

THE HIGH COURT**2009 1054 P****BETWEEN****H. S. E.****APPLICANT****AND****M. H. (A MINOR REPRESENTED BY HIS MOTHER AND NEXT FRIEND M. H.) AND O. H.****DEFENDANTS****AND****D. M.****NOTICE PARTY****JUDGMENT of Mr. Justice Garrett Sheehan delivered on the 16th July, 2009**

1. Shortly after his admission to Ballydowd, the thirteen year old boy M.H., who is the subject of the care order in this case, was described by the Director of Ballydowd as follows:-

"M. is a young adolescent boy who was admitted to special care following a rapid deterioration in the circumstances of his life as a result of non-attendance at school; non-engagement with professionals and poly substance misuse of legal and illegal drugs. In addition, he has been drinking alcohol with his peers and despite his young age has suffered a number of blackouts where he cannot remember current or preceding events.

His mother has a life threatening brain tumour which has affected her mental state and short term memory to such an extent that at times she does not recognise M., and on other occasions mistakes him for another brother. His mother's partner, who has been M.'s main role model and carer for the past six years in his struggle to cope has become over dependent on alcohol. This complex picture of loss and anger is compounded by the absence of any attachment to his natural father O., or his five older brothers who all reside with O.. The additional stressor of alleged criminality by his father and brothers has impacted on M.'s moral development and appears to have created a belief in M. that if he is like them they will accept him, thus providing a possible explanation for M.'s involvement in alleged use, dealing and distribution of drugs."

2. It was in this context that the court invited submissions from the parties in relation to the ongoing exercise of its inherent jurisdiction in this case.

3. The court received helpful oral and written submission from Felix McEnroy S.C. on behalf of the HSE, Inge Clissmann S.C. on behalf of the *guardian ad litem* and Máire Whelan S.C. on behalf of the notice party, who is the partner of the child's mother.

4. The court was concerned about a number of matters including the length of time M. might be detained for, and how this Court ought to exercise its jurisdiction to ensure as far as possible that the child would receive the maximum benefit from his detention.

5. This concern arose from the courts experience of cases where good work undertaken by HSE staff which had led to an improvement in the child's welfare appeared to be undermined by a belief on the part of the HSE that it was necessary to move detained children out of secure care as quickly as possible, because of a particular interpretation of the law relating to secure care. This sometimes seemed in practice to place a premium on liberty over welfare and a premium on some notion of stability over the true welfare of the child. When asked to describe the purpose of civil detention by her counsel, the Director of Ballydowd replied by saying:-

"The core purpose is for a short term period of stabilisation so that a child can be gradually re-integrated into the community and the allied systems of care that exist in the community in a time period that is as brief as it can be given the detention aspect of it."

6. The courts concern was also prompted by its observation that in many cases children found themselves being moved from one residence to another over relatively short periods of time, and the possible detrimental effects on a child of these moves just as he or she had begun to form trusting relationships with adult staff. It was this Court's experience that the children who appeared to benefit the most from secure care were those who were able to enter into trusting relationships with staff and fully engage with the opportunities offered to them.

7. It was clear from the social work reports presented to court that most children had undergone huge suffering in their young lives and came to secure detention from a place of chaos. It was also clear that they required a structure in a secure setting to enable them to regain some sense of themselves, some sense of their potential, and some sense of their personal freedom. It also appeared to this Court that in a significant number of cases the children had suffered so much that they required a lengthy stay in secure care if they were to truly benefit from such detention.

8. The extent and appropriate exercise of this Court's inherent jurisdiction is clearly set out by MacMenamin J. in his judgment in the matter of *S.S. (a minor) v. Health Service Executive* [2008] I.R. 594. Having regard to the circumstances of this particular case, I regard that section of the judgment headed "safeguards" as particularly relevant.

9. At para. 70, MacMenamin J. states and I quote:-

"The specific stipulation of the Supreme Court in *D. G.* is conclusive. Orders of this type should be short term or interim. Additionally, even the most basic problem of definition or meaning finally precludes any question of detention of a long term nature save in the most unusual circumstances. What does "long term" mean? It has not been defined. Does it entail three to six months (the general parameters of such orders or longer). If longer, for how long. These questions have not been answered either because they cannot be answered or because to consider them would be to beg the question of whether other constitutional rights should not also be canvassed."

10. The important thing to note from this section of the judgment of MacMenamin J., is that he was careful to leave the length of detention open, in particular recognising the need in exceptional cases for long term care. The other relevant matter for the purpose of this judgment was his recognition on foot of the Attorney General's submissions, that this Court might make orders of predetermined duration provided they contained an inbuilt review mechanism.

11. In the course of her evidence in this case the Director of Ballydowd, Enda Fulham stated:-

"One of the most difficult things for children on a civil detention, is that there is an indeterminate time period so they would often comment on the fact that, if I commit a crime I will be committed to Oberstown for three or six months, but if I commit no crime and I am placed in a special care unit I have no idea of the duration of the stay."

12. This evidence is an example of one of the difficulties that the HSE faces in endeavouring to assist a child placed in secure care. The possibility of seeking a determinate order envisaged by MacMenamin J., is a factor which should be given consideration by the HSE and the appointed *guardian ad litem* at a very early stage in future cases of civil detention.

13. It is also important to endeavour to assess at an early stage in the detention of each minor whether he or she is likely to fit into the exceptional category envisaged by MacMenamin J., requiring long term care.

14. Needless to say the above remarks are based on the assumption that the reports presented to this Court accurately reflect the apparently exemplary manner in which secure care institutions are managed and run by the HSE, and that they are places where seriously disturbed minors can flourish.

15. Shortly after the conclusion of this hearing the court was told, by both the HSE social worker and the *guardian ad litem* that, M.'s progress was such that he was ready to move from detention to a high support unit. Accordingly, the court acceded to the HSE application to terminate the detention of M.