

THE HIGH COURT**2011 1208 P****IN THE MATTER OF J.O'B AND IN THE MATTER OF THE INHERENT
JURISDICTION OF THE HIGH COURT****BETWEEN****HEALTH SERVICE EXECUTIVE****PLAINTIFF****AND****J.O'B (A PERSON OF UNSOUND MIND NOT SO FOUND) REPRESENTED BY HIS GUARDIAN AD LITEM H.O'B****RESPONDENT****JUDGMENT of Mr. Justice of Mr. Justice Birmingham delivered the 3rd day of March, 2011**

This is a novel application.

In these proceedings the Health Service Executive ("H.S.E.") seeks declarations that Mr. J. O'B. is a person who lacks capacity to make decisions in relation to his treatment care and welfare;; that Mr. O'B. is a person in need of an appropriate and continuous regime of clinical, medical and nursing treatment in an environment of therapeutic security, this being in his best welfare and interest;; that the clinical, medical, nursing, therapeutic security, welfare services and treatment at the Central Mental Hospital (C.M.H.), Dundrum, are appropriate to his needs; and for an order directing the H.S.E. to detain Mr. O'B in the C.M.H., as well as seeking various ancillary reliefs.

What makes this application very unusual, if indeed not entirely unique, is that it is agreed on all sides that Mr. O'B. is not suffering from a mental illness or mental disorder as that term is defined in s. 3 of the Mental Health Act 2001, and accordingly it is agreed that the provisions of that Act are of no application.

The factual background

The applicant was born in 1985 in Cork. Early in life he was diagnosed as displaying mild to -moderate learning disabilities associated with very challenging behaviour. So, hHe engaged in extreme violence at pre-school and was excluded from national school when aged four years. Placements in other national schools also failed, as did a placement at a special care primary school for pupils with mild learning disability where he was involved in numerous assaults and was suspended on several different occasions. Aged eight, he was placed in a residential hostel operated by a religious order and over the following years moved through a number of different hostels and institutions, most linked to the religious order. Between 1998 and 2004 he attended a specially dedicated school where very considerable resources indeed were allocated to meeting his needs. However, in 2000 he set fire to the school as a result of which he was admitted to a psychiatric hospital for a weekend. Further admissions followed.

Throughout this period his behaviour was challenging in the extreme, involving a history of physical aggression towards family members, carers, persons known to him and strangers. He has engaged in serious cruelty towards animals and insects. The Clinical Director of the facility operated by the religious order to which I have referred described Mr. O'B. as showing the features of a "sociopathic personality disorder".

When he was eighteen years of age that facility concluded that he required a therapeutic environment providing for people with learning disabilities and personality disorders and that no suitable placement existed in Ireland. Contact was made with the Mental Health Services in Britain but unfortunately placements in a number of different units broke down because of the extremely challenging nature of his behaviour. Ultimately he was transferred to the care of an agency known as "Care Principles", in accordance with the provisions of the Mental Health Act 1983, and since then he has been detained at a number of different facilities operated by them. It may be noted that the legislation in England and Wales contains a broader definition of "mental disorder" than applies in this jurisdiction and this would appear to have permitted the invocation of s. 3 of the English legislation.

The application now before the Court is grounded on an affidavit of Professor Henry Kennedy, Clinical Director of the Central Mental Hospital, who has exhibited a number of detailed reports. Professor Kennedy was also called to give oral evidence during the course of which he elaborated on and clarified certain aspects of his grounding affidavit and reports.

Professor Kennedy's involvement with Mr. O'B., came about when he was asked to see him by the H.S.E. South. This request was made because the H.S.E. South was anxious to explore whether bringing Mr. O'B. back to Ireland from Britain was feasible and whether it was in his best interest. It should be explained that Mr. O'B. was very anxious to get home to Ireland and that Mr. O'B.'s family members were also very anxious that he should return. Professor Kennedy familiarised himself with the case by reading all available reports, interviewing family members, interviewing his primary carers and travelling to Britain to see Mr. O'B., both in his present location and in the placement where he was previously detained. Then, in January 2009, the Director of Clinical Services with "Care Principles" sought the advice of Professor Kennedy in relation to the management of Mr. O'B. It may be noted that during throughout his placement in Britain that Mr. O'B.'s behaviour has remained very challenging:. So, he has attempted to bite, punch and kick members of staff and other residents and has punched windows and walls. Twenty five incidents of physical aggression involving spitting at staff, biting, punching, head-butting and slapping staff and fellow residents were recorded at his first placement. Also recorded were incidents of sexually inappropriate comments and gestures. This pattern has continued. While the most common type of incident in which Mr. O'B. has been engaged consists of him spitting and kicking doors, there are also recorded instances of him intimidating female staff members and attempting to touch female staff members and touching the groin of a male staff member. Mr. O'B. has informed the staff that he is sexually frustrated. On the basis of what Professor Kennedy has to say, a number of matters

emerge very clearly. These include that:-

1. Mr. O'B. has intellectual disability and autism spectrum traits and arrested or incomplete development of mind which includes significant impairment of intelligence and social functions.
2. Because of his arrested or in complete development of mind, Mr. O'B. has significant impairment of social functioning and engages in abnormally and aggressive and seriously irresponsible conduct.
3. Mr. O'B. lacks the mental capacity to manage his financial affairs. In that context it should be noted that Mr. O'B. recently received an award of €50,000 from the Residential Redress Board, and this is an aspect that requires consideration.
4. Mr. O'B. lacks the mental capacity to make decisions about his welfare in his own best interests.
5. Mr. O'B. could not make reasoned decisions regarding his personal care, both medical and psychological.

Professor Kennedy has stated that it is his clinical view that, due to Mr. O'B.'s condition, that he requires care and treatment in conditions of therapeutic security at a medium to high security level. I am entirely satisfied to accept Professor Kennedy's clinical view as correct and would wish to act upon it. The C.M.H., Dundrum, is the only place in Ireland where such a therapeutic environment as described by Professor Kennedy, can be provided. The members of Mr. O'B.'s family have been very supportive of his needs and I am also satisfied given their involvement which is a very positive feature of the case, that if he can be cared for in an appropriate setting in Ireland that there are very considerable advantages in having him close to home and family. In that regard, in terms of Mr. O'B.'s needs it is clear he would benefit from family work as an aspect of his care and treatment and this would obviously be facilitated by a return to Ireland. Caring for Mr. O'B. can only safely take place in an in-patient unit. Staff to patient ratios comparable to what are now provided in his current placement in Britain would be required. It is also clear that access to a highly skilled forensic nursing team with training and experience in relation to the prevention and management of violence and aggression would be essential. All these requirements, can, I am assured, be met at the C.M.H.

It has also been established that Mr. O'B. requires a low stimulation environment appropriate for his autistic spectrum traits and intellectual disability. This must, however, be combined with appropriate "slow stream" psychological and rehabilitative programmes designed to optimise the level of recovery that Mr. O'B. is able to achieve. The use of the phrase "slow stream" by Professor Kennedy indicates that there is no realistic expectation of any rapid or dramatic recovery and one must be prepared to contemplate a lengthy period of care and detention. The consultant psychiatrist who has been treating Mr. O'B. has informed Professor Kennedy that consideration is being given to transferring Mr. O'B. from his present location, one that provides medium security and low security facilities for patients to a high secure unit. The consultant also expressed the view that it was likely to be many years before Mr. O'B. could be moved even to a low secure unit.

It seems clear that it is absolutely necessary for Mr. O'B. to remain in care, if he is to receive the necessary treatment and if his unusual needs are to be addressed. It is also clear that it would be in Mr. O'B.'s best interests that he be cared for in Ireland if that can be achieved. If that can be achieved it has the considerable merit that it accords with the wishes of his family, including the wishes of his sister, H. O'B., the member of the family with the most sustained level of involvement with him, who has agreed to act as Guardian *ad litem* and has been appointed to that role on an interim basis, and indeed it also accords with Mr. O'B.'s own wishes. I am told that great efforts have been made to explain to Mr. O'B. that if he returns to Ireland he would not be going back to his family or going back to take up an independent lifestyle and that he now appreciates that this is so, but that it remains his strong wish to come back to Ireland.

Caring for Mr. O'B. will require the involvement of a multi-disciplinary team, consultant led, and including among its members specialist nurses with training and experience in relation to the care of those with intellectual disabilities and having complex needs including engaging in highly challenging behaviour.

If Mr. O'B. is to be cared for in Ireland it is absolutely clear that the level of care required, including the necessary degree of security, can only be provided in the C.M.H. The H.S.E. explored other possible placements but these efforts proved unsuccessful. Professor Kennedy is firm in his view that the C.M.H. is in fact the only facility in Ireland that can meet the needs of Mr. O'B. It is of course a specialist mental hospital providing treatment for persons with mental disorders in conditions of special therapeutic security.

In all these circumstances I am quite satisfied that it is very much in the best interests of Mr. O'B. that he should be detained and cared for in the C.M.H. in Dundrum which is the only location in Ireland equipped to meet his needs, if that can be achieved. There remains for consideration whether what is desirable and what is in his best interest can be achieved.

The legal basis for the orders sought

Counsel on behalf of the H.S.E., Mr. Felix McEnroy, S.C., contends that the Court can in the exercise of its inherent jurisdiction make the orders sought. He says that if one has regard to the manner in which the Court has exercised a similar jurisdiction in relation to minors over a number of years that by analogy the Court should, where necessary and appropriate, exercise a similar jurisdiction in the case of vulnerable adults.

The origin of the jurisdiction exercised by the courts in relation to minors can be traced to the judgment of the Supreme Court in the case of *D.G. v. E.H.B. Eastern Health Board* [1997] 3 I.R. 511, a case which arose from the decision of the High Court to direct the detention in St. Patrick's Institution of an "at risk" minor. In the Supreme Court it was accepted by counsel that it may be lawful in certain circumstances for a court to order the detention of a child with a view to protecting his or her constitutional rights but disputed that the power extended to detaining a child in a penal institution. The majority of the Supreme Court was of the view that the High Court had indeed jurisdiction to make the order which was the subject of the appeal.

In this case, before one can contemplate making the orders sought, one has to have regard to the provisions of both the Constitution and the European Convention on Human Rights. Article 40.3.1 s.3, subs. 1 of the Constitution states:-

"The State guarantees to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

Article 40., s.3., subs. 2, provides:-

"The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice

done, vindicate the life, person, good name and property rights of every citizen.”

Article 40.4.1 provides:-

“No citizen shall be deprived of his personal liberty, save in accordance with law.”

Article 5(1) of the Convention so far as material provides:-

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure described by law;

(e) The lawful detention of persons for the prevention of the spreading of infectious diseases of persons of unsound mind, alcoholics or drug addicts or vagrants.”

The jurisdiction jurisprudence of the European Court of Human Rights establishes that an individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum requirements are met: – firstly, the individual must reliably be shown to be of unsound mind; secondly the mental disorder must be of a kind or degree warranting compulsory confinement; and, thirdly, the validity of continued confinement depends upon the persistence of such a disorder. See *Hutchison Reid v. U.K.* (Application No. 50272/99(2003) 37 E.H.R.R. 9) and *Winterwerp v. The Netherlands*, (24th October, 1979, Application No. 6301/73).

While the issues that arise in the present case do not appear to have been the subject of any direct authority in this jurisdiction, similar issues have arisen for consideration in England and Wales, and in particular were the subject of consideration by the Court of Appeal in “*In Re F (Adult: Court’s Jurisdiction)* [2000] 2 F.L.R. 512. In that case the adult at the centre of the proceedings was mentally handicapped and had been voluntarily accommodated in a children’s home since shortly before her 17th birthday but parental consent to that arrangement was withdrawn because the parents of the now adult wished her to return to the family. In earlier proceedings it had been established that the adult did not come within the terms of the Mental Health Acts and that she was not susceptible to the Court’s Wardship jurisdiction. In these circumstances the local authority sought to invoke the Court’s inherent jurisdiction quoting the doctrine of necessity, a doctrine that can be traced back to a number of court decisions in the 18th and 19th Centuries, in order to claim a declaration enabling the local authority to direct where the adult should live and to restrict and place under supervision the adult’s contact with her natural family. The Court held, in affirming the decision of the High Court, that where there was a risk of possible harm in respect of an adult who lacked the capacity to make decisions as to his or her own future, that the Court had power, under its inherent jurisdiction, and in the best interests of that person, to hear the issues involved and to grant the necessary declarations. Dame Butler- Sloss, President of the Family Division was of the view that the English Mental Health Legislation did not cover the day- to- day affairs of mentally incapable adults and that accordingly the doctrine of necessity may properly be invoked side by side with the statutory regime.

There are a number of similarities between the *F.* case and the present case but also a number of very significant differences. In both cases, the adult lacks the capacity to make a decision as to his or her future. However, while in *F.* there was disagreement between the parents and the Local Authority, the Local Authority felt that the mother in that case had failed to take proper care for her daughter, in the present case the family members of the incapable adult, and the H.S.E. are in agreement as to what is in the best interests of Mr. O.B. It is also the case that what is proposed accords with the wishes of Mr. O.B. There is also the fundamental difference that in *F.*, the choice was whether the adult reside in the place specified by the Local Authority or whether she would reside with her parents. Here the question is whether this young Irish adult is to be detained at the Central Mental Hospital in his own country, or whether he is to be detained in an institution in Britain. In a situation, where the H.S.E., the family of the adult and indeed Mr. O.B. the adult himself are all of the same mind, the Court’s task is a less daunting one.

The issues that arise were discussed in the quite different context of arranged marriages in the case of *Re S.A. (Vulnerable Adult with Capacity Marriage)* [2006] F.L.R. 867. Discussing the powers of the court, Munby J. commented as follows at para. 84:-

“As I have said, the Court exercises what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established jurisdiction in relation to children. There is little, if any, practical difference between the types of orders that can be made in exercise of the two jurisdictions. The main difference is that the Court cannot make an adult a Ward of Court... But this apart, the Court’s powers to make orders under the inherent jurisdiction in relation to adults would seem to be as wide as its powers when exercising its inherent *parens patriae* jurisdiction in relation to children. Just as there are, in theory no limits to the Court’s powers when exercising the Wardship jurisdiction, I suspect that there are, in theory, few if any limits to the Court’s powers when exercising the inherent jurisdiction in relation to adults.”

He then went on to refer to his own comments in *Re S. (Adult Patient) (Inherent Jurisdiction:; family Family life)* [2002] EWHC 2278 (FAM) [2003] 1 F.L.R. 292, where he had commented, at para. 50:-

“The Court has jurisdiction to grant whatever relief in declaratory form is necessary to safeguard and promote the incapable adult’s welfare and interests.”

The observations of Munby J. are couched in broad terms, and in the absence of full debate, and unless and until the issues arise, I am not to be taken as necessarily being in full agreement. However, in more limited cases, where an adult lacks capacity and where there is a legislative *lacuna* so that the adult’s best interests cannot be served without intervention by the Court, I am satisfied that the Court has jurisdiction, by analogy with cases like *D.G.* and the several High Court decisions from different judges of the High Court there referred to, to intervene.

There remains for consideration the question of what structures are necessary by way of safeguard. In the analogous case of children detained by order of the High Court, all such situations are the subject of regular, usually monthly reviews. There is the difference that in the childrens’ cases, the hope and expectation is that the detention will be a short one and that after a relatively brief period in secure care that the children will be able to move on, whether that be back to their families, to a step-down residential facility or to a foster placement. Here, the expectation is that the requirement for care while detained will be a lengthy one.

The orders proposed involve a serious interference with the right to liberty and that interference, if it is to be contemplated at all, must be reviewed on a regular basis and if it is to be continued will have to be justified on a regular basis. Accordingly, I intend to review the case at an early stage once Mr. O.B. has taken up residence in Dundrum the C.M.H., and thereafter to review the case regularly. Initially, at least, reviews will take place every two months but I will consider re-addressing that time table once a routine is established – given that autistic traits are a feature of the case, the establishment and maintenance of a routine is vital.

Mr. Timothy O'Leary S.C., counsel on behalf of the Guardian *ad litem*, Ms. H O'B., has indicated that he will be seeking an opportunity to obtain an independent professional report on the suitability of the C.M.H. and the progress being made there in due course. In signalling that desire, he stresses that Ms. O'B. is firm in her view that it is very much in her brother's interests that he be transferred to the C.M.H.Dundrum and that he be cared for there, as indeed it is the view of her parents. While not for a moment suggesting that either Professor Kennedy or the medical and nursing team in the C.M.H. Dundrum would ever for a moment contemplate acting in a way that was other than in what they perceived to be Mr. O'B.'s best interests, the suggestion is nonetheless a worthwhile one and I will require the H.S.E. to facilitate this. That all involved with Mr. O'B. have a common view on what is best for him offers considerable reassurance and comfort to the Court. However, on the other hand, it does mean that the Court is without the assistance that is offered by the intervention of a *legitimus contradictor*. Counsel who have appeared have been very conscious of that and I am very grateful to them for the level of assistance that they have provided. However, in a situation where all parties participating in the proceedings are in agreement, I think it would be of assistance if the Court had the benefit of an expert professional report from someone independent of all parties and I will require the H.S.E. to facilitate the making of the necessary arrangements. Subject to the putting in place of the necessary safeguards and supports as described, I am prepared to make the orders sought and I will discuss with counsel exactly what form those orders should take.