APPROVED

AN CHÚIRT ACHOMAIRC
COURT OF APPEAL

Neutral Citation Number [2024] IECA 242

Court of Appeal Record No 2023 289

Hogan J.
Pilkington J.
O'Moore J.

IN THE MATTER OF KK (A WARD OF COURT)

Between:

THE CHILD AND FAMILY AGENCY

Appellant

AND

KK (A WARD OF COURT REPRESENTED BY THE COMMITTEE OF THE PERSON, GENERAL SOLICITOR FOR MINORS AND WARDS OF COURT)

Respondent

AND

HEALTH SERVICE EXECUTIVE

Notice Party

JUDGMENT of Mr. Justice Gerard Hogan delivered the 11h day of October 2024

Part I- Introduction

1. The enactment of the Assisted Decision-Making (Capacity) Act 2015 ("the 2015 Act") represents the most fundamental change in the legal regime governing vulnerable persons in well-nigh 150 years. It is clear from s. 7(2) of the 2015 Act that – save for certain transitional provisions – the principal pre-existing statute, the Lunacy Regulation (Ireland) Act 1871 ("the 1871 Act"), has been repealed. So far as material to this appeal, the relevant provisions of the 2015 Act were commenced with effect from 26th April 2023: see Assisted Decision-Making (Capacity) Act 2015 (Commencement) Order (SI No. 192 of 2023).

2. The principal question in this appeal is whether another earlier cornerstone of the pre-existing wardship regime – namely, the detention power in respect of wardship as provided for in s. 9 of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act") – has been impliedly repealed or otherwise rendered inoperative by the commencement of the 2015 Act. As we shall see, this appeal presents difficult and unusual questions of statutory interpretation regarding the congruity and compatibility of the pre-existing jurisdiction in respect of such wardship detention order with the operation of the new provisions of the 2015 Act.

3. Admittedly, s. 9 of the 1961 Act does not in terms provide for the detention of any person. As we shall see, however, s. 9 carries over the pre-existing wardship jurisdiction and it references the pre-1961 statutory jurisdictions (which I shall presently describe) and its corpus of case-law and practice. It is not disputed but that this pre-existing jurisdiction extended to making an order providing for the detention of a ward where this was objectively warranted.

4. The issue arises in the following way. The appeal ostensibly concerns the case of Ms. KK, a young person who is now 24 years of age. She has mild intellectual disability with a history of self-harming. While detention orders had previously been made in respect of her, since July 2021 Ms. KK had been placed in a remote rural location where the risk of absconding had been thought to be less. On 27th July 2021 the High Court (Heslin J.) made an order that she be made a ward of court and the General Solicitor was appointed as the committee in respect of the ward.

5. A few months later a man whom Ms. KK had met online attended at her placement location. It appears that this individual was aggressive, and staff were required to call Gardaí. As a result of all of this, on 27th December 2021 Ms. KK was detained at an approved centre for a nine-day period pursuant to the provisions of the Mental Health Act 2001.

6. At various stages during the calendar year 2022, Ms. KK was further detained pursuant to a variety of High Court orders. These applications were supported by uncontested psychiatric evidence. However, on 7th February 2023 a further application to the High Court for a detention order was adjourned in order to allow the appropriate medical evidence to be furnished. When no such evidence was forthcoming the applications for the orders duly lapsed. When the relevant consultant psychiatrist prepared a report in April 2023 in which it was concluded that these detention orders should be continued, the Child and Family Agency ("the CFA") duly made a fresh application by way of notice of motion dated 22nd May 2023 to the High Court seeking orders to this effect.

7. By this stage, however, the 2015 Act had been commenced by ministerial order. The question then arose as to whether the High Court was still entitled to make a fresh detention order in respect of a ward of court under s. 9 of the 1961 Act. It is important to stress that this appeal concerns only the question of the survival of the s. 9 detention

powers. It is unnecessary to consider whether in any other respects the s. 9 powers have survived post-April 2023 or what other s. 9 derived powers might now be exercised by the High Court.

8. In a reserved judgment delivered on 7th June 2023, *Child and Family Agency v. KK* [2023] IEHC 306, Hyland J. held that the High Court no longer had a jurisdiction to make a detention order pursuant to s. 9 of the 1961 Act on the basis that this provision was fundamentally inconsistent with the new regime provided for by the 2015 Act. She did hold, however, that the Court enjoyed an inherent, constitutionally derived jurisdiction to detain Ms. KK should this be medically warranted, the existence of which jurisdiction had been expressly preserved by s. 4(5) of the 2015 Act. As of that date (i.e., May/June 2023), however, no order had been made discharging Ms. KK from wardship pursuant to s. 55(1) of the 2015 Act.

9. The CFA have now appealed to this Court against this conclusion and in this it is supported by the Health Service Executive ("HSE"). The conclusion of Hyland J. is, however, supported by the General Solicitor. When this appeal originally came before this Court on 29th January 2024, it transpired that Ms. KK had just been discharged from wardship by order of Dignam J. in the High Court which was made on 29th January 2024. This then raised the question of whether the appeal was moot and, if so, whether the Court should proceed to hear this appeal. (I propose to consider this question presently.)

10. At that point we directed that that the Attorney General should be put on notice of the appeal. The Attorney General then decided to participate qua notice party, albeit that he has adopted a neutral position insofar as any issue concerned the factual circumstances of Ms. KK herself. The Attorney General nonetheless submits that Hyland J. was correct in the conclusions which she reached. We also directed that Ms.

KK be put on notice of of the appeal. This matter was then mentioned before Haughton J. on 22nd March 2024 where it was confirmed that neither Ms. KK not her decision-making representative wished to participate in the appeal.

11. At one level it might be thought that irrespective of any issues of mootness the present appeal is of little practical consequence or value. After all, all sides are agreed that the High Court does indeed possess a jurisdiction to detain troubled young persons such as KK (whether they are or were wards of court) where this is strictly warranted by the medical evidence. The disagreement accordingly relates to the source – rather than the existence – of the power to detain.

12. While the appeal accordingly appears at first blush to relate more to theoretical rather than strictly practical considerations, it must be accepted that the outcome of this appeal will nonetheless have implications for the operation of the 2015 Act, the gradual fading out of the wardship jurisdiction and the operation of the High Court's inherent jurisdiction. As Baker J. noted in her separate judgment in *Re JJ* [2021] 1, [2022] 3 IR 1 at 211, the wardship jurisdiction is essentially binary in character: one is either taken into wardship or not. If an adult is taken into wardship, then all decisions relating to that person's life are taken by the High Court (or, quite often, the committee appointed by the Court). In the case of wardship there is no via media. (As Baker J. pointed out in her separate judgment in *Re JJ*, different considerations arise in the case of minor wards where a more proportionate approach may be required in order to accommodate the rights of parents under Article 42 and Article 42A of the Constitution: see [2022] 3 IR 1 at 216-219.)

13. By contrast, as Hyland J. noted (at paras. 25 and 26) of her June 2023 judgment, the 2015 Act is more nuanced and proportionate in its approach. This is particularly reflected in s. 8(6)(a) of the 2015 Act which provides that, henceforth judicial

intervention in support of a relevant person will be made in a manner which seeks to minimise the restriction of the relevant person's rights and general freedom of action. Any such intervention must be proportionate (s. 8(6)(c) and, where practicable, time limited (s. 8(6)(d)).

14. For completeness, it should be noted that in her second judgment in this matter delivered on 6th October 2023, *Re KK (No.2)* [2023] IEHC 565, [2023] 2 ILRM 189 Hyland J. dismissed on procedural grounds the CFA's application for an order providing for the detention of KK should it prove necessary to do so in case she was to abscond from her placement. The application was dismissed because although the CFA had invoked the inherent jurisdiction of the High Court by way of notice of motion dated 25th May 2023 that motion had issued out of the Office of the Wards of Court. As it happens, Ord. 67A, r. 19 had taken effect two days earlier. It specifies that any such application must be brought by way of originating notice of motion issued out of the Central Office and not by way of the Office of Wards of Court.

15. Hyland J. accordingly held that the application required to be re-commenced by way of a fresh notice of motion issued out of the Central Office. The judge also indicated in general terms the type of independent evidence that would be required to be produced in the event that an order providing for KK's detention under the inherent jurisdiction were now to be sought: see paragraph 57 of the judgment in *Re KK (No.2).* As indicated, I mention all of this for completeness, since none of the issues which were addressed by Hyland J. in *Re KK (No.2)* require to be considered in the present appeal.

16. In these circumstances, it is appropriate that this Court should now seek to resolve this issue as to whether the s. 9 jurisdiction has in fact survived the enactment of the 1961 Act, i.e., the principal issue which arose in *Re KK (No. 1).* Before proceeding to do so, however, it is appropriate that I should first set out the relevant statutory provisions;

second, summarise the arguments of the parties; provide a more extended summary of the High Court judgment and, fourth, consider the issue of mootness.

Part II – The relevant statutory provisions

17. Section 9 of the 1961 Act provides:

> "(1) There shall be vested in the High Court the jurisdiction in lunacy and minor matters which—
>
> (a) was formerly exercised by the Lord Chancellor of Ireland,
>
> (b) was, at the passing of the Act of 1924, exercised by the Lord Chief Justice of Ireland, and
>
> (c) was, by virtue of subsection (1) of section 19 of the Act of 1924 and subsection (1) of section 9 of the Act of 1936, vested, immediately before the operative date, in the existing High Court.
>
> (2) The jurisdiction vested in the High Court by subsection (1) of this section shall be exerciseable by the President of the High Court or, where the President of the High Court so directs, by an ordinary judge of the High Court for the time being assigned in the behalf by the President of the High Court.
>
> (3) References in the Lunacy Regulation (Ireland) Act 1871, and the rules and orders made thereunder to "the Lord Chancellor entrusted as aforesaid" shall be construed as references to the judge of the High Court for the time being exercising the jurisdiction vested in the High Court by subsection (1) of this section.
>
> (4) (a) The President of the High Court or such other Judge of the High Court as may be assigned by him under subsection (2) of this section may from time to time by order made under section 118 of the Lunacy Regulation (Ireland) Act 1871, amend any form prescribed by or under that Act for use in relation to the jurisdiction

in lunacy matters vested in the High Court by subsection (1) of this section by substituting in such form the expression "ward of court" or such other similar expression as he thinks proper for the word "lunatic" and the expression "person of unsound mind" respectively and by making such further consequential amendments in that form as he thinks necessary and proper.

(4) (b) Any order made under section 4 of the Courts of Justice Act 1928, as amended by paragraph (b) of subsection (2) of section 9 of the Act of 1936, which is in force immediately before the operative date shall continue in force and be deemed to have been made under paragraph (a) of this subsection.

(5) Such solicitors, doctors, visitors and other persons as were, immediately before the operative date, retained or nominated in relation to the exercise of any jurisdiction which, by virtue of subsection (1) of section 19 of the Act of 1924 and subsection (1) of section 9 of the Act of 1936 was, immediately before the operative date, vested in the existing High Court shall be retained or nominated by the President of the High Court and section 59 of the Act of 1926, as applied by section 48 of this Act, shall not apply to them."

Part III – The submissions of the parties

18. I now propose to give a brief summary of the arguments advanced by the respective four parties to the appeal, commencing with the arguments of the CFA.

The arguments of the CFA

19. The CFA argue that the High Court erred in concluding that s. 9 does not permit the making of fresh orders detaining a person under the protection of the Court after the 2015 Act was commenced. In their submissions, the CFA state that the High Court erred in concluding that the purpose and aim of the 2015 Act was to bring about the end of

wardship. The CFA contend that neither the Long Title or any express provision of the Act or its scheme provide support for that conclusion. The CFA submit that absent any express objective found within the 2015 Act that it was an error to conclude that the s. 9 jurisdiction was curtailed by implication. The CFA support this proposition by noting the lack of express repeal or amendment of s. 9 and the fact that the constitutionality of the section was at no point in the proceedings challenged as to its constitutionality.

20. The CFA further contend that the s. 9 jurisdiction's operation and exercise has remained unaffected by the commencement of the 2015 Act, save for the new requirement to assess decisional capacity on a functional, time and issue specific basis. This change in manner of assessment, the CFA submit, does not impede the continued operation of the jurisdiction. The CFA also reject the conclusion that Part 10 of the 2015 Act changed the function of s. 9. The CFA submit that Part 10 rather relies on the existence of the s. 9 jurisdiction, as the 2015 Act does not make any provision for detention. The CFA submit therefore it was an error to conclude that s. 9 and Part 10 were so incompatible that s. 9 was to be treated as being repealed by necessary implication. Notwithstanding their arguments, the CFA accept that orders may be instead made pursuant to the inherent jurisdiction of the High Court but contend that recourse to the inherent jurisdiction was unnecessary and contrary to principle in circumstances where no legislative lacuna arises given the s. 9 powers are, in their submission, extant.

General Solicitor for Minors and Wards of Court

21. The General Solicitor for Minors and Wards of Court (the 'General Solicitor') opposes the appeal on the basis that she considers that Hyland J. was entitled to conclude as she did as to the meaning and effect of the 2015 Act on the jurisdiction and powers vested in s. 9. The General Solicitor submits that the s. 9 jurisdiction was fundamentally affected by the repeal of the 1871 Act by the 2015 Act, as doing so revoked the

machinery for the exercise of the s. 9 jurisdiction. The General Solicitor attributes the lack of appeal or amendment of s. 9 to the fact that the jurisdiction vested in s. 9 pre-existed the section and was not founded or limited by statute. Rather, it was regulated by statute. As such, the General Solicitor contends that the Oireachtas could change and render inoperable the underlying powers and duties vested under that provision by commencing the 2015 Act without the need for appeal or repeal of s. 9.

22. Furthermore, the General Solicitor submits that the purpose of the 2015 Act is clear: it ends the old regime and jurisdiction and creates a new system of minimum intervention which emphasises the rights of people based on functional capacity. The General Solicitor contends that this system is incompatible with the old regime. They submit that the provisions of s. 55 are evidence of this conclusion, as it provides for the orderly winding down of the old regime. Furthermore, they submit that the purpose of the 'saver' provisions only allows the s. 9 jurisdiction to continue in limited circumstances during the limited winding down period. The General Solicitor contend that insofar as s. 9 contained a power to make orders for detention and insofar as Part 10 does not permit for review of detention orders after the date of commencement of the 2015 Act, 26th April 2023, that Hyland J. was correct to find that no new orders for detention could be made under s. 9 after the commencement of the 2015 Act.

Health Service Executive

23. The HSE support the CFA's grounds of appeal but adopt a neutral position as to the making of any orders and contend that such questions ought to be remitted to the High Court if the decision in *Re KK (No.1)* is overturned. The HSE submit that the conclusions of *Re KK (No.1)* are inconsistent with the principles relied upon in the judgment and are in any case misplaced or insufficient. The HSE contend that it is contrary to the test for implicit repeal to state that the 2015 Act has trammelled the s. 9

power and jurisdiction. In any case, insofar as it protects personal constitutional rights, the HSE contend that only an unambiguous and express repeal is sufficient. No such repeal occurred of s. 9. The HSE contend that the repeal of the 1871 Act does not affect s. 9 as the jurisdiction is itself a statutory manifestation of constitutional personal rights and as such is not contingent on the 1871 Act. The HSE contend that the commencement of the 2015 Act did not impact the s. 9 jurisdiction.

24. The HSE further contend that is no basis to assert that s. 9 is inconsistent with the 2015 Act. Rather, the HSE submit that provisions of the 2015 Act are consistent with the continuation of s. 9. The HSE submit that s. 56 of the 2015 Act preserves the s. 9 jurisdiction without qualification. The HSE furthermore contend that the silence in Part 10 of the 2015 Act as to a power of detention is consistent with the idea that s. 9 continues to operate and Part 10 exists to regulate it, rather than put it to an end. The HSE finally express concern that the judgment of the High Court had the effect of making the use of the inherent jurisdiction of the High Court commonplace, losing its exceptional nature, and point to this as evidence of error in the judgment.

The Attorney General

25. The Attorney General argues that the judgment of Hyland J. in *Re KK (No.1)* was correct: the Court could no longer make orders for detention under s. 9 after the commencement of the 2015 Act and that the correct legal basis for doing so now lay with the inherent jurisdiction of the High Court. The Attorney contends that while s. 9 was not expressly or implicitly repealed or amended, the effect of the 2015 Act was to fundamentally change the jurisdiction which had been vested in s. 9 such as to trammel that jurisdiction's operation. The Attorney disagrees with the CFA's contention that the 'saver' provision preserves the s. 9 jurisdiction unaffected. Rather, the Attorney submits that the 2015 Act has the effect of making s. 9 gradually redundant by winding down

the wardship regime by no later than 26th April 2026. The Attorney contends that the CFA's submission that the jurisdiction could continue to operate post commencement would require impermissible judicial law-making. The Attorney instead submits that the inability to review future detention orders by ss. 107 and 108 is consistent only with the understanding that new detention orders are not permitted after the commencement of the 2015 Act.

26. The Attorney submits that the clear purpose of the 2015 Act is to put an end to wardship insofar as it establishes a fundamentally different framework than the old regime which applies to all relevant persons, and which changes the manner in which interventions as a whole are governed. The Attorney submits that to allow the Court to continue making orders under s. 9 on an alternative basis would be contrary to the clear legislative intent of the 2015 Act which is to treat wards pending discharge the same as non-wards with respect to detention. The Attorney finally contends that s. 4(5) of the 2015 Act (as inserted by the Assisted Decision Making (Capacity) (Amendment) Act 2022) was clearly inserted to expressly carve out the inherent jurisdiction of the Court to make detention orders after the commencement of the 2015 Act. He argues that this change was in recognition of the effect of the 2015 Act as rendering the previous statutory scheme inoperable and leaving a legislative lacuna, thus making the resort to the inherent jurisdiction of the Court necessary.

Part IV- The judgment of the High Court

27. In her judgment of 7th June 2023 in *Re KK (No.1)*, Hyland J. rejected the contention that the power to detain an existing ward under s. 9 of the 1961 Act had survived after the commencement of the 2015 Act. Hyland J. considered that it was the clear legislative intent of the Oireachtas in the 2015 Act to significantly alter the regime pursuant to which wards of court were detained in a manner which altered the s. 9

jurisdiction. The changes effected by the 2015 Act, in particular by Part 10 of the Act had the effect that a Wardship Court no longer had the power to make fresh detention orders in respect of an existing ward. Nothing in the s. 56(2) 'saver' provision precluded the possibility that the s. 9 jurisdiction was affected by the 2015 Act. Hyland J. attached particular importance to the fact that ss. 107 and 108 of the 2015 Act only applied to detention orders that were in existence on the date of commencement of the 2015 Act (26th April 2023) and the fact that the Part only operates as long as persons detained pursuant to an order of a Wardship Court (26th April 2026).

28. In so concluding, Hyland J. noted that s. 9 never explicitly provided for the making of detention orders in relation to Wards of Court. Rather, s. 9 simply vested a pre-existing jurisdiction in lunacy in the High Court. Hyland J. concluded that this jurisdiction now derives from Article 40.3.2° of the Constitution and that the same constitutional imperative to vindicate the personal rights of all persons can be achieved through the invocation of the inherent jurisdiction of the High Court. Hyland J. held that s.4(5) of the 2015 Act envisages and provides for this circumstance. As such, she adjourned the matter for further submissions to be made by the parties in relation to the potential of making the Order sought on the basis of the inherent jurisdiction of the Court. While noting that appeal to this Court was only sought on the basis of the principal issues in *KK (No. 1),* for completeness, an a short summary of the findings of the further judgment delivered on 6th October 2023, in *Re KK (No. 2)* will now be provided.

29. In *Re KK (No. 2),* Hyland J. held that though the inherent jurisdiction of the Court was necessarily flexible, it was necessary to identify an approach which would apply in the particular exercise of that jurisdiction when used to detain persons

lacking capacity. As such, Hyland J., while not prescribing detailed steps to be taken by an applicant, considered what proofs may be necessary for a successful application of that kind by setting out some general principles to be adhered to in taking such an applicant; a judge must be satisfied that the person lacking capacity is represented by a person competent to assist them in responding to the application (be that a lawyer, the committee of the ward, a *guardian ad litem*, or other person), the Court must ensure that the views of the person lacking capacity are heard, and independent evidence ought to be sought as standard in all applications.

30. Hyland J. furthermore held that while an application to detain under the inherent jurisdiction of the Court was not subject to the regime prescribed by the 2015 Act, the principles that inform the 2015 Act may be taken into account in considering what is required to defend and vindicate a person's constitutional rights. Hyland J. drew particular attention in this respect to the advanced legislative weight given to the defence of autonomy of persons lacking capacity effected by the 2015 Act and the procedures which are required to be followed when such an application is made. Hyland J. nevertheless refused to grant the reliefs sought. Although the CFA had invoked the inherent jurisdiction of the High Court by way of notice of motion dated 25th May 2023 that motion had issued out of the Office of the Wards of Court. As it happens, Ord. 67A, r. 19 had taken effect two days earlier. It specifies that any such application must be brought by way of originating notice of motion issued out of the Central Office and not by way of the Office of Wards of Court. Hyland J. accordingly concluded that in these circumstances any such application would have to be re-issued and follow the procedures specified in Ord. 67A, r. 19.

Part V – The issue of mootness

31. It is not really disputed but that the present case is now moot in that the CFA are no longer pressing to have an order made providing for Ms. KK's detention – even on a provisional basis – pursuant to the s. 9 jurisdiction. She has, in any event, been discharged from wardship since the original decisions of Hyland J. in the present case. This, however, does not mean – or, at any rate, no longer means – that this Court should not hear and determine the appeal.

32. It is clear that contemporary attitudes and practice with regard to mootness have changed profoundly following the decision of the Supreme Court in *Odum v. Minister for Justice* [2023] IESC 3, [2023] 2 ILRM 164. It is clear from the judgment of O'Donnell C.J. that different considerations apply to mootness where there already has been an authoritative decision at first instance which would otherwise be binding or where the issues are very likely to be presented again and requires to be resolved in the public interest.

33. The present case is in these respects not altogether dissimilar from the position which prevailed in *Odum.* There the question was the extent to which the Minister for Justice was obliged to take the constitutional rights of non-national parents into account in determining whether to make a deportation order. By the time the case came to the Supreme Court the appeal was now moot in that the deportation order had been revoked. In his judgment O'Donnell C.J. signalled a significant shift in judicial attitudes towards matters of mootness and in respect of the prudential considerations underlying that approach. The Chief Justice considered that given the importance of the point and the fact that the case was not moot when it was decided at first instance all suggested that the Supreme Court should nonetheless hear and determine the case.

34. I consider that similar considerations apply to the present case. Here Hyland J. gave a thorough and considered decision in a reserved judgment which would prima facie bind all other High Court judges. The issue is furthermore one of considerable importance which will affect many other cases and it is also one which the public interest requires to be determined. If it is not determined in this case it will have to be decided in another similar case in the very near future. There is the further point that the case was fully and thoroughly argued, so that the Court is in a position to deliver a reserved judgment which addresses all the relevant issue in this appeal. At the hearing of the appeal all the parties stressed the systemic importance of this question and they urged the Court to determine this issue.

35. For all of these reasons, therefore, I consider that based on *Odum* principles it is appropriate that this Court should hear and determine the issue, the issue of mootness notwithstanding.

Part VI- The historical background to the wardship jurisdiction

36. We may next proceed to consider the substantive arguments. It is first necessary to consider the historical background to the wardship jurisdiction itself. Much of this has already been set out in a variety of contemporary Supreme Court decisions including *Re Ward of Court* [1996] 2 IR 79, *Re FD* [2015] IESC 83, [2015] 1 IR 741 and *AC v. Cork University Hospital* [2019] IESC 73, [2020] 2 IR 38.

37. It is perhaps sufficient to state that prior to 1922 the exercise of the wardship jurisdiction was a Crown prerogative which had been delegated to the Lord Chancellor by the Sovereign personally under the sign-manual. The jurisdiction extended to "the care and commitment of the custody of the idiots and lunatics and their estates": In *re Birch* (1892) 29 L.R.IR. 274 at 275, per Lord Ashbourne L.C. It is true that, as the very title of that Act suggests, the exercise of this jurisdiction was regulated by the 1871 Act.

Yet as O'Malley J. observed in *AC v. Cork University Hospital*, the 1871 Act was "merely a regulatory item of legislation" and the "jurisdiction of the former Lord Chancellors of Ireland was much broader. It followed that the jurisdiction now exercisable by the courts is broader then, and does not depend upon, the applicability of the Act of 1871": see [2020] 2 IR 38 at 100.

38. One might add that, as both the CFA and the HSE observed, the 1871 Act is, in any event, almost exclusively concerned with the care and administration of the ward's property and assets. It really has little to do with much of the modern day-to-day work of the wardship courts in relation to matters such as the welfare of incapacitated or vulnerable persons and (where appropriate) issues pertaining to their detention.

39. Similar views regarding the extent of this jurisdiction have been expressed in other contemporary authorities. So in *Re Ward of Court* [1996] 2 IR 79 Blayney J. said (at 140) that the Lord Chancellor had been given "extremely wide powers" which "had never been curtailed by statute." In *Health Service Executive v. AM* [2019] 2 IR 115 MacMenamin J. first referred to the judgment of Finlay C.J. in *Re D* [1987] IR 449 and then added that the latter's conclusion "was that the jurisdiction was effectively non-statutory, based on pre-independence jurisprudence, but subsequently supported by the provisions of Article $40.3.2^0$ of the Constitution."

40. This, of course, was the extent of the jurisdiction as it existed in 1922. The previous jurisdiction of the Lord Chancellor was then transferred to the Chief Justice by s. 19 of the Court of Justice Act 1924. (As that section acknowledges, during the interregnum period from December 1922 to June 1924 the jurisdiction was exercised by the Lord Chief Justice.) This was a purely personal jurisdiction which was vested in the Chief Justice alone, albeit that s. 19(2) did contemplate that an appeal would lie from the exercise of that jurisdiction to the Supreme Court. That jurisdiction was subsequently

transferred to the President of the High Court by s. 9 of the Courts of Justice Act 1936 ("the 1936 Act"). Section 9(2) of the 1936 Act permitted the President to delegate that power to other judges of the High Court, so the wardship jurisdiction now effectively devolved upon the High Court as an institution.

41. Following the enactment of the Constitution and the establishment of the new High Court and Supreme Court by the Courts (Establishment and Constitution) Act 1961 the opportunity was taken to re-state the nature of the wardship jurisdiction. This was done by providing that the jurisdiction "in lunacy and minor matters" formerly exercisable by the Lord Chancellor and which had been vested in the (pre-1961) High Court by the operation of s. 19 of the 1924 Act and s. 9(1) of the 1936 Act was now to be vested in the High Court. While aspects of that jurisdiction were regulated by statute, the full amplitude of that jurisdiction essentially rested on case-law and (at least prior to 1922) prerogative practice. As Hyland J. observed (at para. 105 of her June 2023 judgment) s. 9(1) of the 1961 Act carries over "an existing but undefined jurisdiction."

42. It is nevertheless worth noting, however, that s. 3 of the 1924 Act defined "in lunacy" as relating to "the custody of the persons and estates of idiots, lunatics and persons of unsound mind." This was part of the jurisdiction which was transferred (in effect) to the High Court by s. 9(1) of the 1936 Act and which in turn was preserved by s. 9 of the 1961 Act. One might also observe that s. 283 of the Mental Treatment Act 1945 (which is still in force) provides that nothing in that Act affected the power of the High Court "in connection with the care and commitment of persons found to be idiots or of unsound mind." (Given that s. 1(2) of the 2001 Act provides that the 1945 Act and that Act are to be collectively construed and interpreted, s. 283 of the 1945 Act is now thereby applied to the 2001 Act.) This provision seems to acknowledge that the wardship jurisdiction extended to the commitment and detention of persons of unsound

mind. The jurisdiction to detain a person of unsound mind accordingly had - at least to some extent - a statutory basis or acknowledgment prior to the enactment of the 2015 Act.

43. It is, I think, unnecessary to consider any issue relating to the survival of this prerogative power following either the enactment of the Constitution of the Irish Free State in 1922 or the Constitution of Ireland in 1937. It has been clear since at least the decisions of the Supreme Court in cases such as *Re D* [1987] IR 449 and *Eastern Health Board v. MK* [1996] 2 IR 99 that the operation of the s.9(1) wardship jurisdiction no longer rests on concepts of the prerogative, but is rather exercised – at least in the absence of further statutory regulation – ultimately by reference to constitutional considerations arising from the judicial duty arising from Article 40.3.2º to protect the person and property of the ward (*Re D*) and in the case of minor wards considerations such as Article 42 and Article 42A: see *MK* and, more recently, *Re JJ*.

44. So much is uncontroversial so far as this appeal is concerned. It is clear from the terms of her June 2023 judgment (e.g., paras. 36-41) that Hyland J. had expressed similar views regarding the evolution of the wardship jurisdiction and, in any event, none of the parties to this appeal disputed this analysis. The real question, however, is whether the 2015 Act had the effect of rendering this jurisdiction inoperative or otherwise inapplicable.

Part VII – Whether the effect of the 2015 Act is to render the previous s. 9 jurisdiction inoperative

45. In urging that the Court should acknowledge the continued survival of the s. 9 jurisdiction, counsel for both the HSE and the CFA have emphasised that s. 7 of the 2015 Act deals with repeals and that nowhere does this section seek to repeal s. 9 of the

1961 Act. Section 7(2) provides as follows: "Subject to the provisions of Part 6, the Lunacy Regulation (Ireland) Act 1871 is repealed."

46. Given the historic centrality of the 1871 Act to at least aspects of the entire wardship jurisdiction, counsel for the CFA and the HSE both stressed that had it also been intended that s. 9 of the 1961 Act should be repealed or rendered inoperative, one would have expected that this opportunity would have been taken by the Oireachtas in express terms. There is admittedly a good deal to be said in favour of this proposition. As the Supreme Court made clear in *Director of Public Prosecutions v Grey* [1986] IR 317, the courts generally lean against implied repeals. As Henchy J. explained ([1986] IR 317 at 325):

> "It may be stated as a general rule that the courts lean against the repeal or exclusion of earlier statutory provisions by implication…[m]odern statutes tend to be meticulous in indicating, usually in a special schedule, the earlier statutory provisions that are being repealed or amended."

47. This is, as we have just seen, also true of the 2015 Act given that s. 7(2) is a special section dealing with repeals. On this basis, given s. 9 of the 1961 Act stands unrepealed, there is, admittedly, an argument for saying that it can continue to be exercised – at least in principle – so far as those persons who were admitted to wardship prior to the commencement date of 23rd April 2023.

48. Yet on occasion the courts have nonetheless been obliged to acknowledge that the earlier legislation has been rendered inoperative by a later enactment. In *Grey* Henchy J. approved the following test in respect of implied repeal as articulated in *West Ham (Church Wardens and Overseers) v. Fourth City Mutual Building Society* [1892] 1 QB 654 at 658: "The test of whether there has been a repeal by implication by subsequent

legislation is this: Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together."

49. The application of this principle is illustrated by a decision of the Supreme Court from around the same period as the decision in Grey, namely, *McLaughlin v. Minister for the Public Service* [1985] IR 631. Here s. 10(3) of the Garda Compensation Act 1941 required the judge "to take into consideration" the fact that the plaintiff had received a pension or gratuity in fixing compensation in determining compensation for injury, whereas s. 10(1)(a) of the same Act (which was inserted by the later Garda Compensation (Amendment) Act 1945) had provided that he should not "take into account" such matters. Henchy J. observed ([1985] IR 631 at 635):

> "Unless there is a difference (which I am unable to discern) between 'take into consideration' and 'take into account', there may be a want of congruity between these two provisions, but if there is, it is s.10(1)(a) which should prevail, for it represents the later thinking of the Oireachtas, having been inserted in the Act of 1941 by the Act of 1945."

50. This is essentially the question here: is there a want of congruity between the continued application of s. 9 of the 1961 Act following the commencement of the 2015 Act and the rest of the 2015 Act itself? For my part, I feel bound to say that there is. As the Supreme Court's decision in *McLaughlin* illustrates, it is in those circumstances the later Act (i.e., the 2015 Act) which must prevail. I reach this conclusion even though I agree that the drafting of the 2015 Act might, with advantage, have stated this conclusion even more explicitly than it in fact did so far as the wardship jurisdiction is concerned. (It may be recalled, of course, that the s. 9 jurisdiction in respect of minors remains unaffected by all of these changes).

51. Why, then, is to be concluded that the continued operation of the two regimes are mutually incompatible? In my view, there are – at least – four fundamental reasons which mandate this conclusion. These may be considered in turn.

Part VIII - The treatment of questions of capacity and autonomy are essentially different under the 2015 Act regime

52. First, it may be said that questions of capacity and autonomy are treated essentially differently under the 2015 Act as compared with the pre-existing wardship jurisdiction. It is clear that the 2015 Act deliberately and intentionally introduces a new regime in respect of what s. 2 describes as "relevant persons", i.e., a person whose capacity "is in question or [which] may shortly be in question in respect of one or more than one matter." As Hyland J. observed in *Re JD* [2022] IEHC 518, under the wardship jurisdiction the court generally made "a global assessment of capacity" which addressed "the person's ability to manage their affairs across the board." By contrast, the 2015 Act mandates a different approach: the court exercising that 2015 Act jurisdiction is required to make an assessment of a person's capacity in a particular area or areas. The relevant person in question may, for instance, lack the capacity to make basic financial decisions but would nonetheless be fully capable of making a different type of decision, such as, for example, a decision as to where he or she should reside.

53. In addition, as Collins J. noted in *S Ltd. v. A and F* [2020] IECA 225, a person's capacity is to be assessed "functionally" by reference to s. 3 of the 2015 Act, so that the court has to assess the person's understanding of the particular decision which is at issue. This is contrast to the wardship jurisdiction generally where, as Collins J. put it, "a ward is treated as lacking decision-making capacity generally."

54. Furthermore, as I have already noted, the adult wardship jurisdiction is essentially an "all or nothing" binary structure. As Whelan J. observed (at para. 186) in *Child and*

Family Agency v. Adoption Authority of Ireland [2022] IECA 196 "admission to wardship has the effect of removing autonomy and capacity to make any decisions." (emphasis supplied) One could add that the Long Title to the 2015 Act clearly envisages that the pre-existing law will be reformed and that these changes will be significant.

Part IX- The importance of the provisions of ss. 54, 55 and 56 of the 2015 Act

55. Sections 54 and 55 contemplate that the High Court will review the capacity of each ward and then proceed to make declarations as to the capacity of each ward as they exit wardship. Section 56 contains certain saver provisions in favour of existing orders in wardship. While the overall purpose of these provisions is clear – in that they provide for the phasing out of wardship – there are nonetheless features of s. 56 in particular which present difficulties of interpretation.

56. Section 54 contemplates that that the "wardship court" shall make a declaration as to capacity under s. 55 in respect of all existing adult wards within three years of the commencement of Part 6 of the 2015 Act. This means that such a review must be conducted by April 2026 at the very latest. (The term "wardship court" is defined by s. 53 as meaning either the High Court or the Circuit Court exercising its jurisdiction under Part 6).

57. Section 55(1) then vests the court with an extensive jurisdiction in respect of any assessment of the capacity of each ward. It may declare that the ward does not lack capacity in which case he or she must be discharged immediately from wardship. One immediate consequence of this – which I did not understand any party to the appeal to dispute – is that the s. 9 jurisdiction can no longer be deployed in respect of any person who has been discharged from wardship.

58. Section 55(1)(b)(i) permits the court to declare that the ward lacks capacity "unless the assistance of a suitable person as a co-decision-maker were made available to him or

her to make one or more than one decision." In that instance the ward is also to be discharged from wardship upon the registration of a co-decision-making agreement with the return of the ward's property: see s. 55(3).

59. Finally, s. 55(1)(b)(ii) permits the court to declare that the ward lacks capacity, even if a co-decision-maker were made available to him or her. In the latter case, s. 55A provides for a review by the court the decision no later than three years from the date of the original decision. In that instance, the ward is also to be discharged from wardship, save that a decision-making representative is to be appointed with the property of the ward also to be returned in that instance as well: see s. 54(5). The wardship court can also give further directions for review and the appointment of appropriate experts: see s. 54(5).

60. Pausing here, it is sufficient perhaps to say that these provisions point to the phasing out of wardship, at least on a transitional basis. This is further underscored by the saver provisions of s. 56 of the 2015 Act. Section 56(1) provides that the repeal of the 1871 Act shall not affect pre-existing wardship orders. Section 56(2) then provides that: "Pending a declaration under s. 55(1) the jurisdiction of the wardship court as set out in sections 9 and 22 [of the 1961 Act] shall continue to apply." Section 56(3) then states:

> "Notwithstanding its repeal by s. 7(2), [the 1871 Act] shall remain in force on and after the date of the coming into operation of this Part with regard to any proceedings in being on that date that were initiated under that Act before that date."

61. I agree with the observations of Hyland J. (at paragraphs 73 and 74) that the reference to "proceedings" in this sub-section is ambiguous. (As she noted, s. 56(3) was in fact added by s. 47 of the Assisted Decision-Making (Capacity)(Amendment) Act 2022.) In this respect, s. 56(3) goes further than s. 56(1) in that it not only validates all pre-existing

wardship orders, but on one view it keeps the 1871 Act alive in respect of all existing wardship cases (including the present one). As Hyland J. remarked (at paragraph 74), if this interpretation were correct, it would mean that the 1871 Act was kept alive until all wards had been discharged so that such cases were now to continue to be dealt with under the 1871 Act until this occurred rather by reference to than the modern practice and philosophy which underpins the 2015 Act.

62. While I agree that this is a possible interpretation of s. 56(3), nevertheless given the underlying purpose of the 2015 Act it seems to me that this is an unlikely one. As Herbert J. acknowledged in *McCallig v. An Bord Pleanála (No.1)* [2013] IEHC 60, the word "proceedings" is not a term of art or one which has a fixed and defined meaning. The word must accordingly take its meaning from the statutory context and purpose: see the judgment of Murray J. in *Heather Hill v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 and in *A, B and C v. Minister for Foreign Affairs* [2023] IESC 10, [2023] 1 ILRM 335. Given that, as we have seen, the entire thrust of the 2015 Act is to favour the phasing out of wardship, this points to a slightly narrower construction of the word "proceedings". After all, the wording is not simply to "proceedings" simpliciter, but rather to "proceedings in being". These additional words ("in being") tend to connote proceedings which are active and live immediately before the commencement date.

63. In this particular context, therefore, the better construction of s. 56(3) would appear to be that it does not refer simply to pre-existing wardship cases simpliciter, but rather refers either to applications to have a person made a ward or, in the case of existing wards, applications in the wardship proceedings which applications originated *prior* to the commencement date of 23rd April 2023 and which were current as of that date.

64. On this interpretation, therefore, it is immaterial that Ms. KK had been made a ward in July 2021 or that there were other applications for her detention made in the course of that wardship prior to April 2023. The significance of the date rather rests with the fact that this particular application for a detention order was made by notice of motion of 25th of May 2023 some weeks after the 2015 Act had been commenced: these are the "proceedings in being" so far as s. 56(3) is concerned. It follows, therefore, that these are "new" proceedings so far as s. 56(3) is concerned, so that the 1871 Act does not apply to them.

65. In expressing this view, I have not overlooked the fact that s. 55(2) of the 2015 Act provides: "Pending a declaration under s. 55(1), the jurisdiction of the wardship court as set out in sections 9 and 22(2) [of the 1961 Act] shall continue to apply." To this one must add that s. 56(4) provides that: "Subsections (1) and (2) shall apply to the proceedings referred to in subsection (3), or to an order made in such proceedings, as they apply to an order made before the coming into operation of this Part."

66. As Hyland J. noted (at paragraph 71 of *KK (No.1))*, the legislative expectation was that this s. 55(1) process would be completed in respect of all wards within the three-year transitional process. As I have already observed, it is clear from s. 55(1) that the Oireachtas intended that the High Court would make the appropriate declaration as to capacity and the ward would then exit from wardship. As Hyland J. observed, the inevitable consequence of this would be that all existing detention orders made in such wardship would also lapse, albeit that the 2015 Act does not quite say so in terms.

67. Counsel for the HSE and counsel for the CFA both urged that s. 56(2) enabled the High Court to utilise the s. 9 jurisdiction to detain Ms. KK pending the making of any such declaration. I do not, however, think that s. 56(2) can be read in isolation in this fashion as if it were an entirely free-standing provision. The scope of this sub-section is

necessarily circumscribed by the operation of s. 56(4) which confines its operation to those "proceedings in being" which are referred to in s. 56(3). Since, for the reasons I just given, I am of the view that the detention application brought by way of notice of motion dated 25th May 2023 did not constitute "proceedings in being" for the purposes of s. 56(3), it follows that the saver in respect of the s. 9(1) jurisdiction provided for in s. 56(2) does not apply to the present case.

68. In any event, as Hyland J. observed (at paragraph 90 of her judgment in *Re KK (No. 1)*), any other conclusion would lead to anomalous results in respect of the scope and review of detention orders provided by Part 10 of the 2015 Act. Since these provisions are of vital importance, it is important to turn to them.

Part X - The detention provisions of the 2015 Act

69. Part 10 of the 2015 Act is headed "Detention Matters". In summary, Part 10 seeks to apply the provisions of the Mental Health Act 2001 ("the 2001 Act") to those incapacitated persons suffering from a mental disorder who are the subject of a court application for their detention. These are important – indeed, constitutionally vital – safeguards in respect of such persons: see, e.g., the decision of this Court in *AB v. Clinical Director of St. Loman's Hospital* [2018] IECA 123, [2018] 3 IR 710. These provisions ensure that there is an independent psychiatric evaluation of each patient; that any detention order is quickly reviewed by the Mental Health Tribunal and that there is regular review of such orders by that Tribunal. All of this is necessary to ensure that the constitutional right to liberty of any person under Article 40.4.1º is appropriately safeguarded.

70. Section 106 of the 2015 Act thus provides:

> "Where an issue arises in the course of an application to the court or the High Court under this Act, as to whether a person who lacks capacity is suffering

from a mental disorder, the procedures provided for under the Act of 2001 shall be followed as respects any proposal to detain that person."

71. Section 107 provides for the review of all pre-existing detention orders in respect of wards who are currently detained pursuant to a court order in an approved centre (i.e., a psychiatric hospital or clinic for the purposes of s. 2 of the 2001 Act). Section 108 makes similar provision where the ward is detained in a non-approved centre. I stress that ss. 107 and 108 apply only to pre-existing detention orders. No provision is made for the review of any detention orders made in respect of wards after the commencement of the 2015 Act.

72. It is also critical to stress – as Hyland J. did (at paragraph 92 of her judgment in *Re KK (No.1)* – that the standard of review is quite different under Part 10 detention. Here the question is whether the person in question is suffering from a mental disorder for the purposes of s. 3 of the 2001 Act. The old wardship test was whether the ward lacked capacity and whether it was in their best interests to be detained. The latter category of cases is obviously broader than that envisaged by Part 10 of the 2015 Act. Put simply, the test now is whether the relevant person is suffering from a mental disorder. There can be no detention order made under Part 10 unless this test is satisfied by appropriate psychiatric evidence, even if the relevant person otherwise satisfied the old s. 9 detention criteria.

73. To my mind, the obvious inference to be drawn from all of these provisions is that the Oireachtas never contemplated that the courts would have any jurisdiction to make a fresh detention order in respect of a ward in proceedings (such as the present one) where the application post-dated the commencement of the 2015 Act. Sections 107 and 108 of the 2015 Act envisage that the courts can merely review a pre-existing detention order made under the s. 9 jurisdiction prior to the commencement date of the 2015 Act.

74. A further inference to be drawn from the operation of these provisions is that the power to detain now reposes (tacitly, at least) in s. 106 of the 2015 Act and that where the court proposes to detain a person in fresh proceedings commenced after 23rd April 2023, the procedures provided for in respect of the 2001 Act are incorporated by reference. This is a further reason why the s. 9 jurisdiction cannot be taken to have survived in respect of a detention case of this kind, because the Oireachtas presumably never contemplated that a relevant person could be detained without enjoying the protections provided for by the 2001 Act in fresh proceedings which post-dated the commencement of the 2015 Act.

75. I do not overlook the fact that – as the HSE and CFA forcefully argued – it might be possible to apply s. 9 in a constitutionally acceptable fashion so far as the detention power is concerned by ensuring that there would be independent oversight of the detention in the manner contemplated by this Court in *AB v. Clinical Director of St. Loman's Hospital*. The fact remains, however, that the effect of s. 283 of the 1945 Act (as applied by s. 1(2) of the 2001 Act) is that none of the safeguards provided for in the 2001 Act apply to the exercise of the s. 9 detention jurisdiction by the High Court.

76. For completeness, I should also draw attention to the fact that s. 4(5) of the 2015 Act provides that nothing in the 2015 Act is intended to affect the High Court's inherent jurisdiction "to make orders for the care, treatment or detention of persons who lack capacity." It is unnecessary for present purposes to consider the extent to which the exercise of that jurisdiction should (or must) be attended by appropriate safeguards. It is sufficient to say that the Oireachtas manifestly understood that, post-commencement, the exercise of the detention powers provided in s. 106 of the 2015 Act would be attended by the 2001 Act safeguards. It never contemplated – and did not so provide –

that the s. 9 jurisdiction could be exercised in respect of new applications to detain a ward commenced after 23rd April 2023.

Part XI – The incongruence of applying the s. 9 detention powers in respect of fresh detention applications which post-date the commencement of the 2015 Act.

77. If one endeavours to sum up this complex inter-play of different statutory provisions one may say that the s. 9 jurisdiction cannot congruently be operated in respect of a fresh application to detain a ward after the commencement date of the 2015 Act. While I agree that it is unusual for a court to hold that there has been an implied repeal or profound want of congruity between the old legislation and the new – and this is one of the reasons why this appeal presents such unusual and difficult questions of interpretation – the Supreme Court's decision in *McLaughlin* illustrates that this apporach is not without precedent.

78. There is in addition an exceptional jurisdiction to treat a statute as inoperative where it is clear that it is simply unworkable. An example here is supplied by the Supreme Court's decision in *Gilsenan v. Foundary Homes Investment Ltd*. [1980] ILRM 273. Here the effect of the s. 17 of the Landlord and Tenant (Ground Rents) Act 1967 was that the County Registrar was required to assess the value of the fee simple to be acquired by reference to the yearly rent for the next 99 years. The Court held that this statutory obligation imposed an impossible and unworkable task. The "vicissitudes of the marketplace and the uncertainties of the future" combined to make ([1980] ILRM 273 at 278) this exercise "obsolete, unquantifiable and no more than a hypothetical speculation": [1980] ILRM 272 at 278 All of this meant that s. 17 of the 1967 Act could not be operated.

79. While just as with implied repeal, a conclusion as to want of congruence or operability of legislation is not a conclusion that any court would lightly reach. I nonetheless

believe that it is one which is inevitable in the circumstances. This want of congruity or operability of the s. 9 jurisdiction in the context of a fresh application to detain a ward in proceedings (as defined by s. 56(3)) which commenced after 23rd April 2023 is, however, established by a range of factors which I have just endeavoured to set out. In this summary it is perhaps sufficient to point, first, to the radically different nature of assisted decision-making as provided for by s. 8 of the 2015 Act as compared with the "all or nothing" binary structure of wardship and, second, to the nature of the detention provisions provided by Part 10 of the 2015 Act and the specific review mechanisms for which it provides.

80. The latter provisions incorporate by reference the protections of the 2001 Act and, furthermore, ground the basis for detention on the concept of mental disorder under s. 3 of the 2001 Act. This is quite different from the s. 9 jurisdiction which is based on lack of capacity and the best interests of the ward. One could also point to the fact that ss. 107 and 108 do not make any provision for a review of s. 9 jurisdiction detention order made in proceedings which commenced after the April 2023 commencement date.

81. All of this means that the continued operation of the s. 9 jurisdiction in detention cases commenced after April 2023 would lead to manifest and indefensible anomalies. It is accordinglyperhaps sufficient to say that by reference to the principles of congruity and operability articulated by the Supreme Court in cases such as *Gilsensan*, *McLaughlin* and *Grey* that the s. 9 detention jurisdiction can no longer be operated in such circumstances, even if that jurisdiction was not, in terms, expressly repealed by the 2015 Act.

Part XII - Overall Conclusions

82. In summary, therefore, I am of the view that Hyland J. was correct in the conclusions which she reached that the High Court no longer enjoyed a detention power under the

s. 9 jurisdiction in respect of adult wards where (as here) the proceedings (as so defined by s. 56) were commenced after the commencement date of the 2015 Act on 23rd April 2023. It follows, therefore, that I would dismiss the appeal. Since this judgment is being delivered electronically, I am authorised to say that Pilkington and O'Moore JJ. agree with its terms and with the order proposed.

83. So far as costs are concerned, I note that the costs of all four parties are in effect being discharged from the public purse. Quite apart from the fact that this case raises difficult and important points of statutory interpretation – a factor which in itself would otherwise have an important bearing in respect of any potential costs order – the fact that all the parties are publicly funded is, I think, a decisive consideration in the circumstances regarding any cost order. My provisional view is that in the interests of overall efficiency and costs effectiveness the most appropriate order is to make no order as to costs. Should any of the parties wish to dispute this they are required to contact the Registrar of the Court of Appeal within fourteen days of the delivery of this judgment and directions will be given regarding the filing of further submissions.