THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 217

Record No. 2016/353

Peart J.
Hogan J.
Whelan J.

BETWEEN/

A.C.

APPLICANT

- AND -

CORK UNIVERSITY HOSPITAL AND THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

-AND-

GENERAL SOLICITOR FOR MINORS AND WARDS OF COURT

NOTICE PARTY

Record No. 2016/389

BETWEEN/

A.C.

APPLICANT

- AND -

JOSIE CLARE, CORK UNIVERSITY HOSPITAL and THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

-AND-

GENERAL SOLICITOR FOR MINORS AND WARDS OF COURT

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 2nd day of July 2018

1. In July 2016 Mr. P.C. made two separate applications to the High Court pursuant to Article 40.4.2 of the Constitution for an enquiry into the legality of what he contended was the detention of his mother, Ms. A.C., at Cork University Hospital ("CUH"). Ms. A.C. was born in October 1922 so at the date of these applications she was aged ninety three years. Mr. P.C. contended that the hospital had unlawfully refused to permit his mother to leave the hospital. For reasons I will presently set out, Kelly P. refused both applications. He did, however, direct pursuant to s. 11 of the Lunacy Regulations Ireland Act 1871 that a medical visitor be appointed to report to the High Court as to the capacity of Ms. A.C. to make any decisions concerning her welfare or her property. This process culminated in a decision to take Ms. A.C. into wardship a month later in August 2016.

2. Mr. P.C. has now appealed to this Court against these decisions to refuse the Article 40 applications. As this appeal is fundamentally concerned with whether a hospital or other institution can refuse to permit an elderly patient to leave the institution in question on the basis that it considers that she lacks the capacity make a valid request to be permitted to leave, it is clear that it raises legal and constitutional issues of far reaching importance regarding the care and welfare of the infirm elderly.

3. It is important, however, to stress that the issues raised in this appeal are purely legal - and not medical - ones. Specifically it is clear that CUH, its staff and clinicians all were at all material times devoted to the care of Ms. A.C, and at all times acted in her best interest, as they saw it. It is equally clear that Ms. A.C. has received excellent medical care from CUH and its nursing and medical teams. To repeat, therefore, the only issue presented on this appeal is a legal one, namely, whether CUH was entitled to prevent Ms. A.C. leaving the hospital in the company of her son, Mr. P.C., when, along with his sister, Ms. V.C., he attempted to take his mother home from hospital on the 23rd June 2016.

4. Before proceeding further I should note that the Court has made an order pursuant to s. 27(8) of the Civil Law (Miscellaneous Provisions) Act 2008 directing that the identity of the applicant and members of her family should not be disclosed.

The Background Facts
5. Ms. A.C. was first admitted to Cork University Hospital in October 2015. It appears that she had fallen at home and broken her right hip. It was originally envisaged that she would be discharged in early 2016. Although Ms. A.C. was well she nonetheless refused to leave hospital and her discharge was therefore deferred. She was ultimately discharged from South Infirmary Victoria Hospital to her son's house on the 5th December 2015. Unfortunately, Ms. A.C fell again and this resulted in a broken left hip. She was re-admitted to Cork University Hospital. It appears that in view of what was described by her consultant ortho geriatrician, Dr. Clare, as her "increasing frailty, dependence, co-morbidities and two recent hip fractures" she was treated by a multi-disciplinary team ("MDT"). They were of the view that Ms. A.C.'s care needs would be best met in a nursing home on discharge.

6. The MDT was, however, of the view that Ms. A.C. did not have the capacity to engage in discussions and decision making regarding her discharge plans. At the time of the Article 40 applications, Ms. A.C. was largely bed bound and required two nurses to transfer her from the bed to the chair. She was variably incontinent and at significant risk of pressure sores. She required full assistance with the activities of daily living.

7. As Ms. Lynn Oliver, a medical social worker attached to the Clinical Social Work Department deposed to in an affidavit dated the 11th July 2016, the medical and nursing personnel sought to engage with Mr. P.C. and Ms. V.C. on many occasions between February and April 2016 regarding a post-discharge plan, but these efforts were to no avail.

8. There were, moreover, concerns on the part of the MDT and the hospital concerning the attitude and behaviour of both her son, Mr. P.C., and her daughter, Ms. V.C. It would be difficult to say that these concerns were other than well-founded. I would, by way of example, instance the fact that the family members arranged for an exercise bike to be purchased for Ms. A.C. Not surprisingly this was not in accordance with the advice of the in-patient physiotherapy team. They were obviously concerned Ms. A.C. would be at the risk of further falls and further injury if she was to engage in exercise activity of this kind.

9. Furthermore, while Mr. P.C. indicated that his sister, Ms. V.C., would be managing the primary needs for Ms. A.C. on discharge, the MDT had concerns about the conduct and general behaviour of Ms. V.C. For example, Ms. V.C. apparently took her mother out in a wheelchair and was seen to be prodding her with her finger resulting in Ms. A.C. becoming distressed. On another occasion Ms. V.C. visited her mother on the ward and covered her in cayenne pepper. (Cayenne pepper is a hot chilli pepper used to flavour dishes and this pepper is also used as a herbal supplement). One can, therefore, readily understand that the MDT had real concerns about the rather eccentric behaviour of the family members and how the latter's plans for the care of their mother post-discharge appeared at times to be somewhat divorced from reality.

10. Returning now to the narrative, by late May/early June 2016 the MDT had begun to have discussions with Ms. A.C. regarding her future care needs. She indicated that she would like to go home, but she was also aware that her care needs were high. She was nonetheless of the opinion that her son, Mr. P.C. was taking care of the situation. At the same time, however, it appears that Mr. P.C. was of the opinion that the HSE would be responsible for her care needs. One of her treating consultants, Dr. Josie Clare, put the situation starkly in her affidavit of the 11th July 2016:

> "[Ms. A.C] signed a letter on the 22nd June 2016 indicating that she wished to take her own discharge from hospital. The letter had a paragraph stating "All costs associated with my rehabilitation at the home of my son [P.C] in…will be the responsibility and liability of Cork University Hospital and the Health Service Executive."

11. After the self discharge letter was received on the 23rd June 2016, there was some discussion on the ward about whether a care package could be set up at short notice which would facilitate the discharge of Ms. A.C. It was, apparently, decided that it would be neither feasible nor appropriate to pursue this possibility at short notice. As Dr. Clare explained:

> "First, we had met with the community team a few days previously who had expressed concern about providing a care package without a meeting with [P.C]. Second, the letter was premised on an erroneous belief that the HSE would be liable for the full cost of rehabilitation and care post discharge. Accordingly, the clinical team were not satisfied that …. [Ms. A.C] understood the implications of taking her own discharge against medical advice and therefore asked for security and Gardai assistance in preventing [Mr. P.C] removing [Ms. A.C] from the ward on the 23rd June 2016."

12. While Dr. Clare accepted that Ms. A.C. did have capacity to complete a nursing home support scheme application in June 2016, she nonetheless stated that Ms. A.C. was physically frail and vulnerable and that her mental state and general well being were subsequently adversely affected by the incident which took place on the 23rd June 2016. The MDT were of the view that she did not have the capacity to make a decision to go home on the 23rd June 2016.

The High Court decisions
13. The first Article 40 application was made by Mr. P.C. on the 7th July 2016. Kelly P. made an order directing the production of the applicant and directing the hospital to certify in writing the grounds of the detention. Having referred to the medical evidence, Kelly P. concluded:

> "… two consultant doctors have put before the court affidavit evidence as to their view that [Ms. A.C] is unable to make a decision, insofar as this matter is concerned, herself. In other words she lacks the capacity to make a decision pertinent to her own welfare. …
>
> Insofar as the Article 40 application is concerned I will not make the absolute order. I take the view that [Ms. A.C] is not in unlawful detention. She is an elderly and frail lady who has a bad history of health in recent times. I am satisfied on the evidence that she is not detained unlawfully in Cork University Hospital. The hospital authorities wish to have her discharged at the earliest opportunity possible, provided that such discharge is consonant with her wellbeing and with her health."

14. A second application was made by Mr. P.C. on Friday, the 21st July 2016. On that occasion Haughton J. directed an inquiry pursuant to Article 40.4.2. The substantive application was again dealt with by Kelly P. and on this occasion he again ruled that Ms. A.C. had not been unlawfully detained. He stated:

> "[Ms. A.C] is suffering from senile dementia which is of moderate degree. It is a progressive and irreversible disorder and, in particular, her judgment is impaired as to what her care needs are and how they should reasonably be met. She does not have the mental capacity to make a decision about where she should reasonably reside. This impaired judgment is as a result of impaired cognitive function due to senile dementia. She is of unsound mind and is incapable of planning her care needs. Furthermore, in view of the cognitive impairment she is vulnerable to exploitation by others. This application is

brought in the name of and purported to be made by Ms. C. I permitted her son to pursue the application today although strictly speaking, he does not have a right of audience in that regard.

I am satisfied on the basis of the evidence that I have before me that I ought not to make absolute the conditional order which was made on Friday last. Ms. C. is not in unlawful detention. It is clear that as far as the hospital are concerned they have no desire that she should stay there for one moment longer than is absolutely necessary. Having regard to her impaired state of health, she should be transferred to another facility in a manner which is appropriate. Appropriate care must be taken in that transfer. She should be transferred to facilities which can look after her needs. She is no longer, on the evidence before me, capable of making decisions in that regard. Neither does she have capacity to bring this application."

15. Kelly P. accordingly rejected the application which had been made in the name of Ms. A.C. for an order of release pursuant to Article 40.4.2. The appellant, Ms. A.C., has now appealed to this Court against both decisions. While the notice of appeal is her name, it would seem that the appeal has been pursued by Mr. P.C. on her behalf.

Whether the proceedings are moot

16. The first legal issue to be considered is whether these appeals have become moot by the passage of time. As it happens Ms. A.C is no longer a patient at CUH, as she was moved in December 2016 to another HSE facility in Cork, St. Finbarr's Hospital. St. Finbarr's specialises in the care of the elderly.

17. In my view, it is probably unnecessary to express any concluded view as to whether the proceedings are moot, because even if they are, they clearly fall into the category of cases where the Court will entertain a moot appeal. As is clear from the contemporary case-law, the Supreme Court has now confirmed that it will entertain appeals which are already moot where the case presents an issue or issues of systemic importance, or where, for example, it is necessary to resolve questions which had given rise to uncertainty or conflicting High Court judgments.

18. This principle emerges clearly from the Supreme Court decision in *Farrell v. Governor of St. Patrick's Institution* [2014] IESC 30, [2014] 2 I.L.R.M. 341. In that case the High Court had considered that the effect of the grant of a stay of criminal proceedings was to prevent the remand of the applicant in custody by the District Court, so that such remand effected an unlawful detention. A majority of the Supreme Court held that the appeal by the respondents was moot as the applicant had been released. All the members of the Court, however, were agreed that it should nonetheless proceed to determine the appeal. As Denham C.J. explained ([2014] 1 I.L.R.M. 341 at 348-349):

"The reasons why I would hear this moot appeal include the following:-

(i) the decision to grant a stay was made on an ex parte application, and the appellant had no opportunity to address the issue, or terms, of a stay;

(ii) the decision has an effect on criminal proceedings which are of real and reasonable concern to the appellant;

(iii) such an issue arises in circumstances which would escape review if the Court did not exercise a discretion to hear the appeal;

(iv) the decision potentially affects many criminal cases in the District Court:

(v) the decision has a systemic relevance to cases before the courts, where an application for judicial review has been granted."

19. A similar view was also taken by the Supreme Court in *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 1, [2014] 2 I.L.R.M. 378 in respect of a moot appeal because the operation of the legislation giving rise to the Article 40 application "had given rise to conflicting judgments in the High Court", so that, in the words of Denham C.J. ([2014] 2 I.L.R.M. 378, 400) it "was important that this conflict be resolved by the [Supreme] Court." This approach was affirmed by the Supreme Court even more recently in an important child care case involving an Article 40.4.2 application: see, *e.g., SMcG v Child and Family Agency* [2017] IESC 9, [2017] 1 I.R. 1, 51, per Charleton J.

20. Admittedly not all of the considerations which were relevant in *Farrell* apply to the present case. There is no doubt, however, that the matter is of considerable significance and importance to Ms. A.C. and her family. The issue raised in this case might well escape review if this Court ruled that these appeals were moot and did not exercise its discretion to determine them. Over and above these considerations lies the fact that these appeals raise issues of far-reaching importance regarding personal liberty and our deep-seated tradition of voluntarism in a medical and hospital setting, not least so far as the care and welfare of the infirm and the elderly are concerned.

21. Applying, therefore, the principles in *Farrell* I would hold that even if these two appeals are in fact moot, this Court should nonetheless entertain them for all the reasons I have just mentioned.

The certificate filed by the Hospital

22. The order made by Kelly P. on the 7th July 2016 required the hospital in time honoured fashion to certify in writing the grounds of Ms. A C.'s detention in accordance with Article 40.4.2 of the Constitution. The first issue which arises is whether CUH fully required with this requirement.

23. In his affidavit of the 11th July 2016 the general manager of CUH, Mr. Tony McNamara, swore as follows by way of certification of the grounds of detention:

"…It is denied that the applicant is unlawfully detained and I make this affidavit pursuant to the order made by this Honourable Court on 7th July 2016 and in order to certify the grounds upon which Ms. A.C....continues to be kept as an in patient at CUH and has not yet been discharged…The applicant has been an inpatient at CUH since her admission on the 10th December 2015. [At] a meeting of the MDT looking after the applicant which took place on the 8th March 2016 it was considered that the applicant was well and fit for discharge...[S]ince that date the relevant staff at CUH have been endeavouring to effect a safe and appropriate discharge of the applicant…[It] is the opinion of the MDT that the applicant presently lacks capacity to evaluate the information to make an informed decision regarding discharge destination…I say and am advised that, in the absence of such capacity, the respondents are lawfully entitled to manage a safe discharge

> of the applicant in accordance with her best interests by having due regard to her previously expressed wishes. I say that that is precisely what the MDT are endeavouring to do."

24. A little later in that affidavit Mr. McNamara stated that:

> "[Ms. A.C]'s discharge had not yet occurred due to the failure of her family to engage and co-operate in a reasonable way with the relevant hospital staff so that a safe and appropriate discharge plan can be agreed and put in place of her behalf."

25. The importance of the Article 40.4.2 certificate cannot be overstated. As I said in *McDonagh v. Governor of Mountjoy Prison (No.2)* [2015] IECA 71 that "it is therefore implicit in the scheme of things" provided for by Article 40.4.2 "that the opportunity to justify the detention must be by reference to the certificate filed by the detainer." As Humphreys J. stated in *Grant v. Governor of Cloverhill Prison (No.2)* [2015] IEHC 768 this means in turn that:

> "The central importance of personal liberty under the Constitution means that the detainer has to stand over in law the acts of any other persons on whose actions the validity of the detention depends, and moreover to do so in the context of the Article 40 application (if that is the procedure invoked by an applicant) and not by its conversion to any other form of procedure."

26. It is true, of course, that the certificate itself need not take any particular form. As O'Flaherty J. said in *Bolger v. Garda Commissioner*, (Supreme Court, 2nd November 1998),:

> "There is no formality provided for the certificate in writing. The Governor of the prison, may, no doubt, certify in writing that he holds a prisoner pursuant to such an order of such a court. He may well annex a copy of the warrant committing him to prison to a certificate in writing. I am not saying that he necessarily has to do so, but for completeness sake, it is probably a wise move."

27. In *McDonagh* I likewise noted that:

> "All of these authorities have, however, stressed the importance of a clear and accurate record in matter of detention. It is important that such documentation possess "the integrity worthy of a document whose effect is to authorise the deprivation of a person's liberty": see *JOG v. Governor of Cork Prison* [2007] 2 I.R. 203, 213, *per* Peart J. All of this underscores the importance of the certificate filed by the detainer, since it is that certificate (and the documentation appended thereto) which the Constitution ordains is the basis upon which the detainer must justify the detention and upon which the High Court must then determine the legality of the detention. The Supreme Court has already said as much in *The State (Rogers) v. Galvin* [1983] I.R. 249."

28. CUH were, of course, perfectly within their rights in electing to provide the certificate by means of affidavit. But what the certificate must do is to state unambiguously whether the person the subject matter of the application has been or is being detained and, if so, what the legal authority for the detention actually is. Possibly because of an unfamiliarity in a general hospital setting of being called upon to justify the detention in the context of an Article 40 application, the certificate as filed by CUH by means of affidavit does not go that far. It does not directly say whether Ms. A.C. had been detained, or whether, if she was detained on the 23rd June 2016, what the legal authority for that detention actually was. While Mr. McNamara's affidavit is commendably candid and helpful, it still does not in terms address the question of whether Ms. A.C. was prevented from leaving the hospital on the 23rd June 2016 in the manner alleged by Mr. P.C and, if so, the precise legal basis for what amounted in law to a detention of Ms. A.C.

29. Although the affidavit does not explicitly say this, one is left with the impression that CUH maintains that given Ms. A.C.'s enfeebled state and dementia, it was then entitled, as a matter of law, to determine when and whether it would be in her best interests to leave the hospital. This in its own way serves to highlight the importance of the legal issues raised in these appeals

Mr. P.C.'s locus standi to make this application

30. The next question concerns Mr. P.C.'s *locus standi* to make this Article 40 application. It is clear from the actual language of Article 40.4.2 of the Constitution that a complaint of unlawful detention may be made "by or on behalf" of any person. The Constitution thus expressly contemplates that one person has the right to complain on behalf of another that the other person is unlawfully detained. An obvious example is where solicitor and counsel are entitled to make an application on behalf of a detained client, even in the absence of express instructions or even the consent of the detained person: see *The People (Director of Public Prosecutions) v. Pringle* (1983) 2 Frewen 57, 97, *per* O'Higgins C.J.

31. While there are therefore no ex ante rules precluding such an application by a third party, there are obviously circumstances in which the making of such an application could be regarded as abusive. This might be especially so where the third party applicant had no real interest in the matter or where the application could properly be regarded as officious or meddlesome or where the applicant was acting contrary to the wishes of the person allegedly detained.

32. It is unnecessary to consider this issue at any length, because it is clear that Mr. P.C. was clearly prompted by deep concerns regarding his mother's welfare, however misguided – even eccentric - those concerns might be regarded by the hospital. In these circumstances he plainly had the appropriate standing to seek this relief *qua* family member on behalf of his mother, not least given her frail and infirm medical condition.

33. In this regard it is interesting to note that in Re D [1987] I.R. 449 – a case with some similarities to the present one – the parents of a young woman with a severe intellectual disability made an application pursuant to Article 40.4.2 claiming that she was being unlawfully detained in a particular residential institution. While the Supreme Court's decision in that case is principally concerned with the scope of the wardship jurisdiction, it may nonetheless be of interest to note there was no suggestion that the parents in that case lacked the appropriate standing to seek an inquiry pursuant to Article 40.4.2 into the alleged detention of their daughter.

34. In arriving at this conclusion I do not overlook the fact that Ms. A.C. was subsequently taken into wardship and the Court was informed during the course of the appeal that the committee of the ward has no interest in maintaining this appeal. It must be recalled, however, that the right to apply on behalf of another is deemed by Article 40.4.2 to be constitutionally inviolate. As the Supreme Court has made clear, the rights guaranteed by this constitutional provision lie beyond the capacity of the Oireachtas to regulate, still less abridge: see, e.g., by analogy the comments to this effect of Walsh J. in *The State (Aherne) v. Cotter* [1982] I.R. 188, 200.

35. It follows, therefore, that if Mr. P.C. has the right to apply on behalf of his mother pursuant to Article 40.4.2 as - in these circumstances, at least, he clearly has - that right cannot be swept away by Victorian wardship legislation, no matter how venerable or long-established. It follows in turn that Mr. P.C. must be deemed to have the necessary standing to make the present applications on behalf of his mother and this right remains unaffected by the fact that his mother was subsequently taken into wardship after the High Court had ruled against him in these two applications.

Whether the hospital was entitled to detain Ms. A.C.

36. Outside the special circumstances of the Health Act 1953 (which concerns the detention for those suffering from infectious diseases) and the Mental Health Act 2001 (which deals with the treatment of the mentally ill, including those suffering from severe dementia), the concept of detention is one which really has no place in our system of medical care. In this context, therefore, given our embedded tradition of voluntarism in this sphere of medical treatment – a tradition reflected in the Constitution's guarantee to protect the "person" in Article 40.3.2 - the question of whether somebody is being detained in hospital is something of an unpleasant question to have to ask. Now, however, that the issue has been presented to us in the course of these two appeals, ask it we must.

37. The first question, therefore, was whether Ms.A.C. was in fact detained by the hospital when she endeavoured to leave with her son and daughter on the 23rd June 2016. There can, I think, be only one answer to that question. The hospital took active steps to prevent Ms. A.C. leaving the hospital premises, and, indeed, insisted under threat of compulsion that Mr. P.C. and Ms. V.C. leave the grounds of the hospital. The conclusion must be, therefore, that Ms. A.C. was not free to leave on that date, that she was prevented from leaving, and she was, therefore, as a matter of law and in fact, detained by the hospital.

38. The second question is whether this detention was lawful. In the course of his ruling Kelly P. noted that Ms. A.C. was no longer capable of making decisions of this kind and, by implication, accepted the hospital's submission that Ms. A.C. was free to go save that she no longer had the capacity validly to make that decision, and that the CUH was accordingly entitled to make the appropriate decisions regarding her liberty and welfare which they considered to be in her best interests.

39. I do not doubt that a hospital is entitled to take appropriate steps to regulate its own affairs in an orderly way. Returning to some of the examples given by me in my judgment for this Court in *PL v. Clinical Director of St. Patrick's University Hospital* [2018] IECA 29, [2018] 1 I.L.R.M. 441, the hospital could probably have prevented Mr. P.C. and Ms. V.C. from entering their mother's ward with a view to evacuating her in the middle of the night had they suddenly determined on this course of action. Had this occurred in that fashion the hospital would probably have been entitled to say that this would have been inconsiderate of the needs of other patients and disruptive of good order within the hospital.

40. But what CUH were not entitled to do was to prevent Ms. A.C. from leaving the hospital at any appropriate time and place if this is what she wanted to do. As I put it in *PL* ([2018] 1 I.L.R.M. 441, 452) while "hospital personnel could lawfully attempt to persuade a patient not to leave, this must involve persuasion and not restraint." As matters stand there is currently no statutory power equivalent to s. 23 of the Mental Health Act 2001 ("the 2001 Act") (which enables a psychiatric hospital to detain a voluntary patient leaving the hospital for a 24 hour period) which would enable the hospital to detain the patient in such circumstances. The question therefore must be whether such a power exists under the common law.

41. In my view, there is no such power. The power claimed by the hospital amounts to a paternalistic entitlement to act in the best interests of the patients whose capacity is impaired and, in effect, to restrain their personal liberty and freedom of movement and, if necessary, to do at the expense of close family members. But ever before the enactment of the Constitution the common law has always rejected the claim that personal liberty could be compromised on such a basis. In a celebrated case dating from the War of Independence, *Connors v. Pearson* [1921] 2 I.R. 51, the (old) Court of Appeal held that there was no justification for the detention by the police of a small boy which was said to be for his own good. O'Connor L.J. rejected the idea that this might provide a lawful justification for such conduct, saying ([1921] 2 I.R. 51, 91) that:

> "You cannot incarcerate a man or a boy merely because his going abroad or his doing something that he is minded to do exposes him to some danger. If that were so, the adventurous spirits that sought the North Pole or the interior of Africa or that conquered the Atlantic in flight might have been locked up for their own good."

42. In my view, this is true *a fortiori* of the post-Constitution state of affairs. It could not be otherwise in the context of a Constitution which commits itself to upholding the dignity and freedom of the individual (Preamble), that pledges a democratic State based on the rule of law (Article 5) and, most fundamentally of all, which contains guarantees to protect the person (Article 40.3.2) and personal liberty (Article 40.4.1) respectively. Some may think that a care-giver in the position of CUH should have the power akin to that contained in s. 23 of the 2001 Act to restrain an elderly patient suffering dementia from leaving the hospital premises where no suitable care plan has been put in place for her treatment following her discharge. That, however, is a matter of policy for the Oireachtas, and even if a s. 23-type power was to be so conferred by statute to deal with cases of this nature, it would also be necessary to have it hedged with appropriate safeguards if it were to have any prospect of surviving constitutional challenge.

43. To repeat, however, there is at present at least no such s. 23-type statutory power. While one can certainly sympathise with the position of CUH, their self-created power of detention might, if unchecked, lead to widespread abuse. For if the power of detention claimed by CUH was to be judicially accepted, the logical consequence would be that tens of thousands of the infirm elderly who are suffering from dementia (or whose capacity is otherwise impaired) and who are presently residing in nursing homes and other similar institutions could equally be restrained from leaving. In many cases this would doubtless be for good clinical reasons. In other instances, however, this decision could be simply for reasons of convenience and, perhaps in a small minority of cases, for even less noble motives.

44. This issue which was also before Peart J. in *McN. v. Health Service Executive* [2009] IEHC 239. In that case the applicants suffered from advanced dementia and had originally been detained under the 2001 Act in an approved centre as involuntary patients. Their respective admission orders were then subsequently revoked, but both remained in a locked hospital ward, the departure from which was controlled by staff. Both applicants lacked the mental capacity to make a decision to remain in the locked unit on a voluntary basis and it was said that they were in involuntary detention.

45. Peart J., however, rejected the applications which were brought on their behalf for their release pursuant to Article 40.4.2 of the Constitution, saying:

> "In my view the mere fact that the unit in which the applicants are is locked and secure should not be seen in the context of forced restraint amounting to a false imprisonment or other unlawful detention. The respondent owes a duty of care to these vulnerable applicants. It is not disputed that they are suffering from both mental and general medical illness. They cannot look after themselves unaided by others. It is reasonable therefore that they should be in a part of

the hospital from where they cannot leave unnoticed. Also, it would be grossly negligent for the hospital, following the required revocation of the admission/renewal order, to immediately bring these vulnerable patients to the front door of the hospital, lead them down the steps and to pavement and say to them "we no longer have any legal basis for keeping you in hospital, so off you go – home or wherever you can". How could such an appalling vista be within the contemplation of an Act such as this which has at its heart the best interests of vulnerable patients? "

46. Peart J. later continued by stating:

> "When considering whether keeping these patients in the same Unit 5 as before amounts of itself to an unlawful detention, one must bear in mind the overall context in which they are in that unit, and not simply the physical geography of the unit. Yes, it is a secure unit, with staff who monitor the patients and ensure that they cannot leave it. But visitors are allowed, and indeed it has been quite clearly stated that these applicants are free to leave but only where they are safe when leaving, such as in the company of a family member. The reality for these applicants is that if a responsible adult family member of one came to the hospital and indicated that he or she wished to take either applicant home and look after him or her, the applicant in question would not be prevented from leaving. That presupposes of course that by that time the condition of the patient in question had not once again deteriorated to a point within the s. 3 definition. So the fact that Unit 5 is a secure unit cannot of itself mean that the applicants are detained in any technical sense. Rather it can be seen as a safe environment for the applicants to be, given their illnesses, but one which they may leave if appropriately accompanied as I have said."

47. In *PL* I addressed the implications of this judgment, saying ([2018] 1 I.L.R.M. 441, 456-457):

> "One may understand, sympathise with and appreciate the sentiments which Peart J. expressed in these passages ….But one might ask with regard to the question which hovers over the judgment in McN.: what is to happen where there is no responsible family member who will take home from the approved centre the elderly patient who is suffering from dementia – but not from mental illness? The answer seems to be that such patients are doomed to a life of *de facto* confinement in an approved centre as voluntary patients who, while voluntary in theory, are in fact detained involuntarily, but without the protections provided for detained patients in the 2001 Act.
>
> I cannot believe that the Oireachtas ever intended such a result. There is nothing at all in the 2001 Act to suggest that voluntary patients could be detained in this manner. Rather, s. 29 envisages that such persons can remain for treatment in an acute hospital if they choose to do so, but that has to be on a purely voluntary basis, subject, of course, to the provisions of s. 23. It must be recalled that voluntarism remains a cornerstone of our system of medical treatment, for all the reasons so eloquently stressed by Hardiman J. in *North Western Health Board v. H.W.* [2001] IESC 90, [2001] 3 I.R.662, 746-750.
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> There are, of course, exceptions provided for by statute and, indeed, the 2001 Act is itself one of the principal exceptions to that rule. But the legislative *quid pro quo* is always that compulsory medical treatment and detention is attended by appropriate safeguards. Where I respectfully part company with the judgment under appeal is that its net effect is that voluntary patients may, at least in some circumstances, be prevented from leaving an approved centre otherwise than in accordance with s. 23 and thereby left in a form of detention without the safeguards otherwise carefully provided for by the 2001 Act for detained patients who are subject to an admission or renewal order. Any other conclusion would not only be entirely at odds with the rule of law based-democracy envisaged by Article 5 of the Constitution, it would also contradict the fundamental constitutional premise of Article 40.4.1 of the Constitution, namely, that the deprivation of personal liberty must be "in accordance with law." To that extent, therefore, I consider that, with respect, *McN.* was wrongly decided and should not be followed….."

48. There is, indeed, a strong similarity between the issues raised in *McN.* and those arising in the present case, as both cases involve voluntary patients suffering from dementia and where the institutions concerned considered that they no longer had the capacity to make the decision to leave the institution and where there was no responsible family member willing to take them. It is true that in the present case Ms. A.C.'s son and daughter wished to take her home, but they were obviously not considered by CUH to fit into the category of responsible family members given their views on the appropriate treatment which their mother should receive.

49. The fact remains, however, that CUH had no power to prevent Ms. A.C. from leaving the premises once she expressed her wish to do so. In this context it mattered not that this decision to refuse permission to leave was considered to be in her best interests.

50. In this context it may be recalled that s. 3(1) of the 2001 Act provides that:

> "(1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where:
>
> (a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or
>
> (b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and
>
> (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."

51. It is clear, therefore, that the Oireachtas has considered that a patient suffering from severe dementia should, where necessary, be admitted to an approved psychiatric centre. This, however, could only take place under the specific conditions specified in the 2001 Act, accompanied by the various protections contained in Part 2 of that Act. As I pointed out in *PL*, the Oireachtas could never have contemplated that persons in the condition of Ms. A.C. could be detained by reference to some self-created power of detention, shorn of all the essential protections for independent review provided for by the 2001 Act.

52. In many ways, it all comes back to the fundamental proposition so memorably articulated by Hanna J. in *Dunne v. Clinton* [1930} I.R. 336, 372: there is, simply, no "half way house" between liberty "unfettered by restraint and an arrest". Yet if the power to restrain contended for by CUH in the present case were to be admitted, it would mean that the personal liberty of Ms. C. – and, by

extension, the personal liberty of tens of thousands of vulnerable, elderly patients suffering from dementia and residing in institutional care through the State – would be reduced to a half way house of ambiguity, variable and inconsistent grants of permission and subjective paternalism on the part of clinicians, nurses and care-givers.

53. Those who contend that it would be appropriate that those caring for the elderly should have this power should not come as supplicants to this Court requesting that we should create it, for we lack that power and jurisdiction. If, as a result of this decision, the law is considered to be unsatisfactory, then any change is exclusively a matter for the Oireachtas to determine.

Conclusions

54. In summary, therefore, Article 40.4.1 provides that all detention must be in accordance with law. The reasons and motives of the detainer are not relevant to any consideration of this issue of law. Since no power to detain Ms. A.C. in these circumstances has been identified, it follows, therefore, that I am not satisfied that CUH acted lawfully in restraining and preventing her leaving the hospital in the company of her son and daughter on the 23rd June 2016. I would, therefore, to that extent allow the appeal. As Ms. A.C. is no longer detained in the C.U.H., the only further order that this Court could have made under Article 40.4.2 of the Constitution, namely, one ordering the release of Ms. A.C., is now unnecessary.