

> *An intervention in respect of a relevant person shall—*
>
> *(a) be made in a manner that minimises—*
>
> *(i) the restriction of the relevant person's rights,*
>
> *(ii) the restriction of the relevant person's freedom of action,*
>
> *(b) have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property,*
>
> *(c) be proportionate to the significance and urgency of the matter the subject of the intervention, and*
>
> *(d) be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention.*

35. The Constitution is a living document and is interpreted having regard to the context, including the legislative context, in which it is invoked. That context now includes the ADMCA, which reflects a clear change in the approach of society to the autonomy of persons lacking capacity. When weighing the detriment to the autonomy of a person

lacking capacity that results from a detention order, I think it appropriate for a court to take into account the enhanced legislative weight that has been given to the autonomy of such persons.

36. Once the Court has decided which rights are to prevail, it is necessary to consider the nature of the detention proposed and to decide whether it is the least restrictive and most proportionate way of vindicating the constitutional rights requiring protection. There are of course gradations in the types of detention orders that may be sought, as discussed in my decision of June 2023. There I observed that the nature of the detention Order sought in this case was undoubtedly significantly less restrictive than other types of detention orders, for example one that requires the detention of a person in an institution without the possibility of any leave from the institution save with the permission of the director of the centre. Indeed, certain detention orders permit the clinician to determine the precise basis upon which the person is held, and the person may be detained in a particular ward or unit in an institution, without liberty to move to other areas, as is the case for example with persons detained in the Central Mental Hospital. In the decision of 7 June, I referred to the acid test identified by O'Malley J. in *AC v Cork University Hospital* [2020] 2 IR 38 i.e., in determining whether a person has been unlawfully deprived of liberty, the Court must start with the factual circumstances and ask whether the individual has in fact been deprived of liberty (see paragraph 394). I noted that when one considers what would happen if KK absconded, or failed to return to her placement after being on leave, it is clear that this is a detention order. KK would be sought by An Garda Síochána, could be arrested without a warrant and detained by them and would be returned to her placement. Any such action by An Garda Síochána would impinge upon her liberty significantly, and would be intended to ensure that she remains in her placement, thus mandating her place of residence.

Nonetheless, it must be recognised that she is free to come and go from her place of residence subject to those restrictions, and therefore the restraints sought must be characterised as a relatively light form of detention on a spectrum of detention type orders.

37. The nature of the precise restriction sought will always be a relevant factor since it impacts upon the extent of the interference with the liberty of the person. Of necessity, the greater the interference, the more compelling the justification for the measure.

Safeguards

38. To permit the parties to understand what proofs are required in the context of an application for detention on the basis of inherent jurisdiction, it is necessary to consider the safeguards that a court is required to put in place when exercising this jurisdiction, both by reference to the Constitution and the ECHR. The parties are largely in agreement as to the matters that require to be considered. This is unsurprising, given that in *A.M.* McMenamin J. addressed the necessary safeguards that must be put in place in order to ensure that detention orders made under the wardship jurisdiction are compatible with the Constitution and the ECHR. His observations at page 154 as to the requisite protections are very helpful in determining the type of protection that must exist where applications are made to detain persons lacking capacity under the inherent jurisdiction.

Medical Evidence

39. There is a consensus amongst the parties that the Court must have medical evidence in relation to (a) the capacity of the person and the decisions in respect of which the person lacks capacity (unless that has already been provided to the Court in the context of wardship and the Court is satisfied with same) and (b) the necessity of the restrictive

measures proposed. Where an application is brought to detain a person, the applicant for the detention orders will be required to put forward such evidence. The only difference of opinion between the parties is whether independent medical evidence is also required i.e., evidence from a party other than the party seeking the detention order. The HSE referred to the approach of the Supreme Court in *A.M.* and makes the following submission at paragraphs 35 onwards of its written submissions:

> "*It is notable that in rejecting these concerns the Supreme Court did not prescribe that reviews of detention orders made in wardship should be "levelled up" so that a report from a clinician who was not treating the ward must always be provided to the wardship court when carrying out a detention order review.*
>
> *The approach taken by the Supreme Court in A.M. is significant and demonstrates that there is a difference between the additional statutory safeguards which the Oireachtas is free to legislate for as it considers appropriate and the minimum/necessary procedural protections which must be present in order to satisfy the requirements of constitutional justice and ensure compatibility with the Convention. …*
>
> *It is submitted that it should remain for a reviewing Court to satisfy itself in the circumstances of each given case as to whether these evidential requirements have been satisfied and whether the Court should require reporting from a clinician who is not already involved in some respect in treating or overseeing the treatment of a respondent. Further it is submitted that the maintenance of a certain flexibility in terms of procedures is not simply permissible, but is necessary having regard to the nature of the inherent jurisdiction and its*

importance as a jurisdiction of last resort for the vindication of the constitutional rights of the relevant person.

40. However, it must be remembered that, in *A.M.*, the Supreme Court was dealing with a person who already had been made a Ward of Court and therefore would have been the subject of medical evidence from two separate sources when his capacity was being evaluated, i.e., the evidence proffered by the person seeking admission into wardship and the medical visitor's report. In respect of the wardship inquiry prescribed under the 1871 Act where a court is charged with deciding whether to admit a person into wardship, s.11 of the ADMCA provides for the sending out of a medical visitor who is obliged to inquire into the state and condition of the mind of the person concerned, and his or her capacity or incapacity to manage his or her person or property, and residence, mode of treatment, and condition generally, and also to make such other specific inquiries as the Court may wish and report thereon.

41. Here, I have already identified the desirability of the provision of independent medical evidence in relation to an aspect of capacity. I am of the opinion that it is also desirable that independent medical evidence from a party other than the CFA in respect of the necessity of detention type orders sought should be provided as part of the application. I return to the gravity of the application being made i.e., one that impacts upon the liberty and autonomy of a person. Counsel for the General Solicitor argued that a person should not be detained exclusively on the word of the person detaining them. There is some force in this argument, at least when one is considering the initial application for detention rather than a review. For a court to accede to a detention application on the basis of inherent jurisdiction, I am of the opinion that the Court should generally have medical evidence from at least two separate sources i.e., from the body seeking the detention Order and from one other source. Usually this will either come from lawyers

or other persons acting on behalf of the proposed detainee or by an independent medical practitioner retained directly by the Court.

42. A similar approach may be found in the ADMCA in relation to detention orders made under s.107 and s.108, whereby the Wardship Court, when reviewing a detention order, must hear evidence both from the consultant psychiatrist responsible for the care or treatment of the person concerned and from an independent consultant psychiatrist selected by the Wardship Court (see s.107(5) and s.108(5)). The function of the independent consultant psychiatrist is to report to the Wardship Court. It is a similar function to that of the medical visitor under s.11, described above.

43. It is true that in wardship, if the application for detention is made after a person has already been admitted into wardship, the application will often be based solely on medical evidence from the proposed detainer. But this approach has been departed from in the process established by the ADMCA in respect of s.107 and s.108 reviews. The HSE makes the point that this should not necessarily inform the approach of the Court when making detention orders pursuant to its inherent jurisdiction. But no argument in principle is made by the HSE as to why an application for detention of persons lacking capacity made pursuant to the inherent jurisdiction should be subject to a lesser burden of evidence than that made under the ADMCA. In my experience as a wardship judge, where there is a difficult judgment call to be made as to whether detention should be ordered or not, it is of significant assistance to the Court to have a second view. Whether that view comes from an independent medical expert retained by the Court or whether it comes from medical experts retained by the person sought to be detained is, in my view, not of significance. The important point is that a second view is available to the Court. I should add, given the very diverse nature of the applications that are made in this context, that each case will turn on its own particular facts and that there may be

circumstances (such as particularly urgent cases) where that general requirement cannot be met or may be dispensed with by the Court.

44. Further, where a court is reviewing an Order, as opposed to making an Order for the first time, it may only require medical evidence from one party, again depending on the circumstances. The parties all accept that where a person is detained pursuant to the inherent jurisdiction, it will be necessary to have regular reviews of that detention. Medical evidence may not be required from two different sources where there is an application to renew detention, as opposed to detain for the first time.

45. In summary, I agree that it is not appropriate to establish immutable rules in the context of inherent jurisdiction given the flexibility of the jurisdiction. Nonetheless, the optimum approach appears to me to be that a court would usually be presented with medical evidence from two separate sources in respect of any application to detain.

Representation/participation of the person sought to be detained

46. There is unanimity amongst the parties that the voice of the person sought to be detained should be heard loud and clear in any such application. In *AC*, O'Malley J. held that the right to fair procedures of the person whose capacity was in question had been breached by the way in which the inquiry hearing taking her into wardship had been conducted, stating:

> "*[370] My concern in respect of what happened in August 2016 is that the process lacked certain fundamental safeguards for the interests of the proposed ward. To return to a theme discussed above, one of the most salient aspects of that process was the absence of Mrs. C's voice, whether speaking for herself, or through a legal representative, or through a person such as a guardian ad litem…*

[372] … The more basic point is that there must, in my view, be at least a mechanism by which the views of the proposed ward can be ascertained and her interests protected."

47. A similar position has been adopted by the ECHR. The case law in this respect was extensively analysed in *AC* by O'Malley J. and it is not proposed to repeat that analysis. However, in summary, the ECHR has identified, *inter alia*, that any protective measure in respect of persons of unsound mind should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. The person concerned by measures proposed to be taken should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. In certain cases, special procedural safeguards may be called for in order to protect the interests of person who, on account of their mental disabilities, are not fully capable of acting for themselves.

48. Those principles have been carefully reflected in the ADMCA. This Act reflects a change in how society views a person lacking or potentially lacking capacity, and their right to be heard in any process affecting their legal rights, including their right to liberty. It is true that the 1871 Act recognised to a certain extent the right of a person alleged to be of unsound mind to be heard in proceedings aimed at deciding upon their capacity. Under that Act, which established procedural rules in respect of inquiries to admit people into wardship, there is a right to be heard on the part of the proposed ward. Section 13 provided that a person alleged to be of unsound mind must have notice of the presentation of a petition to the Lord Chancellor seeking an inquiry to admit them into wardship and rules were made providing for service of same. A proposed ward was entitled to demand that an inquiry take place before a jury. Those service requirements

have been scrupulously observed on the part of the Wards of Court office for many years. A necessary proof in any capacity inquiry was proof of service on the respondent to the wardship application.

49. However, as the case of *AC* showed, that system had its flaws, as it did not provide for a system of legal representation and it did not ensure that the wishes and views of the person were heard by the Court. This is far from an abstract issue: in my experience, many persons deemed to lack capacity in relation to the question, for example, of where they should live, nonetheless may be articulate and informed about that question, and are in a position to provide vital information to the Court. This may inform issues such as the appropriate place of detention, or conditions of detention if the Court decides to make a detention Order, as well as informing the question of whether detention should be ordered at all. It is a perhaps a truism to invoke in this context the phrase "nothing about them without them"; and yet that phrase brings home the importance of ensuring that people whom it is proposed to detain are fully heard in respect of any such proposals.

50. The ADMCA contains detailed provisions in relation to the wishes and preferences of the person. This is reflected in s.8(7):

> *(7) The intervener, in making an intervention in respect of a relevant person, shall—*
>
> > *(a) permit, encourage and facilitate, in so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible, in the intervention,*

(b) give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable,

(c) take into account—

(i) the beliefs and values of the relevant person (in particular those expressed in writing), in so far as those beliefs and values are reasonably ascertainable,

and

(ii) any other factors which the relevant person would be likely to consider if he or she were able to do so, in so far as those other factors are reasonably ascertainable,

51. Section 139(1) of the ADMCA provides that applications to the Court shall be heard in the presence of the person the subject of the application unless the fact that the relevant person is not or would not be present in Court would not cause an injustice to the relevant person, such attendance may have an adverse effect on the health of the relevant person, the relevant person is unable, whether by reason of old age, infirmity or any other good and substantial reason, to attend the hearing, or the relevant person is unwilling to attend.
52. The approach of the ADMCA has been captured by Practice Direction HC121 on Wards of Court Review pursuant to s.107 and s.109 ADMCA of 11 May 2023. This provides as follows:

"The applicant shall, if the applicant is not the ward of court, nominate an independent solicitor for the ward of court for the purpose of the application

and provide details of the nomination to the Registrar of Wards of Court, together with the opinion of the applicant as to whether it is necessary or appropriate for the Court to appoint the nominated independent solicitor and the reasons for that opinion. The Court shall determine whether to appoint any independent solicitor and may, subject to its approval, appoint the nominated independent solicitor or such other independent solicitor as the Court may consider appropriate."

53. Separately it requires an Affidavit of Service by the independent solicitor or Committee that includes averments confirming that an explanation of the application and implications of same have been provided to the Ward of Court, identifying the response and reaction of the Ward of Court; and identifying the efforts undertaken to arrange for the Ward of Court to be present for the application in accordance with the provisions of s.139 of the ADMCA.

54. An application to detain under inherent jurisdiction is not an application under the ADMCA and not subject to the regime prescribed by the ADMCA; but nonetheless, as discussed above, the principles that inform the ADMCA may appropriately be taken into account when considering what is required to defend and vindicate a person's constitutional rights, including the procedures to be followed when an application to detain is made. It is not appropriate in this judgment to prescribe the detailed steps to be taken in an inherent jurisdiction detention application, given the obligation on the judiciary to avoid stepping into the shoes of the legislature. However, at a minimum, any court hearing an application of this type must be satisfied that a person is represented by a person competent to assist them in responding to the application, whether that be a lawyer or the Committee of the ward where the person is already a Ward of Court or a *guardian ad litem*, or some other appropriate person. Second, and

separately, a court should ensure that the views of the person themselves have been heard. This is not precisely the same as representation. A person whose capacity is in question is often already disadvantaged in their communications with the world and needs a clear pathway in the context of court proceedings to be heard in relation to their wishes and preferences. The ADMCA has provided this pathway by the legislative provisions identified above.

55. As to how a person's views and wishes are heard will be a matter for the Court depending on the circumstances. One of the few benefits of the pandemic was that it became commonplace for persons lacking capacity to address the Court from their hospital bed, or residential placement, or home, without having to face the additional challenges of physically coming to Court. This facilitated far greater participation by those persons, including those persons who might wish to observe the proceedings but not be seen or heard. Of course, some people may not wish to participate on line, or may not be able to. In those circumstances, their representative must be in a position to convey their thoughts and wishes.

56. In this case, the voice of KK has been present throughout the proceedings. KK participated by video link in both hearings and gave me her views. She was ably represented by her Committee, who retained solicitors and counsel. It is desirable that a similar approach will be taken in any application made by CFA under the inherent jurisdiction.

Conclusion

57. For the reasons set out above, I refuse the application and direct that if the CFA wishes to proceed with an application under the inherent jurisdiction, it must do so by way of a Notice of Motion lodged in the Central Office under Order 67A, Rule 19, following

the procedures identified in Practice Direction HC123. In my view, that application should include (a) medical evidence from a party other than the CFA of KK's capacity to enter safe romantic and sexual relationships; and (b) if that evidence establishes a lack of capacity, medical evidence from a party other than the CFA in respect of the necessity for the detention type restrictions sought having regard to the constitutional rights of KK.

58. I will list this matter for costs on **20 October** at **10.15** for costs only.