THE HIGH COURT

WARDS OF COURT

[2023] IEHC 306

Record No: WOC10692

IN THE MATTER OF KK

JUDGMENT of Ms. Justice Niamh Hyland delivered on 7 June 2023

Summary

1. This case concerns a young woman who was made a Ward of Court on 27 July 2020. The Child and Family Agency ("CFA") are seeking detention orders that would ensure she is returned to her placement by the Gardaí if she absconds or fails to return from leave. This application raises the net but important question as to whether a detention Order can be made for an existing Ward of Court post the commencement of the Assisted Decision-Making (Capacity) Act 2015 (the "ADMCA") and, if so, the appropriate legal basis for same. Detention of a person impacts very significantly on the right to liberty, even where the detention is for the purpose of protecting the constitutional rights of the person, as in the present case. The fact that here the power is conditional i.e., it only comes into operation if certain events take place, for example if KK absconds or does not return from permitted leave, does not alter the fact that it prevents KK from exercising her power to reside where she wishes. I should emphasise that this decision is only about the jurisdiction to make detention orders under s.9 and does not concern orders about matters other than detention.
2. The CFA and the HSE suggest I can make a detention order under s.56(2) of the ADMCA, a transitional provision that continues the jurisdiction of the Wardship Court under s.9 of the Courts (Supplemental Provisions) Act 1961. The General Solicitor disagrees,

suggesting any detention Order can only be made on the basis of the inherent jurisdiction of the High Court. I have come to the conclusion that the acknowledged power of the Wardship Court to make new detention orders under s.9 has not survived the commencement of the ADMCA but that such an Order can, in principle, be made under the inherent jurisdiction of the High Court. Pending further submissions, I have left over the question whether such a detention Order should be made in the particular circumstances of this case.

3. My reasons are, in summary, as follows. The jurisdiction vested by s.9 must be read in the light of the ADMCA, in particular Part 10 of that Act. Sections 107 and 108 of Part 10 introduce important new rules in relation to the detention of Wards of Court, *inter alia* by requiring a review of all wards detained by Order of a Wardship Court as soon as possible from the commencement of the ADMCA and by providing for the detention of wards with mental disorders under certain conditions and the discharge from detention of wards that no longer have a mental disorder. They indicate a clear legislative intention on the part of the Oireachtas to significantly alter the regime pursuant to which Wards of Court are detained. The jurisdiction vested under s.9 must be treated as having been altered by Part 10, given the changes effected by that Part to existing detention orders. (Part 10 operates only as long as persons are detained pursuant to an Order of a Wardship Court. Once a person is discharged from wardship, as all wards except certain wards under 18 must be within 3 years of the commencement of the ADMCA, they will no longer be subject to the jurisdiction of the Wardship Court and can no longer be detained by that Court).

4. The difficulty presented by this application is that Sections 107 and 108 only apply to detention orders that were in existence on the date the ADMCA was commenced i.e. 26 April 2023. Therefore, were I to make the detention Order sought, KK could not have her detention reviewed under the new regime. There is no suggestion in the ADMCA that the

legislature intended to treat wards the subject of detention orders made after the commencement of the Act less favourably than wards who were the subject of detention orders when the Act was commenced by excluding them from review under the new detention regime.

5. In addition, s.9(1) does not itself explicitly provide for the making of detention orders in relation to Wards of Court, but only vests a jurisdiction in lunacy previously exercised by the Lord Chancellor and the Lord Chief Justice of Ireland and the High Court without specifying the nature of that jurisdiction. Equally, s.56(2) - the transitional provision that continues the s.9 jurisdiction pending the discharge of a person from wardship altogether – does not describe the jurisdiction of the Wardship Court under s.9. Nothing in s.56(2) precludes the possibility of the s.9 jurisdiction being affected by the ADMCA.

6. Moreover, the s.9(1) jurisdiction now derives from Article 40.3.2 of the Constitution i.e. where action is necessary to defend and vindicate the personal rights of incapacitated citizens. That same constitutional imperative can be achieved through the inherent jurisdiction of the High Court to make orders in respect of persons lacking capacity in order to vindicate their personal rights, including detention orders where necessary. The continuation of this jurisdiction is expressly confirmed in s.4(5) of the ADMCA.

7. In those circumstances, the reference in s.56(2) to s.9 means s.9 as read in the light of the ADMCA, and as so read, s.9 no longer includes a power to make detention orders in respect of existing wards post the commencement of the Act.

Facts and Background

8. KK is a Ward of Court 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 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.

9. She has been in her current placement 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. Following this, in December 2021, a man KK met online attended at her placement and she was put at risk, the man displayed aggressive behaviour and staff had to resort to calling the Gardaí. On 27 December 2021 she was detained in an approved centre for nine days despite her being a Ward of Court.

10. 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 detailing further medical evidence from Dr. M of 15 August 2022. The matter returned before the Court on 7 February 2023 and three weeks were given to gather evidence to ground a further extension of the detention orders. On 28 February 2023 no extension of those orders was made in the absence of such evidence.

11. On 21 April, Dr. M recommended that detention orders and those restricting access to smartphones and social media be put in place. By the time the matter came back before the Court again, on 9 May 2023, the ADMCA had been commenced.

Nature of Application

12. A fresh application for a detention Order was made by way of Notice of Motion of 22 May 2023 brought by the CFA and was heard on 25 May 2023. The reliefs sought were, *inter alia*, in the following terms:

"2. An Order pursuant to section 9 of the Courts (Supplemental Provisions) Act 1961 and/or pursuant to section 56(3) of the Assisted Decision Making (Capacity) Act 2015 and/or pursuant to the inherent jurisdiction of the High Court and/or pursuant to common law directing and/or permitting An Garda Síochána to search for, arrest, without warrant, and detain in their custody the Ward for a reasonable period of time and deliver and/or return as soon as practicable the Ward to [her placement] in the event that she is at large and/or has absconded and/or has failed to return from leave approved by the manager of [her placement] and/or any other responsible servants or agents of the Child and Family Agency and/or the Health Service Executive.

…

5. An Order pursuant to section 9 of the Courts (Supplemental Provisions) Act 1961 and/or pursuant to section 56(3) of the Assisted Decision-Making (Capacity) Act 2015 and/or pursuant to the inherent jurisdiction of the High Court and/or pursuant to common law directing that, if deemed appropriate in the Ward's best interests by a Consultant Psychiatrist, the Ward 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 the Ward and for such period of time as is deemed by the Ward's treating Consultant Psychiatrist at the said Approved Centre to be appropriate and necessary"

…

7. An Order pursuant to section 9 of the Courts (Supplemental Provisions) Act 1961 and/or pursuant to section 56(3) of the Assisted Decision-Making

(Capacity) Act 2015 and/or pursuant to the inherent jurisdiction of the High Court and/or pursuant to common law directing that, if deemed clinically appropriate in the Ward's best interests by a registered medical practitioner, the Ward may be admitted to and detained at an Acute Hospital for the purposes of providing care and therapeutic services to the Ward there for such period of time as is deemed by the Ward's treating Consultant at the said Acute Hospital to be appropriate and necessary."

13. It may be seen from these reliefs that there are three alternative bases put forward upon which KK could potentially be detained i.e. under the wardship regime (being the jurisdiction under s.9 and/or s.56(2) of the ADMCA), under the inherent jurisdiction of the Court (the existence of which in this context is confirmed by s.4(5) of the ADMCA) and/or pursuant to common law. No arguments were advanced in relation to the common law, and I will not further consider it in this judgment. Significantly, no application was made for a detention Order under the terms of the ADMCA, as that Act only provides for the making of detention orders in very specific circumstances i.e., where a person is a Ward of Court, was the subject of detention orders prior to the commencement of the ADMCA, and is suffering from a mental disorder. Only the continuation of an existing detention Order, as opposed to the making of a new Order, is provided for under the ADMCA.
14. The relief sought therefore raises the important question as to whether a new detention Order can be made for an existing Ward of Court post the commencement of the ADMCA and, if so, the appropriate legal basis for same. In order to decide that question, it is necessary to consider four different Acts, being the Lunacy Regulation (Ireland) Act 1871 (the "1871 Act"), the Courts (Supplemental Provisions) Act 1961 (the "1961 Act"), the Mental Health Act 2001 (the "2001 Act") and the ADMCA, and their relationship and

interaction with each other, as well as the constitutional principles underlying the jurisdiction to make detention orders in respect of persons lacking capacity.

15. Prior to the commencement of the ADMCA, it is accepted by all parties that detention orders made by the Wardship Court, were made pursuant to the jurisdiction enjoyed by that Court under s.9 of the 1961 Act. However, because of the magnitude of the changes introduced by the ADMCA, discussed below, differing approaches have been taken by the parties as to whether the Court still enjoys a jurisdiction to make a detention Order in respect of KK under s.9, or any other jurisdictional basis. The CFA and HSE argue that it is still permissible to make a detention Order under s.9, while accepting that there is a power to make one under the inherent jurisdiction of the Court if the s.9 jurisdiction is no longer available. The General Solicitor, on the other hand, argues that there is no longer a power to make a detention Order for KK under s.9, but that such an Order may be made under the inherent jurisdiction of the Court.

16. Section 9(1) is an unusual statutory provision, in that it does not specify the nature of the wardship jurisdiction to be exercised by the Wardship Court. Rather it vests in the High Court the jurisdiction in lunacy and minor matters that was formerly exercised by the Lord Chancellor of Ireland, was at the passing of the Courts Act 1924 exercised by the Lord Chief Justice of Ireland and was by virtue of the 1924 Act and the 1936 Act vested immediately before the operative date in the existing High Court. Section 56(2) of the ADMCA is a transitional provision, providing that the jurisdiction of the wardship court as set out in sections 9 and 22(2) of the Courts (Supplemental Provisions) Act 1961 shall continue to apply pending the discharge of a ward. Section 22(2) of the Courts Act refers to the jurisdiction of the Circuit Court in wardship and is not relevant to this application.

17. The impact of the ADMCA cannot be underestimated. It has radically changed the landscape in relation to Wards of Court. It has put in place an entirely new legislative

structure for persons lacking capacity in relation to how decisions affecting them are to be made, and in so doing, it necessarily has had to address the existing system of wardship. It has done so in a number of ways. Perhaps most importantly, it has provided that all Wards of Court save minor wards are to be discharged from wardship within 3 years of the date of commencement of the Act. A Ward of Court is defined under s.53 as a relevant person in the wardship of a Wardship Court. A "Wardship Court" is defined by the same section as the High Court or Circuit Court exercising its jurisdiction under Part 6.

18. Part 10 of the ADMCA introduces important new rules in relation to the detention of Wards of Court, *inter alia* by requiring a review of all wards detained by Order of a Wardship Court as soon as possible from the commencement of the ADMCA and by providing for the detention of wards with mental disorders on certain conditions and the discharge from detention of wards that no longer have a mental disorder. It is that Part in particular that requires me to consider whether the existing jurisdiction to make detention orders has survived the enactment of the ADMCA.

Detention Order sought

19. It was argued by the HSE that this was not strictly speaking a detention Order, given that it did not seek to detain KK on an ongoing basis. The nature of the detention Order in this case is undoubtedly significantly less restrictive than the types of Order sometimes made in other wardship cases. For example, a detention Order might in certain instances require the detention of a person in an institution, for example the Central Mental Hospital, without the possibility of any leave from the institution save with the permission of the director of the centre. Detention orders are required to be reviewed at least every six months but if renewed on review, may be the basis for a person being deprived of their freedom for many years. There are wards that have been detained for years under such wardship detention Orders.

20. Nonetheless, despite the relatively liberal terms in which the Order is couched and the fact that it is a "fall back" type of Order, I am compelled to agree with the submission of counsel for the General Solicitor that this is in substance a detention Order and must be treated as such despite the fact that it is in less restrictive terms than other detention orders. O'Malley J. in *AC v Cork University Hospital* [2020] 2 IR 38 noted that in determining whether a person has been unlawfully deprived of liberty, in breach of the constitutional guarantee, the Court must start with the factual circumstances and ask whether the individual has in fact been deprived of liberty (paragraph 394).

21. Here I am satisfied that the detention Order sought, if granted, would deprive KK of her liberty. The proposition that the Order sought is not really a detention Order may be tested by considering what would happen for example, if KK absconded, or failed to return to her placement after being on leave. She 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. That cannot amount to anything but a restriction on the liberty of KK and I will approach the application on that basis.

Arguments of the parties

22. The gist of the **CFA** submissions is that the s.9 jurisdiction has not been affected by the enactment and commencement of the ADMCA. Much emphasis was placed on the fact that s.9 had not been repealed, unlike the 1871 Act. The point was made that the saver clause, particularly s.56(2), had to be considered in that context. It was argued that the purpose of s.56(2) was to confirm that existing s.9 orders remained undisturbed and valid until the s.54 and s.55 review and discharge process was complete. In relation to Part 10 of the ADMCA, it was emphasised that it did not contain any express power to make

detention orders and that therefore any new orders would have to be made either under s.9 of the 1961 Act or under the inherent jurisdiction. Consideration was given to whether KK meets the criteria in s.108(4) of the ADMCA and whether she is a person who is no longer suffering from a mental disorder. It is noted that she was at one point briefly suffering from a mental disorder when she was admitted to a psychiatric unit in December 2021, but that this is not the basis upon which the detention orders have been previously obtained or are being sought now. It is pointed out that the s.9 jurisdiction is not tied to a finding of a particular mental disorder. The CFA argued that even if s.108(4) did apply, there is nothing to prevent the making of a fresh detention Order at the point of discharge from detention under s.108(4), since the s.9 jurisdiction continues to apply and, based on the decision in *In Re D* [1987] IR 449, is at least to some extent constitutionally mandated where the protection of the person requires it.

23. In those circumstances, it is pointed out that s.108 and Part 10 do not restrict the Court in making a fresh detention Order for KK under s.9 of the 1961 Act if the Court is satisfied on the medical evidence that it is required. The CFA went on to address the position when KK is discharged from wardship and points out that if she continues to require detention orders, they would require a readmission to wardship and any such readmission would fall outside of s.54 and so no further review and discharge would be automatically required.
24. In summary, it is argued that KK continues to require protective orders of the Court under s.9 and in those circumstances, given the jurisdiction's relationship to the vindication of constitutional rights there is no reason why those orders cannot be made.
25. **The HSE** emphasises that it is only a notice party and where the CFA is currently responsible for KK's placement and KK is represented by her Committee, the HSE makes submissions simply to assist the Court. Those submissions were of considerable assistance, particularly the description of the origin and operation of the s.9 jurisdiction as it existed

prior to the commencement of the ADMCA. The HSE argues that given that s.9 is not repealed, its jurisdiction applies to those already subject to a wardship process without any qualification pending the conclusion of the statutory process i.e., the declaration under s.55 of the ADMCA. It expresses the opinion that while the construction of sections 106, 107 and 108 of the ADMCA is not straightforward, they neither in express terms nor by necessary implication require that the scope of the jurisdiction vested by s.9 of the 1961 Act be treated as materially amended and restricted such that, upon the commencement of those sections, s.9 no longer includes a power to make detention orders on a protective basis.

26. In the alternative it argues that having regard both to the express terms of s.4(5) of the ADMCA and to existing case law, including the jurisprudence of the Supreme Court, if a court deems that powers available to it under the statutory regime of the s.9 jurisdiction were not adequate, in the specific facts of a given case, to vindicate the fundamental constitutional rights of a person, then an application invoking the inherent jurisdiction of the Court may be made, including for the purposes of making an Order detaining the person.

27. In relation to Part 10 of the ADMCA, emphasis is placed on the deliberate importation into that Part of definitions from the Mental Health Act 2001 and it is noted that the statutory power to continue to detain a person and to discharge a person are framed expressly and exclusively by reference to mental disorder as defined in the 2001 Act and not by reference to decision-making capacity as addressed in Part 1 and 2 of the ADMCA. It is further noted that various subsections of sections 107 and 108 closely mirror the equivalent provisions of the Mental Health Act 2001. Having analysed s.106, it notes that while Part 10 confers a statutory power to continue existing detention orders in certain circumstances, it does not itself confer any power on a court to make a new detention Order in respect of a person

who was a Ward of Court immediately before the commencement of the Act and regardless of whether the person is subsequently found to have a mental disorder. It notes that the omission of the provision conferring such a power does not equate to and does not necessarily imply an existing power under the s.9 jurisdiction to make such an Order. It is submitted that the intended purpose of sections 107 and 108 is to apply to persons with a mental disorder a regime of automatic and requested reviews that more closely tracks the regime which would otherwise apply to those persons if they were not subject to the s.9 jurisdiction and were amenable to involuntary detention under the 2001 Act in respect of their mental disorder. It is acknowledged that there may appear to be something incongruous about a Wardship Court being statutorily mandated to discharge an existing detention Order if satisfied that a person is no longer suffering from a mental disorder while remaining free to make a fresh detention Order under the s.9 jurisdiction. However, any substantive incongruity is rejected on the basis that sections 106, 107, and 108 have on their face no application to the question of the detention of a ward on grounds other than mental disorder as defined in the 2001 Act.

28. It is argued that to construe Part 10 as materially amending the s.9 jurisdiction in the absence of any express wording and notwithstanding the express wording of s.56(2) to the contrary, runs counter to recognised principles of statutory interpretation. The HSE relies upon the case of *In re L (Vulnerable Adults: Court's Jurisdiction) (No 2)* [2013] Fam 1 where the U.K. Court of Appeal rejected an ouster of inherent jurisdiction, quoting *Shiloh Spinners Ltd v Harding* [1973] AC 691:

> *"In my opinion where the courts have established a general principle of law or equity, and the legislature steps in with legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law. To suppose otherwise*

involves the conclusion that an existing jurisdiction has been cut down by implication, by an enactment moreover which is positive in character…rather than negative."

29. In relation to the inherent jurisdiction of the Court, it notes that having regard both to the express terms of s.4(5) of the ADMCA and to existing case law, the Court would possess an inherent jurisdiction to make the Order of the type sought by the CFA. It identifies the core principles applicable to the inherent jurisdiction. It concludes that there is nothing in the ADMCA to suggest any intention to prohibit recourse by the Court to its inherent jurisdiction in the event that the Court deemed the powers available to it under the statutory regime of the s.9 jurisdiction, the ADMCA, the Mental Health 2001 Act or any other applicable regime were not adequate to vindicate the fundamental constitutional rights at issue.

30. **The General Solicitor** takes a different view to that taken by the CFA and the HSE. She emphasises the views of KK in respect of the involvement of the Court in her life as gleaned by Ms. Seery, an independent social worker who has provided reports outlining KK's views and wishes regarding her placement and the continuing role of the Court in her life. KK's view is that she does not wish to have any Court involvement and wishes to be free from the Court. Ms. Seery outlined her own views to the effect that KK is a very vulnerable young woman who requires the protection of the Court. She notes there is no evidence before the Court as to whether KK suffers from a mental disorder within the meaning of s.3 of the 2001 Act.

31. The General Solicitor emphasises the correct approach to statutory interpretation as set out in the recent Supreme Court decision in *A, B and C v Minister for Foreign Affairs and Trade* [2023] IESC 10. She notes that central to the fundamental change brought about by the ADMCA is the protection of the autonomy and right to self-determination of all

persons and those rights may only be restricted where necessary. She identifies this is the philosophy underpinning the Act. She argues that s.56(4) requires that the exercise of the s.9 jurisdiction as to whether to grant an Order for detention after 26 April must be informed and governed by what must occur where such an Order is made before 26 April 2023 as set out in sections 107 and 108 of the Act.

32. The General Solicitor argues that sections 107/108 have implications for how the jurisdiction grounded on s.9 is to be exercised. The sections are designed to ensure that wards and persons who are not wards should be subject to similar and equivalent arrangements in regard to detention after the ADMCA comes into force and that this makes sense since after a ward is discharged, a ward will be in the same position in regard to the possibility of detention as a person who is not a ward. The procedural protections afforded to wards replicate those to which persons who are not wards are entitled under the Mental Health Act. Sections 107 and 108 seek to ensure that a ward is in no worse a position in relation to detention pending their discharge than that which they will be in after such determination. She notes a review of detention under those sections must take place as soon as possible while the determination of a s.55 application is not subject to such a requirement but rather has a long stop of 3 years.

33. The General Solicitor notes that having regard to s.4(5), it is clear that a ward is subject to the possibility of detention pursuant to the inherent jurisdiction of the High Court and in this respect is in no better nor worse position than a person not a ward. She points out that a ward who is the subject of an existing detention Order on 26 April 2023 and can, upon review under sections 107 and 108, only be retained in detention if he or she is found to be suffering from a mental disorder following an adjudicative process which requires the views of an independent psychiatrist to be obtained and considered in reaching such a finding. In so submitting, I note she is assuming that s.108(4) requires that wards currently

detained who are not suffering from a mental disorder require to be discharged on review under s.108(1). As I note below, the meaning of s.108(4) has not yet been pronounced upon by a court. She argues that the s.9 power should be read down in a manner consistent with the new statutory code contained in the ADMCA and should not operate in a manner which would undermine or frustrate the ADMCA's purpose. Section 56(2), read in the context of the objective and scheme of the Act, requires that a ward only be made the subject of a new detention Order after 26 April 2023 if he or she is found to be suffering from a mental disorder following an adjudicative process which requires the views of an independent psychiatrist to be obtained and considered in reaching such a finding.

Section 9 of the Courts (Supplemental Provisions) Act 1961

34. In order to decide whether a jurisdiction still exists permitting a detention Order to be made in respect of KK, it is necessary to consider first the nature of the jurisdiction in place prior to the commencement of the ADMCA. Section 9 of the 1961 Act provides in relevant part as follows:

> *"9.—(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 exercisable 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 that 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."

35. The wardship jurisdiction as identified in s.9 has been the subject of significant attention from the Supreme Court, particularly in the last number of years. Several principles drawn from the caselaw have been highlighted by the parties. The first is that the origin of the wardship jurisdiction predates the foundation of the State as identified in the judgments of Baker and McKechnie JJ. in *In the Matter of JJ* [2021] IESC 1 where they comment on

the development of the jurisdiction formerly exercised by the Lord Chancellor and its breadth.

36. McKechnie J. in *JJ* identified the origin as being a form of crown prerogative and that same is recorded by Abraham in "*The Law and Practice of Lunacy in Ireland*" (1886). However, following the Supreme Court's determination, *inter alia*, in *Byrne v Ireland* [1972] IR 241, no prerogative has survived the establishment of the State. Therefore, the Supreme Court have identified two interlinked sources of the modern exercise of the wardship jurisdiction. The first is the express statutory power identified in s.9 of the 1961 Act set out in part already in this judgment. The second, is that this power has been identified by the Supreme Court as a statutory manifestation of the constitutional imperative to protect and give effect to the personal rights of those citizens lacking capacity. In *AC*, O'Malley J. held, drawing on Finlay C.J. in *Re D*, that s.9 did not simply transfer the jurisdiction but rather "*it directly vested in the High Court a jurisdiction described and identified by reference to jurisdictions previously exercised or vested*".

37. McMenamin J., in *Health Service Executive v A.M.* [2019] 2 IR 115, similarly discussing the decision in *Re D*, identified that the court had held that the warship jurisdiction was not one conferred or delimited by the 1871 Act. Rather, it was a wider, general protective jurisdiction over persons of unsound mind vested by the 1961 Act, derived from the jurisdiction previously vested in the pre-independence courts. Further, McMenamin J. held that the gravamen of Finlay C.J.'s analysis in *Re D* was that the jurisdiction was previously non-statutory, "*based on pre-independence jurisprudence, but subsequently supported by the provisions of Article 40.3.2 of the Constitution*".

38. The constitutional underpinning of the jurisdiction was also elucidated by Hamilton C.J. in *Re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79 where he noted that the jurisdiction of the Court over wards is "*subject only to the provisions of the*

Constitution: there is no statute which in the slightest degree lessens the court's duty or frees it from the responsibility of exercising that parental care.".

39. In *A.M.*, McMenamin J., following his analysis of the relevant Supreme Court caselaw concluded that *"[t]here is no doubt as to the constitutional basis of the exercise of the power*". Similarly in *JJ*, Baker J. concluded her analysis of the jurisprudence by noting she supported the interpretation established in *Re D*, "*that this power derives from Article 40.3.2 of the Constitution*".

40. It is now well established that the wardship jurisdiction is not contingent upon the continuation of the 1871 Act, particularly having regard to the Supreme Court decision in *Re D* where it was held that it was entirely open to the President of the High Court to take the respondent in that case into wardship regardless of their having no property and thus falling outside the scope of the 1871 Act. This was reiterated in *AC* where O'Malley J., discussing *Re D*, identifies that:

> *The 1871 Act is however merely a regulatory one, and the tenor of Finlay C.J.'s judgment was to the effect that the jurisdiction of the former Lord Chancellors of Ireland was much broader. It followed that the jurisdiction now exercisable by the courts is broader than, and does not depend upon, the applicability of the 1871 Act."*

She further identifies that the current basis for the exercise of the jurisdiction is s.9.

41. Insofar as detention orders are concerned, in *A.M.* McMenamin J. confirmed that, in light *inter alia* of s.283 of the Mental Treatment Act 1945's reference to the power of the Wardship Court to make an Order for the "commitment" of a ward, the wardship jurisdiction includes detention orders.

42. The jurisdiction under s.9 to detain a ward absent a consideration of the impact of the ADMCA is well established. However, as identified above, its continued existence post

26 April 2023 has been challenged by the General Solicitor in this application, because of the terms of the Act under Part 10, in particular, sections 107 and 108. To unpick that argument, it is necessary to identify in some detail the provisions of Part 10 and to seek to understand what was intended by that Part, read in the context of the Act as a whole. A similar exercise is required in respect of the transitional/saver provisions contained at s.56 of the Act.

Part 10 of the ADMCA

43. Essentially, what Part 10 does is to introduce a new transitional regime in relation to Wards of Court who were detained at the time the new Act was commenced on 26 April 2023 and continued to be detained thereafter. The reason I describe it as a transitional regime is that it operates only as long as persons are detained pursuant to an Order of a Wardship Court. Once a person is discharged from wardship (as all wards save those who reach 18 after a specified date are required to be within 3 years of 26 April 2023 under s.54(2)) they will no longer be subject to the jurisdiction of the Wardship Court and therefore can no longer be detained by a Wardship Court. Therefore, assuming no new wards are created under the s.9 jurisdiction, Part 10 will eventually become redundant.
44. Part 10 has three different substantive components. The first (s.105) requires the Mental Health Commission, a body established under the Mental Health Act 2001, to establish a panel of suitable consultant psychiatrists to carry out independent medical examinations. The second component (s.106) regulates the detention of persons who may have a mental disorder within the meaning of the Mental Health Act 2001 post 26 April 2023. The third component (s. 107/108) establishes a regime for reviewing, detaining, and discharging detained wards.
45. Dealing with that third component first, when considering s.107/108, it is necessary to understand that many of their provisions are in substance very similar to those under the

Mental Health Act 2001. Section 107 applies to detention in approved centres i.e. those centres that have been designated as approved centres under s.2 of the 2001 Act, and s.108 applies to centres not so designated, described as non-approved centres. KK resides in a non-approved centre. For that reason, when I am quoting from Part 10, I will quote from s.108 only but there is no substantive difference between it and s.107.

46. The Mental Health Act 2001 only applies to persons with a mental disorder. A mental disorder is defined by s.3 as follows:

> *(1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where—*
>
> *(a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or*
>
> *(b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and*
>
> *(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.*
>
> *(2) In subsection (1)—*
>
> *"mental illness" means a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the*

mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons;

"severe dementia" means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression;

"significant intellectual disability" means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.

47. The explicit link between the two Acts is demonstrated by the fact that the definition section in Part 10 defines mental disorder as having the meaning assigned to it by s.3 of the 2001 Act.

48. Section 8 of the 2001 Act provides that a person may be involuntarily admitted to an approved centre pursuant to an application under s.9 or s.12 and detained there on the grounds that he or she is suffering from a mental disorder. Section 8(2) restricts the scope of 8(1).

"8.—(1) A person may be involuntarily admitted to an approved centre pursuant to an application under section 9 or 12 and detained there on the grounds that he or she is suffering from a mental disorder.

(2) Nothing in subsection (1) shall be construed as authorising the involuntary admission of a person to an approved centre by reason only of the fact that the person—

(a) is suffering from a personality disorder,

(b) is socially deviant, or

(c) is addicted to drugs or intoxicants."

49. Under s.15 of the Act, an admission Order may be renewed on the first occasion for a period not exceeding 3 months and thereafter, for periods not exceeding 6 months. Section 8 and s.15 are in part replicated by s.107/108(2) and (3), which adopt the same two step approach and duration limits of detention. Section 28 is particularly important in the context of Part 10. It provides, *inter alia*, that:

> *"28.—(1) Where the consultant psychiatrist responsible for the care and treatment of a patient becomes of the opinion that the patient is no longer suffering from a mental disorder, he or she shall by order in a form specified by the Commission revoke the relevant admission order or renewal order, as the case may be, and discharge the patient."*

50. This is similar to s.107/108(4) of the ADMCA, discussed in more detail below. The 2001 Act does not use capacity as a determinant as to whether a person may be detained. Rather the test is whether they have a mental disorder. Of course, many persons coming within the definition of mental disorder may also lack capacity. The interaction between the Mental Health Act and wardship was, in the past, addressed by s.283 of the Mental Treatment Act 1945 (which is to be read together with the Mental Health Act 2001) which effectively disapplies the mental health regime to Wards of Court:

> *"283.—(1) Nothing in this Act shall affect any power exercisable immediately before the commencement of this section by a Judge of the High Court or a Judge of the Circuit Court in connection with the care and commitment of the persons and estates of persons found to be idiots or of unsound mind.*
>
> *(2) No power, restriction, or prohibition contained in this Act shall apply in relation to a person of unsound mind under the care of a Judge of the High Court or of a Judge of the Circuit Court.*

51. Although that section has not been repealed or amended by the ADMCA, it is important to understand that the previous approach has been radically altered by Part 10. Up until 26 April 2023, persons detained by Order of a Wardship Court would not be subject to the approach of the Mental Health Act 2001 because of s.283. Now however, wards detained after 26 April 2023 are made subject to a review process that is essentially mirroring the 2001 regime. The test imposed for their continued detention is whether they have a mental disorder and not the previous approach i.e. whether they lack capacity and it is in their best interests that they be detained.

52. Because of this shift in approach, it is fair to say that Part 10 approaches the question of detention of wards largely through the lens of mental disorder. An exception to that approach is found in s.108(1). That is because that subsection requires that, where a person is detained in a non-approved centre on the Order of a Wardship Court immediately before the commencement of s.108 and continues to be detained from 26 April 2023, that Order shall as soon as possible be reviewed by the Wardship Court in accordance with 108(2). This section applies to <u>all</u> detained wards. There is no threshold test of whether they have a mental disorder. Section 108(1) is in the following terms:

> *"108. (1) Where, immediately before the commencement of this section, a person is detained in an institution other than an approved centre on the order of a wardship court and, from that commencement, continues to be so detained, that order shall, as soon as possible, be reviewed by the wardship court in accordance with subsection (2)."*

53. Three features of s.108(1) warrant comment. First, the impetus to review the detention Order must come from the Court rather than the parties; there is a mandatory obligation on the Wardship Court to review. Second, that review is identified as a matter of some urgency, with it being required to take place "as soon as possible". In practice, the

discharge of that obligation has been ensured by the adoption of Practice Direction 121 "Wards of Court Review Pursuant to S.107 or S.108 ADMCA". That provides that all such reviews will proceed by way of Notice of Motion grounded on an affidavit sworn by or on behalf of the applicant along with an affidavit of service. Where the applicant is not the ward, an independent solicitor must be nominated by the applicant who may be appointed by the Court. The Registrar of Wards of Court will then nominate an independent psychiatrist from the panel who will report on the ward, in particular on whether the ward is suffering from a mental disorder. That report will be shared with the Court, the applicant and the ward or their independent solicitor if they are not the applicant. A panel of suitable consultant psychiatrists for the purposes of Part 10 as provided by s.105 has been established. The process for reviewing detention orders by the Wardship Court has commenced. Third, the review process under s.108(1) is a door through which all wards detained at the date of commencement of the ADMCA must pass.

54. However, when one moves onto the remainder of the section, the focus is no longer on all wards, but rather wards found to have a mental disorder in the course of the s.108(1) review. The two step process, and limits to the detention periods, found in s.15 of the 2001 Act are replicated. Section 108(2) provides *inter alia*:

> *"(2) Where, on a review of a detention order, the wardship court is satisfied that the person concerned is suffering from a mental disorder, it may direct that the detention of the person concerned in the institution, or in such other place, being an approved centre, as may be determined by the wardship court having obtained the views of the clinical director for that other place, shall continue for such further period, not exceeding 3 months, and not exceeding 6 months in the case of any subsequent review carried out by the wardship court under subsection (3), as the wardship court may determine.*

(3) Before the period referred to in subsection (2), or such other period as may be determined by the wardship court, expires, the wardship court shall review the continued detention of the person concerned in the institution or approved centre concerned and, if satisfied that the person concerned is suffering from a mental disorder, may direct that the person concerned shall continue to be detained, whether in the institution where the person concerned was first detained or in an approved centre determined in accordance with subsection (2) on a first or subsequent review."

Subsection 5 directs the process to be followed when carrying out a review, either the initial review under subsection (1) or any subsequent reviews.

"(5) The wardship court, when reviewing a detention order, shall hear evidence 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."

55. Subsection 4 is of considerable importance in the context of the application currently before me. It provides as follows:

"(4) Where the wardship court determines that the person concerned is no longer suffering from a mental disorder, it shall order the discharge of the person concerned from detention."

56. As noted above, the wording of this is very similar to the equivalent provision in the Mental Health Act 2001, s.28. Before considering the correct interpretation of this section, and whether it is appropriate for me to express a view on its correct interpretation at this stage, I should explain what types of conditions might lead a court to conclude that a person was not suffering from a mental disorder but nonetheless lacked capacity and whose best interests required a detention Order. First, the definitions of mental disorder in the 2001

Act, set out above, are stringent. A person will only be deemed to have severe dementia if they have a deterioration which significantly impairs the intellectual function of the person and includes severe psychiatric or behavioural symptoms such as physical aggression. That would exclude many people with dementia who nonetheless lack capacity and may require to be detained for their own safety, due for example to the likelihood of them wandering. Equally, a person may lack capacity because of an intellectual disability, particularly if it is combined with another condition, such as PTSD, but that might not be considered to meet the definition in s.3, being a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person. Indeed, KK is an example of this, being deemed to lack capacity because she has a borderline intellectual disability, low adaptive functioning, and a history of self-harm. On the basis of that description, it seems unlikely she would meet the criteria under s.3 as a person with a mental disorder. Separately, a person might suffer from a personality disorder leading to a lack of capacity but will not come under s.3 as personality disorders are specifically excluded by the Act.

57. Returning to s.108(4), in my view there are two potential interpretations of it. The first is that it is a stand-alone type of provision whereby any detained person reviewed under s.108(1) who is not suffering from a mental disorder shall be discharged by the Wardship Court. The alternative interpretation is that which emphasises the literal wording of the subsection, i.e., it only applies to people who are *no longer* suffering from a mental disorder, whether this is at the first review under s.108(1) or a subsequent review under s.108(3). The mental disorder referred to could either be that which led to the detention being reviewed, or might include any mental disorder that the person has ever suffered. Indeed, if the latter interpretation was preferred, then KK could argue that she is a person

no longer suffering from a mental disorder, on the basis that she was detained for nine days in an approved centre under the 2001 Act and therefore by definition she must have been considered to be suffering from a mental disorder at that stage. (I should add for the sake of clarity that that detention does not appear to have been compliant with the requirements of s.283 but I do not need to further consider this issue as that detention is long since spent).

58. The correct interpretation of s.108(4) goes to the question of whether someone should be discharged from detention, as opposed to whether they should be detained. I am charged with deciding the latter rather than the former question. Nonetheless the answer to the first question is likely to inform the second question, since, if all persons detained who do not have a mental disorder are to be discharged on review, then it might suggest that no detention orders should be made post the commencement of the ADMCA under s.9 in respect of persons that do not have a mental disorder.

59. But deciding only questions absolutely necessary to the resolution of a case is an approach that has proved its worth over and over again. The question as to whether s.108(4) requires discharge of persons not suffering from a mental disorder is an important one that will affect significant numbers of detained wards. Therefore, I think it is better left for disposition in a case where its resolution is absolutely required. However, as I discuss below, if KK is detained pursuant to s.9, she will not be subject to the Part 10 process in relation to detained wards in any way since s.108 only applies to wards who meet two conditions – they were detained by Order of a Wardship Court prior to 26 April 2023 and they remained detained after 26 April 2023. She does not meet these conditions. Therefore, she will not have any opportunity to argue that she should be discharged from detention by the Wardship Court pursuant to the terms of s.108(4).

60. Turning now to the third component of Part 10, section 106 provides as follows:

"106. Where an issue arises in the course of an application to the court or the High Court under this Act, or otherwise in connection with the operation of 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."

61. I understand that section to mean that from 26 April 2023 onwards, if there is a proposal to detain a person lacking capacity and there is an issue as to whether they are suffering from a mental disorder, then the procedures provided for under the 2001 Act shall be followed. Section 106 applies widely, i.e., either in connection with the operation of the ADMCA or where an issue arises in the course of an application to the Circuit or High Court under the ADMCA.

62. The HSE identified two potential alternative interpretations of s.106, firstly that it means the Court can make a detention Order under ADMCA while following the procedures laid down in the 2001 Act or alternatively that the detention Order would not be made under the auspices of ADMCA but rather entirely under and pursuant to the procedures of the 2001 Act. The HSE contends that this first interpretation runs into significant difficulty as the Court cannot simply place itself in the shoes of a particular professional or statutory body who gives effect to the statutory machinery of the 2001 Act. In that light, they argue that the second interpretation is the correct one and accords with the fact that, while Part 10 allows for the Court to continue existing detention Orders, it does not confer any power to make a new detention Order.

63. I concur with that interpretation. In my view, the import of this section is that a person lacking capacity who potentially has a mental disorder should be treated in the same way as any other person who may require detention under the Mental Health Act 2001, whether they are already a Ward of Court or otherwise. Counsel for the General Solicitor argued

that s.106 was significant as it reflected an intention on the part of Oireachtas to treat all persons with a mental disorder in the same way, whether they lack capacity or not. I agree.

64. Moreover, this section makes sense of the restriction in s.108(1) identified above that only persons who were detained before and after 26 April 2023 may benefit from the review process. That is because any persons requiring detention after that date who may have a mental disorder are to be dealt with under the 2001 Act and therefore there is no necessity to provide a review process for detention orders made by a Wardship Court after that date as it is not envisaged that any new detention orders, certainly insofar as persons with a mental disorder are concerned, will be made after that date. Therefore, if KK was a person with a mental disorder, it seems highly unlikely that this application would have been brought as any application would have been made under the 2001 Act instead. Unfortunately, the Act is not so clear as to the making of detention orders for persons not suffering from a mental disorder i.e., the question that I am required to answer in this judgment.

Saver/Transition Provisions

65. The CFA has argued that it is entitled to the detention Order sought under s.9 of the 1961 Act and points in this respect to s.56(2) which continues the s.9 jurisdiction pending the making of a declaration under s.55 discharging a ward. This argument requires me to consider whether the existing jurisdiction under s.9 to make detention orders is affected by Part 10. To properly understand and interpret s.56(2), it is necessary to look at the totality of s.56. It is important to understand that the ADMCA repeals the 1871 Act but not s.9 of the 1961 Act.

66. Section 56(1) is straightforward enough, providing as follows:

> *"56. (1) The repeal of the Lunacy Regulation (Ireland) Act 1871 by section 7 shall not affect the validity of any order—*

(a) made by the wardship court within its jurisdiction, and

(b) which was in force immediately before the commencement of this Part."

67. This may be described as a traditional "saver" provision, confirming that the legality of orders made prior to 26 April 2023 under the 1871 Act is not thrown into doubt by the repeal of that Act.

68. Section 56(2) is in the following terms:

> *"Pending a declaration under section 55(1), the jurisdiction of the wardship court as set out in sections 9 and 22(2) of the Courts (Supplemental Provisions) Act 1961 shall continue to apply."*

69. The declaration referred to is that which must be made in relation to all wards save for some minor wards within three years of 26 April 2023. The declaration will identify whether a person is deemed not to lack capacity, or to lack capacity unless a co-decision maker is available or to lack capacity even with a co-decision maker. In all instances, a discharge from wardship takes place.

70. The consequences of a declaration under s.55 are very significant because not only is a person discharged from wardship, the property of the person is returned to them. Although it is not stated explicitly in the ADMCA, in my view the inevitable consequence of a discharge from wardship is that any detention orders made by a Wardship Court in respect of the person discharged will also come to an end.

71. Because all declarations must be made within three years of 26 April 2023, s.56(2) governs the period between 26 April 2023 and the discharge of that ward but in all cases will become spent by 26 April 2026 (save for wards who are currently minors). What then is the jurisdiction that is explicitly preserved by s.56(2)? Notably, s.56 does not attempt to describe the s.9 jurisdiction. As of 26 April 2023, before one takes into account the impact of the ADMCA, the jurisdiction of the Wardship Court was very wide, including not just

the power to detain but also to make decisions about many facets of a ward's life, for example the type of residential setting in which they should be placed, or which parent they should reside with (assuming they are over 18) or whether they can return to their own home after a stay in hospital, the type of medical treatment they should receive, including for example vaccines, or treatment for gender re-assignment, or treatment for cancer, or naso-gastric feeding in the case of anorexia, their capacity to make decisions about discrete areas, whether they should be restrained from seeing or being in contact with a family member and a myriad of other associated decisions. Indeed, the other restrictive Order sought in this application, i.e. that KK should only have access to her phone under limited conditions is an example of such an Order. The contested part of the application before me is the detention orders sought. No objection is taken to the continuing jurisdictional basis to make orders in respect of wards about matters other than detention. This decision is only about whether the Court continues to enjoy a power of detention under s.9 given the very particular provisions of Part 10, and not about any of the other powers the Wardship Court continues to enjoy pending a declaration.

72. There is in my view a clear implication in s.56(2) that, after a discharge under s.55, the jurisdiction of the Wardship Court will no longer apply to that ward, including in relation to any application that might be made to take them back into wardship under s.9. Counsel for the CFA suggested that after a person was discharged from wardship, and if, for example, they required to be detained, an application could be made under s.9 to take them back into wardship and exercise all the powers in wardship that the Court enjoys under s.9. Leaving aside for the moment the question of whether those powers do in fact include a power to make a new detention order post 26 April 2023, the wording of the section strongly suggests that the s.9 jurisdiction ends in respect of any given ward after they have been discharged from wardship. Even if that interpretation is incorrect, it seems likely that

the obligation to review a ward for the purpose of discharge under s.54 would arise all over again, leading to a revolving door type of situation where a person would be discharged from wardship, then readmitted to wardship, then discharged again and so forth. However, I do not have to decide that question since KK has not yet been the subject of a declaration Order, and consequent discharge from wardship.

73. Section 56(3) is somewhat difficult to interpret. It was added by the Assisted Decision-Making (Capacity) (Amendment) Act 2022, as was section 56(4). It provides as follows:

> *"(3) Notwithstanding its repeal by section 7(2), the Lunacy Regulation (Ireland) Act 1871 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."*

74. It goes further than s.56(1), keeping the 1871 Act in force in respect of a particular category of wards, as opposed to simply recognising the validity of orders made under the 1871 Act prior to the commencement of the ADMCA. Again, there are two possible interpretations of this section. Either the reference to "proceedings" is intended to apply to all wardships, such that 1871 Act remains applicable to all wards, or at least all wardships active before the Wardship Court, for example those the subject of a six-monthly review or a live dispute. However, this interpretation would have the somewhat odd effect that the 1871 Act would remain in force until all proceedings ever initiated under that Act were at an end i.e., until all wards had been discharged. Had the legislature wished to achieve that end, it could have specified that in the same way as was done in s.56(2) by stating that the 1871 Act would remain applicable pending all declarations under s.55, or something of that nature.

75. An alternative construction of s.56(3) is that the 1871 Act remains in force in relation to an application for a declaration initiated before 26 April 2023 where the inquiry hearing

had not yet taken place by that date. Section 56(3) refers to "*proceedings in being on that date that were initiated under that Act before that date*". When one looks at the 1871 Act, the term "proceedings" is not defined. In *McCallig* v *An Bord Pleanála (No. 2)* [2014] IEHC 353, Herbert J. noted that the term "proceedings" was not defined, *inter alia*, in the Interpretation Act 2005, was not a term of legal art, and where undefined its meaning fell to be established by reference to the context in which it is used, citing *Minister for Justice v Information Commissioner* [2001] 3 IR 43 at 45 and *Littaur v Steggles Palmer* [1986] 1 W.L.R. 287 at 293 A-E in support of that proposition.

76. Adopting that approach, a considerable part of the 1871 Act is devoted to describing the process for determining whether a person is of unsound mind or not, including establishing the s.11 procedure for sending out a medical visitor, the s.12 procedure for initiating an application for a declaration that a person is of unsound mind, the separate s.15 procedure, the s.13 entitlement to be offered a hearing by a jury in relation to the commission of inquiry i.e. the hearing as to whether a person was or was not of unsound mind, and associated procedural entitlements in relation to mode of hearing, affidavits, service and so on.

77. Given the specific reference to "proceedings" and the context in which it is used i.e. in respect of proceedings initiated under the 1871 Act, in my view the reference to "*proceedings*" may be more likely to mean an application made under the 1871 Act (which will generally be an application for a commission of inquiry to determine whether a person is of unsound mind) rather than simply the general exercise of the wardship jurisdiction under s.9 by the Wardship Court. This interpretation would mean that the 1871 Act remains in force in respect of extant proceedings where an inquiry remains to be heard or where there are any other specific proceedings in relation to the ward, for example

proceedings taken by a Committee on behalf of a ward, that are governed or affected by the 1871 Act.

78. The final subsection, s.56(4), provides as follows –

> *"(4) 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."*

79. When subsection 3 is interpreted as only applying to extant proceedings under the 1871 Act, s.56(4) makes perfect sense. In relation to s.56(1), it means that in relation to extant wardship proceedings i.e., matters where an inquiry hearing has yet to take place, orders made in that context, including orders made post 26 April, and the proceedings themselves, will remain unaffected by the repeal of the 1871 Act. The alternative interpretation of the term "proceedings" would mean that this protection would be extended to all wardship proceedings and orders made in those proceedings.

80. Insofar as s.56(2) is concerned, s.56(4) appears to mean that the s.9 jurisdiction shall equally continue to apply to those proceedings or orders made thereunder. Again depending on the meaning of "proceedings" under s.56(3), s.9 either continues to apply to all wardship matters, or just to situations where the inquiry has yet to take place. If the latter interpretation is adopted, that might have the effect that no new detention orders could be made in respect of existing wards such as KK, simply because the definition of "proceedings" would exclude an application in respect of an existing ward. However, that matter was not argued by the parties and I think it preferable not to decide the application on this basis.

81. On either interpretation, s.56(4) does not have a meaning beyond extending the s.9 jurisdiction to existing wardship proceedings and orders made thereunder. Some attempt was made to argue that s.56(4) means that any Order made post 26 April, including a

detention Order, must be treated as if it were an Order made prior to 26 April. That would mean that new detention orders would be subject to the review process of s.108(1). But there is no basis to interpret s.56(4) as displacing the clear wording of s.108(1) to the effect that only detention orders made prior to 26 April can be reviewed under the procedure set out in Part 10. Nor could I treat Part 10 as applying to fresh detention orders where its wording clearly limits its application to detention orders already in existence. To do so would be to amount to impermissible judicial law making.

Power to make detention orders under s.9 post 26 April 2023

82. This brings me to the question raised by this application i.e., whether the power to make new detention orders has survived the commencement of the ADMCA. To answer this I am obliged to interpret s.9 of the 1961 Act and s.56(2) of the ADMCA by reference to the principles of statutory interpretation as recently restated by the Supreme Court in *Heather Hill Management Company v ABP* [2022] IESC 43 and *A, B and C* i.e. the language used in those provisions, the relationship of those provisions to the statute as a whole, the location of the statute in the legal context in which it was enacted and the connection between those words, the whole Act, that context and the discernible objective of the statute. The overriding approach was identified by Murray J. in the following terms:

> *"What, in fact, the modern authorities now make clear is that with or without the intervention of that provision, in no case can the process of ascertaining the ' legislative intent' or the ' will of the Oireachtas' be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted."*

83. Moreover, this seems to me a case where the provisions of s.5 of the Interpretation Act 2005 may potentially be of assistance. This provides as follows:

> *"(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or*
>
> *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

84. To interpret s.56(2) and s.9 correctly is not an easy task given the very unusual wording and approach of s.9. I have already observed that s.56(2) may preserve the operation of the majority of wardship powers in respect of persons already under the jurisdiction of the Wardship Court pending their declaration and discharge, if one accepts the wider meaning of "proceedings" under s.56(3). That means, for example, that orders can continue to be made under s.9 in relation to the ward's place of residence or education or any of the other many matters detailed above.

85. However, the position is less obvious in relation to detention of wards. First, it is important to make the obvious point that the detention of a person impacts very significantly on the right to liberty, a right explicitly recognised by Article 40.4.1 and one so elevated in the constitutional order that Article 40.4.2 and 40.4.3 of the Constitution specifically provide

for a procedure to challenge the legality of any detention. It is true that in *AC*, O'Malley J. differentiated between unlawful detention in the context of the criminal or tortious concepts of false imprisonment, as opposed to in the context of the protection of the constitutional rights of vulnerable patients. This case clearly arises in the latter context. Nonetheless, she acknowledged the constitutional guarantee of the right to liberty of all persons, including those whose capacity may be impaired. The fact that here the power is conditional i.e., it only comes into operation if certain events take place such as KK absconding or not returning from permitted leave, does not alter its core feature, being that it is designed to prevent KK from exercising her power to reside where she wishes, albeit for the express purpose of protecting other constitutional rights she enjoys, such as her right to life and to health. Therefore, any jurisdiction to detain a person must be scrutinised closely to ensure that it does indeed authorise the detention. No easy assumptions may be made about the existence of a power to detain.

86. To decide upon whether the jurisdiction to make a fresh detention Order in respect of a ward has survived the commencement of the ADMCA, it is necessary to revisit the jurisdiction conferred on the Wardship Court under s.9(1). It is useful to recall the wording of the section in relevant part:

> *"9.—(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.*

87. I have identified earlier in this judgment various judicial observations about s.9. It was preserving and continuing a jurisdiction previously exercised. That jurisdiction was undoubtedly a wide one, but it was not described by s.9. The legitimacy of the decision not to enumerate and identify the precise nature of the jurisdiction was acknowledged by McKechnie J. in *In the matter of JJ*, where he observed at paragraph 108:

> *This type of drafting is not uncommon: it is designed for economy of purpose. If, instead of adopting that approach, the Oireachtas had, at the time of drafting, painstakingly described the scope and ambit of the jurisdiction, rather than opting for a shorthand, before declaring it vested in the High Court, either within the section or as part of a schedule, could it seriously be suggested that such would not have the force of law in this jurisdiction and would continue to do so subject to any successful constitutional challenge? I think not.*

88. Nonetheless, when interpreting s.56(2) and s.9, I cannot ignore the fact that it does not identify a power on the part of the Wardship Court to detain wards, although it has undoubtedly been treated as a source of the power to make detention orders in wardship. Importantly, the basis for the existence of that jurisdiction has not remained fixed. In *JJ*, it was made clear that it has moved from being based on crown prerogative to being a statutory manifestation in the context of wardship of the constitutional imperative to defend and vindicate the personal rights of incapacitated citizens.

89. Turning now to the impact of the commencement of the ADMCA, it is clear that the jurisdiction to detain under s.9 has not remained unaltered given the terms of Part 10. As previously identified, the aim of the ADMCA is to end wardship and to replace it with a system that not only emphasises the rights of persons lacking capacity and gives them a greater role in decision making, but also removes the Wardship Court from the decision-making process insofar as persons lacking capacity are concerned, and replaces it, *inter*

alia, with decision making representatives where persons require assistance with making decisions. This is a seminal shift, and it requires the discharge of all wards within 3 years of the commencement of the Act save for minor wards. The message of Part 6 of the ADMCA and particularly s.54(2), which imposes the three-year sunset clause, could not be more clear: wardship is on its way out (save insofar as minors are concerned). The position of the CFA and the HSE may be summarised as being, insofar as this application is concerned, that the ADMCA changes nothing. The position of the General Solicitor may be summarised as being that the ADMCA changes everything. I tend towards the latter view.

90. In those circumstances, this means that where s.56(2) provides that the jurisdiction of the Wardship Court, as set out in sections 9 and 22(2) of the 1961 Act, shall continue to apply, it is necessary to read this down to mean s.9 as read in the light of the ADMCA. Were s.56(2) not to be interpreted in this way, it would mean that the explicit changes wrought by Part 10 could be ignored by the Wardship Court, an interpretation that is quite obviously at odds with the explicit terms of the ADMCA. That approach to the interpretation of s.56(2) has consequences for the making of detention orders not envisaged by Part 10, just as it has for those detention orders explicitly addressed by Part 10.

91. To address first the explicit changes made by Part 10 to the s.9 jurisdiction, s.108(1) requires a review by the Wardship Court "*as soon as possible*" of all persons who were and remain detained by a Wardship Court on 26 April 2023. Certain of those persons will require to be discharged under s.108(4). As noted above, there is an important question, as yet unresolved, as to whether persons who have never suffered from a mental disorder also require to be discharged under s.108(4). Moreover, the review procedure prescribed by s.108(1) is different to the practice that has developed in respect of detention orders made under s.9. In the latter case, medical evidence is required from the person seeking the

detention but there is no requirement for the Court to obtain independent medical evidence. That is only done under the 1871 Act where an inquiry is being held as to whether a person lacks capacity. A court can of course send out a medical visitor to obtain an independent view if it considers it necessary but that is not done as a matter of course at detention reviews. On the other hand, under s.108(5), the Wardship Court when reviewing a detention Order shall hear evidence from an independent consultant psychiatrist selected by the Wardship Court. That is required to be done whether this is the initial review under s.108(1) or subsequent reviews at 3 or 6 months. All reviews carried out are done in the light of the fact that there is no provision in the ADMCA for detention of a ward save for a continuation of an existing detention under the provisions established by sections 107/108(2).

92. Further, in deciding upon continuation of detention and discharge, an entirely new standard of review is introduced, i.e., whether the ward suffers from a mental disorder as defined by s.3 of the 2001 Act, rather than the prior test as to whether the ward lacks capacity and it is in their best interests to be detained. That means that a ward who no longer has a mental disorder requires to be discharged even if they still meet the tests under s.9.

93. Separately, under s.106, if after 26 April 2023, a person who may have a mental disorder requires to be detained, then s.106 mandates that any inquiry into the question of mental disorder, and any detention should be done under the 2001 Act and not under wardship rules. In so doing, s.106 excludes by implication any reliance upon the previous s.9 powers.

94. Therefore, it is not correct to say, as the CFA and the HSE maintain, that s.56(2) means that the jurisdiction under s.9 continues to apply exactly as it did. It has been radically altered by Part 10. Part 10 clearly demonstrates an intention on the part of the Oireachtas to fundamentally alter the basis upon which either all wards, or a significant percentage i.e., those who suffer or suffered from a mental disorder, are detained.

95. If KK fell under the Part 10 procedure, at her review under s.108(1), the Court would be obliged to consider whether she was suffering from a mental disorder. The evidence upon which the application is based suggests that she might not meet that criterion as what is relied upon is her mild intellectual disability, her low adaptive functioning, and her propensity to self-harm. However, no independent consultant psychiatrist has been asked to examine her to assess the position in this regard. Moreover, as outlined above, she was previously detained under the Mental Health Act in 2021, so that might be relied upon to support the existence of a mental disorder, or perhaps to establish that she is no longer suffering from a mental disorder and therefore should be discharged under s.108(4). Arguments might also be made that she is entitled to be discharged under s.108(4) on the basis that she does not have a mental disorder, having regard to the correct construction of that subsection.

96. When one looks at sections 106, 107 and 108 in this light, I cannot agree with the submission of the HSE that on their face they have no application to the question of detention of a ward on grounds other than mental disorder. All wards are subject to the review procedure and the omission from that Part of a detention power other than a continuation of an existing detention Order on the grounds of mental disorder is at least potentially relevant to other detained wards.

Exclusion from review of KK

97. The particular difficulty thrown up by this application is that KK, although an existing ward, is not covered by the review procedure identified in s.108(1) as no detention Order was in place "*immediately before the commencement of this section*" and "*from that commencement, continues to be so detained*", and is therefore entirely excluded from the Part 10 provisions. Any detention Order that I might make under s.9 would not be subject to the s.108 review. Section 56(2) continues the application of s.9 but does not provide for

new detention orders made post April 26 to be treated as orders in place before the commencement of the section on 26 April.

98. That does not create a problem for applications for new detention orders based on mental disorders as under s.106 they are to be made under the 2001 Act. But it creates a very serious problem in cases such as the present one, where the application to detain does not identify the presence of a mental disorder. If I made a detention Order under s.9, I would be putting KK in a worse position than an existing ward who was the subject of a detention Order on 26 April, as they would be entitled to a review of their detention under s.108 whereas she would not. She would not be entitled to a review by an independent consultant psychiatrist. She could not argue that the detention should only be continued by the Court if it was established that she met the test for mental disorder, and/or that she was entitled to be discharged under s.108(4), either because she is a person "*no longer suffering from a mental disorder*" or because she does not suffer from a mental disorder.

99. The situation is made more complicated by the fact that the latter question has not been resolved. If a court had interpreted s.108(4) and decided that wards not suffering from a mental disorder required to be discharged on review, it would be easier to conclude with certainty that s.9, as impacted by the ADMCA, ought no longer be used to detain wards not suffering from a mental disorder post the commencement of the Act. However, the correct interpretation of s.108(4) is a separate, and complex, question and I do not think I should decide it given the question before me is whether I should detain KK, not whether I should discharge an order detaining her.

100. Nonetheless, in my view, Part 10 of the Act indicates a clear legislative intention on the part of the Oireachtas to significantly alter the regime pursuant to which Wards of Court are detained, given the features I describe above, and requires a review of all detentions as soon as possible in order to give effect to those changes. However, the new altered regime

is not available to persons the subject of fresh detention orders under s.9. That is either explicable by an intention on the part of the legislature not to afford wards detained after 26 April 2023 those protections, or alternatively an intention that no fresh detention orders should be made under s.9 post the commencement of the Act.

Correct construction of s.56(2) and s.9

101. In my view, all of this suggests two alternative constructions of s.56(2). Either it was intended to continue the s.9 jurisdiction insofar as detention is concerned without reference to the ADMCA or it was intended to continue that jurisdiction read in the light of the ADMCA. If the latter (given that I can see no way of making available the Part 10 protections to a person the subject of fresh detention orders) it seems to me the only coherent way of reading s.9 is to treat it as no longer including a power to make fresh detention orders.

102. Arguments in favour of interpreting the s.9 jurisdiction to permit new detention orders to be made include the following:

- Section 9 is not repealed;
- Section 56(2) expressly continues the jurisdiction of the Wardship Court as set out in s.9;
- The purpose of the jurisdiction to make detention orders was to vindicate the constitutional rights of the person in the context of wardship and that jurisdiction should not be lightly set aside.

103. Arguments in favour of interpreting s.9 as no longer including a power to make fresh detention orders include the following:

- Fresh detention orders in relation to wards with a mental disorder may not be made on the basis of s.9 after 26 April 2023;

- The purpose of Part 10 of the ADMCA is to regulate the manner in which Wards of Court are to be detained pending the ending of wardship within a time limited period;
- Section 9 has already been implicitly amended in relation to wards the subject of an existing detention Order at the date of commencement of the Act by Part 10, thus demonstrating that s.56(2) did not preserve s.9 unaffected pending the making of a declaration;
- There is no identification in the ADMCA of a desire to treat wards the subject of detention orders post 26 April differently and less favourably than wards the subject of detention orders pre 26 April. No legislative history or any other background material has been advanced by the CFA or HSE that suggests such an intention should inform the construction of the Act;
- The constitutional rights of persons lacking capacity that require a detention Order can be vindicated by the making of a detention Order under the inherent jurisdiction of the Court having regard to the case law on same and the express terms of s.4(5) of the ADMCA.

104. In *Shiloh,* Lord Wilberforce referred to the legislature to be taken as having left intact principles of law apart from where they have legislated in a particular area unless a contrary intention is shown. Here, despite s.56(2) neither explicitly altering the s.9 jurisdiction nor acknowledging an implicit alteration of same, I consider Part 10 demonstrates that s.9 is not to be left intact. That intention is demonstrated both through the express alteration of the conditions regulating existing detention orders under s.108(1) and the exclusion of fresh detention orders from the s.108(1) procedure.

105. My conclusion is reinforced by the particular wording of s.9. Most legislative provisions identify with considerable precision the areas they regulate. But s.9 is highly unusual. It

seeks to capture an existing but undefined jurisdiction at various points in time and vests that jurisdiction in the High Court. The continued survival of the s.9 jurisdiction was only made possible by the fact that it was held to be grounded in the necessity of protecting the constitutional rights of persons.

106. In *Heather Hill*, Murray J. referred to the observations of McKechnie J in *DPP v Brown* [2018] IESC 67 as follows:

> *"(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning (at paras. 92 and 93).*
>
> *(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include ' the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including … LRC or other reports; and perhaps … the mischief which the Act sought to remedy' (at para. 94)."*

107. Here, the words of s.9 do not identify any explicit entitlement on the part of a Wardship Court to detain wards. They simply refer back to an existing jurisdiction. The context that the words must be viewed in, in those unusual circumstances, is twofold: the jurisprudence of the Supreme Court, in particular *A.M.*, that recognises the source of the power of the Wardship Court to detain wards as being grounded in s.9 (while recognising that there is a similar power under the inherent jurisdiction in certain circumstances); and the enactment and commencement of the ADMCA. That context leads one to an acknowledgment of the previous untrammelled power to detain under s.9, and the

trammelling of that power by the ADMCA. To the extent that there is an implicit amendment of s.9 by Part 10, it is an amendment of an implicit power. In fact, one of the very undesirable features of s.9 is that it is entirely lacking in transparency. Persons the subject of the ADMCA ought to be able to understand the legal regime applicable to them in all respects, including in respect of a matter that impacts hugely upon their personal liberty, i.e. the entitlement to detain them against their will. No-one reading the ADMCA without a detailed knowledge of the jurisdiction formerly exercised by the Lord Chancellor, the Lord Chief Justice of Ireland, and the jurisprudence of the Superior Courts, in particular recent case law of the Supreme Court, would understand that the reference to s.9 in s.56(2) includes a reference to a regime of detention quite separate to that identified in Part 10.

108. My conclusion that Part 10 has altered the nature of the s.9 jurisdiction so as to remove the entitlement to make a fresh detention Order in respect of an existing ward is bolstered by the alternatives open to a court that considers a detention Order is required in order to protect the constitutional rights of a person. I have already identified a very unusual feature of the s.9 jurisdiction, i.e., being one that derives from Article 40.3.2 of the Constitution and the power to protect the property and person of every citizen as described by Baker J. in *JJ*. The power vested by the 1961 Act can be seen as a statutory manifestation of the constitutional imperative to defend and vindicate the personal rights of incapacitated citizens. If there were no other way to defend and vindicate those personal rights, this might lean against the interpretation of s.9 identified above.

109. But here, that constitutional imperative can be achieved through another mechanism that does not depend on the continued existence of the wardship jurisdiction i.e., the inherent jurisdiction of the High Court to make orders in respect of persons lacking capacity in order to vindicate their personal rights, including orders for detention of those persons

where necessary (discussed in more detail below). Therefore, to interpret s.9 in the way I propose will not deprive such persons of the protection afforded to them by the Constitution.

110. To return to the principles of statutory interpretation, when I consider the language used in s.56(2) and s.9, the relationship of those provisions to the ADMCA as a whole as described above, the location of the ADMCA in the legal context in which it was enacted i.e. including the 1961 Act and the previous wardship jurisdiction of the Lord Chancellor, the arguments in favour of interpreting s.9 as no longer including a power to make fresh detention orders are so strong that it seems to me there is no need to have recourse to s.5 of the Interpretation Act. This does not appear to me to be a situation where the meaning of s.56(2) is obscure or ambiguous. If I am wrong about this, and its meaning is indeed obscure or ambiguous, then I am confident that the intention of the Oireachtas can be ascertained from the ADMCA as a whole in relation to detention orders, to the effect that it was not intended in enacting s.56(2) to preserve and continue the power of the Wardship Court under s.9 to make detention orders in relation to existing wards post the commencement of the Act.

111. Before concluding, I should explain why I am not persuaded by the argument of the CFA, and to a lesser extent the HSE, that s.9 must be interpreted as if the ADMCA had not been adopted. Significant reliance was placed by the CFA and the HSE on the non-repeal of s.9, in contrast to the explicit repeal of the 1871 Act by s.7 of the ADMCA. It was argued that had it been intended to repeal s.9, that would have been done. In the absence of repeal, it was argued that it should remain unaffected by the 2015 Act. Indeed, as noted above, that argument went so far as to suggest that s.9 should remain unaffected post-26 April 2026 i.e., the date after which all wards save for some minor wards are to be discharged from wardship, and that persons could continue to be brought into wardship under s.9. That

argument fails to appreciate that there is an interim position between the abolition of s.9 on the one hand, and s.9 being applied in precisely the same way post 26 April 2023 as pre 26 April 2023. The decision of the legislature not to repeal s.9 is likely to have been motivated, *inter alia*, by the fact that s.9 also applies to minor wards, who are not covered by the ADMCA and by the necessity to keep in place the Wardship Court's power to make orders in respect of existing wards in areas other than detention.

112. That approach also ignores the impact of the ADMCA upon s.9 insofar as detention is concerned, as detailed above, since it is clear that detention powers in relation to wards with mental disorders under s.9 have been comprehensively displaced by the new Act. Although the continuing existence of s.9 was presented as the basis upon which the detention powers must be treated as being unaffected, that argument failed to recognise that, even absent repeal, the ADMCA has a significant effect on s.9 that cannot be ignored.

113. In those circumstances I conclude that the correct construction of s.56(2) and s.9 is that post the commencement of the ADMCA, a Wardship Court no longer has the power to make a new detention Order in respect of an existing ward.

Inherent jurisdiction

114. That the High Court enjoys a power under its inherent jurisdiction to detain persons lacking capacity is not in doubt (*see HSE v J O'B (A Person of Unsound Mind Not So Found)* [2011] 2 ILRM 433 and *HSE v VF* [2014] 3 IR 305).

115. In *J O'B* Birmingham J. was confronted with a case where the HSE argued that the respondent, who suffered from mild to moderate learning disabilities associated with extremely challenging violent and destructive behaviour, lacked capacity, and should be detained in the Central Mental Hospital for appropriate multidisciplinary treatment. It was common case between all the parties that J O'B was not suffering from a mental disorder within the meaning of the Mental Health Act 2001. Following an identification of the

requirements of relevant ECHR jurisprudence and a discussion of analogous case law in other jurisdictions Birmingham J. concluded that, by analogy with *D.G. v Eastern Health Board* [1997] 3 IR 511, it was appropriate to exercise his inherent jurisdiction in circumstances where an adult lacked capacity and there was a legislative lacuna, so that the best interests of the person could not be served without intervention by the Court.

116. That decision was followed in *VF*, where McDermott J. exercised the inherent jurisdiction of the High Court to direct the detention of a woman suffering from an alcohol related memory disorder, who did not have a mental disorder within the meaning of s.3 of the Mental Health Act 2001. The Court was satisfied that the woman lacked capacity and conducted a proportionality analysis in respect of her constitutional rights to determine the appropriateness of a detention Order. McDermott J. ultimately concluded that detaining the woman in a secure unit was the least restrictive way to ensure her health and wellbeing and that it adequately balanced her right to liberty with the danger her condition posed to her paramount right to life and bodily integrity.

117. The Supreme Court confirmed the correctness of this approach, with McMenamin J. explaining in *AM* at paragraph 89:

> *"Applications invoking an inherent jurisdiction may, therefore, be made, but only in exceptional cases. But the fact that there exists such a jurisdiction is not conclusive of this case. What is under direct consideration here are undoubtedly two statutory regimes. As was made entirely clear by the judgment in* DG, *inherent jurisdiction must not be used as a first port of call, when, by legislation, the Oireachtas has spoken on the matter."*

118. Section 4(5) confirmed that there was no alteration to the inherent jurisdiction effected by the ADMCA and its commencement. The parties have made some submissions about how that jurisdiction should be exercised in general and also in this particular case. However,

for understandable reasons, the bulk of the argument focused on the s.9 jurisdiction and how it had been affected by the ADMCA. Given that I have found that it is no longer appropriate to use s.9 as the jurisdictional basis for detention orders, and given that there is an alternative application by the CFA to make detention orders for KK on the basis of the inherent jurisdiction, I propose adjourning the matter for further submissions to be made by any of the parties if they so wish in relation to the appropriateness of making the Order sought on the basis of the inherent jurisdiction of the Court.