Neutral Citation: [2015] IEHC 216

THE HIGH COURT

[Record No: 2014/ 9083P]

IN THE MATTER OF J.B. AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

BETWEEN:

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

J.B. (REPRESENTED BY HIS SOLICITOR PATRICK DALY)

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 5th day of March, 2015.

1. A plenary summons was issued in the within proceedings dated the 24th October, 2014. An appearance was entered on behalf of the respondent for "J.B" (a person of unsound mind not so found, represented by his solicitor Patrick Daly), on the 10th November, 2014.

2. A notice of motion was issued dated the 23rd October, 2014 seeking extensive reliefs, and in particular a declaration that the defendant is of unsound mind to such a degree that he is incapable of managing his affairs and/or a declaration that the defendant, as a result of an impairment, cannot protect his best welfare interests.

3. There were previous proceedings between the Health Service Executive and "J.B". On foot of a court order dated the 17th May, 2012, "J.B" was detained in St. Andrew's Hospital, Northampton, and he has been the subject of intensive welfare reviews, most recently on the 17th October 2014 before Birmingham J. On the 15th October, 2014. Dr. Gabriel Pendlebury advised that it might be possible for "J.B", subject to the safe guarders agreeing to same, to remain on the Richmond Watson Unit at St. Andrew's for approximately six months and that he would then be referred to a low secure unit and in turn, returned back to Ireland. It was anticipated that he would be on the Richmond Watson ward for a further six to twelve months depending on his progress.

4. On the 7th October, 2014, "J.B" spoke to the Irish High Court and outlined that he was very anxious to return to Ireland. Moreover, "J.B" outlined that if that was not possible, he would be happy to stay on the Richmond Watson Unit after his eighteenth birthday.

5. The applicant is concerned that the defendant does not have capacity to make a decision for his future at this point in time, as he remains very vulnerable. Moreover, as "J.B" is compliant with medication for his bi-polar disorder, said condition being in remission, he cannot be detainable pursuant to the Mental Health Act 2001.

6. On the 23rd October, 2014, the matter came before the President of the High Court. On hearing the oral evidence of Dr. Margaret Kelleher and Dr. Gabrielle Pendlebury, and having heard the views of "J.B", the Court considered the matter to be urgent and required steps to be taken immediately for the welfare of "J.B". The Court found:

> 1. "J.B" is and has been placed by order of this Court in St. Andrew's Hospital, Northampton, for the purposes of receiving therapeutic and educational treatment since the 4th October, 2011.
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> 2. That "J.B" has and continues to suffer from a serious personality disorder accompanied by bi-polar personality disorder, which requires continued treatment at St. Andrew's.
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> 3. That "J.B's" illness is of a kind and degree that is likely to continue after his eighteenth birthday on the 24th October, 2014, and will require a period of compulsory confinement for the purposes of alleviating his symptoms.
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> 4. That on the evidence of Dr. Pendlebury of St. Andrew's Hospital Northampton, "J.B" meets the criteria for detention in England under s. 3 of the Mental Health Act 1983 on the basis that were he to be a patient in England, the statutory ground for detention under s.3(2) would be satisfied in that;
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> > (a) He is suffering from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital;
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> > (b) it is necessary for the health and safety of the patient or the protection of other persons that he should receive such treatment, and it could not be provided unless he were to be detained under section 3;
> >
> > (c) appropriate medical treatment is available for him at St. Andrew's.
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> 5. That "J.B" (aged eighteen on the 24th October, 2014) owing to an impairment of his personal faculties cannot protect his own interests. The Court being satisfied that there is no suitable facility available in this jurisdiction, and having found at the aforesaid hearing the matters to be urgent, it is in the best interests of "J.B" that he would continue to receive the appropriate therapeutic benefits available to him at St. Andrew's, and continue to be detained there for that purpose and returning to Ireland on completion of his treatment or at the direction of this Court. The Court was satisfied on the evidence before it that St. Andrew's Hospital, Northampton is a suitable institution for the purposes of treatment, welfare and therapeutic services to "J.B", and on hearing counsel for all relevant parties, and it so appearing that this application was unopposed, the Court did declare that:

(1). "J.B" (born on the 24th day of October, 1996) was placed in St. Andrew's Hospital, Northampton, England as a minor for therapeutic and educational purposes by Order of this Honourable Court made on the 4th October, 2011 pursuant to the inherent jurisdiction of the Court and Article 56 of Council (EC) No. 2201/2003 of the 27th November, 2003

(2). It is in "J.B's" best interests to continue to receive the services available to him for a period of six months from the 24th October, 2014 or such other period as this Court may order. It is ordered that:

(3). The plaintiff, the Health Service Executive, its servants or agents are authorised and permitted to place "J.B" at St. Andrew's Hospital, Richmond Watson Unit for the purpose of receiving treatment there, together with any welfare and therapeutic services for a period of four weeks subject to review and a further order of this Honourable Court.

(4). The Director of St. Andrew's Hospital, her servants or agents are authorised to detain "J.B" for a period of four weeks subject to review or such further period as this Honourable Court deems fit.

(5). The Director of St. Andrew's Hospital, her servants or agents are authorised to provide a step down facility to a lower secure unit, the ISHAM Unit or such similar facility within St. Andrew's when it is considered by the clinicians that it is therapeutically safe to do so.

(6). The Director of St. Andrew's Hospital, her servants or agents are authorised to take all necessary steps to promote "J.B's" welfare and to allow a regime of mobilites for "J.B" out of St. Andrew's at the discretion of the director.

(7). The Director of St. Andrew's Hospital, her servants or agents are authorised to provide such step down facilities to "J.B" in the course of his treatment at St. Andrew's for the purposes of his return to Ireland.

(8). That Ms "W.B" and/or Mr "J.B", mother and father of "J.B" should have frequent contact with "J.B" in the interests of his welfare, and shall be entitled to liaise with "J.B's" treating clinicians at St. Andrew's and in Ireland, to discuss any issues concerning "J.B's" treatment, medication or general welfare. His parents have liberty to apply to the Court at any time during "J.B's" detention in St. Andrew's to bring before the Court any issue of concern pertaining to "J.B's" welfare for review by the Court.

(9). That "J.B's" present or future guardian ad litem visit the said "J.B" every month or such lesser or greater periods as this Honourable Court deems fit, and file a report before this Honourable Court updating the Court in relation to the progress of "J.B's" treatment at St. Andrew's, with the purposes of enabling the Court to review his detention there.

(10). That the plaintiff, its servants or agents, are to visit "J.B" at regular intervals and file a report before this Honourable Court in response to such visits and updating the Court on the progress of "J.B's" treatment at St. Andrew's to enable the Court to review his detention there.

(11). Any necessary information in relation to "J.B" in the within proceedings and orders are to be disclosed to the Director of St. Andrew's Hospital, Northampton, the police in the United Kingdom, and/or other agencies in the United Kingdom as may be required to ensure the safety and welfare of "J.B" and compliance with this order.

(12). The Irish Psychiatric Services are to be permitted to engage and interact in the care planning of "J.B" during his remaining period at St. Andrew's.

(13). The Director of St. Andrew's Hospital, its servants or agents in the event, that in the opinion of "J.B's" responsible clinician, he no longer meets the criteria for detention under s. 3 of the Mental Health Act 1983, that they immediately procure a report from such responsible clinician at the hospital, and take urgent steps to alert the plaintiff so that the matter can be brought back before this Honourable Court for immediate review.

(14). The plaintiff, its servants or agents are to bring separate related proceedings to be issued on "J.B" attaining his age of majority on the 24th October, 2014 back before the Court on the 20th November, 2014 so that the Court can consider inter alia "J.B's" discharge and return to Ireland as a matter of urgency in the event of receiving such a report referred to above from St. Andrew's in respect of "J.B".

(15). The Court does declare that "J.B" is as of the date hereof habitually resident in Ireland and will remain so habitually resident during the period of his treatment at St. Andrew's Hospital.

(16). Liberty to apply to this Honourable Court at twenty four hours notice if necessary in circumstances of urgency to bring the matter before this Honourable Court.

(17). Separate related proceedings are to be issued on "J.B" attaining his age of majority on the 24th October, 2014 and shall be listed back before the Court on the 20th November, 2014 and shall be subject to regular monthly intensive welfare reviews during the currency of "J.B" at the said institution, to enable the Court to ascertain whether there still persists a basis for treatment and therapies provided at St. Andrew's in "J.B's" best welfare interest.

(18). The plaintiff, its servants or agents are to make an application forthwith to the Court of Protection in England including for urgent interim provision, pursuant to the provisions of the Mental Capacity Act 2005, seeking an order for the enforcement and recognition of the orders of this Honourable Court, pursuant to Part IV of Schedule III of the said Act, with permission to disclose the papers from these proceedings before the Court of Protection.

(19). This Honourable Court notes that all parties herein agree to the above order being sought with expedition to the abridgment of service and/or of notice requirements and intend to file letters of consent and (with the exception of the plaintiff) seek leave not to have to appear before the English Court.

(20). The plaintiff, its servants and agents are to notify the official solicitor in London of the within proceedings together with separate related proceedings to be issued on "J.B" attaining his age of majority on the 24th October, 2014, back before the Court on the 20th November, 2014.

(21). The plaintiff is to notify this Honourable Court and the parties herein of the outcome of proceedings before the Court of Protection on the 20th November, 2014.

(22). The plaintiff is to pay to the guardian ad litem her costs to include reserve costs of the within proceedings when taxed and ascertained.

(23). The Court doth reserve the costs of the plaintiff, and of "J.B" in separate related proceedings to be issued on attaining his age of majority on the 24th April, 2014.

(24). Liberty to apply was granted and on the application of counsel for the notice party, and for an order that the plaintiff do pay their costs of the within proceedings and the Court being informed that the said notice parties are legally aided. Liberty to apply to Birmingham J.

7. This order was perfected on the 23rd October, 2014.

8. On the 20th November, 2014 before the President of the High Court, an order was made that:-

(1). In any report of the proceedings herein, no information in relation to the identification of the defendant, the subject matter of the within proceedings or of the notice party herein shall be published in a written publication available to the public or be broadcast.

(2). The suite of orders made on the 23rd October, 2014 in the proceedings bearing High Court Record No. 2011/ 2045P continue until the 19th December, 2014.

(3).The plaintiff (the Health Service Executive), its servants and or agents are to continue to be authorised and permitted to place "J.B" at St. Andrew's Hospital, Richmond Watson Unit for the purpose of receiving treatment together with any welfare and therapeutic service for a period of four weeks, subject to review and further order of this Honourable Court.

(4). The Director of St. Andrew's Hospital, her servants or agents continue to be authorised to detain "J.B" until the 19th December, 2014.

(5). The Director of St. Andrew's Hospital, her servants or agents continue to be authorised to provide a step down facility to a lower secure unit, the ISHAM Unit or such similar facility within St. Andrew's when it is considered by the clinicians that it is therapeutically safe to do so.

(6). The Director of St. Andrew's Hospital, her servants or agents be authorised to take all necessary steps to promote "J.B's" welfare and to allow a regime of mobilities for "J.B" out of St. Andrew's at the discretion of the Director.

(7). The Director of St. Andrew's Hospital, her servants or agents are authorised to provide such step down facilities to "J.B" in the course of his treatment at St. Andrew's for the purposes of his return to Ireland.

(8). The costs of this hearing are reserved.

9. On the 19th December, 2014, O'Hanlon J. made the following order in relation to the matter:-

(1).That in any report of the proceedings herein, no information relating to the identification of the defendant, the subject matter of the within proceedings or of the notice party shall be published in a written publication available to the public, or be broadcast

(2).That the suite of orders made on the 23rd October, 2014 in the proceedings bearing High Court Record No. 2011/2045P continue until the 26th January, 2015

(3).The plaintiff, the Health Service Executive, its servants or agents are to continue to be authorised and permitted to place "J.B" at St. Andrew's Hospital, Richmond Watson Unit for the purpose of receiving treatment together with any welfare and therapeutic services for a period of four weeks subject to review and further order of this Honourable Court.

(4).The Director of St. Andrew's Hospital, her servants or agents are to continue to be authorised to detain "J.B" until the 26th January, 2015.

(5).The Director of St. Andrew's Hospital, its servants or agents continue to be authorised to provide a step down facility to a lower secure unit, the ISHAM Unit or such similar facility within St. Andrew's when it is considered by the clinicians that it is therapeutically safe to do so.

(6).The Director of St. Andrew's, her servants or agents continue to be authorised to take all necessary steps to promote "J.B's" welfare and to allow a regime of mobilities for "J.B" out of St. Andrew's at the discretion of the Director.

(7).The Director of St. Andrew's, her servants or agents continue to be authorised to provide such step down facilities to "J.B" in the course of his treatment at St. Andrew's for the purposes of his return to Ireland.

(8). An order appointing Mr. Raymond McEvoy to act as *guardian ad litem* on behalf of the defendant in these proceedings.

10. The Court directed that:

(1).The report of Dr. O'Malley be released to the Health Service Executive and the notice party.

(2).The report of Dr. Pendlebury dated the 24th November, 2014 be released to all parties.

(3). A request that the English High Court release all reports to the Health Service Executive.

(4). All reports to be shared with the English solicitors.

(5).Liberty to apply.

(6).An order reserving the costs of the proceedings.

11. This order was perfected on the 19th December, 2014.

12. On the 26th January, 2015 the matter came before the President of the High Court, and it was ordered:

(1).That the suite of orders made on the 23rd October, 2014 in the proceedings bearing High Court Record No, 2011/2045P, and in these proceedings on the 20th November, 2014 continue until the 26th February, 2015.

(2).That the commencement of the hearing of this action be fixed for 10.45am on the 26th February, 2015.

(3). An order reserving costs.

This order was perfected on the 26th January, 2015.

13. In the current proceedings, the Health Service Executive is applying for various orders including *inter alia*, (i) an order authorising and permitting the plaintiff, its servants and agents, to continue to place "J.B" at St. Andrew's Hospital, for the purpose of receiving treatment there, together with any welfare and therapeutic services for a period of time subject to review and further order of this Court, and (ii) an order authorising and permitting the Director of St. Andrew's Hospital, her servants or agents, to detain "J.B" subject to review every month or such lesser or greater period as this Honourable Court deems fit.

Medical Evidence.
14. Dr. Martin Lawlor, Consultant Psychiatrist, gave a number of psychiatric reports and oral evidence to this Court.

15. Dr. Lawlor is employed in a substantive post by the HSE South, based at Carrigmore Enhanced Care Service and the Mercy University Hospital, Cork. He is employed as a consultant psychiatrist with expertise in forensic rehabilitation. He is currently listed on the specialist register for adult psychiatry, and he is a senior clinical lecturer in psychiatry at U.C.C.

16. Dr. Lawlor indicated to the Court that he had taken part in 900 high risk assessments. He described "J.B" as having a personality disorder and conduct disorder, and set out the history of placement both in Ballydowd and Kibble in Scotland, as well as nine private placements out of twenty placements in all. He indicated in his evidence that every effort had been made to contain "J.B" in Ireland. He felt that with "J.B's" current degree of presentation, that if he were in a community setting without the appropriate medication, he would be vulnerable and at the highest risk. He stated that as recently as June 2014, "J.B" made a threat to throw boiling water on a staff member and felt he was erupting with anger.

17. Dr. Lawlor outlined that "J.B" planned or instrumented violence for which he had no remorse. In fact, on some occasions, "J.B" expressed remorse that he had not inflicted a more significant level of violence and damage.

18. Dr. Lawlor felt that "J.B" would not be detainable in the Carrigmore Unit. He felt that "J.B" had a conduct disorder with marked oppositional behaviour with a lack of full understanding, and limited insight into his own behaviour.

19. Dr. Lawlor explained that "J.B" was only partially engaged in the current setting. He gave evidence that "J.B" was not detainable on the basis of his personality disorder in Ireland, but would be so detainable in England under the U.K mental health statutory scheme. Dr. Lawlor described that the concerns of "J.B's" right to life itself and bodily integrity were relevant, and that he had an impaired capability and paranoid view with oppositional defiant behaviour leading to impaired capacity. Dr. Lawlor opined that this lack of capacity or impaired capacity was decision specific.

20. Regarding "J.B's" consent to treatment, Dr. Lawlor expressed the view that there was a lack of insight and understanding of the consequences of refusing the said treatment and a high risk of relapse. Dr. Lawlor explained that "J.B" hit the maximum score for risk of violence, and that he would support a return to his home environment in a safe manner, but that it would not be safe to return him at the moment. Dr. Lawlor believed that "J.B" had to engage with dialectical behavioural therapy.

21. With regard to his mental state examination of "J.B", Dr. Lawlor explained that "J.B" has a pronounced over valued ideation regarding returning to Ireland (pg. 20 of his report), and this ideation resulting in "J.B" avoiding engaging in the necessary psychiatric treatment.

22. Dr. Lawlor described "J.B", in clinical terms, to be functioning intellectually at an average level as compared to the general population. With regard to "J.B's" insight, Dr. Lawlor gave specific details regarding the nature and symptom profile of "J.B's" bi-polar disorder, which is in remission at present. Dr. Lawlor opined that "J.B" had no insight into the need for longer term compliance with medication in the community. Moreover, "J.B" had no insight into his difficulties with anger or mood regulation, and no insight into the necessity for psychological therapies.

23. Dr. Lawlor gave evidence and confirmed that "J.B's" impulsivity was still present. However, he felt that "J.B's" impulsivity had improved when he was proscribed Clopixol, which is an anti-psychotic drug. Dr. Lawlor felt that it was too soon to give an opinion on the overall effectiveness of the Clopixol. Moreover, he explained that the medication would take a few months for it to reach optimum therapeutic levels.

24. Dr. Lawlor explained that on the previous medication, "J.B" reported side effects such as feeling agitated, feeling over sedated and reported sexual dysfunction. The previous medication has been stopped and "J.B" is now being treated on a different type of injection that has reduced side effects of sedation.

25. Dr. Lawlor felt that there would be a risk of impulsivity as "J.B" is still relatively under-medicated by virtue of inconsistent compliance with his oral medication. Dr. Lawlor confirmed that there was no evidence of inappropriate behaviour towards female staff in St. Andrew's by "J.B". He then highlighted matters such as anger management, reduced empathy and difficulties with authority. He also carried out an assessment on the risk of violence. Dr. Lawlor spoke of the need to ensure "J.B" is protected, and that any

protective measures must be proportionate.

26. Under questioning from the Court, Dr. Lawlor accepted that in relation to "J.B's" diagnosis of bi-polar disorder, same is in remission, but that if "J.B" continues to refuse to engage with the medication, there is a very high risk of relapse.

27. Dr. Lawlor felt that on "J.B's" scoring, there was a high probability of failure at the present time, unless "J.B" engages in the psychological work proffered. Dr. Lawlor specified St. Andrew's as the clinical facility in which that psychological work should be done.

28. Dr. Lawlor explained that "J.B" showed low to moderate risk of violence in a structured care environment, but this risk may escalate to a high risk of violence in the context of non-compliance and alcohol misuse.

29. Dr. Lawlor opined that "J.B" should remain in St. Andrew's for a period of time as he has stepped down from medium secure care to low secure care, and this shows an improvement. However, Dr. Lawlor expressed the view that "J.B" lacked capacity in that he does not understand the necessity for psychological interventions which would result in a sustained recovery. Dr. Lawlor defined what he meant by lack of capacity (p. 97 of the transcript) when he reported that "J.B" lacked stability to consistently make decisions for himself in relation to his person, and in regard to his welfare:

> *"He can express preferences but as I said at the beginning of my evidence it is my view that those choices are based on impaired mental capabilities and particularly a paranoid style of world view and an oppositional defiant behavioural style whereby he will pick and choose which therapies he is going to engage in. Therefore, he is not able to weigh up the therapeutic pros and cons of staying in St Andrew's versus Ireland. In the balance in my opinion, that has profound implications for his ability to give valued consent and the issue is about giving consent. The other point I have made is that it is very clear that consent is decision specific. He may just meet the threshold for consent to medication, but may not meet the threshold for consent to the broader aspects of his care, that is my key point."*

30. In summation, Dr. Lawlor felt that, at present, it was not in "J.B's" best interest to place him on a step-down programme.

31. Under cross-examination, Dr. Lawlor confirmed that he was instructed on this case on the 25th January, 2015. The witness confirmed the letter of instruction was dated the 20th January, 2015. Dr. Lawlor confirmed under cross-examination that he had seen Dr. Kelleher's report dated 12th September, 2014, and referred to as exhibit KK3 in the grounding affidavit in this case. The contents of Dr. Kelleher's letter were put to Dr. Lawlor and her final sentence sets out "my impression was that he("J.B") demonstrated capacity to make decisions for himself".

32. When it was put to Dr. Lawlor that the grounding affidavit on which this application is brought was on the basis that "J.B" has capacity, Dr. Lawlor's view was that "J.B" lacked capacity at present. Dr. Lawlor also accepted that "J.B's" bi-polar disorder is in remission at present.

33. Dr. Lawlor also confirmed that "J.B" was also at a high risk of violence and had no insight. Moreover, Dr. Lawlor confirmed that "J.B's" recovery had a high probability of failure unless he does the necessary psychological work at St. Andrew's.

34. Dr. Lawlor's final conclusion was that "J.B's" lack of capacity is central as unless he understands the necessity for psychological interventions, he will not have a sustained recovery.

35. The Court heard evidence that when "J.B" had a drug free trial, his behaviour was very challenging. There were multiple assaults on staff at St. Andrew's.

36. "J.B's" ability to weigh up information on balance was deemed by Dr. Lawlor to be significantly predictated by the stability of his mental state. He felt that if "J.B" is un-medicated, he becomes manic quite quickly. If "J.B" becomes manic, he is not in a position to weigh the necessary information on balance.

37. Dr. Lawlor agreed that a personality disorder condition was not a justification to detain under the Irish Mental Health Act 2001. Dr. Lawlor agreed with the suggestion that "J.B" should be detained under the inherent jurisdiction of the High Court by virtue of his incapacity to consent.

38. The Court was directed to a letter sent to the solicitor for the *guardian ad litem* outlining that Dr. Lawlor was visiting St. Andrew's to examine "J.B" and to discuss a plan for his return to Ireland. It was put to Dr. Lawlor that there were two letters, one sent before he went to examine "J.B", and the second after he got there. In the first letter, there was no mention of an assessment and in fact, its content concerned a plan for his return. The second letter contained no reference to a plan for "J.B's" return.

39. A letter from Dr. Pendlebury, who treated "J.B" for twelve months at St. Andrew's carried out an assessment about "J.B's" ability to conduct legal proceedings, which stated as follows:-

> *"The normal practice is to use the functional test of capacity in relation to particular decisions, at a particular time rather than an all or nothing global assessment of a persons decision making capacity. Therefore, on the 13th November, I assessed "J.B's" capacity to conduct legal proceedings using the following criteria:*
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> *That he understood the information provided, was able to retain the information, believe the information given, was able to weigh up the information and understand the implications of his choices, and an ability to communicate his decision."*
>
> *Following full discussion with "J.B", I am of the opinion that at the time of the assessment, his mental state was stable and he had capacity to follow legal proceedings. He was able to understand, retain and believe all the information provided. He understood that there were no provisions in Ireland that would be able to support him but still wanted to instruct a solicitor to request the court to look at options in Ireland so he could return there. "J.B's" reasoning was clear in that he wished to be back with his family. He was able to communicate effectively his decision"*

40. This letter from Dr. Pendlebury was dated 24th November, 2014. Dr. Lawlor's response was that these criteria would be used to assess capacity to consent to medication. They would be well known to a psychiatrist in the U.K. Dr. Lawlor confirmed that this was the first time he had read the letter in depth.

41. Dr. Lawlor accepted that the context of Dr. Pendlebury's letter was that the assessment was to establish if "J.B" had capacity to conduct legal proceedings. The assessment was at the request of the English High Court. Dr. Lawlor confirmed that this was correct.

42. Dr. Lawlor highlighted that Dr. Pendlebury's assessment was on whether "J.B" had the capacity to engage in legal proceedings. However, Dr. Lawlor's assessment was based on "J.B's" capacity to weigh and balance the overall pros and cons of care in the U.K, as oppose to receiving treatment in Ireland. Dr. Lawlor opined that "J.B" did not have the capacity to make that decision.

43. Dr. Lawlor felt that Dr. Pendlebury had made an appraisal, that at the time of Dr. Pendlebury's assessment, "J.B" had the ability to give consent. Dr. Lawlor's opinion on this issue is that Dr. Pendlebury is making an appraisal in November about "J.B's" ability to consent or his capacity to consent to legal proceedings but at the same time, was expressing a professional opinion, that he is gravely concerned that "J.B's" mental state will deteriorate if discharged from social services. In terms of his capacity to consent to treatment, Dr. Lawlor confirmed that "J.B" was at T2 under the Mental Health Act in England. Further reference was made to Dr. Pendlebury's letter where she said as follows:-

> *"J.B has developed a number of skills and gained maturity over the last six months. I realise this process is frustrating for him but hope that he as an adult will understand this is a necessary that cannot be avoided."*

44. Dr. Ciaran O'Malley, Consultant Psychiatrist, gave evidence on behalf of the guardian ad litem. He carried out an independent assessment. He described having a very specialised client base, and he said his present practice is devoted to assessing and evaluating children, adolescents and young adults with neuro-developmental and neuro-psychiatric problems. Dr. O'Malley opined that "J.B" fits into the category of patient he has been examining for the last twenty years. Dr. O' Malley gave evidence that he thought "J.B"'s dislocation was a real issue. Dr. O'Malley explained the background of the amorphous family for people stemming from the traveller community.

45. Dr. O'Malley expressed the view that "J.B" was incarcerated in a foreign country which had no frame of reference to understand him, and he felt such a misunderstanding was relevant to his mental health issues. Dr. O'Malley recounted his visit to "J.B" in St. Andrew's, and highlighted that "J.B" was able to explain that he had obtained his level four privilege, which meant he could walk around the garden and surrounding environs of St. Andrew's.

46. Dr. O'Malley described "J.B" as a person needing medicine with complex neuro-psychiatric problems. He explained that "J.B's" current medication mitigated his impulsivity and increased his ability to cope with low frustration tolerance. Dr. O'Malley highlighted that "J.B" had expressed a desire to return back to Ireland but felt that his wishes would never be acceded to.

47. Dr. O'Malley described himself as the thirteenth psychiatrist to see "J.B". He described "J.B" as having an aggressive side and a self-harming side. Dr. O'Malley expressed fears that "J.B" would start internalising his aggression. However, Dr. O'Malley did express in his professional opinion, that "J.B" was not detainable under the mental health legislation when he saw him on the 17th December, 2014. He explained that "J.B" was not detainable the day he saw him, but having discussed this case with the psychiatrist in England in a measured way, "J.B's" treating psychiatrist felt he had a bi-polar disorder which they were treating.

48. Dr. O'Malley gave evidence that in the last four to five months before he consulted with J.B", he had become manageable and the staff at St. Andrew's had taken the clinical decision to transfer "J.B" to a minimal secure unit.

49. Dr O'Malley referred to "J.B's" transition to Ireland, and he did feel that the psychiatrists in England did foresee "J.B" in a process of transitioning.

50. Dr. O'Malley expressed the view that the bi-polar disorder is a core issue that needs to be factored in as much as the conduct disorder, in any future transitioning. He described the bipolar disorder as a chronic condition. He felt that "J.B" would be a real challenge in the community because compliance is an issue. He described "J.B" as being in remission at the moment but that this remission is a delicate one.

51. Dr. O'Malley felt that "J.B's" present medication had created a therapeutic situation where he was now able to transition to a low secure unit and also shows more insight into violent and impulsive problems.

52. Dr. O'Malley did feel he could see a transitioning period for "J.B", but there has to be a consultant psychiatrist who takes responsibility. However, Dr. O'Malley opined that "J.B" is vulnerable and that the parent state recognises that children under a full care order are still vulnerable, and therefore, the state has a duty to provide an after care programme for them until they are twenty one years of age.

53. Dr. O'Malley suggested that there needs to be a forensic psychiatry/ psychological component given the well documented forensic, violent, compulsive behaviour of "J.B". He felt that "J.B" could benefit from the skills of a forensic psychiatrist.

54. Dr. O'Malley talked about cultural sensitivity and cultural competence, and he felt that a person in the nature of a traveller liaison officer might be of assistance to "J.B". He referred to Dr. Joseph Barry, Professor of Public Health. Dr. O' Malley explained that Dr. Barry has the requisite stature and knowledge and might be able to assist in terms of a therapeutic alignment.

55. Dr. O'Malley was asked generally whether "J.B" has capacity to make decisions in his own best interests. He expressed the view that while "J.B" has the cognitive ability, he has a long documented history of unpredictable violent behaviour with overlapping aetiologies still not fully understood. Dr. O'Malley opined that on one side "J.B" has a hyperkinetic disorder not uncommonly linked to a bipolar disorder, in which his mood and reactivity/frustration tolerance vary, but clearly respond to a correct medication regime. On the other hand, Dr. O'Malley highlights that the staff at St. Andrew's continues to be concerned about "J.B's" callous/unemotional side coupled with a certain remorselessness for his violent actions and an almost paranoid sensitivity.

56. Dr. O'Malley expressed the view that because of "J.B's" dark side, he needed a forensic psychiatrist /psychologist involved. Dr. O'Malley confirmed that "J.B" does require another six months detention in the low secure but locked unit at St. Andrew's. He felt that this would help him to have an increased level of "normal social interaction" and would also facilitate a transition after care programme back to Ireland.

57. Dr. O'Malley agreed that psychological therapies would be an essential component of treatment and that DBT or CPT therapy would bring "J.B" to a point of insight. He felt that this was relevant because of the issue of compliance, and that compliance was relevant in transitional planning.

58. Under cross-examination, Dr. O'Malley confirmed that he felt that joined up planning was very helpful, and referred to Belfast clinical centres where it was implemented to address persons who have mental health issues and are not detainable under the Mental Health Act, but who have certain personality traits that make them a risk for the community. These measures were necessitated to

protect the community from these individuals.

59. In relation to capacity, Dr. O'Malley confirmed that while he believed "J.B" had capacity to come to court and make his views known, he felt that he did not have capacity to make the correct decision regarding his future care. He clarified this in a letter dated the 17th October, 2014:-

> *"'J.B" continues to require considerable therapeutic interventions in order for him to progress his rehabilitation and recovery. All mental health professionals are in agreement with this. He was clear that given the opportunity to do so he would leave St. Andrew's and the appropriate opportunities there to return to Ireland where there are no comparable facilities. The impairment of his personal faculty particularly in regard to insight and judgment are of such a degree, that it is reasonable to conclude that he is not capable of properly protecting his own interests at present."*

60. Dr. O'Malley qualified his original statement on capacity and clarified further that in his view, "J.B" did not have the capacity, the understanding, the ability to weigh up the pros and cons and to think rationally about the decisions he was making.

61. Dr. Kelleher expressed her concern that the appropriate facilities were not available in Munster for "J.B", and that, on return, he might become very dangerous. In turn, "J.B" could end up in the criminal system, and she felt that this was a real risk for a variety of reasons. She felt that for "J.B" to return, he would require a lot of preparation and a lot of work. Dr. Kelleher felt that the rate at which the transitioning is done is most important.

62. Under cross-examination, Mr. Durcan S.C put it to Dr. Kelleher that "J.B" is willing to co-operate with a transitioning arrangement. Dr. Kelleher felt that "J.B" was not at the point of being consistent regarding an effective and orderly transition.

The evidence of "J.B".

63. "J.B" outlines that he would remain in St. Andrew's provided that he knew when he would be returning to Ireland. He would be willing to stay at St. Andrew's until his nineteenth birthday, but in a perfect world, he would like to come back next week. His view oscillates slightly. He did accept he was improving in St. Andrew's Healthcare and his treatment was of benefit.

64. Mr. Finlay S.C for the HSE, submitted that this interview saw him openly consenting to treatment, but that he doubted that "J.B" had the capacity to consent.

65. Dr. Stephen Attard is "J.B's" treating psychiatrist at present. He gave specific evidence of eight occasions when "J.B" refused to take his medication. Dr. Attard believed that if "J.B" was not taking medication, he would abscond. He described "J.B" as grandiose when not taking his medication, and he confirmed that if "J.B" were not in a secure hospital, there would be high risk to the welfare of "J.B" and the community at large. Dr. Attard described "J.B's" conduct disorder not only as historical, but contemporaneous. Dr. Attard felt that if "J.B" did not take his medication, he would have a significant chance of relapse to bi-polar disorder.

66. As recently as the 20th January, 2015, Dr. Attard described "J.B" as disputing his diagnosis and asserting that he did not believe he needed to be in hospital, nor did he require anger management therapies. He felt that "J.B's" insight and mood vary, and "J.B" was only beginning to develop a relationship with the team. Dr. Attard opined that because of non-compliance and refusal to engage in therapies, "J.B's" mental state would deteriorate. Moreover, Dr. Attard expressed the view that there are sufficient grounds for the view that "J.B" required a course in anger management. Such a course would take eighteen weeks.

67. Dr. Attard indicated that there was an improvement in "J.B", and that he was now willing to engage with treatment compared to his past positions. He felt there was a reduction of risk incidents from February/March 2014, and the frequency of ongoing incidents was reduced. He said there were two incidents of verbal aggression to staff in 2015.

68. Dr. Attard accepted that any court hearing was an anxiety provoking event and in this regard, it was intended initially to have "J.B" give his evidence in this Court. However, a letter was received from St. Andrew's outlining that, due to "J.B's" heightened stresses, there were grounds for a heightened risk situation and he would give evidence by video link.

69. Dr. Attard believed that "J.B" communicated well during his evidence via video link. Dr. Attard highlighted that "J.B" had received his level five privilege, where he can be granted escorted leave within the grounds of St. Andrew's.

70. Dr. Attard explained the reasons for changing his depot medication lay with "J.B" suffering tremor stiffness and sexual dysfunction. The side effects of the previous depot have now been reduced with a change of medication. However, Dr. Attard expressed the view that the new depot medication was not at optimum functioning levels.

71. Dr. Attard expressed the view that the nature of "J.B's" mental disorder was chronic, and that he was liable to periods of deterioration. He explained that if "J.B" was not in a secure unit, he would not comply with treatment for his mental disorder He described "J.B" as having a conduct order and bi-polar affective disorder, which is in remission currently. Dr. Attard felt he could not comment in relation to the question that "J.B" would not be detainable in Ireland in respect of his bipolar disorder as it stands, given that it is in remission and he felt that he could not comment on Ireland but that he would be detainable in England and Wales since their legislation covers personality disorders. Although he did feel "J.B" was beginning to gain insight, Dr. Attard felt it was impossible to give a clear date or time of discharge, and he felt that "J.B" would need to do an anger management course which would take eighteen weeks.

72. Dr. Attard expressed the opinion that "J.B" should remain in St. Andrew's for a further twelve to eighteen months, but that it could be longer. He said "J.B" needed to do additional work in the areas of emotional regulation and adoptive problem solving, as well as work in interpersonal relationships. Dr. Attard believed that in order for "J.B" to be discharged there would need to be an absence of significant incidents of violent aggression, and that he would need to be tested on escorted leave. He believed that this process could take up to one year.

73. Dr. Attard did confirm that "J.B" has capacity to decide where he lives.

74. "J.B"'s *guardian ad litem*, Mr. McEvoy gave evidence to the effect that "J.B" can understand the treatment process fully. Moreover, the guardian expresses the belief that "J.B" has the ability to instruct a solicitor. In fact, he went so far as to say that in his view, "J.B" did not require a *guardian ad litem* at present. Mr. McEvoy met "J.B" on the 5th January, 2015 and he felt that "J.B" was able to engage in a dialogue and navigate complexity of the discussion. In addition, he explained that "J.B" was able to give a view regarding a return to Ireland. He described him as a very interesting person with a very troubled pathway, but that he was able to focus on the matter at hand.

75. Mr. McEvoy opined that "J.B" was aware of the need for supportive measures if returned to Ireland. Mr. McEvoy expressed the view that "J.B" should make intermittent trips home to Ireland.

76. While Mr. McEvoy accepted that "J.B" has mental health difficulties and may not make decisions in his best interests, he felt that "J.B" has the capacity to make general decisions.

77. Ms Egan B.L appeared on behalf of "J.B's" mother, "W.B" and idicated that the she was very supportive, and was keen to travel to England to visit "J.B".

78. This Court finds that "J.B" is an Irish citizen and is of Irish domicile.

79. He has been placed in England for the purposes of his best interests and care by the Irish Court under its inherent jurisdiction. His case has been reviewed intensively and periodically by this Court, and the Irish Courts have at all times retained seisin of this case. This Court finds that "J.B" is habitually resident in Ireland and has been so at all material times.

The Issue.
80. The primary issue which this Court must determine is whether "J.B" has capacity to make material decisions as to his residence, care arrangements and his medical treatment in terms of his medical disorder.

The Applicable Law.
81. In *Fitzpatrick v. F.K* [2009] 2 I.R. 7, Laffoy J set out the principles which this Court must consider in determining whether an individual has capacity (at para.84):

> "(1) There is a presumption that an adult patient has the capacity, that is to say, the cognitive ability, to make a decision to refuse medical treatment, but that presumption can be rebutted.
>
> (2) In determining whether a patient is deprived of capacity to make a decision to refuse medical treatment whether-
>
> > (a) by reason of permanent cognitive impairment, or
> >
> > (b) temporary factors, for example, factors of the type referred to by Lord Donaldson in *In re T. (Adult: refusal of medical treatment)* [1993] Fam. 95
>
> the test is whether the patient's cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect of the proffered treatment and the consequences of accepting or rejecting it in the context of the choices available (including any alternative treatment) at the time the decision is made.
>
> (3) The three stage approach to the patient's decision making process adopted in *In re C. (Adult: refusal of medical treatment)* [1994] 1 W.L.R 290 is a helpful tool in applying that test. The patient's cognitive ability will have been impaired to the extent that he or she is incapable of making the decision to refuse the proffered treatment if the patient-
>
> > (a) has not comprehended and retained the treatment information and, in particular, has not assimilated the information as to the consequences likely to ensue from not accepting the treatment,
> >
> > (b) has not believed the treatment information and, in particular, if it is the case that not accepting the treatment is likely to result in the patient's death, has not believed that outcome is likely, and
> >
> > (c) has not weighed the treatment information, in particular, the alternative choices and the likely outcomes, in the balance in arriving at the decision.
>
> (4) The treatment information by reference to which the patient's capacity is to be assessed is the information which the clinician is under a duty to impart information as to what is the appropriate treatment, that is to say, what treatment is medically indicated, at the time of the decision and the risk and consequences likely to flow from the choices available to the patient in making the decision.
>
> (5) In assessing capacity it is necessary to distinguish between misunderstanding or misperception of the treatment information in the decision making process (which may sometimes be referred to colloquially as irrationality), on the one hand, and an irrational decision or a decision made for irrational reasons, on the other. The former may be evidence of a lack of capacity. The latter is irrelevant to the assessment.
>
> (6) In assessing capacity, whether at the bedside in a high dependency unit or in court, the assessment must have regard to the gravity of the decision, in terms of the consequences which are likely to ensue from the acceptance or rejection of the proffered treatment. In the private law context this means that, in applying the civil law standard of proof, the weight to be attached to the evidence should have regard to the gravity of the decision, whether that is characterised as the necessity for "clear and convincing proof" or an enjoinder that the court "should not draw its conclusions lightly".

82. There is no statutory test for capacity in this jurisdiction. Section 56 of the Mental Health Act does define "consent" in the context of consenting to treatment under the provision of the Act of 2001. It states as follows:

> "In this Part "consent", in relation to a patient, means consent obtained freely without threats or inducements, where-
>
> > (a) the consultant psychiatrist responsible for the care and treatment of the patient is satisfied that the patient is capable of understanding the nature, purpose and likely effects of the proposed treatment; and
> >
> > (b) the consultant psychiatrist has given the patient adequate information, in a form and language that the patient

can understand, on the nature, purpose and likely effects of the proposed treatment."

The Submissions of the Health Service Executive.
83. Counsel for the HSE submitted that in determining the question of capacity, this Court must only decide whether "J.B" has capacity in making material decisions as to his residence, care arrangements and his medical treatment for his mental disorder. It submitted by the applicant that, on the balance of probabilities, and on the medical evidence outlined above, "J.B" lacks capacity to make the material decisions as to his residence, care arrangements and medical treatment.

84. The applicant submits that while "J.B" may have capacity in respect of many aspects of his life, he lacks the capacity to make material decisions as to his residence, care arrangements including medical treatment for his mental disorder. Thus, the Court should grant the order sought. In support of this proposition, the applicant refers to the decision of *Health Service Executive v. V.F (A Person of unsound mind not so found represented by her next friend)* (Unreported, McDermott J., 5th December, 2014), where Mc Dermott J. had to consider the question of capacity in respect of a woman suffering from Wernickes Encephalopathy, an amnesic syndrome frequently precipitated by alcohol misuse. In regards the question of capacity, the Court underlined that although the defendant had capacity in some respects of her life, she did not have sufficient capacity to make major decisions. McDermott J. stated as follows (at para.48):

> "The court is also concerned that the precise cognitive deficit suffered by the applicant be investigated as recommended earlier this year by way of neuropsychological assessment. This may also assist in ascertaining the level of capacity at which the applicant is operating. All doctors are agreed that her functioning capacity in respect of major decisions in her life is severely deficient. She is unable to look after herself in terms of hygiene and other basic matters. However, there is a level at which she retains capacity which if possible needs to be identified so that her rights under Article 8 of the Convention and her rights to respect for her dignity and as a person under the Constitution may be respected and protected".

85. Although there is no statutory definition of capacity in this jurisdiction, the applicant submits that this Court should consider the provision of section 56 of the Mental Health Act 2001 in determining whether "J.B" has capacity in regards the aforementioned category of material decisions.

86. The applicant claims that if this Court is to find that "J.B" lacks the aforesaid capacity, it must consider whether it can and should exercise its discretion to grant an order to detain "J.B" pursuant to the inherent jurisdiction of the High Court so as to uphold his personal rights as guaranteed under Article 40 of the Irish Constitution 1937.

87. Counsel for the applicant highlights that the Irish Court holds an inherent jurisdiction to grant an order to detain "J.B". Under Article 40.3.1º and Article 40.3.2º of the Constitution, the Court has a duty to vindicate the personal rights of the citizen as guaranteed under Article 40. The applicant directed the Court to the dicta of O'Dalaigh C.J. in the landmark decision of *The State (Quinn) v. Ryan* [1965] I.R. 70, where he stated (at pg. 122):

> "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires".

88. In further support of the proposition that the High Court has an obligation to vindicate the personal rights of citizens as guaranteed under the Constitution, the applicant relies on the dicta of Hamilton C.J in *D.G. v. Eastern Health Board* [1997] 3 I.R 511 (at pg. 522):

> "It is part of the courts' function to vindicate and defend the rights guaranteed by Article 40, section 3. If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights"

Hamilton C.J goes on to say at (pg. 524):

> "The jurisdiction, which I have held, is vested in the High Court is a jurisdiction which should be exercised only in extreme and rare occasions, when the Court is satisfied that it is required, for a short period in the interests of the welfare of the child and there is, at the time, no other suitable facility".

89. Thus, in light of the above dicta in *D.G. v. Eastern Health Board* [1997] 3 I.R 511 and *State (Quinn) v. Ryan* [1965] I.R. 70, the applicant proffers that judicial intervention may be necessitated in exceptional circumstances, so as to protect the personal rights of citizens even where such intervention impinges upon the citizen's constitutional right to liberty as guaranteed under Article 40.4.1º of the Constitution.

90. However, the applicant claims that the Court can only exercise its inherent jurisdiction in issuing orders to detain in the absence of any statutory scheme that could regulate the aforesaid detention. The Mental Health Act 2001 regulates the circumstances and manner of detention, psychiatric assessment and medical treatment of persons with a mental disorder. However, in circumstances where a person suffers from a mental impairment which does not come within the scope of the Mental Health Act 2001 for the purposes of involuntary admission, there is, at present, no statutory scheme in force that regulates the circumstances and manner in which therapeutic intervention is imposed.

91. Section 8 of the Mental Health Act 2001 deals with the involuntary admission of persons to approved mental health centres. It provides as follows;

> "(1) A person may be involuntarily admitted to an approved centre pursuant to an application under section 9 or 12 and detained there on the grounds that he or she is suffering from a mental disorder.
>
> (2) Nothing in subsection (1) shall be construed as authorising the involuntary admission of a person to an approved centre by reason only of the fact that the person—
>
> (a) is suffering from a personality disorder,

(b) is socially deviant, or

(c) is addicted to drugs or intoxicants."

92. On reading section 8(2) of the Act of 2001, it is clear that a person who is suffering from a personality disorder is not detainable for the purpose of section 8(1) of the Act. "J.B" has been diagnosed with a personality disorder and bi-polar affective disorder and in turn, is not detainable under the Act of 2001.

93. It is submitted by the applicant that as "J.B" is a vulnerable adult and falls outside the protective regime of the Mental Health Act 2001, the Court should exercise its inherent jurisdiction to detain "J.B" so as to vindicate his personal rights under the Constitution. The applicant directed the Court to the decision of *Health Service Executive v J O'B* (Unreported, Birmingham J, 3rd March, 2011), where Birmingham J. was requested to invoke the inherent jurisdiction of the High Court to detain a vulnerable adult. The adult in that case suffered from both an intellectual disability and personality disorder. He was placed in a psychiatric facility in England for clinical assessment and treatment under the English Mental Health Act 1983. The HSE had exhausted the clinical regime in England and petitioned to return the defendant to the Irish jurisdiction. The only hospital capable of dealing with the adult's very complex mental health needs was the Central Mental Hospital, which is an approved institution under the Mental Health Act 2001. The legal problem which arose was that the adult did not suffer from a mental disorder within the meaning of the Mental Health Act 2001. It was submitted by the applicant that in considering whether to permit the HSE to detain Mr. O'B in a secure setting, Birmingham J. held that although, he would not necessarily go so far as to agree that the Court could grant whatever relief is necessary to safeguard and promote the incapable adult's welfare and interest, he would go so far as to say that where an adult lacks capacity, and where there is a legislative lacuna, so that the adult's best interest cannot be served without intervention by the Court, the Court can exercise its inherent jurisdiction to see that the best interests of the vulnerable adult are vindicated (at para.25):

> "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 to intervene by analogy with cases like *D.G. v Eastern Health Board* [1997] 3 I.R. 511 and the several High Court decisions from different judges of the High Court therein referred to."

In discussing the order to detain the vulnerable adult pursuant to the inherent jurisdiction of the High Court, Birmingham J. stated(at para.27):

> "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 the respondent has taken up residence in the Central Mental Hospital, Dundrum and thereafter to review the case regularly. Initially, at least, reviews will take place every two months but I will consider readdressing 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."

94. The applicant submits that the approach of Birmingham J. was followed in the subsequent decision of *Health Service Executive v V.E (A person of unsound mind, not so found)* (Unreported, Feeney J., 26th July, 2012). The applicant submits that in this case, the High Court was requested to make an order to detain pursuant to its inherent jurisdiction notwithstanding that the individual in question was not suffering from a mental disorder, was an adult, and did not consent to the order of his detention. The applicant directs the Court to following dicta of Feeney J;

> "I adopt and follow the approach outlined by Birmingham J. The facts of this case are that Mr. E clearly lacks capacity to a very significant extent and in vital areas directly impacting on his physical and mental health and indeed upon his personal safety..... It is also the case that there is a legislative lacuna and where it truly can be said that Mr. E's well-being and best interest and indeed his very safety and well-being cannot be served without the intervention of this Court. This Court is satisfied that there is an inherent jurisdiction to be used in rare and exceptional cases where the subject of an application can be shown that the person lacks a critical capacity and where the individuals wellbeing cannot be met other than by the intervention of the Court by order. Given that this Court is satisfied that it has an inherent jurisdiction, it follows that such jurisdiction has no precise or defined parameter and cannot be delineated other than by reference to previous decisions of the Court and by recognition that the Orders must not only be for a minimum required time but also must be the subject of ongoing and rigorous review. The power availed of by this Court is as ample as the Constitution requires but always subject to the other provisions of the Constitution" .

Feeney J. continued as follows:

> "The Court only exercises its jurisdiction as a last resort and has allowed time to pass if any order other than detention was possible. This is not just a case of the Court deciding on balance that the order is required for Mr. E's own good but rather that absent an order, Mr. E's physical and mental wellbeing will be seriously damaged, that he will be placed in a position that he would be at risk of injury or damage. Mr. E continues to enjoy individual rights and the court duly acknowledges his dignity. But where his very wellbeing and safety is at risk and where he cannot, on the evidence, make a real decision about his own safety and accommodation and has no capacity to do so, the legal protection of Mr. E and the vindication of his rights requires the Court, on the facts of this case, to invoke its inherent jurisdiction and provide him with protection."

95. The applicant also directs the Court to Article 5(1)(e) of the European Convention on Human Rights, which states:

> "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 person of unsound mind, alcoholic or drug addicts or vagrants".

96. The applicant claims that if this Court finds that "J.B" lacks capacity, a subsequent detention order based on that finding would not be in violation of "J.B's" right to liberty under the Convention. In support of this proposition, the applicant relies on the case of *Winterwerp v Netherlands* (24th October, 1979, App No. 6301/73), where the applicant, who had been compulsorily detained under the relevant Dutch mental health legislation, complained that their rights under article 5 and article 6 of the Convention were violated. The Court held that where a person of unsound mind is deprived of their liberty, there must be no question of arbitrariness and there must be clear medical evidence supporting the detention:

> "The Commission likewise stresses that there must be no element of arbitrariness; the conclusion it draws is that no one may be confined as 'a person of unsound mind' in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalization..... The Court fully agrees with this line of reasoning. In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority- that is, a true mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinements depends upon the persistence of such a disorder".

97. The applicant also relies on the decision of *Hutchison Reid v. U.K.* (Application No. 50272/99 (2003) 37 E.H.R.R. 9), where the European Court of Human Rights held that in order for a signatory state to comply with article 5(1) of the Convention, the detention in issue must take place "in accordance with a procedure prescribed by "law" and "be lawful". In considering this procedural concept, the Court held(at para.46);

> "In order to comply with Art.5(1) of the Convention, the detention in issue must take place "in accordance with a procedure prescribed by law" and be "lawful". The Convention here refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the aim of Article 5, namely to protect the individual from arbitrariness."

The Court went on to identify three minimum conditions that must be satisfied for a person of unsound mind to be detained (at para.47):

> "For the purposes of Art.5(1)(e), an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: first, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder"

The position of "J.B".

98. Counsel for "J.B" outlines that in applying the criterion in *Fitzpatrick v. F.K* [2009] 2 I.R. 7, "J.B" has capacity to make material decisions as to his residence and care arrangements, including medical treatment for his mental disorder. In particular, counsel submits that it is clear from the dicta of Laffoy J. in *Fitzpatrick*, that just because "J.B" may make an irrational decision regarding his medical treatment (i.e "J.B's" decision to discontinue his medical treatment at St. Andrew's and return to Ireland) does not render "J.B" incapacitated.

99. Counsel for "J.B" outlines that in decisions of *Health Service Executive v J O'B* (Unreported, Birmingham J., 3rd March, 2011), *Health Service Executive v V.E (A person of unsound mind, not so found)* (Unreported, Feeney J., 26th July, 2012) and *Health Service Executive v. V.F* (Unreported, McDermott J., 5th December, 2014), that it was clear from the facts of those cases, that the detainees lacked capacity, and in turn judicial intervention and protective measures were necessitated under the inherent jurisdiction of the High Court. Moreover, the defendant submits that it is clear from the aforesaid dicta, that in order for this Court to exercise its inherent jurisdiction, and issue an order detaining "J.B" so as to ensure that his personal rights under Constitution and his best welfare interests are vindicated, this Court must decide that (i) "J.B" lacks capacity and (ii) that "J.B's" best interest cannot be best served without the intervention of this Court.

100. The defendant submits that the affidavit of Ms. Katharine Kelleher of the 21st October, 2014 does not support a declaration that "J.B" lacks capacity. Ms. Kelleher's affidavit outlines that due to "J.B's" anti-social personality disorder with psychopathic features, he would not be in a position to control himself if faced with a confrontation. Moreover, the aforesaid affidavit opines that "J.B" does not have the capacity to make decisions for his future at this point in time, as "J.B" remains vulnerable. The defendant submits the concept of vulnerability is not the yardstick in which capacity is measured and determined.

101. The defendant submits that the medical evidence of Dr. Lawlor and Dr. O'Malley does not support a finding that "J.B" lacks capacity. In Dr. Lawlor's report dated the 24th February, 2015, he concludes that, " "J.B" constitutes a lack of capacity to consistently make decisions for himself in relation to his person(particular need for psychological interventions) and his welfare (need to remain abstinent from alcohol) and ability to weigh up his therapeutic options beyond a descriptive account of his diagnosis and medication, the need for external therapeutic structure and support the inability to regulate anger, low threshold for frustration and discharge of both affective and instrumental(planned) violence". The defendant submits that this finding does not apply the test enunciated by Laffoy J. in *Fitzpatrick v F.K.* Counsel for the defendant submits that the concept of consistency is not required for general capacity, nor is the concept of consistency required for capacity to make material decisions regarding therapy or medication. It is submitted by the defendant that the issues in determining whether "J.B" has capacity is not whether one agrees with his decision regarding residence, therapy and medication, but whether he can take those decisions.

102. The defendant directs the Court to Dr. O'Malley's psychiatric report, where he queries whether "J.B" can weigh competing factors regarding his treatment at St. Andrew's because of "J.B's" "consuming desire to return to Ireland". Counsel for the defendant submit that this Court cannot conclude that "J.B" lacks capacity merely because one may disagree with the weight that "J.B" gives to his desire to return to Ireland.

103. With regard to "J.B's" mental health, counsel for the defendant directed the Court to the medical reports of Dr. Attard and Dr. Lawlor. In Dr. Attard's report of the 23rd February, 2015, he diagnoses "J.B" with bi-polar disorder but states (at para.12.2 of his report) that "J.B's" bi-polar disorder is in remission. Moreover, Dr. Attard diagnoses "J.B" with conduct disorder and states (at para 12.1 of his report) that "evidence in literature indicates that there is a significant link between conduct disorder and progress to an adult personality disorder, particularly anti-social personality disorder." Moreover, the defendant directs the Court to Dr. Lawlor's report of the 24th of February, 2015, where he states (at pg. 19 of his report), that "J.B's" diagnosis of conduct disorder puts him at high risk of developing a personality disorder. Furthermore, Dr. Lawlor concludes in his report that bi-polar disorder is classified as a mental disorder under the Mental Health Act 2001, and that "J.B's" mental disorder "warrants ongoing detention"(at pg.33 of the report). Finally, counsel for the defendant directs the Court to the affidavit of Ms. Katherine Kelleher of the 21st October, 2014, where she states (at para.8 of her affidavit) that "as "J.B" is compliant with medication for his bi-polar disorder he cannot be detainable pursuant to the Mental Health Act 2001".

104. The defendant submits three points on the foregoing evidence. Firstly, if "J.B" has bi-polar affective disorder warranting detention under the Mental Health Act 2001, then he should be detained in an approved centre under the Mental Health Act 2001. It is submitted by counsel for the defendant that St. Andrew's is not an approved centre. The defendant petitions that the inherent jurisdiction cannot be used to circumvent the clear provision of the Oireachtas. In support of this proposition, the defendant relies on

the decision of *Health Service Executive v. V.F* (Unreported, McDermott J., 5th December, 2014) where Mc Dermott J. held (at para.29):

> "It would be wholly within the statutory scheme if a patient were to be removed from an approved centre for an extended period of time or for the whole part of the period of the detention order, and detained in an approved centre".

105. Secondly, counsel for the defendant submits that "J.B" is not detainable under the Mental Health Act 2001, as his bi-polar condition is in remission. The defendant submits that the real reason why detention is sought is because of "J.B's" emerging anti-social personality disorder. The defendant highlights that section 8(2) of the Mental Health Act 2001 prohibits an order for detention grounded solely on the fact that an individual is suffering from a personality disorder". Thus, the defendant submits that section 8(2) of the Act of 2001 makes clear the policy of the Oireachtas in regard prohibition of involuntary admission to approved centres solely on the basis that the individual suffers from a personality disorder and, this Court cannot use the inherent jurisdiction of the High Court to circumvent the express provisions of the Oireachtas, as to do so would constitute a violation of the doctrine of the separation of powers.

106. Finally, counsel for the defendant submits that even if the inherent jurisdiction could be used, the Court should only avail of the jurisdiction in rare and exceptional circumstances (see *Health Service Executive v. V.F* (Unreported, McDermott J., 5th December, 2014)(at para.40), and that this case does not warrant such action.

Conclusion

107. This Court has considered all the affidavits, medical evidence and legal submissions of the parties.

108. This Court also heard the evidence of the *guardian ad litem*, Mr. McEvoy, who holds specific qualifications for dealing with mentally unwell individuals, and he stated a firm belief that "J.B." has cognitive capacity to decide where he resides. Moreover, he relayed "J.B's" firm desire to return to this jurisdiction. Mr. McEvoy expressed the view that he believed "J.B" to have cognitive capacity.

109. This Court finds it significant that both Dr. Attard and Dr. Kelleher also confirmed "J.B." has capacity to decide his place of residence. Dr. Attard gave evidence to this effect, even though he felt "J.B" would need a year or more in St. Andrew's before "J.B." could make an effective transition back to Ireland. Dr. Pendlebury also felt that "J.B" had capacity to determine residence in relation to the evidence she gave by letter.

110. Initially in his evidence, Dr. O'Malley indicated that "J.B" had capacity but then went on to qualify this conclusion to a significant extent in his evidence. Dr. O'Malley concluded that "J.B." could develop an "internalised aggression" as a result of being dislocated from his own cultural background and because he has not experienced a normal adolescence due to his placement in St. Andrew's.

111. This Court has to consider strongly vindicating the constitutional rights of "J.B." in terms of his strong desire to return to live in Ireland. "J.B" has a constitutional right as an Irish citizen to reside in this State where possible, pursuant to Article 40 of the Irish Constitution 1937. This Court must also vindicate "J.B's" right to family life in the Irish State pursuant to Article 41 of the Irish Constitution 1937, and ensure that he is able to transition back to Ireland so that he can reside and be cared for in this jurisdiction.

112. This Court notes with great interest, the observation of the independent psychiatric assessor, Dr. Ciaran O'Malley who expressed the view that "J.B." would require an additional six months of therapy at the low secure care unit in St. Andrew's before he could make a fruitful transition to an appropriate placement in Ireland. He also gave his view that such a placement would have to be sheltered.

113. This Court rejects the view of Dr. Lawlor where he opined that "J.B." must continue to be treated in St. Andrew's, otherwise there would be a very high risk of relapse. This amounts to preventative medicine. Such an approach is not acceptable in terms of the application of mental health law in this jurisdiction.

114. However, I do accept a good deal of what Dr. Lawlor has said in his evidence as set out in para. 29 p. 16 of this judgment. I hold that "J.B." does not have the capacity (i.e. full capacity), to weigh up the therapeutic pros and cons of staying in St. Andrew's versus therapy in an Irish treatment centre. I accept Dr. Lawlor's contention that this has implications for his ability to give a valued consent, and I accept his opinion, that the issue is about giving consent and that the consent is decision specific. Dr. Lawlor explained that "J.B." just meets the threshold for consent to medication but may not meet the threshold for consent to the broader aspects of his care. This was Dr. Lawlor's key point.

115. In light of all the medical evidence, and in particular Dr. Lawlor's evidence, this Court considers the criterion that the Court must consider in determining whether an individual has capacity as set out by Laffoy J. in *Fitzpatrick v. F.K* [2009] 2 I.R. 7 (as set out in para. 81 of this judgment). With particular consideration to factors (2)-(5) of the legal test for capacity as set out by Laffoy J. in *Fitzpatrick v. F.K* [2009] 2 I.R. 7, this Court concludes that "J.B" does not have capacity to make material decisions in terms of his medical treatment and therapy. This Court has not come to this conclusion lightly and is cognisant of the consequences of "J.B" immediately refusing his treatment at St. Andrew's. In that light, the Court has given significant consideration to the comments of Laffoy J. in *Fitzpatrick v. F.K* [2009] 2 I.R. 7 (at para. 84):

> "(6) In assessing capacity, whether at the bedside in a high dependency unit or in court, the assessment must have regard to the gravity of the decision, in terms of the consequences which are likely to ensue from the acceptance or rejection of the proffered treatment. In the private law context this means that, in applying the civil law standard of proof, the weight to be attached to the evidence should have regard to the gravity of the decision, whether that is characterised as the necessity for "clear and convincing proof" or an enjoinder that the court "should not draw its conclusions lightly."

116. As the Court has found that "J.B" lacks capacity in terms of making material decision in regards his medical treatment and therapy, this Court concludes that "J.B's" best interest and personal rights under Article 40 of the Irish Constitution 1937 are endangered and in turn, the intervention of the Court is necessitated. Thus, this Court considers its obligations under Article 40.3.1º and Article 40.3.2º of the Constitution to vindicate "J.B's" personal rights as guaranteed under Article 40 (see *The State (Quinn) v. Ryan* [1965] I.R. 70 at pg.122), and in turn exercises its inherent jurisdiction to continue the present detention of "J.B" for the purposes of overseeing an orderly transition of "J.B" from St. Andrew's, Northampton to an appropriate placement in Ireland.

117. Furthermore, this Court takes the view that it would be completely irresponsible to try and time limit artificially, a period during which "J.B." must undergo further therapy in defence of his rights. He is described by Dr. Ciaran O'Malley as having aetiologies yet

unknown, in addition to the disorders already described as attributable to his conditions. Therefore, it is the view of this Court that there should be a transitioning period to enable a safe and orderly return of "J.B." to this jurisdiction where, on the evidence of Dr. O'Malley, he will require a solution arrived at by joined up thinking of the professionals and some form of sheltered living situation.

118. This Court recommends the formation of a committee of doctors to oversee "J.B's" transition to Ireland, and advise when and how soon such transition is to be effected. Each party to the proceedings is to nominate one of the medical professional who had given evidence in this case to the proposed committee of doctors; said committee should include one forensic psychiatrist. This Court believes that a forensic psychiatrist is necessary on the advice of Dr. O'Malley.

119. Dr. Attard gave evidence that "J.B.'s" current depot levels need to be built up to the appropriate level. This observation does not appear to be contested by any professional witness. Thus, this Court is of the view that when such depot levels have been met, the committee is to consider "J.B.'s" transition back to Ireland.

120. Dr. Attard gave very practical evidence of "J.B.'s" need to complete an anger management course at St. Andrew's, Northampton and that it was necessary that "J.B" engage in a tailor made course of psychotherapy tailored to his specific needs. While Dr. Attard thought that this could take more than a year, it is the view of this Court that depending on the level of commitment to transitioning "J.B" effectively, this process could be completed with more expediency. It is open to the HSE to provide additional resources to ensure such expediency.

121. For the avoidance of doubt, this Court holds that "J.B." does not have full capacity (i.e. lacks capacity) in terms of the necessity for treatment and medication for his mental disorder.

122. It is the view of this Court that Mr. McEvoy, *guardian ad litem*, should remain involved in this case to assist "J.B." in transitioning back to this jurisdiction effectively.

123. It is the view of this Court that in furtherance of the protection of "J.B's" constitutional rights, and further to the inherent jurisdiction of this Court given a certain lack of capacity at present, that "J.B." should remain under the intensive welfare review system, which this Court carries out on at least monthly intervals to assist with the transitioning of "J.B." back to this jurisdiction.

124. This Court notes that "J.B." did indicate to Birmingham J. that he would stay in St. Andrew's past his eighteenth birthday if he had to, but wishes that he would be able to transition back to this jurisdiction as soon as possible, and certainly before his nineteenth birthday, if at all possible.

125. This Court will hear submissions from counsel on the form of order to be made, and in relation to those specific parties who may be nominated for the committee of medical professionals and social worker who may wish to assist in "J.B's" transitioning phase.