

THE HIGH COURT

[Record No: 2015/459p].

IN THE MATTER OF K.W., A VULNERABLE ADULT UPON HER REACHING THE AGE OF MAJORITY ON THE 25TH DAY OF JANUARY, 2015.

AND

IN THE MATTER OF AN APPLICATION TO PLACE K.W. IN SECURE ACCOMODATION IN THE CUSTODY OF THE DIRECTOR OF ST. ANDREW'S HEALTHCARE, BILLING ROAD, NORTHAMPTON, NN1 SDG, U.K.

AND

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

BETWEEN:

HEALTH SERVICE EXECUTIVE

APPLICANT

AND

K.W.

RESPONDENT

AND

L.R. AND J.T.

NOTICE PARTIES

AND

RAYMOND MCEVOY-GUARDIAN AD LITEM ON BEHALF OF K.W.

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 14th day of May, 2015.

1. On the 12th March, 2015, this Court delivered judgment in the principal proceedings (hereinafter referred to as the "principal judgment") and held, *inter alia*, that "K.W.", a vulnerable adult, lacked capacity to make material decisions regarding her medical treatment and therapy. This conclusion was predicated upon the medical evidence of consultant forensic psychiatrist, Professor Henry Kennedy, that "K.W." lacked capacity to express a decision that is the product of understanding relevant information, reasoning and appreciating the importance of the decision. Moreover, Professor Kennedy outlined in his report (dated the 16th February, 2015.) that "K.W." did not appreciate the benefits of others taking decisions on her behalf and limiting her freedom to harm herself at such times.

2. On the evidence tendered during the hearing, this Court concluded that the therapy received by "K.W." in St. Andrew's Healthcare, Billing Road, Northampton, United Kingdom, had not alleviated, cured or altered her mental health conditions. Moreover, this Court was cognisant of "K.W.'s" express desire to return to this jurisdiction, given that she had recently reached her age of majority and had been absent from the jurisdiction for a significant period.

3. On concluding that "K.W." lacked capacity to make material decisions regarding her medical treatment and therapy, this Court held that "K.W.'s" best welfare interests and personal rights under Article 40 of the Irish Constitution 1937 were endangered. On reaching this conclusion, the Court considered its obligations under Article 40.3.1^o and 40.3.2^o of the Constitution to vindicate "K.W.'s" personal rights as guaranteed under Article 40 (see *The State (Quinn) v. Ryan* [1965] I.R. 70 at pg. 122). Furthermore, this Court also noted its obligation to vindicate "K.W.'s" constitutional right to reside in the State as an Irish citizen under Article 40.3.1^o of the Constitution.

4. In turn, this Court exercised its inherent jurisdiction to order the return of "K.W." to this jurisdiction, and detain her involuntarily as a psychiatric patient in an adult psychiatric ward under the care of the Clinical Director of Ennis General Hospital, Co. Clare. This Court took the view that "K.W.'s" transition back to this jurisdiction should occur as soon as possible and no later than the 12th June, 2015. However, the Court also expressed the view that "K.W." could be returned earlier if the appropriate therapeutic structures and supports were in place on her return to Ireland. In the interim period, "K.W." could continue to avail of therapeutic treatments and medication as advised by her treating psychiatrist in St. Andrew's Healthcare. This Court was of the view that this approach would ensure that "K.W.'s" return to this jurisdiction would be safe and expeditious.

5. On the 19th March, 2015, this Court made an order reflecting the conclusions of the Court's principal judgment concerning these proceedings, and made further ancillary orders of a protective nature. On the 30th March, 2015, this order was perfected. The matter was to continue to be the subject of intensive review by this Court to ensure the safe transitioning of "K.W." to this jurisdiction, and to monitor her prospective progress in Ennis General Hospital, Co. Clare. In the interim period, the Court acceded to requests that "K.W." remain in an adolescent ward in St. Andrews, given the proposed expedited transition to this jurisdiction.

6. During the intensive review of this matter, counsel for "K.W.", counsel for the *guardian ad litem*, and counsel for "K.W.'s" parents stressed the importance of implementing and particularising a care plan for "K.W." prior to her return to this jurisdiction. It was submitted that such a detailed plan was necessitated so that any return by "K.W." to an Irish care institution would foster a stable and fruitful transition. The Court agreed and continues to agree with this position.

7. On the 30th April, 2015, this matter came before this Court for review. During the hearing, counsel for the Health Service Executive (HSE) informed the Court that "K.W." was scheduled to be transferred to Ennis General Hospital on the 8th June, 2015. However, it transpired that no formal care plan had been formulated by the HSE, nor was any substantive plan distributed to the other parties in these proceedings. Furthermore, counsel for the guardian ad litem highlighted to the Court that "K.W." was not in receipt of adequate treatment. Rather, "K.W." was merely in receipt of depot medication and continued to reside in an adolescent unit in St. Andrew's Healthcare. This course of action by St. Andrew's Healthcare was contextualised by an email from "K.W.'s" treating clinician, Dr. Boris Iankov. The email was dated the 31st March, 2015 and outlined that the HSE should make arrangements for the direct transfer of "K.W." to Ennis General Hospital as soon as possible. It was submitted by counsel for "K.W." that Dr. Iankov's email reflects the view that St. Andrew's Healthcare deemed it inappropriate to engage in a course of treatment with "K.W." if she is to be returned to this jurisdiction by the 12th June, 2015.

8. In addition, the Court was informed by counsel for the HSE that they were pursuing an application for a stay on the order of this Court made on the 19th March, 2015 (and perfected on the 30th March, 2015) (hereinafter referred to as the "principal order") pending an appeal. In particular, counsel for the HSE outlined that they were appealing paragraph three of the aforesaid order, namely, an order pursuant to the inherent jurisdiction of the High Court that "K.W.", upon her return to Ireland, be detained as a psychiatric patient in an adult psychiatric ward under the care of the Clinical Director of Ennis General Hospital, Co. Clare subject to periodic review by this Court.

9. The Court was also informed that there were existing cross-appeals by other parties to these proceedings. On concluding the hearing on the 30th April, 2015, this Court directed that the HSE furnish a comprehensive care plan for "K.W.", with said care plan to be distributed between the parties before the next periodic review of this matter on the 6th May, 2015. On that date, the Court agreed to hear the parties on the application for a stay on the Court's principal order.

10. On the 6th May, 2015, the matter came before the Court to determine the issue of a stay. During the hearing, the parties highlighted that they received a formal written care plan from the HSE outlining that "K.W." is scheduled to return to this jurisdiction on the 8th June, 2015, and the prospective supports and structures to be implemented on "K.W.'s" return. Moreover, a report (dated the 1st May, 2015.) from Dr. Iankov was submitted to the Court. Dr. Iankov's report outlined that "K.W." continues to warrant hospital placement in a female only environment that offers safe containment and in addition, treatment in the form of psychiatric input, psychological work, occupational therapy assessment and treatment, education provision, therapeutic social work, involvement and nursing support. In his report, Dr. Iankov raised concerns that "K.W." would require an urgent transfer to adult services as her placement on an adolescent unit is inappropriate. In addition, Dr. Iankov raised concerns regarding "K.W.'s" risk of self-harm in that her last documented "incident" was on the 30th April, 2015, and her current risk assessment is high in all domains including self-harm, suicide and absconding. In the concluding paragraphs of his report, Dr. Iankov outlines that "K.W." presents with significant risk behaviour with suicidal intent and, she continues to demonstrate symptoms of emotional instability, impulsivity, poor distress tolerance with difficult interpersonal relationships.

11. With regard to the current care plan proffered by the HSE, counsel for "K.W." submitted that the care plan lacks the requisite detail to ensure that "K.W.'s" transfer/transition would be effective. In addition, counsel for the *guardian ad litem* and "K.W.'s" parents highlighted that there was a significant disparity between the prospective supports and structures envisaged in the HSE's care plan and the supports and structures recommended in the report of Dr. Iankov.

12. During the hearing, counsel for the HSE confirmed its position that they were appealing paragraph three of this Court's principal order and in turn, seeking a stay on the Court's principal order pending an appeal.

13. The *guardian ad litem*, "K.W." and "K.W.'s" parents oppose the application for a stay on the principal order of this Court. Counsel for each of the aforesaid parties submit that, on the application for a stay, the HSE have a *bona fide* ground of appeal in relation to paragraph three of this Court's principal order. However, the aforesaid parties submit that, on the balance of convenience, a stay on this Court's principal order would be detrimental to "K.W.'s" best welfare interests as, if "K.W." was returned to this jurisdiction by the 8th June, 2015, the remaining protective measures envisaged in the Court's principal order protecting "K.W." on her return, would be vitiated.

The Law

14. In *Dankse Bank A/S trading as National Irish Bank v. Mc Fadden* (Unreported, High Court, Clarke J, 27th April, 2010), Clarke J. outlined the applicable principles that should be considered by the trial judge before an application for a stay is imposed on an order of the Court pending an appeal to a higher court (at pg 2, paragraphs 2.1- 2.2):

"It is clear from both *Redmond v. Ireland & Anor* [1992] 2 I.R. 362 and *Irish Press Plc v. Ingersoll Irish Publications Limited* [1995] 1 I.L.R.M. 117 that, in general terms, two broad issues will ordinarily arise for consideration in relation to whether a stay should be placed on an order of this Court pending appeal to the Supreme Court. The first issue is that, in order that a stay might be considered, any such appeal must be *bona fide*. For example, McCarthy J. in *Redmond* noted that a heavy responsibility lay on the legal advisers of those seeking a stay to assist the court on the reality of an appeal and also noted that appeals have been known in the past to have been brought for tactical rather than *bona fide* reasons".

Clarke J. continues (at pg 3, paragraphs 2.4-2.5):

"Where the appeal is genuine, it seems clear from *Ingersoll* that the court should conduct a process analogous to the balance of convenience test which the court is required to apply in determining whether to grant an interlocutory injunction. It is obvious that a successful party in this Court may lose out to a greater or lesser extent and with a greater or lesser degree of permanency as a result of having a stay placed on any order obtained. Likewise, it is equally clear that an unsuccessful party who fails to obtain a stay, but who ultimately succeeds on appeal, may suffer, again to a greater or lesser degree of permanency, as a result of the fact that a court order has been effective against them in the intervening period. In the words of McCarthy J. in *Redmond* the court is, in those circumstances, required to *"maintain a balance so that justice will not be denied to either party"*.

"To those considerations, I would add one further matter. In the context of the interlocutory injunction jurisprudence, I expressed the view in *Evans v. I.R.F.B Services (Ireland) Limited* [2005] IEHC 107, that, in a case, where there was significant potential detriment on both sides, it seemed to me "that it is necessary to consider whether there is any form of injunction which might meet, to the greatest possible extent, the legitimate concerns as to detriment of both parties". It seems to me that an analogous principle applies in the context of a stay. It may be that a stay on terms or the imposition of terms without a stay can ameliorate the potential detriment to both sides in the event that either a stay is granted and the appeal fails or a stay is not granted and the appeal succeeds".

15. It is clear from the foregoing dicta, that this Court should adopt a two staged test in determining whether a stay should be imposed on the order of this Court pending an appeal. Firstly, the Court must be satisfied that the applicant has a *bone fide* ground of appeal. If the Court finds that the applicant does have a *bone fide* ground of appeal, the Court must assess whether the balance of convenience necessitates the imposition of a stay on the principal order of the Court.

Conclusion

16. As the applicant seeks a stay on the principal order of this Court, it is clear from the foregoing that they must prove that their grounds of appeal are *bone fide*. If the Court is satisfied that the applicant raises *bone fide* grounds of appeal, the Court must then assess whether the balance of convenience necessitates a stay.

17. In assessing the *bone fides* of an appeal, this Court considers the comments of Finlay C.J in *Irish Press v. Ingersoll Irish Publications Limited* [1995] 1 ILRM 117, where he said (at pg121):

"The first of those (the factors to be considered by the Court in granting a stay) and the most important of them in the terms of the case is to look at the appeal which is broadly stated on behalf of the defendant and as to what extent that it is arguable".

18. Counsel for the HSE submit that their appeal against an order pursuant to the inherent jurisdiction of the High Court detaining "K.W." as a psychiatric patient in a psychiatric ward in Ennis General Hospital, is necessitated to confirm their obligations, as a state funded institution, to vulnerable adults in this jurisdiction. Moreover, it was submitted that this ground of appeal was necessary to test the ambit of the inherent jurisdiction of the High Court to detain vulnerable adults in the Irish jurisdiction. Counsel for the *guardian ad litem*, "K.W." and "K.W's" parents concede that the applicant's grounds of appeal are genuine. This Court is also satisfied that the applicant's grounds of appeal are arguable and are, in turn, *bone fide*.

19. As the applicant has satisfied this Court that they have a genuine ground of appeal, the Court must now consider whether the balance of convenience lies in favour of the Court granting a stay on its principal order.

20. In assessing whether the balance of convenience necessitates a stay in the present case, this Court is of the view that a paramount factor is the best welfare interests of "K.W.".

21. In the principal judgment of these proceedings, this Court concluded that "K.W." lacked capacity to make decisions regarding her care, medical treatment and therapy. Predicated upon that conclusion, the Court found that "K.W's" best welfare interests and personal rights under Article 40 of the Irish Constitution 1937 were endangered. In turn, this Court considered its obligations under Article 40.3.1^o and Article 40.3.2^o of the Constitution to vindicate "K.W's" personal rights, and made its principal order to that end. Thus, it seems inappropriate for this Court to grant a stay that would, in effect, subvert its positive constitutional obligations to "K.W.", especially where such constitutional obligations necessitate court intervention of a protective nature.

22. In addition, the Court must consider the logistics of granting a stay on its principal order in light of the prospect of the HSE returning "K.W." to this jurisdiction on the 8th June, 2015. Counsel for "K.W." highlighted that the current care plan proffered by the HSE lacked the requisite detail to assure this Court that "K.W's" best welfare interests would be served on her return to this jurisdiction. Moreover, counsel for the *guardian ad litem* and "K.W's" parents submitted that the current care plan proffered by the HSE, is not compatible with the supports and structures recommended by the recent report of Dr. Iankov. Thus, it is an unsatisfactory prospect to grant a stay on the principal order of this Court where the prospective care to be provided by the HSE to "K.W." on her return to this jurisdiction is shrouded in ambiguity.

23. The reasons for the applicant seeking a stay on the principal order of this Court are unclear. On the 6th May, 2015, counsel for the HSE outlined that the organisation were seeking to appeal paragraph three of the principal order so as to confirm their policy obligations to vulnerable adults in this jurisdiction. If the applicant seeks a stay on the basis that the HSE should not be compelled to comply with this Court's order until they obtain confirmation of their obligations by a higher Court, this Court must counterbalance "K.W's" best welfare interests against the applicant's wish to obtain such confirmation on their obligations to vulnerable adults in this jurisdiction.

24. On balancing the best welfare interests of "K.W." against the applicant's wish to obtain confirmation on their policy obligations to vulnerable adults in this jurisdiction, this Court is of the view that the best welfare interests of "K.W." remain paramount. Thus, this Court refuses the application for a stay on the principal order of the Court. The refusal of a stay is apt in light of the Court's positive obligations under Article 40.3.1^o and Article 40.3.2^o of the Irish Constitution 1937 to vindicate "K.W's" best interests and personal rights. To hold otherwise, and allow a stay on the principal order of this Court, in the absence of an adequate and detailed care plan addressing "K.W's" return to this jurisdiction, would create a vacuity of care and supervision that would subvert this Court's positive constitutional obligations to "K.W.".