THE HIGH COURT

[2015 No. 884 S.S.]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

A. C. ON BEHALF OF HIS MOTHER O. C.

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

BY ORDER OF THE COURT THE GENERAL SOLICITOR FOR MINORS AND WARDS OF COURT

NOTICE PARTY

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 7th day of September, 2018.

Background

1. These proceedings come before the Court on foot of an Order of the Court of Appeal made the 27th July, 2018, whereby the Applicant's appeal against the Order of the President, made the 16th July, 2018, was allowed and the application remitted back to this Court for an inquiry into the lawfulness of the involuntary placement (detention) of the Applicant's mother, O.C. at the Community Unit for Older Persons, Dalkey, Co. Dublin, (the Dalkey Unit) to which she had been transferred from St. Vincent's University Hospital, Dublin (St. Vincent's) on foot of orders made by the President on the 16th and 23rd July, 2018 respectively.

2. The Court of Appeal directed further that the Director General of the Health Service Executive (HSE) or his nominee certify in writing the grounds upon which O.C. was being detained. The Head of Service, HSE Community Healthcare East, John O'Donovan, was nominated for this purpose. He issued a certificate, dated the 31st July, which confirmed (a) that O.C. is detained at the Dalkey Unit pursuant to the order of the President (the 'Placement Order') made on the 16th July and (b) that by order of even date (the 'Declaration' Order) O.C. was also brought into wardship.

3. At the outset, I expressed concern that other than the order from which the appeal had been taken the order of the Court of Appeal made no reference to any of the orders made in wardship proceedings brought by the Respondent in respect of the welfare of O.C. (the ward). It was not entirely clear from the response of counsel for the Applicant to a query I raised in this regard what orders, other than the President's order refusing the application, were before the court or what information, if any, had been given by the Applicant about the orders made in the wardship proceedings. This is not in any way intended as a criticism of counsel but merely reflects the fact that the appeal proceeded *ex parte* and the Applicant was then unrepresented.

4. What is clear on the face of the 'Placement Order' is that the Applicant and his father, who had been present in person when the application for an inquiry was refused, walked out of the court during the hearing in the wardship proceedings at the conclusion of which the 'Placement' and 'Declaration' Orders were made and that they did not thereafter return. I pause here to observe that the wardship proceedings, in which the ward, her husband and the Applicant were named as respondents, commenced by way of a Petition in Wardship, dated the 20th June, 2018, which were made available to the Court as an exhibit on affidavit sworn in these proceedings. It is evident from the 'Declaration' Order that the President was satisfied and found on the medical adduced that the ward was of unsound mind and incapable of managing her person or property.

5. It appears to me, therefore, that the net effect of the Order of the Court of Appeal is to direct this Court to conduct an enquiry into the lawfulness of the detention of a citizen who has been brought into wardship and placed in a secure residential facility for her own protection and welfare on foot of certain court orders made by the President in the exercise of his jurisdiction in wardship, orders which on their face are entirely regular; to be absolutely fair to him it is not suggested otherwise by the Applicant. In so far as Order of the Court of Appeal directs this Court to hold an enquiry it would seem the Constitution appears to envisage that the jurisdiction to make such an order under Article 40.4.2 is vested exclusively in the High Court. While there was no objection to proceeding as directed, in the event the matter should proceed further the Respondent invited the Court to consider making this observation.

6. In the ordinary course it would follow that as the orders made are regular on their face the detention of the ward at the Dalkey Unit is lawful. The legal consequences in the context of an application for an enquiry under Article 40.4.2 maybe stated thus: other than in the most exceptional or extraordinary circumstances the Court is not required nor is it concerned to go behind a court order which on its face discloses no invalidity. Delivering the judgement of the Supreme Court in *Ryan v. The Governor of Midlands Prison* [2014] IESC 54 at para 18, Denham C.J., enunciated the general principal in the following terms:

> *…if an order of the court does not show an invalidity on its face, in particular if it is an order in relation to a post-conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy maybe an appeal or an application for leave to seek judicial review. In such circumstances, the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw. See also the judgment of this Court in McKevitt v. The Governor of Portlaoise Prison* [2014] IEHC 442.

7. The case made on behalf of the Applicant amounts to an all-out assault and challenge to the jurisdiction of the President in wardship to make the orders for the involuntary placement (detention) of the ward. Absent the jurisdiction to make such orders the Applicant contends that the ward's detention at St Vincent's and subsequently at the Dalkey Unit, is unlawful. Moreover, as the initial removal of the ward from her home was unauthorised and without consent it tainted all subsequent actions with illegality, propositions with which, not surprisingly, the Respondent and the Notice Party take issue.

8. When carrying out an enquiry under Article 40.4.2 the jurisdiction of the Court is confined to a determination on the legality of the detention, in this case the continuing detention of the ward in the Dalkey Unit and, if found to be unlawful, to order that she be immediately released. In the somewhat unusual circumstances of the case and in the interest of a comprehensive understanding I consider it necessary that the matters in controversy should be placed in context and that the factual matrix on foot of which they arise should now be set out in some detail.

The Ward

9. The ward was born on the 5th July, 1943. She is married. There were five children of the marriage, one of whom, a daughter, died

on the 17th February, 1998. One daughter, S.S. resides in the UK and two other daughters, R. and L. live in Cavan. Until the 17th of June, 2018, when she was removed from her home by the Respondent and admitted to St. Vincent's upon concerns for her wellbeing, the ward lived with her husband and her son, the Applicant, at the family home in Ballinteer, Dublin 16.

10. The ward has a significant medical history. She is a type 2 insulin dependent diabetic. In 2005, she was diagnosed with terminal lung cancer for which she received lifesaving treatment. More recently, in late 2014, she had a serious fall which resulted in severe mobility issues that necessitated surgical intervention; four unsuccessful hip surgeries were carried out, the most recent in November, 2017.

11. Given the previously unsuccessful surgical outcomes, the ward was advised that if further hip dislocation was to be avoided and stability was to be achieved she needed to have a constrained hip replacement; this was performed at the most recent surgery in 2017. It follows that the subsequent dislocation of the hip, shortly before admission to St Vincent's, was entirely unexpected; the cause for the dislocation remains unexplained but featured in the Respondent's deliberations as to the most appropriate course of action in order to ensure the health and welfare requirements of the ward.

12. The Applicant denies any knowledge of accident or other trauma to explain the dislocation. However, the dislocation was viewed with bafflement, shock and surprise by Mr Fintan Doyle, the ward's consultant which he expressed in a letter to her GP, dated 9th May, 2018. His opinion would also feature in the Respondent's concerns for the ward's welfare and safety as appears in the subsequent wardship proceedings. Further medical intervention, including possible revision surgery is necessary to address the ongoing issue of hip dislocation.

13. The ward's health issues are intellectual as well as physical. In or about 2014/2015, she developed cognitive problems which manifested in symptoms of intermittent confusion and agitation. In 2016, she was diagnosed with mild dementia; this condition is progressive and was categorised as sever in the medical evidence adduced in the wardship proceedings, an assessment not shared by the Applicant. The ward has also had to undergo neck surgery, performed in August, 2016 to relieve compression of her spinal cord due to spinal bone degeneration and as if she did not have enough medical problems to cope with she also suffers from urinary incontinence.

14. Given this background it is hardly surprising that following the surgery in November, 2017 the ward's capacity to look after herself if discharged from hospital was a matter of some considerable concern to the multidisciplinary team responsible for her medical needs and requirements; they recommended long term institutional residential care. However, in May, 2018 she was discharged against medical advice and taken home by the Applicant who undertook to look after her.

15. With regard to the deterioration in her cognitive capacity, a medical assessment was carried out by Dr. Teresa Cooney, Consultant Geriatrician in June, 2018. She found the ward to be disorientated with little insight into her medical condition and ability to care for herself at home. In her opinion, the ward was of unsound mind and incapable of managing her affairs, an opinion shared by Dr. John Seery, Consultant Physician, who also carried out an assessment after her admission to St Vincent's.

16. The Applicant's views on the ward's medical status are set out in the Affidavits which he swore in these proceedings. As far as he is concerned the ward had no medical issues which required admittance to a medical emergency facility in June, rather she was very comfortable and very well looked after in her home by the Applicant and her husband. In a replying affidavit, the Applicant described the ward as being lucid most of the time but accepted she could become confused and agitated in stressful situations. He wants his mother released and discharged back into his care and the care of her husband.

Background to the Events of the 7th June, 2018.
17. According to a nursing report prepared by Sinead Farrell in the wardship proceedings, home visits were commenced by her in May, 2018 following the ward's discharge from the Beacon Hospital. She recounts having found the ward on occasion to be unkempt, unwashed, expressing pain, having dirty nails and lying in urine soaked bed. This clear description of neglect is disputed by the Applicant and is entirely at variance with the description of the care provided by her husband and by the Applicant deposed to in his Affidavits.

18. The Applicant avers that his sisters R. and L. are not on speaking terms with the rest of the family and that over the years have made allegations against him of elder abuse of the ward. About his sister R. in particular he levels a number of complaints accusing her of having a vendetta and of trying to separate their mother from him and from their father. In this regard, he exhibits a report prepared by Garda Donal Tully, dated the 11th June, 2018, which refers to a contact made by a HSE social worker, Kieran Stenson, with the Gardaí at Dundrum following concerns of elder abuse raised by the Applicant's sisters in June, 2018. The complaints consisted of threats of physical, emotional and psychological abuse of the ward. In his replying affidavit, the Applicant categorically denies that there is any basis for what he describes as truly egregious allegations made against him.

19. It is clear from the evidence on affidavit sworn in the wardship proceedings that since 2015 there have been concerns about the welfare of the ward and that in early June, 2018 the subsequent interaction by social service personnel with the Applicant and the ward's husband came to a head when Kieran Stenson attended Dundrum Garda station with the Applicant's sisters R. and L who had brought with them a telephone recording made on the 6th June, consisting of verbal exchanges between the ward, her husband and the Applicant in the family home.

20. The recording had been made possible by a failure to properly replace the telephone handset following a call between one of the daughters and the Applicant. A professional transcript of that recording was made subsequently and exhibited on affidavit in the wardship proceedings. In the course of the recorded exchanges the Applicant is heard to threaten his mother with physical injury and to abuse her emotionally, using the most vile and repugnant language in the process.

21. Notwithstanding, the Applicant challenges the veracity of the conversation and the recording in his replying affidavit despite what had been said to the contrary in court when he appeared in person at the hearing of a motion on notice to place the ward in hospital and prohibit interference by the Applicant and his father with the placement.

Events of June 7th
22. The content material of the recording raised serious concerns for the welfare and safety of the ward which the Respondent concluded were best addressed by removal and admission to hospital for psychological assessment. Following a meeting between Mr. Stenson and the Gardaí at Dundrum Garda Station, a number of police officers and ambulance service personnel called to the family home and spoke with the Applicant and the ward's husband; Garda Tully explained the reason and purpose for the visit. Critically it is said that the Applicant's father gave his consent to the removal and admission of the ward to St. Vincent's.

23. Although the Applicant avers that the presence of three officers and the ambulance crew created an intimidating situation in the house, that the reasons given for the intended removal had caused confusion and that the impression he formed was that his mother was going to be removed regardless of objections to this course of action, it is not disputed that the ward's husband had consented to his wife's removal and placement in St. Vincent's. That such consent was most probably given is consistent with an averment in the Applicant's replying affidavit that he, his father and other members of the family went with the ward to the hospital. Furthermore, there appears to have been no suggestion in the wardship proceedings that there was anything irregular or untoward about the removal and initial placement in St. Vincent's.

24. Finally, the ward's GP, Dr Fagan, wrote a referral letter, dated 7th June, requesting that his patient be admitted to hospital on a number of grounds which included threats of violence and elder abuse by the Applicant. Referring to the recorded phone conversation he stated that the Applicant could be heard threatening to kill the ward by putting a pillow over her head or by putting a hand over her mouth. As mentioned earlier Dr. John Seery, carried out an assessment in hospital on the 12th June, 2018, as a result of which he formed the opinion that the ward did not have the mental capacity to make decisions with regard to her medical care or her personal safety.

Wardship Proceedings
25. Apart from moving to have an inquiry undertaken into the mental capacity of the ward to manage herself and her affairs, the Respondent also moved *ex parte* for a series of interim reliefs which included an order that the ward remain placed at St. Vincent's and that any person with notice of the making of that order, including the Applicant and the ward's husband, be prohibited from interfering with the placement. Liberty was given to issue a notice of motion returnable for the 25th June, 2018, and a direction given that one of the court's medical visitors should carry out a medical assessment of the ward's mental state and capacity or incapacity to manage her person or property and to report thereon pursuant to s. 11 of the Lunacy Regulation (Ireland) Act, 1871 and/or s. 9 (1) of the Courts (Supplemental Provisions) Act, 1961.

26. On the 20th June, pending the notice of motion return date, the President made interim orders in the terms sought on the *ex parte* application already mentioned. On the return date for the motion the Applicant and his father attended Court in person where they sought and were granted an adjournment for two weeks. They were invited by the President to comment on the content of the recording which had been transcribed and were given liberty to file replying affidavits. When the matter next came before the Court on the 9th July, the Applicant and his father once again attended in person and made submissions; neither had filed replying affidavits. The President made a number of orders which included an order which directed the continuing placement at St. Vincent's, provided for the ward's medical and care needs and prohibited the Applicant and his father from interfering with the placement or care of the ward or from visiting her until further order of the court.

27. Both he and his father were given liberty to apply to discharge or vary the orders and file replying affidavits by not later than the 12th July. None such were filed nor was any application made to discharge or appeal the orders made in the wardship proceedings. Instead, on the 16th July, immediately before the hearing in the wardship proceedings was due to commence, the Applicant moved the within application; I should add that no affidavit has been sworn by the ward's husband in these proceedings.

28. The Order of the 16th July provided for the continued placement of the ward in St. Vincent's and for her transfer and placement at the Dalkey Unit at such time as Dr. John Seery considered it appropriate in her best interests. The transfer occurred prior to an adjourned hearing before the President on the 23rd July at the conclusion of which he made further orders continuing the placement of the ward at the Dalkey Unit and restraining the Applicant and his father from interfering with her placement there, however, the orders also provided for the terms and circumstances upon which the Applicant and his father might communicate with and visit the ward.

Applicant's Submissions
29. In summary, the Applicant's case is predicated on whether or not the jurisdiction vested in the High Court pursuant to s.9 (1) of the Courts (Supplemental Provisions) Act 1961 (the 1961 Act) conferred a power to detain in wardship proceedings. It was argued that no such power was conferred and that absent the jurisdiction to exercise such a power the detention on foot of the orders in quo is unlawful. It was made clear to the Court that the case made is not in any way intended to diminish the law in wardship but is concerned solely with the lawfulness of the ward's detention.

30. In this regard, it was recognised that Article 40.4.2 applications arise predominantly in criminal proceedings and that in civil matters are more often than not concerned with a mental health issue where, for example, correct procedures have not been adhered to. The jurisdiction of the Court in this regard was considered by the Supreme Court in *Child and Family Agency v. McG and JC* [2017] IESC 9 where at para. 8 O'Donnell J.' stated:

> *More difficult issues arise when it is sought to justify detention by the production of a valid order which is regular on its face, but which it is asserted is liable to be quashed because of some defect in procedure. The High Court on an Article 40.4 inquiry does not have jurisdiction to make any order other than release or to refuse release. It cannot for example quash an order or direct the performance of a legal duty. Given the importance of the remedy, and its power, I do not doubt that it is possible in a fundamental case, for the High Court to as it were, 'look through' an otherwise validly issued order, or at least an order which has not yet been quashed by a court with jurisdiction to do so and direct the release of the applicant. The Constitution itself recognises perhaps the most dramatic example of this where it specifically provides for the possibility of Article 40 being invoked in circumstances where it is contended that a person is being detained in accordance with law, but 'that such law is invalid having regard to the provisions of this Constitution. However, the High Court is not itself given power under Article 40 to declare the law invalid even though it is for these purposes 'satisfied' that it is invalid. Instead it is to refer the question of validity of law to the Supreme Court, and refrain from making an order under Article 40, until such time as the Supreme Court has determined the question so referred".*

It was submitted that in the circumstances of the case under consideration the Court was warranted in 'looking behind' the Orders made by the President; simply put there was a complete want of jurisdiction to place the ward involuntarily at St. Vincent's and subsequently at the Dalkey Unit. Without prejudice to that contention, even if the court was invested with such jurisdiction, the initial removal of the ward was unlawful and thus tainted everything which followed with illegality. See *Oladapo v. The Governor of Cloverhill Prison* [2009] IESC 42; and *Omar v. The Governor of Cloverhill Prison* [2013] IEHC 186.

31. There are very few circumstances in which a person may be lawfully detained other than in the context of criminal incarceration. By way of example in a civil context a person may be detained in certain circumstances under the provisions of the Mental Health Act 2001 (the 2001 Act) (which deals with the treatment of those suffering from mental illness) or under the Health Act 1953 (which provides for detention of persons who may be suffering from an infectious disease). Otherwise it was submitted that the concept of detention has no place in our system of medical care. See *AC v. Cork University Hospital & the HSE* [2018] IECA 217. Furthermore, in

the absence of consent a person cannot be detained otherwise than as so provided by statute.

32. The 1961 Act is the sole font of the jurisdiction vested in the High Court in relation to matters in lunacy and minors vested and so it is useful at this point to set the relevant provisions out here:

> *There shall be vested in the High Court the jurisdiction in lunacy and minor matters which—*
>
> *(a) was formerly exercised by the Lord Chancellor of Ireland,*
>
> *(b) was, at the passing of the Act of 1924, exercised by the Lord Chief Justice of Ireland, and*
>
> *(c) was, by virtue of subsection (1) of section 19 of the Act of 1924 and subsection (1) of section 9 of the Act of 1936, vested, immediately before the operative date, in the existing High Court.*

There was some controversy between the parties concerning what jurisdiction in lunacy and minor matters had been exercised by the last Lord Chancellor and, latterly, the last Lord Chief Justice of Ireland up until the operative date of the Courts of Justice Act 1924 (the 1924 Act).

33. Prior to independence the jurisdiction over the person and estates of idiots and lunatics formed part of the royal prerogative attaching to the Crown as *parens patriae* which in the case of Ireland was vested in the Lord Chancellor by special instrument under Sign-manual known as the sovereign's 'Letter in Lunacy', and upon which the authority to administer the jurisdiction rested. The 'letter in lunacy' was issued by the reigning sovereign to each successive Lord Chancellor, whether of England and Wales or of Ireland. Significantly, the Sign-manual did not confer any original jurisdiction on the Lord Chancellor but merely endowed him during the lifetime of the reigning monarch with the powers of administration which it was personally inconvenient for the monarch to exercise.

34. In addition to this prerogative jurisdiction, the Lord Chancellor was vested with certain powers regarding the estates of persons of unsound mind not so found and estates of lunatic criminals pursuant to sections 68, 70 and 103 of the Lunacy (Ireland) Act, 1871, (the 1871 Act). However, these powers only attached to the Lord Chancellor when entrusted by the Sign-manual with the prerogative jurisdiction in lunacy and was administered in a similar manner to that jurisdiction of which, for all practical purposes, it formed part. For a more expansive discussion on the topic see Harris, *Law and Practice in Lunacy in Ireland*, Chap. 1. The nature and extent of the Lord Chancellor's jurisdiction in lunacy and minors was considered and expounded upon in two pre-independence cases to which the Court was referred, *In Re Birch* (1892) 26 LR Ir. 274; and *In Re Godfrey* (1892) 26 LR Ir. 278.

35. It was contended that Section 9 of the 1961 Act, does not purport to confer any jurisdiction whatsoever in wardship other than what was extant at the time of the passing of the 1924 Act. Such jurisdiction as the court enjoys is entirely dependent on statute. Whether there is any inherent jurisdiction vested in the High Court when dealing with incapacitated adults who are outside wardship was a question considered by the Supreme Court in the case of *In the matter of FD* [2015] IESC 83 where at para 28 Laffoy J. stated:

> *On this appeal, the issue is whether there exists, alongside the wardship jurisdiction expressly vested by statute in the High Court, an inherent jurisdiction, which exists outside the wardship jurisdiction, to enable and regulate the protection of the property of a person who may lack mental capacity. As was established with clarity by the decision of this Court in the D case, the current jurisdiction of the High Court in matters involving mental incapacity is the jurisdiction expressly vested in the High Court by the Oireachtas by virtue of subs. (1) of s. 9 of the Act of 1961 and exercisable in the manner stipulated in subs. (2) of that section. Neither the nature of the High Court's judicial function nor its constitutional role in the administration of justice, in my view, permits the recognition of an inherent jurisdiction in the High Court to make provision for the protection of persons with mental incapacity outside the wardship process by, for example, sanctioning the establishment of a trust to protect the assets of a person believed to be incapable of managing his or her own property affairs. The rationale underlying the judgment of Murray J. in GMcG v. DW [2000] 4 IR 1 and of Clarke J. in the Mavior [2013] 3 IR 268 makes it clear why such recognition is not permissible. No fundamental principle of constitutional stature has been invoked to justify a different conclusion. The effect of a finding that such an inherent jurisdiction exists by this Court would be, in the words of Clarke J., 'to trespass on the legislative role of the Oireachtas'.*

36. The Applicant submits that there is no evidence of the jurisdiction in lunacy to detain a ward as exercised by the last Lord Chancellor or by the last Lord Chief Justice of Ireland prior to the 1924 Act. Accordingly, to be lawful the exercise by the President of any such power requires express statutory authority. Consequently, absent an express provision in the 1924 Act transferring such jurisdiction or the express vesting of such power under s. 9 of the 1961 Act, no proper juridical basis exists for the exercise of a power to detain; the purported exercise of such power from time to time since independence does not cure the deficiency nor does it invest the court with the power to make the orders on foot of which the ward is detained. It followed that her detention in St. Vincent's and subsequent detention at the Dalkey Unit is unlawful.

37. In summation, in so far as there may have been a power to detain under the wardship jurisdiction vested in the Lord Chancellor of Ireland by 'letters of lunacy', such was personal to the office holder and if such a letter had ever been issued to the last Lord Chancellor there it had not been proved as it had to be in the absence of express statutory provision vesting jurisdiction to exercise such a power. Accordingly, there was no legal basis upon which to found a presumption let alone a conclusion that such jurisdiction had been possessed and exercised by the last Lord Chancellor or that it had been transferred to and exercised by the last Lord Chief Justice of Ireland until the coming into force of the 1924 Act by which all such jurisdiction was transferred to the Chief Justice of the Free State. (The last letter of lunacy issued to the Lord Chancellor of England and Wales was revoked by the UK Mental Treatment Act, 1959).

Respondent's Submissions

38. At the outset, I should mention that in addition to the oral submissions which were made by all parties at the hearing, written submissions on behalf of the Respondent had been prepared in advance of the hearing and were supplemented by further written submissions delivered in response to the oral submissions made on behalf of the Applicant. As counsel for the Notice Party sought to be joined to and identified with the Respondent's submissions and as his submissions were essentially *ad idem* with those of the Respondent, these parties will be dealt with and referred to in this judgement as one.

39. The Respondent's submissions are predicated on the proposition that as the orders upon which the ward is detained are free of defect on their face and are therefore valid it follows that the detention of the ward is lawful. In these circumstances, the law is clear; save in the most exceptional circumstances where an order is regular on its face the Court is not required nor should it seek to

look beyond or go behind an order of the court. If the Applicant had cause for complaint more appropriate courses of action and remedies were available through which he could have ventilated his objections but which he failed to have recourse, either in the wardship proceedings or by issuing declaratory proceedings; whatever else maybe said of it the use of the procedure under Article 40.4.2 in the circumstances was entirely inappropriate. See *FX v. The Clinical Director of the Central Mental Hospital* [2014] IESC 1 at paras. 65 and 66 where the general principal is stated thus:

> *"In general, if there is an order of any court, which does not show invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a court of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional an immediate remedy of habeas corpus is not the appropriate approach.*
>
> *An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2 unless there has been some fundamental denial of justice. In principle, the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2 may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in The State (O) v. O'Brien [1973] IR 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court."*

40. In response to the proposition that the initial removal and involuntary placement of the ward at St Vincent's was unlawful and thus tainted the subsequent orders with illegality, the Respondent urged rejection on the grounds that in the circumstances of the case the Applicant's submissions were misconceived and bad in law. As the order of the Court of Appeal made clear, the matter with which the inquiry is concerned is the lawfulness or otherwise of the ward's continuing detention; the procedure under Article 40.4.2 may not be used and is not a vehicle for an enquiry into the circumstances or steps which led to the removal and initial admission of the ward to St. Vincent's.

41. Even if there was any question mark over the legality of the initial removal and placement of the ward at St. Vincent's as the Applicant contends, it did not taint with illegality the subsequent orders of the court. The decisions on which reliance was placed by the Applicant in *Omar* and *Oladapo*, supra, were not relevant in the circumstances of the case and were thus not authority for the proposition advanced on behalf of the Applicant. See *EH v. Clinical Director of St Vincent's Hospital* [2009] IESC 46; *Grant v. Governor of Clover Hill Prison* [2015] IEHC 768; and *A.C v. Fitzpatrick and others* [2018] IEHC 570.

42. In A.C v. Fitzpatrick, supra, the court had to address a similar argument but in the context of what was a period of unlawful detention in a hospital which had been followed by a period of detention ordered by the court in the exercise of its wardship jurisdiction. Following *EH v. The Clinical Director*, supra, Faherty J. expressly rejected the proposition that the period of unlawful detention had tainted with illegality the subsequent period of detention as ordered by the court.

43. Turning to the issue on the power of detention in wardship the Respondent argued that the jurisdiction in this respect vested in the last Lord Chancellor and transferred by the Government of Ireland Act 1920 (the 1920 Act) to the last Lord Chief Justice of Ireland was vested in the High Court by virtue of the provisions of s. 9 of the 1961 Act. That such was the effect of the section followed from the construction placed on the wording of the section by the Supreme Court in the case of *In Re D.* [1987] I.R. 449, and as further exemplified by Laffoy J. in the case of *In Re F.D.* [2015] 1 I.R. 741 at 754 et seq. The attention of the court was also drawn to the decisions in the following cases, *In the Matter of a Ward of Court (withholding medical treatment) (No. 2),* [1996] 2 I.R. 79, *In Re M., ex parte* unreported, High Court (Finnegan P.) 24th October, 2002; *J.M.* [2003] 1 I.R. 321; *A.M.* [2017] IEHC 184 and *AC v. Fitzpatrick & Ors,* supra.

Decision

44. The Court has no jurisdiction under the Article 40.4.2 procedure to interfere in any way with court orders, let alone the orders made by the President; the jurisdiction is limited to refusing the application or ordering immediate release, see *Child and Family Agency v. McG & JC*, supra, moreover, the Court is not concerned with periods of previous of detention but rather with the legality of the detention in respect of which the application is brought. Accordingly, the inquiry carried out was confined to the continuing detention of the ward at the Dalkey Unit as directed by the Court of Appeal; save as to the legal consequences of the involuntary removal from her home and admission of the ward to St. Vincent's as urged on it by the Applicant, the Court did not concern itself with any previous detentions or placements.

Conclusion; Tainted Orders

45. I propose in the first instance to address the proposition that the orders continuing the detention of the ward are tainted with illegality. As to that I am quite satisfied on the preponderance of the evidence that the initial removal from her home and placement of the ward in St. Vincent's was undertaken with the consent of the Applicant and the ward's family in circumstances where she was mentally incapacitated.

46. Even if that had not been the case I cannot accept the submission that those events and other matters complained of which preceded the 'Placement' and 'Declaratory' Orders were fatal to the legality of those and subsequent orders continuing the detention of the ward. I accept the Respondent's submissions in this regard and am satisfied that the law which is applicable in the circumstances of this case is set out in *EH v. St Vincent's Hospital*, supra; *Grant v. Cloverhill Prison*, supra; and *AC v. Fitzpatrick and others*, supra.

Jurisdiction to Detain

47. The first point of departure on this issue is to ascertain what jurisdiction, if any, to detain in matters lunacy and minors was vested in and exercised by the last Lord Chancellor of Ireland. The jurisdiction of the last Lord Chief Justice of Ireland is relevant because the jurisdiction in matters of lunacy and minors exercised by the Lord Chancellor became exercisable by the Lord Chief Justice under the terms of the 1920 Act and was subsequently transferred to the Chief Justice of the Free State by s.19 (1) of the 1924 Act.

48. The terms of the sovereign's 'letter of lunacy' issued to the Lord Chancellor are specific and the relevant portions thereof for present purposes can be found in the judgement of Ashbourne, L.C. in the case of *In Re Birch*, supra. In particular it will be seen from the text of the letter that incidental to the royal prerogative is the right *"… to have the* custody *of idiots and lunatics and their estates in that part of the United Kingdom called Ireland …. We therefore … have though fit to entrust you with the* care *and* commitment of the custody *of the idiots and lunatics and their estates."* (emphasis added) These words amount to an express delegation by the Crown under Sign-manual to the Lord Chancellor of its prerogative jurisdiction in lunacy, including the *care and commitment of the custody* of idiots and lunatics.

49. Very forceful submissions were made on all sides in relation to the jurisdiction vested under s. 9 of the 1924 Act and whether what was vested carried with it a power of detention. In the absence of express statutory provision to that effect, it is clear from the jurisdictional provisions of the section that if such a power existed in 1924 it had to have been possessed and exercisable by the last Lord Chancellor and subsequently by the last Lord Chief Justice of Ireland. Counsel for the Applicant, Dr. Craven S.C. referred to *In re Birch* and *In re Godfrey*, supra, cases in which the nature of the jurisdiction in lunacy was considered and explained but for which he argued there was no evidence of having vested in the last Lord Chancellor, the 'letter of lunacy', if any issued, having not been proved.

Conclusion; Jurisdiction to Detain

50. In my judgment it is significant in the context of the matter under consideration that the motions before the court in *Birch* and *Godfrey* involved questions of care, custody and the power to place a person with mental incapacity in or remove that person from an asylum or other place. Having regard to the judgements in these cases it appears to me to be beyond question that the jurisdiction over the persons of lunatics as exercised by the Lord Chancellor was prerogative in origin and this jurisdiction was in no way diminished or limited by legislation; the 1871 Act and subsequent pre-independence statutes in Lunacy were essentially regulatory in substance.

51. The prerogative jurisdiction extended to all persons found lunatic by inquisition domiciled or resident within the State whether with or without property, other than persons not found lunatic by inquisition whose estates are administered under sections 68 and 70 of the 1871 Act, furthermore, the power exercisable by the Lord Chancellor on foot of this jurisdiction extended to directing that any person found lunatic by inquisition could be sent to, detained in, or removed from any asylum or other place of residence, or could be transferred to the care of such private persons as he might think fit. See Harris *Law and Practice in Lunacy in Ireland*, Chap 1 p 8 and the authorities cited.

Whether the Jurisdiction was Vested in the High Court

52. The jurisdiction vested in the High Court by s. 9 of the 1961 Act was considered by the Supreme Court in the case of *In re D* [1987] IR 449. Having considered *Birch* and *Godfrey*, supra, Finlay C.J, delivering the unanimous judgement of the full court, was satisfied that the jurisdiction formerly exercised by the Lord Chancellor and Lord Chief Justice of Ireland was vested in the High Court by the provisions of that section and that the jurisdiction to take into wardship extended beyond persons who had property to those who not but who also required protection. In reaching this conclusion the Chief Justice stated at p. 455:

> *"Such a construction of the jurisdiction in lunacy matters vested by the*
>
> *Act of 1961 in the High Court seems to me to obtain significant support from a consideration of the provisions of Article 40.3.2 of the Constitution where the obligation imposed on the State by its laws to protect as best it may from unjust attack and in the case of injustice done to vindicate the life and person of every citizen is put in equal place with the obligation to protect and vindicate the property rights of every citizen"*

53. The circumstances giving rise to that case are also significant in the context of the issue in hand. The respondent had sought and had been granted an order of *habeas corpus* under Article 40.4.2. Upon the hearing on the return date the Midland Health Board responsible for the maintenance of a residential institution to which the respondent had been admitted sought an adjournment to permit the filing of a petition to enquire into the soundness of the respondent's mind. The President refused the application on the grounds he had no jurisdiction to deal with it as the respondent had no property and that the 1871 Act was relevant only where property was involved; the petitioner appealed to the Supreme Court. It follows that in reaching the decision it did the members of the court had to have been aware that the purpose of the petition was to secure the continued detention of the respondent in the event that she was found to be of unsound mind and thereby provided a resolution to the Article 40.4.2 application.

54. The jurisdiction vested by s. 9 of the 1961 Act was again considered in the case of *FD* [2015] IESC 83. Commenting on the judgment of the Chief Justice in *In Re D*, and referring to the passage cited from the judgement of Ashbourne L.C. in *Birch*, Laffoy stated at para. 26:

> *In quoting that passage the clear objective of Finlay CJ (at p.456) was to identify the jurisdiction formerly exercised by the Lord Chancellor of Ireland. Having done so, he had identified a jurisdiction which the Oireachtas expressly vested in the High Court by virtue of s. 9(1) of the Act of 1961 Act. In other words, the source of the present jurisdiction of the High Court which was formerly exercised by the Lord Chancellor is s. 9 of the 1961 Act, by virtue of which the Oireachtas vested that jurisdiction in the High Court. Reliance on succession to the Royal prerogative does not arise.*

Accordingly, it follows that the source of the jurisdiction is dependent upon the vesting provisions of the section alone and not otherwise. I cannot accept the submission on behalf of the Applicant that the absence of evidence as to the terms of and the failure to produce the 'letter of lunacy' to the last Lord Chancellor of Ireland is a lacuna fatal to the lawfulness of the ward's detention.

55. In any event it appears to me to be highly improbable to the point of bordering on the fanciful that a want of jurisdiction to detain in wardship which would have arisen in the absence of a 'letter in lunacy' having issued to the Lord Chancellor would not have been noticed and acted upon before independence to challenge the detention of a person taken into wardship in the purported exercise of a jurisdiction which had never been conferred, still more so that such would not have been recorded and legally reported.

56. There were a number of other authorities to which the Court was referred on this question including *In the matter of A Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79 a case in which Hamilton C.J. also dealt with the question of jurisdiction and the effect of the vesting provisions of s.9 of the 1961 Act. Having outlined the historical evolution and progression of the jurisdiction at pp. 102-103 he went on to consider at p. 106 the nature and extent of the jurisdiction vested as follows:

> *"When a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward and in the exercise of such jurisdiction is subject only to the provisions of the Constitution: there is no statute which in the slightest degree lessens the court's duty or frees it from the responsibility of exercising that parental care. In the exercise of this jurisdiction the court's prime and paramount consideration must be the best interests of the ward."*

57. The jurisdiction of the High Court to detain a ward under the provisions of s. 9 of the 1961 Act and Mental Health Act 2001 were considered by the President in *In Re AM, a proposed Ward of Court* [2017] IEHC 184. He was satisfied that two separate and distinct jurisdictions existed side by side albeit that both dealt with persons of unsound mind on foot of which a ward could be detained, one arising from the 2001 Act and the other under s. 9(1) of the 1961 Act. The following passage from the judgment of the President, at para. 51, is particularly relevant and will be set out in full

> *"There is nothing contained in the Act (the Act of 2001) which interferes with the jurisdiction of this court under s.9 (1) of the 1961 Act. Neither expressly nor by implication is the jurisdiction conferred under s.9 (1) of the 1961 Act fettered or diluted by the provisions of the Act. They are two separate jurisdictions albeit that they both deal with persons of unsound mind. The legislature has chosen to have these two separate jurisdictions exist in parallel and either may be used as appropriate. It is a question of which is the more appropriate or effective in a particular case. That will fall to be decided on a case by case basis."*

That the jurisdiction conferred under s. 9(1) of the 1961 Act included the power to detain a ward and the manner in which that power should be exercised was set out in explicit terms at para. 56 where before he went on to address in detail the administration of the jurisdiction the President stated:

> *"First, the detention of a ward pursuant to s.9 has to be operated in a manner consistent with the Constitution and with the European Convention on Human Rights. This is achieved in part by a system of regular review. Certainly, since I took up my present office I have made it clear that any orders made for the detention of a ward of court must be subject to regular reviews at least every six months.".*

58. In A.*C. v. Fitzpatrick* supra the power to detain a ward pursuant to the jurisdiction vested by s. 9 was expressly recognised by Faherty J. in refusing to order the release of a ward detained in hospital on foot of an order made in wardship. That a person might be taken into a wardship in order that a lifesaving medical procedure could be afforded is illustrated by *In Re M.*, *ex parte*, supra and in *J.M*. supra, where a hospital in patient who was critically ill and required an immediate blood transfusion was admitted into wardship for the purpose of directing the necessary medical treatment. I accept the Respondent's submissions that such an order could not have been made in the absence of a jurisdiction to direct that the patient be placed or that her placement should be continued in the hospital in order that treatment should be afforded.

59. Finally, it appears to me that the power to commit a person of unsound mind otherwise than by virtue of the provisions of the 2001 Act was expressly recognised in the provisions of s. 283(1) which provides:

> *"(1) Nothing in this Act shall affect any power exercisable immediately before the commencement of this section by a Judge of the High Court or a Judge of the Circuit Court in connection with the* care and commitment *of the persons and estates of persons found to be idiots or of unsound mind."* (emphasis added)

Conclusion; Vesting of Jurisdiction

60. For all of these reasons and having due regard for the long line of authorities cited I accept the submissions made on behalf of the Respondent and the Notice Party and find that that the jurisdiction to detain in wardship, formally exercised by the Lord Chancellors and, subsequently, by the last Lord Chief Justice of Ireland, was vested in the High Court by virtue of s. 9 of the 1961 Act; accordingly the Court finds that there was no want of jurisdiction to make the orders on foot of which the ward is detained.

Ruling

61. It follows from the conclusions reached that the continuing placement of the ward in the Dalkey Unit is lawful. The application is refused and the Court will so order.