This judgment is circulated in redacted form to avoid identification of the parties

Neutral Citation Number: [2007] IEHC 189

THE HIGH COURT

[2005 No. 90M]

IN THE MATTER OF S.S. (A MINOR)
AND IN THE MATTER OF ARTICLE 40.3, ARTICLE 41, AND ARTICLE 42 OF THE CONSTITUTION
AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 AS AMENDED

BETWEEN

THE HEALTH SERVICE EXECUTIVE (SOUTHERN AREA)

PLAINTIFF

AND

S.S. (A MINOR) REPRESENTED BY HIS GUARDIAN AD LITEM AND NEXT FRIEND M.L.

DEFENDANT

AND

M.S., S.C., AND THE SPECIAL RESIDENTIAL SERVICES BOARD

NOTICE PARTIES

Judgment of Mr. Justice John MacMenamin delivered the 15th day of June, 2007.

1. At the conclusion of these proceedings on the 10th day of May, 2007 I delivered judgment on two discrete issues of law which had been identified for determination. I indicated that the reasons for that decision would be furnished later. I now do so.

These issues were:

> (a) whether the High Court, in its exercise of its inherent jurisdiction can make an order for the long term detention in secure care of minors, where on the evidence such care is required in the interests of the education and welfare of such minor and
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> (b) if the answer to (a) above is yes, then what procedural safeguards should be put in place for the protection of the rights of such minors and their parents and the needs of the family unit under the Constitution and the European Convention on Human Rights Act, 2003.

It is first necessary to consider the factual context in which these issues fall for determination.

Background

2. S.S., the minor the subject matter of these proceedings, was born in 1991. At the time of the judgment herein he was aged 15 years, but close to his 16th birthday. His deeply troubled childhood and adolescence have left ongoing emotional and psychological scars. Such home or family unit as S.S. ever had have simply disintegrated.

3. S.'s mother (M.S.) and father (S.C.) live apart. The couple themselves had two children, both boys. At no stage has S.'s father played any significant part in his upbringing. His whereabouts are unknown. He is involved in another relationship. The parents by now have been parted for many years. Their relationship was always poor. They never married. As well as his one full brother S. has two half brothers who were born after his father left his mother.

4. The family was always in close contact with the social services. They lived on a halting site. There were concerns about domestic violence. S.'s mother herself was frequently in poor mental health. The parents separated more than once. S. himself at one stage went to live with his grandmother. This had most unfortunate consequences. He became the victim of sexual abuse. He returned home in March 1995. His mother suffered further periods of depression. She suffered harassment from neighbours. From early 1998 onwards all her children attended respite placements once a month.

5. In the year 2000 S's mother (Ms. S.) began a relationship with a neighbour. That man's wife found out. She physically assaulted Ms. S. She fled to another city with three of her sons, leaving one of S.'s brothers behind.

6. By 2002, the family were homeless. S.'s mother was unwilling to consider the option of going to a refuge with her children. Over the years care orders had been made in the District Court at various times regarding her sons with S.C. and her other sons, the younger of whom was born in 2003.

7. S. has been involved in excess of 30 moves in his life. As well as the short periods with his mother and grandparents, these include both foster placements and residential care in a number of units run by the H.S.E. Unsurprisingly this unfortunate young person, who has seldom, if ever, never known a settled house or family, has been described as having an "attachment disorder" due to an inability to form any close bond with any carer. He has been in and out of care since he was six years of age.

8. Efforts have been made over the years to place S. with foster parents. On each occasion such placements broke down as the foster parents felt unable to cope with S.'s disruptive behaviour.

The period in the custody of his grandparents had the result identified earlier.

9. When in care, S. consistently engaged in what is termed "challenging behaviour"; acts of violence and intimidation against staff members in the various units in which he was placed. While in the community he threatened members of the public, and acted inappropriately continuously. He inflicted damage to property on numerous occasions.

10. S. suffers from a number of psychological problems. His intelligence is less than normal. He has attention deficit disorder, engages in 'oppositional behaviour', including assaults on social workers and other carers. He frequently places his own life at risk. He has a history of cannabis abuse. It is believed that he has also been abusing cocaine.

11. Within the last two years S. was first placed in a high support unit. He absconded from there on numerous occasions, and lived rough in derelict buildings. He was the subject of further predatory sexual abuse from male adults who preyed on him.

12. Between 5th October, 2005 and 12th May, 2006 S. was detained in a Child Care Centre, a unit run under the aegis of the Department of Education and Science. During that period it is acknowledged that he did well. His mood was calmer. He engaged with

staff members. In November 2005 while in the centre, consideration was given to placing him in secure care in B, a Secure Care Unit run by the H.S.E.. However the management there concluded that a placement in B could not cater for the specific therapeutic care which S. needs.

13. As he was also charged with criminal offences, he was remanded by the District Court on 26th September, 2006 to a centre run by the Department of Education and Science. He was discharged from there in December, 2006 by order of this Court arising from legal concerns regarding the legality of his detention and the absence of a proper educational or therapeutic rationale for his detention there. The centre caters for boys under 16 years on remand or sentence.

14. Care staff in various units have themselves had deep concerns as to S.'s welfare and as to their ability to take care of him in a way that might ensure he live in the community in safety.

15. A view consistently expressed by his guardian *ad litem*, and latterly his mother, is that it is necessary for S.'s welfare and protection that he be detained long term in some form of secure unit. This concern, felt by many involved in his care, is enhanced by the fact that when he absconded, he frequently placed himself at serious risk by his own behaviour and at the hands of older and predatory males. No one unit presently in existence appears entirely appropriate to deal with S.'s many difficulties.

The hearing in December, 2006.

16. Judicial review proceedings were instituted in 2005. They were adjourned periodically as a result of the absence of space at any appropriate unit at that time but also because S. was the subject of District Court orders. When the matter came before this Court on 13th December, 2006 on an interlocutory basis, it was necessary yet again to consider the options as to S.'s secure care. Each of these options carried with them substantial objections. None was entirely suitable. Neither the H.S.E. nor his guardian *ad litem* (representing the interests of the minor) suggested that he should be set at liberty as the risks to his life and safety were simply too high. His mother was of a similar view although not then legally represented. She was represented fully at this hearing.

17. It was accepted that, even with the provision of additional care staff in one support unit named P.L., such option would be a "recipe for disaster" with the inevitability of further absconding and high risk. This was near his home area with which he was familiar.

18. A second possibility was to place S. in the Child and Adolescent Centre in F. But this is a unit for young persons on remand or who have been convicted of criminal offences. In favour of this placement was the fact that S. when on remand had previously done well there. But there was no adequate room to accommodate him in the centre at that time, even if such detention there had been lawful. He had not been convicted of any crime which might result in detention in such a unit.

19. A further possibility was that he be placed in the another centre which caters for boys under 16 years committed on remand or sentence. As a matter of law, such detention would be inappropriate for a young person in the absence of a criminal conviction or sentence. A further complexity in relation to this centre arose from a suggestion that while he had been placed there on a previous occasion he had engaged in drug abuse. There was also a suggestion of sexual abuse by another resident. A psychologist from Scotland was identified to whom S. was prepared to speak about this issue. There was considerable delay before this could be done.

20. The next choice was a secure unit administered by the H.S.E. for young persons at risk but who are not placed there on remand or conviction. Instead, such placements result from orders including the exercise of the inherent jurisdiction of the High Court. The placement committee in B (itself administered by the H.S.E.) concluded that S. ought not to be admitted there. That decision was appealed. At the time the matter came before this court in December 2006 that appeal was pending.

21. At that hearing counsel for the H.S.E. Mr. Felix McEnroy SC frankly stated that, were the court to direct that S. should be placed in B a place would be found for him. However that could only be done in light of the fact that placements were necessary for other young persons, including a young girl from another part of the country, an imminent suicide risk. Resources were not an issue, but finding an appropriate placement presented real difficulties at that time.

22. Two legal issues were in the balance. First, that in the exercise of its inherent discretion this Court must observe the principle that an order for placement of a young person in secure care to protect their life, health or welfare when seriously at risk, can only be made on a short term basis. Different considerations arise if a young person is convicted of an offence who may be sentenced to a specified term of detention in a penal institution as opposed to a secure care unit. Needless to say, the purpose of a detention order by this Court must be protective not punitive. The fact that it is so intended does not detract from concerns that what is at stake is nonetheless a restriction of the constitutional right to liberty. But capacity of the minor to preserve and protect his or her own life and safety when in the community is of importance in this assessment. Thus, what is termed 'negative liberty', i.e. absence of constraint, is counter-measured against positive liberty, the ability of S. to take control of his own life in a real way when in the community.

23. A further consideration must be that any period of detention, of whatever duration, must have a rationale; that the purpose and objective of such detention must be educational, therapeutic and for the purpose and objective of protecting the life and welfare of such young person. The means adopted must be proportionate to the ends sought to be achieved, both as to duration, education and therapeutic care.

24. In opting between those various choices (including his right to liberty and none of which it was accepted, could cater fully for S.'s needs) this Court adopted a course of action identified by Costello J. in the case of *D.D. v. The Eastern Health Board* (Unreported, High Court, 1995) in the circumstance that the H.S.E. did not dispute that it owed a statutory duty to S to provide for his accommodation and welfare and to protect his interests pursuant to s. 3 and s. 4 of the Child Care Act, 1991.

25. The court therefore formulated an order phrased in more general terms, that is that the H.S.E. care for and accommodate S until further order in a secure unit managed by it; that in the interest of his welfare it be authorised so to detain him in a manner and under a regime established in accordance with psychiatric or other medical advice; that the statutory body arrange for the provision of suitable education and therapeutic care either in that unit or elsewhere; that it might fulfil these obligations by arranging for S.'s accommodation in a unit or institution managed by another agency or organisation with the approval of psychiatric or other medical advice; and that the manager of such unit or institution be authorised to detain S. as hereinbefore provided in the case of a unit or institution managed by the H.S.E.

26. In compliance with this direction, S. was thereupon placed in B where, in the succeeding months he made significant progress. The matter was adjourned, subject to constant monitoring and review.

27. Having regard to the decision of the Supreme Court in *T.D. and Others v. Minister for Education and Others* [2001] 4 I.R. this

court did not consider itself in a position to make other mandatory orders against the H.S.E. or any other State organ, if any could have been formulated. This observation is in no way intended as a criticism: the fact is that the resolution of the issues facing S. would be a challenge to any health authority anywhere. But the fact remains that it is the statutory and constitutional duty of the H.S.E. to promote the 'welfare' of this child. (See s. 3 and s. 24 of the Children Act, 1997). This involves his psychological and physical well being as well as emotional welfare. There was clearly a difficulty in securing appropriate accommodation for him, if that was to be the order of the court.

Steps taken by the H.S.E.
28. The court should record and recognise that since this hearing in December, 2006 and arising from concerns expressed in this and other cases, the H.S.E. has embarked on a wide ranging review of its procedures on accommodation, detention and care, and has put in place a new procedure and framework to determine and prioritise such placements of young persons at risk as well as re-opening one unit which had ceased operation in 2003. This, taken in conjunction with the creation of the office of Minister for Children has had the effect of significantly reducing complexity in administration and in which responsibility in this area is allocated. These developments will be outlined in two forthcoming judgments in the case of *D.K. a minor* and *W.R. a minor*, which should ultimately be read together with this judgment.

The broad positions of the parties
29. At this hearing, conducted on 8th and 9th May, 2007, the case advanced on behalf of the Guardian *ad litem* (represented by Cormac Corrigan S.C.), and S.'s mother, (for whom Mary Ellen Ring S.C.appeared), was that both under the Constitution and at common law, the H.S.E. was under a duty to provide for the safety education health and welfare of S.S. as a minor, that a facet of that duty owed to him is to uphold and vindicate his personal rights, to provide for his religious moral intellectual physical and social education, and that the defendant owed such obligation to the minor under Articles 3 and 5 of the European Convention on Human Rights (prohibition of inhuman or degrading treatment; right to liberty and security).

30. The Health Service Executive accepted its continuing statutory duty to S. under the Constitution of Ireland; the Child Care Act 1991and under the Convention on Human Rights as effected by ECHRA 2003. In response to the plaintiff's contention that it provide a place of secure care for S., the H.S.E. objected that there had been a failure to specify the nature of such regime, its location, the period of such detention, or the exceptional circumstances sufficient to invoke the inherent jurisdiction of the High Court.

31 However, the only specific 'live' issues were S.'s interests generally, whether S. could or should be detained any longer. If, so, the circumstances of such detention and the duration of such detention fall to be determined.

The various jurisdictions involved
32. A further complicating factor was S.'s involvement with the criminal law. Since 2006 he had been facing criminal charges, remanded from time to time in the District Court. Only during the hearing before this court did it emerge that it was apparently the intention of the learned District Justice who had seisin of the criminal charges to deal with them prior to S. attaining his 16th birthday in May 2007. An application was made in the District Court by those who acted for him in those proceedings to ensure that such charges would be dealt with only after the decision of this Court as to the issues. S. was represented by a different legal adviser in these District Court proceedings. Counsel for the Attorney General had indicated that this is a matter receiving legislative consideration.

S.'s recent detention history
33. In the three years and three months prior to this hearing S.S. has been in various units including a Child and Adolescent Centre, a further unit, P.L., where he was detained until 25th September, 2006, and then, pursuant to the order of the District Court, he was remanded in custody in a centre until 12th December, 2006. During this period, he has never been returned to his family. Quite simply, there is now no family for him to go to. His mother, as well as her own troubles, cannot deal with him and feels the only safe place for him is in some form of care or detention. He has nowhere else to go.

34. These many periods of detention have been determined to be justified on the basis of S.'s own protection, and to ensure he was not exposed to high risk behaviour or exploitation by adults. He has in fact undergone educational and counselling courses. It is accepted that none of these has been sufficient to address sufficiently the problems from which he suffers. The care he has received from management and staff in B is balanced by the difficulty in this case in identifying precisely the form of treatment most appropriate for him. While by no means fruitless, that period of detention has gone as far as it can go in that unit.

35. Throughout his life it seems S.'s other constitutional rights, to liberty, to dignity, to development as a human being, have been almost entirely subsumed by concerns as to the protection of his life and welfare. The unpleasant term 'warehousing' is sometimes used regarding persons placed in institutional care. Even this term imparts too strong a sense of permanence and locale to the constant shifts and transience in S.'s life thus far. This observation is made not in any sense of blame but as a simple statement of fact.

36. Against this background the court had to determine what order or orders were in S.'s best interests with regard to the constitutional duties of this Court, its powers in the exercise of its inherent jurisdiction, and with regard to all S.'s constitutional, legal and Convention rights (if the latter should arise).

37. Counsel for the guardian *ad litem* (appointed to represent S.'s interests) supported by counsel on behalf of S's mother, submit that in those best interests it is necessary that he now be the subject of further care and detention orders, but on this occasion on a 'long term' basis so as to ensure that he will receive psychological psychiatric and therapeutic treatment and care necessary until he attains the age of 18 this year. But can such long term orders be made? Do the interests and rights of this young person coincide in this instance? To deal with these questions it was determined to conduct a hearing on issues outlined.

38. It must be borne in mind that while the general jurisdiction of the High Court is that detention orders can only be made when the life or welfare of the young person is truly at risk, this inherent jurisdiction of the court must be exercised with regard not only to the best interests of a young person, but with all their constitutional rights (including the right to liberty) as a framework.

39. Counsel for the minor who asked that the court try these preliminary issues argued that S. is entitled to have vindicated the rights identified by O'Higgins C.J. in *G v. An Bord Uchtála* [1980] I.R. 32, including the right of life, to be reared, and the opportunity of realising his or her full potential as a human being. These rights include the right to have appropriate 'education' understood in its broad sense. The court should not focus on the issue as to whether a long term order or detention may be made as a purely 'temporal' question. Instead, counsel urged that the court should engage in a 'purposive' assessment of the needs of the minor. To focus on the length of any detention would be to introduce a "red herring" to the assessment by this court of the needs of the minor and to the principles applicable. Such a focus, it was contended might have the effect of diverting attention from a prime issue in the

case that is the provision of appropriate facilities and therapeutic input.

40. It is difficult to reconcile these submissions (that the key issue be now not seen as a purely 'temporal' one), with the fact that it was counsel for the guardian ad litem who asked that the very issue of long term detention be addressed in the first place. An issue touching on the duration or term of detention that affects the fundamental right to liberty can never be a red herring. It cannot be 'parked' or relegated to a subordinate role in the hierarchy of Constitutional rights by assertion, albeit well motivated.

41. Because of the gravity and constitutional nature of the rights in issue the Attorney General also was invited to appear. Ms. Maire Whelan S.C. represented the Attorney General. The court wishes to express its appreciation of this assistance.

The issues under consideration
42. The first area to be addressed is the nature and range of the jurisdiction of this Court to make such orders for detention having regard to not one, but all the fundamental rights engaged.

The extent of the inherent jurisdiction of the High Court
43. In *D.G. v. The Eastern Health Board* [1997] 3 I.R. 511 Hamilton C.J. described the inherent jurisdiction of this Court:

> "The jurisdiction of the High Court is such jurisdiction as
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> (1) is conferred by the Constitution,
>
> (2) maybe imposed by statute, and
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> (3) is necessary to fulfil the obligations imposed on it to defend and vindicate the personal rights of the citizen."

He continued:

> "Article 40 s. 3 (1) provides that –
>
> The State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizens."
>
> In the course of his judgment in *The People v. S* [1982] I.R. 1 Kenny J. stated in relation to Article 40 s.3 that:
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> "The obligation to implement this guarantee is imposed not on the Oireachtas only but in each branch of the State which exercises the powers of legislating executing and giving judgment on those laws …" (at p. 62)
>
> "It is part of the courts function to vindicate and defend the rights guaranteed by Article 40 s. 3:
>
> "If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights."

Hamilton C.J. added:-

> "As stated by O'Dálaigh C.J. in the course of his judgment in the *State (Q) v. Ryan* [1965] I.R. 70 at p. 122 of the report:-
>
> 'It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that the *Courts' powers in this regard are as ample as the defence of the Constitution requires*.'" (Emphasis added)

44. In *D.G.* the court made an order for the detention of a minor at risk with a view to protecting his constitutional rights. His problems were in many ways similar to S's in this case.

45. While the issue was not argued in *D.G.*, it is implicit in the judgments of the majority that in exercising such inherent jurisdiction an order for detention was necessary for the vindication of the rights to life, welfare and protection of that child, even where such order involved a *temporary* abrogation of the right to liberty of such minor. The paramount rights to life and welfare may therefore temporarily outweigh the right to liberty in the circumstance where such important rights cannot always be harmonised. (See judgment of Finlay C.J. in *Attorney General v. X* [1992] 1 I.R. at p. 57.)

46. In *D.G.* Hamilton C.J. later outlined balance of the constitutional rights of the minor at issue in invoking the jurisdiction of the High Court:

> "In this case, the constitutional rights of the applicant involved are:
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> 1. That set forth in Article 40 of the Constitution that no person shall be deprived of his liberty save in accordance with law, and
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> 2. The unenumerated personal rights as set forth by O'Higgins C.J. in the course of his judgment in *G. v. An Bord Uchtála* [1980] I.R. 32, where he stated at p. 56-
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> 'Having been born the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child, (and others which I have not enumerated) must equally be protected and vindicated by the State …'"

47. The court considered the conflict between the minor's welfare and educational needs and the right to liberty guaranteed to each

citizen under the Constitution. In weighing this constitutional balance the former Chief Justice, having referred to the findings in the judgment of Kelly J. in the High Court, stated that the trial judge had found:

> "… The welfare of the applicant took precedence over the right to liberty of the applicant. There is ample evidence to support his (the learned trial judge's) finding in that regard".

48. The majority judgment in *D.G.* drew in turn from a number of authorities identified in a series of High Court judgments dating back to the early 1990s, (cf those identified in the judgment of Denham J. in *D.G.* at p.532).

49. The general principle underlying each of these judgments is that, if the Superior Courts established under the Constitution find that there is a fundamental constitutional right at risk, they must find a remedy (in this instance pursuant to Article 42.5 of the Constitution) in the absence of an undertaking from the State to observe such right.

50. It may be observed that the rights of the child identified in these authorities, to a degree reflect those contained in the United Nations Convention on the Rights of the Child ratified by Ireland without reservation on 21st September 1992 (see Shannon, Child Law Thompson Round Hall 2005 Ch.12) It may also be observed that the rights outlined in the seminal judgment of O'Higgins C.J. in *G v. An Bord Uchtála* are 'positive' rights as to welfare and development of a child as opposed to negative rights such as an absence of constraint. The exceptional nature of the jurisdiction pursuant to Article 42.5 of the Constitution is for the purpose of vindicating these positive rights exercised in circumstances where an even more fundamental right, that of the right to life itself, is engaged.

How the jurisdiction had been exercised

51. The inherent jurisdiction of the High Court must not be exercised in a peremptory fashion. The respect which the courts afford the State are such that where the State gives an undertaking to remedy a wrong, such as a failure to vindicate a personal right of its citizens, a due opportunity should be afforded to the State to comply with such undertaking. This approach was expressly adopted by Geoghegan J. in *F.N. v. The Minister for Education and Others* [1995] 1 I.R. 409, where having made certain findings, and identified certain principles regarding the care and welfare of a minor, he afforded the State respondent an opportunity to address the matters raised.

52. By contrast, Costello J. in *D.D. v. The Eastern Health Board* the High Court Unreported, 3rd May, 1995 was faced with the similar situation as that arising in the instant case of a young person at risk. There, however, the State as respondents had been afforded time to make provision for the minor in question, and had failed to do so. The court therefore made orders to remedy the wrong done.

Limits on jurisdiction

53. It is essential to recollect the observation of Hamilton C.J. in *D.G.* as to the limits to this jurisdiction as being one:

> "… which should be exercised only in *extreme and rare occasions when the court is satisfied that it is required, for a short period in the interests of the welfare of the child and there is, at the time no other suitable facility*." (Emphasis added)

He added:

> "The exercise of the High Court by its jurisdiction in this regard should not in anyway be used by the respondents in these proceedings to relieve them of their statutory obligations in regard to the applicant and they should continue their efforts to make suitable alternative arrangements consistent with the needs of the applicant and if any such arrangements can be made he should not be detained in a penal institution".

54. But the delicate balance of rights involved was emphasised in the minority judgments in *D.G.* Denham J. (dissenting) considered that the detention of a minor on this basis, albeit in a penal institution, and even for the care and welfare of that minor, was "a step too far". Implicitly, Murphy J. too expressed his concerns as to this jurisdiction.

55. However viewed, specific reference to the time duration by Hamilton C.J. as being "for a short period" can neither be subsumed in the consideration of other factors nor ignored. The re-balance or prioritisation of rights where the State intervenes pursuant to Article 4.25 may only be justified if of short duration. It must truly be in the words of the Article an "exceptional case". In one sense therefore the issues raised in this case are easily answered. Detention may be for a short period only. This is confirmed by reference to other jurisprudence to which I now turn.

The European Convention of Human Rights

56. The Supreme Court decision in D.G. was followed by *D.G. v. Ireland* [2002] 35 EHRR 1153 where the European Court of Human Rights determined that the detention ordered was contrary to article 5 of the Convention (right to liberty) by reason –

> (a) that it was exercised in a penal institution and
>
> (b) did not constitute educational supervision

The latter finding addressed article 5.4 of the Convention which permitted detention as a short-term measure preliminary to supervised education.

57. Such findings perhaps did not sufficiently advert to steps taken by the learned trial judge (Kelly J. to ensure that these issues of education and welfare were actually addressed while *D.G.* was in detention. It may be observed that B came into being following the judgment in *D.G.*

58. It is clear from that authority and others, that to comply with rights under the Convention (and indeed the balance of rights under the Constitution of Ireland) the rationale or justification for an order for detention must be clearly identified, must have a therapeutic or welfare purpose, and be exercised *only* in circumstances where it is for the minimum duration (see *D.G. v. Ireland* already cited, and *Bouamar v. Belgium* Case No. 9106/80 (1988) ECHR). In *Bouamar* the Court in Strasbourg very clearly stipulates that detention should be for a short period only, but does not preclude its being used as *"an interim custody measure … as a preliminary to a regime of supervised education"*. (emphasis added) Paragraph 50 of the judgment in *Bouamar* countenances, but subject to the over-arching right of liberty:

> "the detention of a minor by lawful order for the purpose of educational supervision *or* his lawful detention for the purposes of bringing him before the competent legal authority.

59. The disjunctive phraseology clearly allows for detention for the purpose of educational supervision, *without* such measure being necessarily for the purpose of bringing a young person before a legal authority.

The balance of rights and rationale
60. The following general observations may be made. First, the powers of the court (subject to other provisions of the Constitution) are as ample as the defence of rights under the Constitution requires. These include the power to exercise this inherent and interim jurisdiction when these fundamental rights of minors are at risk.

61. Second, the rationale of any detention order must be educational or therapeutic rather than punitive in order to vindicate the constitutional rights of the minor. (See *D.G.*)

62. Third, the inherent jurisdiction to detain a minor is an exceptional one which may only be invoked in circumstances of urgency where it is established that the minor is experiencing or in imminent likelihood that he or she will experience a crisis in their welfare that requires the intervention of this Court to order detention, and only to safeguard life, a serious risk to life or other serious threat to the care, protection and welfare of a minor.

63. Fourth, it is impossible to de-limit the foreseeable circumstances in which may be proper for an applicant to seek to invoke the inherent jurisdiction of the court because the circumstances of this distinct category of case are infinitely variable.

64. Fifth, common examples of where this jurisdiction has been invoked include instances of children attempting suicide, engaging in self-harm and indulging in continuous and highly dangerous behaviour or conduct with serious risks to their life or welfare. In a significant number of cases these children have provisional diagnoses that include conduct and personality disorders that are likely to develop a chronic aspect. Sometimes their life or welfare is placed at risk by others where the criminal law must be brought into consideration.

65. Sixth, the inherent jurisdiction of the High Court does not refer to its general jurisdiction. The special jurisdiction is a part of, or an aspect of, the general jurisdiction of that court. The general jurisdiction of the High Court (subject to the Constitution itself)is unrestricted in nature and unlimited in matters of substantive law, whether civil or criminal, with the exception of limited circumstances where by statute and in unequivocal terms there has been a removal of an area of jurisdiction from the High Court. Constitutional rights and issues are at stake. No such analogous inherent power resides in courts other then the Superior Courts as defined under the Constitution of Ireland, nor is there any other recognised jurisdiction to exercise such power or make orders to the same effect.

66. Seventh, the source of the inherent jurisdiction of the High Court derives from the nature of that court as established under the Constitution. Its inherent jurisdiction is exercisable only as part of the process of the administration of justice. The jurisdiction is procedural in content and is not part of the substantive law of the State.

67. Eighth, the inherent jurisdiction is a flexible process that arises in an *ad interim* or interlocutory proceedings. That inherent jurisdiction may be invoked by the court not only in relation to parties in proceedings before the court but in relation also to a person, whether a party or not, subject to fair procedure.

68. Finally, but vitally in this context, such power may be exercised only upon the basis of regular review of the balance of rights as an integral part of the procedure itself. These rights must include adequate opportunity for the views of the minor to be made known to the court in the fulfilment of his or her "natural and imprescriptible rights".

69. The clear statements of Kenny J. in *The People v. Shaw*, Hamilton C.J. in *D v. G* and the Supreme Court generally in *N v. H.S.E.* illustrate the range and depth of the inherent jurisdiction of the court on matters including procedure relating to minors. Once a court is satisfied that the constitutional rights (in this case of a minor) warrant his detention the court may look to the observation of Walsh J. in *Meskell v. C.I.E.* [1973] I.R. 121, where he observed:

> " … that a right guaranteed by the Constitution can be protected by action or enforced by action even though such an action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries with it its own right to a remedy for the enforcement of it."

70. Abstracting the principles from the authorities it is possible also to arrive at the following statements of broad principle as to content or substance.

71. In summary, the capacity and age of the minor, the nature of the place of detention, the extent, quality, and suitability of the educational and welfare facilities available must have a direct bearing on the duration for which this court may order a minor to be detained. The civil jurisdiction engaged may only be exercised on an interim or interlocutory basis, and only, therefore, with regular review by the court. Such process, to be consistent with the rights of a citizen under the Constitution of Ireland, and to accord with Article 5.4 of the European Convention on Human Rights must guarantee that any deprivation of liberty by arrest or detention imports with it a duty upon the State (including this Court) to provide an integral mechanism whereby proceedings can be initiated for the review of the lawfulness of such detention in a speedy manner (see *Kolanis v. UK* [2005] 1 MHLR 238). It is quite clear that in *D.G. v. Ireland* the Court of Human Rights rejected any use of detention as a preventive measure. Only countervailing rights, or a rationale such as those involving life or welfare, may justify such jurisdiction, and only on the basis that the right to life and welfare of a minor is to be placed temporarily, and only so long as proportionate and justifiable, in a superior position in the constitutional hierarchy to other fundamental values such as liberty, equality, or bodily integrity. While the function of the State in these circumstances may be to act as in a parental role and while such role may allow for a purposive interpretation of statute law, such an approach may never justify the abrogation or negation of fundamental constitutional rights.

72. Justification for such detention may be found in of the nature of the State as defined in the preamble and the text of the Constitution, and in particular Article 40.3 (protection of life) and considerations of the common good. While the procedure may raise libertarian concerns, it may be responded that considerations of the common good may and should influence how rights are prioritised, albeit temporarily, in the protection of a paramount value such as life. By will of the Oireachtas, it is a power now vested in the District Court pursuant to provisions of Part III of the Children Act, 2001.

Why have inherent jurisdiction powers been invoked?
73. In the past two decades the courts have felt constrained to invoke this exceptional jurisdiction under Article 42.5 of the Constitution because of lacunae in children's legislation dating back as far as 1908. As pointed out in *P.S. v. The Eastern Health Board* (High Court, Geoghegan J. 27th July, 1994), even after the enactment of the Child Care Act, 1991 health boards (the predecessors of

the H.S.E.) had no powers of civil containment or detention under the legislation then obtaining. Thus, notwithstanding their legal duty to provide for children in need of care and protection, such statutory bodies were powerless under the legislation with respect to children entirely out of control and at risk and who required detention and care in secure setting.

74. It must be re-emphasised that it was only in such exceptional circumstances that the courts felt constrained to invoke the remedy of detention upon the basis of inherent jurisdiction. It should not be allowed evolve into a 'preferred' option. The subject requires a legislative framework to remove the potential for over-subjectivity in interpretation and application.

75. The legislature sought to address the lacunae in the Child Care Act 1991 and the Children Act, 2001. Part III of the Children Act, 2001 contained an amendment to the Act of 1991 (s. 23) imposing on health boards (as predecessors of the H.S.E.) a duty to seek a special care order in the District Court where the behaviour of a child or young person was such that it imposed a real and substantial risk to his or her health, safety, development and welfare, and where necessary in the interests of the child that such a course of action be adopted. But this did not affect the interim, inherent jurisdiction of the High Court. Subsequent experience has demonstrated that, perhaps for many reasons, there has been a legislative reluctance to implement all provisions of Part III of the Act of 2001 or to abandon the (perhaps more flexible) approach derived from the exercise of inherent jurisdiction. Indeed the number of such cases in the High Court lists has regrettably grown to approximately twenty per week.

76. The frequent invocation and exercise of 'exceptional' constitutional powers, absent principles of application or, any statutory or regulatory framework is undesirable. The fact that those provisions of the Children Act, 2001 vesting analogous statutory powers in the District Court have not been brought into force might, at least for the moment, be seen as itself a policy decision by the legislature itself that this inherent power continue to be operated in these cases. It should not continue indefinitely in the present form. The court again notes that this is a matter under review by the Executive.

77. The absence of statutory framework in this area gives rise to yet further complexity by the frequent simultaneous exercise of jurisdiction by more than one court, (here the High Court in its civil jurisdiction and the District Court in its criminal jurisdiction). In other cases the civil jurisdictions of both the High Court and the District Court have been invoked.

78. This confusion of roles is exemplified by the fact that it was only in the trial of these two identified issues that it emerged that, unbeknownst to the legal representatives of any of the parties, the learned District Judge, dealing with certain criminal charges, (where S.S. was represented by other lawyers) had indicated an intention to engage in a sentencing hearing on such charges facing S.S. on the same day as these matters were being considered by the High Court. This Court therefore delivered its decision at a time prior to the District Court engaging in any such sentencing process.

79. From a broader perspective however, it illustrates the difficult question as to how the dictum of "one family one court" can be best applied where the right of the community to trial of criminal offences must take priority.

80. Clearly, on the basis of established authority, care must be taken to ensure that the invocation of civil jurisdiction does not stand in the way of the constitutional duty mandated upon the courts to exercise their criminal jurisdiction. As McGuinness J. pointed out in the *Director of Public Prosecutions (Murphy) v. P.T*. [1999] 3 I.R. at 254, the District Court has a general duty to consider and promote the welfare of an accused minor and to balance and harmonise this duty with the constitutional rights which pertain to an accused in a criminal trial. However insofar as there may be conflict between the general welfare rights of a minor, and rights delineated by the Constitution as being relevant to the trial of offences, it is clear the latter must have priority and prevail. That authority also pointed out the desirability that there should be a clear division between (on the one hand) criminal proceedings which decide the guilt or innocence of an accused, and (on the other) child care proceedings which make provision for the general welfare and future care and custody of a child (see also *S v. Eastern Health Board* The High Court, Unreported, Geoghegan J. 27th July, 1994) where that judge emphasised the same distinctions.

Parameters

81. No precise parameters as to the inherent jurisdiction of the Superior Courts can be fully delineated. The power is as ample as the Constitution requires but always subject to the other provisions of the Constitution, including the separation of powers. The detention of minors may be open to a range of objections: a 'rationale' may be "justified" upon a vaguely defined basis of "educational supervision". Absent those 'risk factors' and the paramount values of life and welfare being at stake, detention without due process, or for the purpose of 'education' no matter how defined, could not be reconciled with other fundamental rights under the Constitution of Ireland or the Convention on Human Rights and Freedoms. (See *Koniarska v. The United Kingdom* decision 12th October, 2000 No. 33670/96.)

The rights of parents and constitutional safeguards

82. It is necessary now to focus on the position of the family in these applications and the constitutional safeguards necessary. The specific right of audience of minors will be dealt with in the two forthcoming judgments.

83. In *N & Anor. v. The Health Service Executive & Anor*. the Supreme Court, Unreported, 13th November, 2006, Hardiman J. observed on the position of married parents and children in the Constitution in the context of Article 42.5:

> "If the prerogatives of the parents in enabling and protecting the rights of the child were to be diluted, the question would immediately arise: to whom and on what conditions are the powers removed from the parents to be transferred? And why?"

84. In this case, unfortunately, those equally applicable questions, albeit in a different family framework, are answered by the evidence. It has been accepted and urged by S.'s mother that he should be placed in care. S. has not seen his father since 2005. His present whereabouts are unknown. Due to her own circumstances, at no point has S.'s mother objected to his continuation in the care of the H.S.E., or the State, despite its inordinately long duration. M.S., S's mother, has, however, continued to play a role in his life, albeit a significantly attenuated one.

85. An order to detain a minor in secure care must be seen and interpreted in accordance with the rights, not only of the minor, but also the rights of parents (whether or not a family unit) and other family members. In particular it is necessary to ensure that, where possible, parents play a full role in ensuring that any period of detention is truly therapeutic in effect. The rights of such parents are substantive and should, where practicable, extend to all stages of the decision-making process in child protection cases where either, or both, parent evinces a willingness to play a role and to the extent that is in the best interests of the child.

86. By way of illustration, in *Re G. (Care): Challenge to Local Authority's Decision)* [2003] E.W.H.C. 551 (Fam. Munby J., 24th March, 2003) that judge held that, in accordance with article 8 of the Convention, (interference with family rights) parents should be

properly involved in the decision-making process not merely before and during care proceedings, but also after those proceedings had come to an end whilst the local authority was implementing a care order.

87. The European Court of Human Rights also observed in *McMichael v. The United Kingdom* [1995] 20 E.H.R.R. 205 at para 87:

> "Whilst article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference (with family rights) must be fair and such as to afford due respect to the interests safeguarded by article 8 (see *Re G.* [2003] 2 F.L.R. at p. 49; *McMichael v. United Kingdom* 2 March, 1995 Times Law Reports at p. 3 of 4; see also *Re X Barnet, London Borough Council v. Y and X* [2006] 2 F.L.R.)"

88. In *Re X* (cited above) a report prepared by a local authority expert had emphasised the importance of at least one year consistent containment in therapy before any change was planned, and advised that the child not be returned to the mother's care for some time. A failure to alert the child's guardian or the mother to potential difficulties concerning the placement, and the provision of information of a *fait accompli* that the child had been placed elsewhere after the decision had been made was held not to be in the best interests of the minor, as was a failure on the part of the local authority to include the child's mother in the decision-making process. Co-operation and information sharing are essential. This philosophy of parental involvement is reflected in Parts II and IV of the Children Act, 2001. These considerations must be subject to 'bests interests' criteria however.

89. It is now necessary finally to focus more specifically on the question of safeguards where such detention orders as are made by the High Court.

Safeguards

90. 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 circumstance. 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 such as liberty should not also be canvassed.

91. Such fundamental rights cannot be measured in the same way as a 'piece of string'. What must be determinative is the appropriate and justified short term duration of the secure care. This can be determined only with the interests *and rights* of the young person in the consideration, and subject to appropriate safeguards of fair procedures and regular review to vindicate such rights. Any categorisation of secure care into "short" and "long" term stays would be necessarily subjective. Circumstances change, and with them perhaps the priority of rights. In consideration of the length of time for which a particular minor should be detained the court must have regard to all relevant and variable factors. The nature, adequacy and frequency of review procedures should ensure that the balancing of rights of all relevant stakeholders continues to be properly met, particularly those of the minors' parents.

92. As a guide (but not as a conclusive determinant) a court might (in the absence of legislation) require a first review of detention within weeks, thereafter have regard to the time periods provided for in s. 23(b)(4)(a) of the Childcare Act, 1991 relating to the detention by the District Court of children in secure care, and also by analogy have regard to the time limits and procedural safeguards outlined in s. 25 of the Mental Health Act, 2001 relating to the review of involuntary admission of children in need of mental treatment and the constitutional requirement of proper respect for the family unit which require that full account is taken of the views and wishes of parents, the child's guardian and other interested parties.

93. I accept the submissions made on behalf of the Attorney General that because of the wide scope of the inherent power it may be theoretically possible that, in a highly exceptional case, a court might make orders of predetermined duration which are in *effect* or *result* longer than those outlined above. It is difficult to envisage any circumstance, however, where any such order might (absent on-going review) remain lawful. In order to vindicate the correlative right to liberty of a young person there must be in place a regular failsafe process of regular consideration of such detention so as to ensure the continued proper harmonising, or prioritising, of constitutional rights which may conflict. The procedure for vindication of rights requires the application of scrutiny in direct relation to the duration of detention. This may necessitate in an appropriate case that the application of the full range of procedural rights outlined in *Re. Haughey* [1971] I.R. 217.

94. In *Johansen v. Norway* [1996] 23 E.H.R.R. 33 at para. 78 the Court of Human Rights observed:

> "Taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit and … any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child. In this regard a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. In carrying out this balancing exercise the court will attach particular importance to the best interests of the child …"

(See also *Olsson v. Sweden* [1988] 11 E.H.R.R. 259)

95. This general principle, applied so often in our courts established under the Constitution should be both the starting and desired end point of such orders, as to their duration and the procedural safeguards necessary to vindicate the rights of those involved. It must be a matter of true regret that the rationale or aim of reuniting parent and child seems an entirely unattainable aspiration in this case.

96. As there was no longer any rationale for his detention in secure care, S.S. subsequent to this hearing was discharged to a high support unit subject to a very high level of therapeutic and educational care and with provision for psychiatric and psychological supervision.