[2024] IEHC 166

THE HIGH COURT

Record No. 2023/265MCA

IN THE MATTER OF AJ

AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

Between

HEALTH SERVICE EXECUTIVE

Applicant

AJ (A PERSON ALLEGED TO LACK CAPACITY AND) TO BE REPRESENTED BY THEIR GUARDIAN AD LITEM

Ex Tempore Ruling of Mr. Justice Conor Dignam delivered on the 12th March 2024

Introduction

1. The Health Service Executive applies for a suite of orders, the effect of which would be to transfer the respondent from his current placement in an acute hospital unit setting ("the approved centre") to an alternative residential setting and to detain him in that alternative placement ("the residential unit").

2. I am delivering this ruling ex tempore in circumstances where there was agreement between the parties on many - though not all - of the key legal issues and, more importantly, where there is significant urgency in the matter in light of the consensus view that the respondent's current placement is not appropriate and thus, if I agree with that view and conclude that I have jurisdiction to make the orders sought, I should determine whether to do so without delay.

3. I am anonymising the parties other than the Health Service Executive, the relevant medical or clinical practitioners and the Guardian ad Litem, in circumstances where the identities of the parties are not relevant to the issues which have to be

decided. I am in any event making an order under section 27 of the Civil Law (Miscellaneous Provisions) Act.

4. A key factor in this case is that the respondent is currently detained in the approved centre pursuant to the Mental Health Act, 2001 ("the 2001 Act"). The Health Service Executive seeks a suite of Orders under section 9 of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act"). This suite of Orders is designed to effectively supplant the current basis for detention and would provide for, inter alia, the respondent's transfer to the alternative placement with, if necessary, use of restraint and sedation in the transfer process, the detention of the respondent in the residential unit, permission for the residential placement to take all steps reasonably necessary to ensure the safety and welfare of the respondent including the use of restraint, if necessary, and the administration of medication, and permission for the transfer of the respondent to a general hospital or approved centre in furtherance of the protection and promotion of his care, health and welfare circumstances of the respondent. This is only a summary of the Orders. In the alternative, the HSE seeks a smaller number of Orders under the Court's inherent jurisdiction. These are sought on the basis that the respondent's detention would continue to be pursuant to the 2001 Act and the responsible consultant psychiatrist would employ the "leave" provisions of section 26 of that Act to permit the respondent to be absent from the approved centre in order to reside in the residential unit but that Orders permitting various matters in the residential unit would be necessary including the use of restraint and the administration of medication and, in the event that the respondent left that unit, an Order authorising An Garda Síochána to return him to that placement.

5. The reliefs under the Court's inherent jurisdiction were sought as a fall-back in the event that I was not satisfied that I had jurisdiction to make Orders under section 9 of the 1961 Act. In those circumstances, and in light of the fact that this Court's inherent jurisdiction should only be exercised in the event of a legislative lacuna (see *HSE v AM [2019] IESC 3* and *HSE v JO'B [2011] 1 IR 794*), I decided to hear submissions on the question of the section 9 jurisdiction first and to only hear submissions on the inherent jurisdiction if necessary. I subsequently invited the parties to make submissions on the question of the Court's inherent jurisdiction. I also took that opportunity to ask the parties to address me on a number of points in respect of the question of a section 9 jurisdiction. Nonetheless, as the Court should only exercise its inherent jurisdiction in exceptional circumstances I propose to first determine whether the Court has jurisdiction to make the Orders sought under section 9 and only if I decide that I do not have jurisdiction under that section will I go on to consider the inherent jurisdiction.

6. It is essential to note that all parties adopted the same position in relation to the Court's jurisdiction under section 9 of the 1961. There was some argument between the Health Service Executive and the respondent's mother in relation to the Court's inherent jurisdiction. They both agreed that the Court had jurisdiction under section 9 and therefore the inherent jurisdiction did not arise but the HSE's fall-back position was that if section 9 was not available then the Court could make the "top-up" Orders (ie. topping up the detention and leave under the Mental Health Act) under the Court's inherent jurisdiction, whereas the respondent's mother's fall-back position was that if the Court was exercising its inherent jurisdiction it should make a full suite of Orders rather than make "top-up" Orders. The level of agreement and the common position adopted by the parties, including the Guardian ad Litem, particularly in relation to section 9, means that the Court did not have the benefit of contrary arguments. That is not in any way a criticism of the parties or solicitor and Counsel. Indeed, very detailed and thoughtful submissions were made by Counsel for which I am very grateful but it is important to note that what follows is not informed by contrary arguments (other than what was discussed in discussions with the Court) and must therefore be seen as being subject to full argument in an appropriate case.

7. The issues which have to be resolved by the Court are:

(i) Does the Court have jurisdiction under section 9 of the 1961 Act?
(ii) If not, does it have jurisdiction to make the Orders under its inherent jurisdiction?
(iii) Is the Court's jurisdiction under section 9 or its inherent jurisdiction precluded by the existence of the order under the 2001 Act?
(iv) If it has jurisdiction, should the Court make the Orders sought, i.e. are they appropriate and necessary?

8. As will be apparent from the preceding paragraphs, there are a number of sub-issues under some of these headings.

Background

9. Before dealing with these issues, it would be helpful to set out very briefly the background to the application.

10. I have carefully considered all of the evidence in the case and this is not intended to be a summary of that evidence and, indeed, is not intended to reflect the differences of opinion that may exist between the parties as to how matters got to this point but

rather as a brief factual framework for the consideration of those issues and in particular the jurisdiction question. For example, the respondent's mother sets out certain matters in relation to educational provision, provision of support, and her and the respondent's dealings with the hospital where he is currently placed. These are all potentially very important issues but are not directly relevant at least to the legal issues which I have to decide and I am not capturing them all in this brief overview.

11. The respondent is young man who has a diagnosis of moderate intellectual disability, autism spectrum disorder, significant speech and language and communication difficulties and a history of severe behaviours including aggression towards other people and damage to his living environment.

12. He lived with his family all his life until recent admissions to an adult mental health unit under the 2001 Act, the approved centre. He attended school in a local national school's autism unit until it closed and then had a period of home schooling until he enrolled in the autism spectrum disorder unit in the local secondary school where his mother described the experience as negative and traumatic. He subsequently moved to a different school. This was unfortunately disrupted by the Covid-19 lockdown. He graduated from school shortly thereafter.

13. Some months after graduating school, he joined a day service which had been newly created but ultimately this placement broke down. During the period that the respondent was attending this day service, there were incidents where the respondent's behaviour was such that the respondent's mother had to bring him to hospital and he was admitted under the 2001 Act. As noted above, the respondent's mother has explained, from her perspective, the background and contributing factors to these incidents and to the ultimate withdrawal of the day service. These are obviously important but as they are not directly relevant to the issues which I have to decide (other than, perhaps, in relation to planning for the future) and may be disputed, I have not set these out in detail.

14. The first incident was in May 2022. On this occasion he was admitted to the approved centre under the 2001 Act and was discharged in August 2022.

15. He was subsequently admitted to the approved centre under the 2001 Act in November 2022 on an application by his mother (who, it must be observed, felt that she had no other choice), and on the recommendation of his General Practitioner. This was precipitated by what is described by Dr. McTigue, the responsible consultant psychiatrist as "*an aggressive behavioural incident*". He was discharged in late December 2022.

16. Unfortunately, he was admitted to the approved centre again within two weeks. This admission has been renewed on a number of occasions and has been confirmed by a number of decisions of the Mental Health Tribunals. The Mental Health Tribunal affirmed the decision of the responsible consultant psychiatrist that the respondent was suffering from a mental disorder where "*because of the illness, disability or dementia, there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons*" (section 3(1)(a) of the 2001 Act). The respondent's mother does not accept that he is suffering from a mental disorder.

17. This means that since May 2022 the respondent has spent all but approximately four months in the approved centre and has been continuously in the centre since January 2023.

18. It is in that general context that this application is brought.

Jurisdiction under section 9 of the 1961 Act

19. As noted above, it is the position of all the parties that the Court has jurisdiction to make the Orders (which for the present discussion I will refer to as "detention orders") under section 9 of the 1961 Act. In essence, their position is that section 9 vests a broad protective jurisdiction in the Court which allows for the making of detention orders on a standalone basis, ie. outside the context of a wardship process, and is not precluded by the existence of an order under the Mental Health Act. They submitted that it is a complete statutory code.

Source and scope of jurisdiction

20. Section 9 provides, inter alia:

> "*(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 dated 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."

21. Section 19(1) of the Courts of Justice Act 1924 (referred to in section 9) provides, inter alia:

"(1) There shall be transferred to the Chief Justice and exercisable by him all such jurisdiction in lunacy and minor matters as was lately exercised by the Lord Chancellor of Ireland and is at the passing of this Act exercised by the Lord Chief Justice of Ireland. An appeal shall lie to the Supreme Court from the exercise by the Chief Justice of the jurisdiction transferred by this section."

22. Section 3 defines "*in lunacy*" as meaning "*in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind.*" Interestingly, "*in minor matters*" is defined as "*in relation to the wardship of infants, and the care of infants' estates.*" but "wardship" does not appear to have been used in statute in respect of adults until the Assisted Decision Making (Capacity) Act 2015. However, the formal process by which a person was declared to be of unsound mind and incapable of managing their own affairs and taken into the care of the High Court has long been referred to as "wardship" and that is the sense in which I refer to it in the course of this ruling.

23. O'Malley J in *AC v Cork University Hospital [2020] 2 IR 38* emphasised that the effect of section 9 was to 'directly vest' a jurisdiction in the High Court rather than to transfer that jurisdiction. She said:

"[222] … When the President of the High Court is described as the "successor" to the Lord Chancellor…[i]t is simply a shorthand term for describing the powers exerciseable by the President in wardship matters. Those powers are conferred, moreover, by legislation enacted by the Oireachtas – specifically, by s.9(1) of the Courts (Supplemental Provisions) Act 1961. As Finlay CJ said in In re D [1987] IR 449, this section did not "transfer" any jurisdiction. Rather, it directly vested in the High Court jurisdiction described and identified by reference to jurisdictions previously exercised or vested."

24. Thus, section 9 vested in the High Court the jurisdiction which had been exercised by the Lord Chancellor of Ireland. This was a broad protective jurisdiction. The Lunacy Regulation (Ireland) Act 1871 regulated the operation of that jurisdiction but did not confer or delimit it (see O'Malley J in *AC* where she said at paragraph 233 "*As described by Geoghegan J subsequently in In the Matter of Wards of Court and in the Matter of Francis Dolan [2007] IESC 26, [2008] 1 ILRM 19, the 1871 Act is however merely a regulatory one, and the tenor of Finlay CJ's judgment* [In Re D (1987) IR 449] *was to the effect that the jurisdiction of the former Lord Chancellors of Ireland was much broader. It followed that the jurisdiction now exerciseable by the courts is broader than, and does not depend upon, the applicability of the 1871 Act*." I return to the nature and scope of this former jurisdiction because it is important to the question of whether section 9 permits the making of detention orders outside of a wardship process.

25. Importantly, the Supreme Court has also held that the jurisdiction encapsulated in section 9 derives from Article 40.3.2 of the Constitution and that it is a statutory expression of the constitutional imperative to defend and vindicate the personal rights of persons who lack capacity. For example, MacMenamin J in *HSE v AM [2019] 2 IR 115* said that "*there is no doubt as to the constitutional basis of the exercise of the power*." (having noted that Finlay CJ had concluded in *Re D* that the jurisdiction was "*supported by the provisions of Article 40.3.2 of the Constitution*", and that Hamilton CJ said in *Re a Ward of Court* that the court's wardship jurisdiction was "*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*"). More recently, in *Re JJ (Supreme Court, 22nd January 2021)* both Baker J and McKechnie J emphasised the constitutional foundation of the wardship jurisdiction. Baker J said at paragraph 455:

> *"precisely how the jurisdiction evolved does not need to concern us in the present case but I prefer the approach of Finlay CJ in Re D [1987] IR 449, that this power derives from Article 40.3.2 of the constitution, and the power to protect both the property and person of every citizen, and I agree with the more complete observations of McKechnie J in his separate judgment."*

26. Section 9 is the direct or immediate source of the Court's wardship jurisdiction.

Power to detain in wardship

27. It is beyond doubt that the Court has the power to make detention orders as part of its wardship jurisdiction under section 9.

28. In *HSE v AM [2019] 2 IR 115*, MacMenamin J on behalf of the Supreme Court considered section 283 of the Mental Health Act, 1945 and at paragraph 15 of his judgment described as 'acknowledging' "*the* ***continuing power of the courts*** *to order the detention, by way of wardship, for the "care and commitment"* of persons of "*unsound mind*"…" [emphasis added].

29. As recently as *HSE v KK [2023] IEHC 306* and *HSE v MC [2024] IEHC 47* the High Court recognised that the power to make a detention order was a part of the Court's powers in wardship under section 9.

30. Indeed, the Assisted Decision Making (Capacity) Act 2015 Act and, in particular the detailed provisions in Part 10 thereof, is grounded on the courts having had a power to make detention orders as part of wardship.

31. However, of significance to the current discussion where the respondent is not a ward of court and is not subject to a formal wardship process, is that the references in these, and other authorities, to a power to make detention orders were made in the context of the relevant person being a ward or in the context of a formal wardship process. In *AC v Cork University Hospital*, O'Malley J said at paragraph 222 that "*…when the President of the High Court is described as the "successor" to the Lord Chancellor…[i]t is simply a shorthand term for describing the powers exercisable by the President* ***in wardship matters****…*" (emphasis added); in *Re a Ward of Court (No. 2) [1996] 2 IR 79* Hamilton CJ said at page 106 "***When a person is made a ward of court****, the court is vested with jurisdiction over all matters relating to the person and estate of the ward and in the exercise of such jurisdiction 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."* (emphasis added); in *HSE v AM*, MacMenamin J (in the passage referred to above) referred to "*the continuing power of the courts to order the detention,* ***by way of wardship****, for the "care or commitment" of persons of "unsound mind"…*" (emphasis added); in paragraph 102 of *HSE v KK*, Hyland J said "*[T]he purpose of the jurisdiction* [under section 9] *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*" (emphasis added); Barniville P said at paragraph 115 of *HSE v MC [2024] IEHC 47* that "*[I]t is well-established, and not in dispute, that the High Court,* ***in the exercise of its wardship jurisdiction****, has the power to order the detention of a* ***person who meets the test for wardship*** *where such detention is necessary and appropriate.*" (emphasis added).

Power to detain without wardship

32. The respondent in this case is not a ward, and there are no wardship proceedings in being. Thus, the question arises whether section 9 vests jurisdiction in the Court to make a detention order in those circumstances, ie. to do so in respect of a person who is not a ward of court or subject to a formal wardship process. It would seem from these passages that the Court does not have a jurisdiction under section 9 to make a standalone detention order and could only do so within a wardship. Of course, it must be noted that none of the decisions referred to above were concerned directly with the question whether the Court could make a detention order outside of a wardship process but nonetheless they do, it seems to me, at the very least illustrate a general view that detention orders under section 9 are Orders which are made within wardship. That would have been my general understanding and that if a detention order needed to be made outside of formal wardship process it would be made under the Court's inherent jurisdiction. However, subject to what I have said about the possibility of full argument in a future case, I find myself compelled to conclude that the Court does in fact have a standalone power under section 9 to make a detention order even where the person has not been made (or it is not intended that he be made) a ward of court.

33. I arrive at this conclusion based on both the fact that the section vests the previous jurisdiction of the Lord Chancellor in the High Court and a consideration of what that jurisdiction was, and the fact that the section is underpinned by and is a statutory expression of the constitutional imperative to vindicate personal rights.

34. In relation to the first of these, section 9 vests the jurisdiction of the former Lord Chancellor in the High Court. That jurisdiction and its breadth was considered by Ashbourne LC in *Re Birch (1892) 29 LR IR 274* and in *Re Godfrey (1892) 29 LR IR 278*. These judgments were considered in detail by Finlay CJ in *Re D [1987] IR 449*. In *Re Birch*, Ashbourne LC considered the terms of and the interpretation of the "*letter in lunacy*" by which the jurisdiction in lunacy matters (to use the language of the time) was vested in Lord Chancellors of Ireland. He said:

> *"From the earliest times this jurisdiction has been recognized as forming part of the royal prerogative – as a high duty in the Sovereign in his capacity as parens patriae:* ***its exercise has from time to time been regulated by various enactments, but no statute has in any wise curtailed the powers delegated to the Lord Chancellor by virtue of the Sign-manual****. The exercise of this great personal duty was not inappropriately entrusted to the Lord Chancellor, who was frequently in former times some great ecclesiastic, and who has always been one of the greatest officials of the realm.*

The terms of the Queen's letter in lunacy expressly state the nature of the jurisdiction it confers. It commences: 'Whereas it belongeth unto us in right of our royal prerogative to have the custody of idiots and lunatics and their estates in that part of the United Kingdom called Ireland.....we therefore..... have thought fit to entrust you with the care and commitment of the custody of the idiots and lunatics and their estates." These words amount to an express delegation by the Crown under the sign-manual of its prerogative jurisdiction in lunacy to the Lord Chancellor. The single purpose of the Crown is to benefit this afflicted class by confiding them to the care of its highest judge and one of its greatest officials. There is no restriction by which the jurisdiction of the Lord Chancellor is confined to any particular section of this afflicted class. The parental care of the sovereign extends over all idiots and lunatics, ***whether so found by legal process or not****. That high prerogative duty is delegated to the Lord Chancellor, and* ***there is no statute which in the slightest degree lessens his duty or frees him from the responsibility of exercising that parental care and directing such inquiries and examinations as justice to the idiots and lunatics may require****. The Queen puts the care and commitment of the custody of idiots and lunatics before the care of their estates, thus showing with unmistakable clearness that the first and highest care of the Lord Chancellor should be given to the personal treatment of this afflicted class."* [emphasis added]

35. In *Re Godfrey*, Ashbourne LC said:

"The power given by the Queen's sign-manual creates a high and responsible duty in the Lord Chancellor towards these afflicted persons, calling on him to act on their behalf whenever it may come to his notice that their liberty or happiness require his intervention, and ***this beneficent jurisdiction is not confined to those so found by process of law or narrowed to any special class****. The power and duty so given and created afford in this case an illustration of the most salutary and protective exercise of the prerogative of the sovereign."* [emphasis added]

36. It seems clear from the passages in emphasis that the jurisdiction of the Lord Chancellor extended beyond making orders within a formal process such as a wardship process. Indeed, the circumstances of *Re Godfrey* are interesting in that Ashbourne LC,

of his own motion, in the exercise of this jurisdiction, assumed jurisdiction in respect of a person who was not a ward and had not been subject of any court process.

37. Finlay CJ considered these passages in *Re D* (page 455) and stated that:

> "*I am driven by these two decisions and by the statement of a former Lord Chancellor of Ireland as to what his understanding of his jurisdiction was and indeed the exercise by him of it, to the conclusion that it extended beyond the taking into wardship of persons who had property and the management and protection of their property as well as the protection of the person.*"

38. I have to confess to initially having some difficulty with this sentence. The issue which was being determined by Finlay CJ was whether the Court had jurisdiction to make orders to protect the person and I therefore initially understood this sentence as meaning that the jurisdiction extended beyond a power to protect and manage a person's property to a power to protect the person. This meaning seemed to me to be reinforced by the following sentence in the same paragraph where Finlay CJ said "*Such a construction of the jurisdiction in lunacy matters vested by the Act of 1961 in the High Court seems to me to obtain significant support from a consideration of the provisions of Article 40, s.3, sub-s. 2 of the Constitution where the obligation imposed on the State by its laws to protect as best it may from unjust attack and in the case of injustice done to vindicate the life and person of every citizen is put in equal place with the obligation to protect and vindicate the property rights of every citizen.*" However, for the sentence to have this meaning it would have to be read as having an error and that where Finlay CJ said "*as well as*" he meant to say "*to*" or "*to include*", i.e., to read that the jurisdiction "*extended beyond the taking into wardship of persons who had property and the management and protection of their property* ***to/to include*** *the protection of the person.*" Following, as it does, the two passages from *Re Birch* and *Re Godfrey*, the sentence is more correctly understood as meaning that the Court's jurisdiction extends beyond taking persons into wardship and the making of orders within that process. The correct interpretation of the sentence is that Finlay CJ was referring to Ashbourne LC holding that the Lord Chancellor's protective jurisdiction extended beyond taking persons into wardship. This is also consistent with Finlay CJ's statement that the power to make a wardship order "***was part of*** *the general protective jurisdiction over persons of unsound mind vested in the High Court by s.9 of the 1961 Act.*" [emphasis added]. This clearly means that the jurisdiction extends beyond wardship.

39. That being the case, it seems that the protective jurisdiction of the former Lord Chancellor, and therefore, the jurisdiction vested in the High Court by section 9, is not limited to formal wardship processes.

40. Of course, regard must be had to the fact that the Lunacy Regulation (Ireland) Act 1871 had been in place for ninety years at the time of enactment of the 1961 Act and was a core part of the jurisdiction which was vested by section 9. The 1871 Act provided for the formal wardship process. It seems to me that the Oireachtas must be taken to have intended to vest the Lord Chancellor's jurisdiction, including how it was exercised in light of the 1871 Act. However, subject to full argument, that can not mean that the jurisdiction that was vested in 1961 was a jurisdiction that could only be exercised in the context of or within the parameters of the 1871 Act. Firstly, the 1871 Act was in place for twenty years at the time of *Re Birch* and *Re Godrey*, and yet Ashbourne LC held that the Lord Chancellor's jurisdiction was not constrained by particular legal processes. Secondly, it was held in *Re D* that the jurisdiction "*to make a wardship order*" (and I read this to mean to make a protective order) "*was not a jurisdiction conferred or delimited by the 1871 Act"* (see also O'Malley J *AC v Cork University Hospital [2020] 2 IR 38* where she sad that the "*1871 Act regulates certain aspects of wardship but does not create the wardship jurisdiction.*" (paragraph 29) and that "*the 1871 Act is…merely a regulatory one, and the tenor of Finlay CJ'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.*"

41. Thus, the Lord Chancellor's jurisdiction that was vested in the High Court by section 9 was not limited to or by the 1871 Act.

42. The conclusion that the power under section 9 to make a protective detention order is not confined to formal wardship processes also seems to me to follow from the fact that section 9 has been held to be underpinned by the Constitution and to be a statutory expression of the constitutional imperative to vindicate constitutional rights. It is a statutory means by which the Court may exercise its functions to vindicate constitutional rights. It does not necessarily follow that it would be inconsistent with the vindication of constitutional rights if it could only be exercised within wardship proceedings. However, it seems to me that if the Oireachtas had intended that the Court's jurisdiction under section 9 was to be limited in that way, then the section would have so stated.

43. It seems to me that this is reinforced by the fact that the Assisted Decision Making (Capacity) Act 2015 repeals the 1871 Act (albeit with a saver) but did not repeal

section 9 of the 1961 Act. Section 7(2) of the 2015 Act provides that "*Subject to the provisions of Part 6, the Lunacy Regulation (Ireland) Act 1871 is repealed.*" Similarly, section 7(1) provides that "*The Marriage of Lunatics Act 1811 is repealed.*" However, section 56(2) provides that "*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."* The 1871 Act provided for the formal wardship process and its procedures. If the Court's protective jurisdiction under section 9 was understood as being confined to being exercised within a formal wardship process then the effect of the repeal of the 1871 Act would be that the Court could not exercise its powers under section 9 save in respect of persons who were already wards or already within a wardship process because the wardship process has been abolished in respect of most other persons. If this had been the object of the 2015 Act, the Oireachtas could have expressly made provision to that effect by repealing section 9 with a saver transitional provision in respect of persons who were already in a wardship process. It seems to me that by retaining section 9 at the same time as repealing the statutory wardship process, the Oireachtas must be understood as leaving intact the statutory power of the Court to make Orders outside such a wardship process.

44. It has to be said that the manner in which section 9 is formulated is unsual and gives rise to a number of different interpretative questions. However, these were not argued in this case and it would be inappropriate for me to embark on a consideration of them. What is clear is that it does not provide for a straightforward repeal of the section. For present purposes, it seems to me that in circumstances where section 9 has previously been held to have constitutional underpinnings and to be a statutory expression of the constitutional imperative to vindicate the individual's constitutional rights and where it was not repealed notwithstanding the formal "wardship" process under the 1871 Act being repealed this strongly supports the view that section 9 allows for standalone orders to be made in the vindication of constitutional rights.

45. Interpreting section 9 as conferring a jurisdiction to make protective Orders outside of a formal wardship process in order to vindicate constitutional rights may mean that the area in which the Court's inherent jurisdiction may have to invoked or even can be invoked is smaller. It may even mean that the scope of the section 9 jurisdiction where it applies is the same as the Court's inherent jurisdiction. However, that does not seem to me to require section 9 to be interpreted in a more narrow way.

46. Thus, I am satisfied as a general principle that the High Court has power to make a detention order notwithstanding that the person is not a ward of court or is not subject to a formal wardship process.

HSE v KK

47. I have considered whether Hyland J's decision in *HSE v KK* has the effect of precluding any new such detention order being made since the commencement of the relevant parts of the 2015 Act on the 26th April 2023. All of the parties took the position that the judgment did not have that effect and that the judgment did not apply. Hyland J's judgment is very recent and is a detailed and careful consideration of the interpretation of the 2015 Act. However, Hyland J was also careful to emphasise the value of "*deciding only questions absolutely necessary to the resolution of the case…*" (paragraph 59). The question that was determined by Hyland J was "*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.*" She concluded (paragraph 113) 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*." She also said at paragraph 4 that "…*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 regime.*" It seems to me that this case is readily distinguishable as it does not involve a ward of court. A central part of Hyland J's reasoning as to why the Court could not make a new detention order after the 26th April 2023 in respect of an existing ward (as distinct from continuing an existing order) was because this would give rise to a fundamental inequality and unfairness as between existing wards: an existing ward who was the subject of a detention order which was in being on the 26th April 2023 has the benefit of very detailed review provisions in Part 10 of the Act, whereas an existing ward, i.e., the same category of person, in respect of whom a detention order was made after that date would not have the benefit of those protections. In this case, the respondent is not a ward of court and it seems to me that this is a key difference. He is not in the same category as the persons under consideration in *KK*. The proper comparator is in fact a person who might be detained under the Court's inherent jurisdiction. Thus, subject to full argument, I am satisfied that *KK* and the reasoning therein does not apply to preclude the making of a detention order under section 9.

Interaction with the Mental Health Act 2001

48. It bears repeating that the overall jurisdictional question arose because the respondent is amenable to the 2001 Act and, more particularly, is already the subject of an Order made under that Act.

49. It is important to note that the respondent's mother does not accept that he suffers from a mental disorder. In my view, considerable regard must be had to the view of a parent or guardian who has cared for the person for his whole life and I have carefully considered his mother's view. However, it seems to me that for the purpose of the legal analysis of the Court's jurisdiction, I must proceed on the basis that the respondent does suffer from a mental disorder within the meaning of the 2001 Act. This is because there is currently in place a valid and subsisting admission/renewal order under the 2001 Act which is grounded upon a certification that the respondent is suffering from a mental disorder. In circumstances where that is unchallenged (in a legal sense) I should not look behind it.

50. The question that arises directly from this is whether the court has jurisdiction to make a detention order under section 9 where there is already a specific statutory regime in place and in operation. The parties all took the position that the Court does have jurisdiction to do so.

51. In *HSE v AM* the Supreme Court had to consider whether the court could exercise its wardship jurisdiction to detain a person who satisfied the criteria for detention under the 2001 Act. As will, of course, be noted, the Court in that case was considering a detention order in the context of a wardship but it seems to me the reasoning also applies to this case. McMenamin J on behalf of the Supreme Court held that the Court could do so. It was held (per the headnote):

> "*1. That a person who satisfied the criteria for involuntary admission to an approved centre as defined in the 2001 Act could be lawfully detained pursuant to the wardship procedure if it was necessary and appropriate on the evidence before the court and if protections to vindicate and protect the rights of the person were put in place.*
>
> *2. That the court's wardship jurisdiction was a wide one, albeit that it had to be read in light of the Constitution and the European Convention on Human Rights. The court was vested with jurisdiction, where necessary and appropriate, to take into its wardship a person of unsound mind who required its protection and management, and was empowered to make such ex parte or interlocutory orders as were necessary to give effect to that broad jurisdiction, and for the protection of the rights, interests and welfare of the person involved, as well as property.*

3. That the Mental Health Act 1945 to 2001 did not remove or delimit the wardship jurisdiction of the High Court and Circuit Court in regard to persons of "unsound mind". Section 283(1) of the 1945 Act expressly acknowledged the continuing power of the courts to order the detention, by way of wardship, for the care and commitment of persons of unsound mind if such a course of action was necessary and appropriate."

52. The Court went on to hold:

"*5. That the two jurisdictions had to operate separately and interweaving of the procedures under the 2001 Act with the wards of court procedure was not permissible. While a court might make an order that a ward of court be detained in a particular place, such a person might not simultaneously be the subject of an order under the Mental Health Acts.*"

53. Of course, a significant difference between the two cases is that in *HSE v AM* the ward was not the subject of an order under the 2001 Act whereas the respondent is. I do not believe that this affects the reasoning as to whether the Court can have jurisdiction under section 9 (or its inherent jurisdiction). It may, however, affect the exercise of that jurisdiction. The existence of the order under the 2001 Act, of course, raises the serious question of what happens to the relevant admission or renewal order if this Court makes Orders under section 9. I return to this crucial question below because the Court could only exercise its jurisdiction under section 9 if to do so would not leave the respondent subject to two separate orders.

54. I am satisfied, subject to that, that I have power to make a detention order (the Orders sought) under section 9 notwithstanding that the respondent is subject to an order under the 2001 Act.

Should the Court make the Orders sought?

55. The Court could only have jurisdiction if it is satisfied that the respondent lacks capacity and could only make the Orders if satisfied that they are appropriate and necessary (*HSE v AM*) and that sufficient safeguards are or can be put in place. The Court has jurisdiction to put such safeguards in place due to its obligation to vindicate the respondent's constitutional rights.

56. There is no dispute between the parties in respect of the respondent's lack of capacity or that his current placement is inappropriate in the context of a suitable

alternative being available. Nor is there is any serious dispute but that the alternative placement is appropriate. This, however, must be heavily qualified by noting that the respondent's mother fervently wishes the respondent to go home to his family with whom he lived for his entire life before this recent admissions to the approved centre. She does not dispute the appropriateness of the residential placement in itself provided it is viewed as, and is, a means to an end, ie. a means to the respondent transitioning home. She also raises serious concerns about its geographical distance from the respondent's home.

57. The Court has had the benefit of extensive evidence in the form of affidavits and reports. I have carefully considered all of this evidence. I do not propose to recite all of the evidence in circumstances where there is a large degree of agreement between the parties, as just discussed. I had before me, inter alia, an affidavit of Dr. Órfhlaith McTigue, Consultant Psychiatrist, sworn on the 27th February 2024, together with her detailed report dated the 21st February 2024, a report prepared by the HSE Disability Services Manager in February 2024, a Statement of Purpose in respect of the residential unit prepared by the service provider, Nua Healthcare, in November 2023, a capacity assessment report prepared by Dr. McTigue on the 26th February 2024, a forensic psychology report dated the 2nd July 2023 prepared by Dr. John Bogue, Consulting Forensic Clinical Psychologist, a report prepared by Mr. Andrew McDonnell, Clinical Psychologist, Studio III Clinical Services, an affidavit of Mr. Brendan Donnelly, the respondent's Guardian ad Litem, sworn on the 2nd October 2023, and a further affidavit of Mr. Donnelly of the 26th February 2024, exhibiting a report of Dr. Margaret O'Grady, Consultant Psychiatrist, dated the 14th February 2024, which was obtained by the respondent's Guardian ad Litem, an affidavit of the respondent's mother, sworn on the 22nd February 2024, and a report of Professor Patricia Casey, Consultant Liaison Psychiatrist, dated the 16th February 2024, which was obtained by the respondent's mother. There were also before me a number of affidavits of the HSE's solicitor and some additional reports including an Occupational Therapist's report and earlier reports of Dr. McTigue.

Capacity

58. I am satisfied on the basis of the evidence that the respondent lacks capacity in the relevant decision-making areas or domains. It has been accepted for quite some time that it is inappropriate to adopt a status-based approach to the assessment of capacity (or lack thereof) and that the Court must consider whether or not the person lacks decision-making capacity in relevant areas such as to justify or require the Court to

intervene to vindicate that person's constitutional rights. The relevant domains here are personal welfare, health care and where he should live. Dr. McTigue previously provided a capacity assessment report in September 2023 and more recently provided a report based on an assessment which was conducted on the 15th and 19th February 2024. This report was detailed and explained the assessment process and the interactions with the respondent as part of that process which ultimately led Dr. McTigue to set out her conclusions in relation to whether the respondent was able to understand the information required to make decisions relating to his person welfare or to retain and weigh up or balance the risks and benefits of each decision relating to his personal welfare. Dr. McTigue stated that she included in "*personal welfare*" "*the areas of accommodation and where [the respondent] should live, his need for social care and a specialist servce to support his health wellbeing…[and]…other matters relating to personal welfare including nutrition, personal hygiene and care and keeping safe.*" Dr. McTigue, in section 8 of her report, considered the question whether the respondent has "*the capacity to make an informed decision in relation to his own personal welfare and healthcare*" and concluded that he does not have decisional capacity in relation to these areas as he is unable to understand the information required to make decisions relating to his personal welfare and is unable to retain and weigh up or balance the risks and benefits of each decision relating to his personal welfare.

59. Dr. O'Grady also assessed the respondent's capacity on behalf of the Guardian ad Litem on the 6th December 2023 and concluded that the respondent lacked capacity, largely reflecting the views of Dr. McTigue. She said at section 8 of her report:

> "8.3 [The respondent] *did not appear to understand the reason for my visit around options for the future. He was able to understand that I was a doctor but he related to me around day to day activities, asking if he could go to various activities. When I spoke to him about being asked to see him by Mr. Brendan Donnelly, while he recognised Mr. Donnelly's name he did not appear to understand Mr. Donnelly's role and kept repeating Mr. Donnelly's name rather than participating in discussing his role or the process he is involved in. In this context when I attempted to speak with him about options for discharge, despite my using simple language he misinterpreted, stating he wished to go to the OT room. The well documented difficulties he encounters due to cognitive deficits were apparent in these interactions.*
>
> *8.4 He was unable to retain information that I gave him about my role and the role of others, around his current situation, responding to prompts by relaying information about day to day activities on the ward and interpreting my role as part of the routine decision making in the MDT.*

8.5 [The respondent] *was unable to use and weigh up information presented. He was comfortable stating information that was familiar and of interest to him but he was unable to converse on other topics. He exhibited much echolalia where he repeated the last thing that I said as opposed to conversing. He stated that he would like to go home but he was unable to explain why he was in hospital. It was clear that he preferred dealing with the here and now and the immediate than with concepts involving the past, future and the conditional. He was unable to state what help he was receiving in hospital or what help he would need in the future."*

60. I am therefore satisfied that the respondent lacks capacity to make decisions in respect of his personal welfare, his health care, and where he should live.

Appropriateness of current placement

61. There is no dispute that the current placement is inappropriate in the context of a more suitable placement now being available. Dr. McTigue, the treating psychiatrist, clearly states that view. It is worth quoting what she says at some length because this also goes to the question of the appropriateness and indeed necessity of the proposed residential placement. She states in her affidavit, referring to her report of the 21st February 2024, that:

"14. *The Adult Mental Health Unit is a suboptimal environment for* [the respondent]*. His needs and interests would be best served by an alternative placement. I cannot sufficiently emphasise the importance of an appropriate environment in order to address* [the respondent's] *care needs. I state frankly at paragraph 4.2* [of her report] *that the acute Adult Mental Health Unit is not an appropriate living environment for a person like* [the respondent] *who is a young man with autism and intellectual disability.*

15. At paragraph 4.3 I set out that [the respondent]*, who is suffering from anxiety, aggression, and distress in his current environment, is receiving stabilising antipsychotic medication to address that distress. Further, I say that physical restraint has been deployed in order to mitigate the level of risk which* [the respondent] *presents toward other persons (staff and patients). The last incident of restraint occurred on Thursday 22 February 2024. I note incidents of assault, attempted assault, and destruction of his living environment (para. 4.5). I respectfully emphasise to the Court the role played by [the respondent's]*

current environment (an acute psychiatric setting) in contributing to his level of distress:-

> *4.5 There are elements to the AMHU and HDU environment that contribute to* [the respondent's] *distress and potential for further deterioration. These are circumstances that are not controllable and are the norm in an acute AMHU which cares for patients with acute and serious mental illness. These include the turnover of staff, changes in atmosphere, identity of carers, changes in number of other unknown individuals and patients that he may have to meet and interact with on a day to day basis.* [The respondent] *is the only young person with his profile and specific vulnerability on the ward. It is a noisy, changeable environment. There are other patients with their own specific needs due to psychosis or other major mental illness that provides for a fluctuating unpredictable living circumstance that is far from ideal and contrary to his specific needs.*

16. Later in my report, I set out my concern (which I repeat here), that [the respondent's] *continuing placement in the acute Adult Mental Health Unit is not only limiting his ability to access appropriate interventions (psychological and behaviour support interventions, occupational therapy and sensory interventions and speech and language therapy and interventions to aid communication: (see para. 4.2), but risks exposing him to further harm:-*

> *7.2 …There is a serious risk that further prolonging* [the respondent's] *stay in the acute AMHU will cause him to deteriorate."*

62. Importantly, in this case, Dr. McTigue expresses the view at paragraph 19 of her affidavit that the respondent is currently detained under section 3(1)(a) of the Mental Health Act (the existence of risk element of the definition of mental disorder) but the placement is "*singularly unsuited to providing/supporting the types of intervention that could allow him to reduce his risk profile.*" Thus, a catch-22 is created where the very placement which keeps the respondent safe is incapable of providing the interventions which would allow him to reduce the risk which led to his detention in the first place and which then leads to the continuation of his detention.

63. Dr. O'Grady, who prepared a report for the Guardian ad Litem, is also clearly of the view that the current placement is inappropriate. She states that the interventions and care needed by the respondent "*cannot be provided in an acute inpatient psychiatric*

ward which involves rapidly changing clinical settings…" and that *"[C]urrently his detention under the Mental Health Act primarily addresses the containment of risk secondary to behaviours of concern. However, therapies that would assist in addressing and alleviating such behaviours cannot be optimally accessed by [the respondent] in his current location, and indeed the current acute ward environment may hinder such specialist therapy…In my opinion he cannot receive the therapeutic interventions he requires in such an Approved Centre as the AMHU."*

64. Professor Casey provided a report at the request of the respondent's mother. She is of a similar view to Dr. McTigue and Dr. O'Grady and states that the respondent "*is inappropriately placed in his current treatment setting, as it is an Acute Psychiatric Unit and he is in the Intensive Care Section of that because of his behaviour…*"

65. The respondent's mother also clearly expresses the view in her affidavit that the placement is inappropriate.

66. I am entirely satisfied that the current placement is inappropriate. As is clear from the decision in *HSE v AM*, when faced with a case where a person meets the criteria for detention under the 2001 Act and section 9 of the 1961 Act, the Court must carefully assess the evidence to determine whether the case comes within the scope of the 2001 Act or the section 9 jurisdiction. Unfortunately, it can come within both. It seems to me that the Court must then consider which is most appropriate and which best vindicates the individual's constitutional rights. In circumstances where the evidence is that the placement under the 2001 Act is inappropriate and may even be prolonging the respondent's detention then it must follow that the matter is more properly dealt with under the Court's section 9 jurisdiction.

Appropriateness of the proposed residential unit and Orders

67. I am also satisfied that the proposed residential placement is appropriate and necessary. The first consideration is whether it would be appropriate for the respondent to return home because it could not be said that the Orders and residential unit are appropriate or, more particularly, necessary, if he could return home with proper supports. The respondent's mother is strongly of the view that he should return home. However, as noted above, this is tempered somewhat by her not opposing the proposed transfer provided it is directed towards the respondent returning home. She does not take the position that the placement is in itself inappropriate, other than her concern about its geographical location. I return to the respondent's will and preference below.

68. I am satisfied that it would not be appropriate that the respondent should simply return directly home. Professor Casey says in her report that:

> "*In my opinion it is impossible at this point for* [the respondent] *to return home and it would be dangerous and reckless for Dr. McTigue to agree to this.* [The respondent] *needs to be managed in a safe environment, that will be domestic in nature, and where he will be able to exercise and engage in his hobbies under the supervision of trained professionals. The nearer to home the better although at present there is nothing near home.*"

69. Dr. John Bogue, Consulting Forensic Clinical Psychologist, who had been asked by Dr. McTigue to conduct a forensic risk assessment in the context of the respondent's recent and current circumstances (in July 2023), said that:

> *"…risk concerns regarding the Respondent's propensity to engage in aggressive and destructive behaviour in the family home have not been adequately addressed and are probably being underestimated to a significant extent. It would be reckless to ignore such concerns and proceed with an immediate home discharge without having a well monitored medium-term arrangement in place."*

70. Thus, it seems to me that it would inappropriate for the respondent to return directly home.

71. It seems to me that the evidence all establishes that the placement in the residential unit is appropriate and necessary notwithstanding the legitimate concerns about his distance from the respondent's home. I have had regard to the Statement of Purpose in respect this placement. Details are given in the affidavit and report of Dr. McTigue about this placement. It is important to note that recommendations were given in the reports of Dr. Bogue and Studio III in relation to what was required by the respondent.

72. In paragraphs 21 to 34 of her affidavit Dr. McTigue deals with the placement, where she summarises the contents of her report (section 6). There are a number of factors touched upon by McTigue which leads her (and the Court) to the conclusion that the placement is appropriate (notwithstanding its location) and necessary. Dr. McTigue refers to a report of HSE Disability Services in which it was set out that the respondent would have a low-arousal environment, supported by trained staff, have access to an appropriate MDT as recommended, and would be supported with speech and language therapy, behaviour support and sensory needs support. Dr. McTigue visited the unit and

met the proposed multi-disciplinary team. She reviewed the "*staffing compliment outlined, the training provided and the additional training that is available to staff in Autism, Positive Behaviour Support and Trauma Informed Care as well as other training if relevant and required*" and concluded that it was appropriate to the respondent's presentation and needs. An important factor in Dr. McTigue's conclusion was that staff would be available who are trained in therapeutic management of violence and aggression.

73. She states at paragraph 36 of her affidavit that:

> "*This situation has been maintained for far longer than I would ever have wished and could only ever have been justified (insofar as* [the respondent's] *welfare and best interests are concerned) in circumstances where there was no more appropriate placement available for* [the respondent]. *That is no longer the case. A suitable placement has been identified for* [the respondent]*, which is in your deponent's opinion:-*
>
> *a. suitable to meet his needs;*
>
> *b. will be infinitely calmer and less distressing for* [the respondent] *than his current environment;*
>
> *c. will facilitate* [the respondent]*, once he has stabilised, to access a broad range of multidisciplinary inputs which are not available to him in his current busy, acute environment; and*
>
> *d. very significantly mitigates against the real risk of further deterioration in* [the respondent's] *presentation/harm to* [the respondent] *which is posed by his presence in his current acute environment."*

74. I am satisfied at this stage that the placement is capable of providing for the respondent's needs as reported upon in the medical and clinical reports and that it is therefore appropriate.

75. There is no doubt that its geographical location and the distance from the respondent's family home is a matter of serious concern. There is a concern that the geographic location is, at the very least, not ideal. It is four hours drive from the respondent's home. This caused me serious concern about its appropriateness. However, I am satisfied that it does not render the placement inappropriate. It must be balanced with the facts that the respondent has specific needs, in particular in relation to

behavioural issues, and the evidence at this point in time is that it is the only suitable placement which is available.

76. Professor Casey, who it must be borne in mind has not assessed the specific placement (as that was not what she was asked to do), expresses the opinion that "*the least worst option at this point, is for [the respondent] to go as an interim measure, to the house that is available…and as his behaviour improves to have time out with his family taking place in a graduated fashion. The ultimate goal should be to discharge him home to his parents but tat this point this is not safe for them or for others.*"

77. One particular factor in the respondent's presentation is behaviours which are caused by his condition. It is not necessary to recite these in detail other than to say that these have involved physical assaults on other people and destruction of his living environment. One of the core reasons for Dr. McTigue's conclusion that this placement is suitable is their ability to use and training in the use of restraint. I am satisfied that the Orders in relation to restraint and sedation in the transfer and in the placement are necessary.

78. It is not sufficient that I simply be satisfied that the placement is appropriate and necessary. I must also be satisfied that it is necessary to make the Orders notwithstanding that there is already an order in place under the 2001 Act and that the respondent is currently detained. In light of the evidence as to the significant inappropriateness of his current placement, I am satisfied that it is necessary to make these Orders notwithstanding the order under the 2001 Act. This, however, is subject to the issue of what should or can happen in respect of that order.

The respondent's will and preference

79. It is, of course, essential that the Court have regard to the respondent's own views, will and preference insofar as they can be ascertained.

80. It is clear that the respondent's mother is of the view that the respondent wishes to return home.

81. Mr. Donnelly, the respondent's Guardian ad Litem, has met the respondent on a number of occasions, including in September 2023. He records in an affidavit that the respondent told him on that occasion that he would like to go home. Mr. Donnelly describes explaining to the respondent that there was a proposal that he would be transferred from the hospital setting (i.e., the approved centre) to a residential placement and that he tried to explain this to the respondent in layman's language. He records that the respondent was quite adamant that he wanted to leave the hospital and

would like to go home. He also explains that following a long discussion, the respondent said that if he could not go home his wish was to leave the hospital and go to a residential unit, that "he did not want to stay in hospital."

82. In her capacity assessment, Dr. McTigue records that the respondent said that he did not want to stay in hospital and that he wanted to go home. However, she also reports that he wanted to go to an apartment. She also reports that when asked his preference or choice of residence, his answer depended on the order of the words and choices given in the sentence as he was inclined to give an answer in an echolalic fashion (repeating the last word he heard) which is part of his autism, communication and developmental disorder.

83. Notwithstanding this difficulty, it seems to me that the respondent has consistently expressed a wish (i) to leave the hospital and, somewhat less adamantly, (ii) to go home, and I have had regard to those will and preferences.

84. It seems to me that this supports the conclusion that a transfer from the hospital is appropriate. It is in accordance with the will of the respondent. Unfortunately, while considerable weight must be given to the respondent's desire to go home, it can not be determinative in the circumstances set out above.

Conclusion

85. I am therefore satisfied to make the Orders sought under section 9 of the 1961 Act subject to the following matters.

Order under the 2001 Act

86. As is clear from *HSE v AM*, a person may not simultaneously be the subject of a detention order under this Act and of an order under the 2001 Act. As noted above, it was held in *HSE v AM* that "*…the two jurisdictions had to operate separately and interweaving of the procedures under the 2001 Act with the wards of court procedure was not permissible. While a court might make an order that a ward of court be detained in a particular place, such a person might not simultaneously be the subject of an order under the Mental Health Acts*."

87. Unlike in *HSE v AM*, the respondent is currently the subject of an order under the 2001 Act. I will hear from the parties as to what is to happen in relation to that order. It seems to me that some consideration will have to be given to whether the responsible consultant psychiatrist is entitled to discharge the respondent, or whether it is possible

to simply let the most recent renewal order expire and to delay the transfer (which does not seem consistent with the rationale of this application) or to utilise the leave provisions supplemented by the Court's inherent jurisdiction in the meantime. This is not an exhaustive list. There was some discussion of what should happen to the 2001 Act order during the hearing but it is now necessary to address this specifically and I will give the parties an opportunity to do so.

Therapeutic rationale

88. Central to the proposal to transfer the respondent and to detain him outside the provisions of the 2001 Act and in a unit which is not an approved centre is the intention and hope that it will enable the respondent to return home. This was captured by Dr. McTigue at paragraph 39 of her affidavit: "*It is my hope and expectation that in the more suitable environment of the Nua placement,* [the respondent's] *behaviours of concern will dissipate to the point where, as Dr. O'Grady anticipates, he will no longer meet the criteria for detention under section 3(1)(a) of the Act of 2001. I cannot say with certainty that this will be the case, but I say that it is my clinical opinion that this proposed trajectory of care offers him the best prospect of achieving that therapeutic aim.*" Any placement on foot of the Court's jurisdiction must be directed to that objective or therapeutic rationale. There can, of course, be no guarantee that this will be achieved but it seems to me that where that is such a core part of the application, the Court must, on reviews, if it makes the Orders, be satisfied that the placement is addressing that rationale or that there is some other basis upon which the detention can or should be continued.

Location

89. As noted above, there is a consensus that the geographic location is, at the very least, not ideal. Ultimately this does not render the placement inappropriate. However, what it does mean is that if the Court makes the Orders the HSE will have to engage with the respondent's family in respect of visits. I would not propose to make any specific directions in this regard when making the substantive Orders, but it is a matter which will have to be addressed, in the first instance by the parties, and, if necessary, by the Court. It also means that the availability of an appropriate placement closer to home must be kept under review.

Safeguards and Reviews

90. Any Order of this Court which interferes with an individual's constitutional rights, including their right to bodily integrity and their right to liberty, must be subject to strict safeguards including regular reviews by this Court. Such reviews must encompass reviews of the question of capacity, the respondent's welfare, the therapeutic rationale for ongoing detention, the legal basis for same, and the respondent's will and preference. Of course, there is an overlap between these. It is also not an exhaustive list.

91. I will give the parties an opportunity to address me on the specific safeguards which should be put in place. This question is considered at paragraph 101-104 of the judgment in *HSE v AM*.

92. It seems to me that at a minimum these protections would have to reflect, insofar as possible, the types of protections provided for in the 2001 Act; otherwise the effect of the making of the Orders under section 9 would be to deprive the respondent of those important protections. Of course, the procedures can not exactly replicate those under the 2001 Act – for example, reviews before the Mental Health Tribunal will not be available but they will be replaced with reviews by this Court.

93. It seems to me that consideration has to be given to at least the following:

(i) the frequency of the reviews before this Court;

(ii) what reporting and/or evidence will be required at each such review; is the report and/or evidence of the treating psychiatrist sufficient or should a report or evidence also be given by an independent psychiatrist;

(iii) should an independent solicitor be appointed or is the Guardian ad Litem (who is a solicitor) sufficient;

(iv) who will pay the costs of the reviews;

(v) should there be liberty to apply.

94. As these safeguards and protections are a central part of the decision as to whether to make the Orders under section 9 I will not decide to make the Orders until the question of the safeguards has been resolved.

Inherent Jurisdiction

95. As I have decided that I have jurisdiction to make the Orders sought under section 9 subject to consideration of what can and should happen in respect of the 2001 Act order, it is not necessary to consider the exercise of the Court's inherent jurisdiction at this stage, and I will only consider this in the event that it is not possible to determine the questions relating to the orders under the 2001 Act and relating to the appropriate safeguards.

96. I will, therefore, list this matter for further submissions on those matters tomorrow, at a time to be discussed with the parties.