THE HIGH COURT

[2018 No. 970 S.S.]

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

A.C.

APPLICANT

AND

KAREN FITZPATRICK,

DIRECTOR OF NURSING AT ST. FINBARR'S NURSING HOME,

HEALTH SERVICE EXECUTIVE

AND

COMYN KELLEHER TOBIN SOLICITORS

RESPONSDENTS

AND

THE GENERAL SOLICITOR FOR MINORS

AND WARDS OF COURT

NOTICE PARTY

JUDGMENT of Ms. Justice Faherty delivered on the 3rd day of August, 2018

1. The within proceedings concern an inquiry pursuant to Article 40.4.2 of the Constitution as to the detention of the applicant, A.C., in St. Finbarr's Hospital, Douglas Road, Cork.

2. On 31st July, 2018, by Order of the High Court (Faherty J.) upon the application of P.C., son of A.C. who made the application on behalf of his mother, the Court directed an inquiry into the detention of A.C. in St. Finbarr's. As it must, the Court also made an Order directing the respondents to certify the basis of A.C.'s detention.

3. The basis of P.C.'s application for an inquiry was the respondent's refusal on 10th July, 2018 to permit A.C. to leave St. Finbarr's. A.C. is 95 years of age and, by all accounts, is in frail health and suffering from senile dementia.

The background to the within application

4. In truth, the kernel of the within application can be traced to events in 2016. In 2016, A.C. was an in-patient in Cork University Hospital and she remained there until 14th December, 2016 when she was transferred to St. Finbarr's hospital. In a judgment delivered on 2nd July, 2018, in proceedings entitled *A.C. v. Cork University Hospital* [2018] IECA 217, the Court of Appeal held that Cork University Hospital acted unlawfully when it prevented P.C. and his sister V.C. from removing A.C. from the hospital on 23rd June, 2016 in circumstances where A.C. had signed a letter of discharge on the previous day.

5. Following upon Cork University Hospital's refusal in June, 2016 to let A.C. leave, P.C. made two separate applications on behalf of A.C. to the High Court pursuant to Article 40.4.2 for an inquiry into the legality of the detention of his mother. The basis of each refusal is helpfully set out in the judgment of the Court of Appeal in *A.C. v. Cork University*, delivered on 2nd July, 2018, as follows:

> *"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:*
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> *'… 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. …*
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> *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.'*
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> *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:*
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> *'[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.*
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> *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.'"

6. As regards the Article 40 applications which were before the learned President of the High Court, while Kelly P. declined the substantive Article 40 applications, he did, however, direct, pursuant to s. 11 of the Lunacy Regulations Ireland Act, 1871 ("the 1871 Act"), that a Medical Visitor be appointed to report to the High Court as to the capacity of A.C. to make any decisions concerning her welfare or her property. This process culminated in a decision to take A.C. into Wardship, effected by Order of Kelly P. of 19th August, 2016 (bearing record no. WOC 8900) whereupon the General Solicitor for Minors and Wards of Court (hereinafter "the General Solicitor") was appointed Committee for A.C.

7. As deposed to by David Hickey, solicitor in the firm of Comyn Kelleher Tobin (the third named respondents herein) in his replying affidavit in the within application, there have been a number of Orders made by the learned President of the High Court in Wardship upon the application of the HSE (the second named respondent herein) in respect of the welfare of A.C.

8. It appears that the placement of A.C. in St. Finbarr's came about in the following circumstances. By letter dated 8th December, 2016, Ms Patrice O'Keeffe of Comyn Kelleher Tobin wrote to Ms Sheena Lally of the Office of the General Solicitor seeking the consent of the General Solicitor as Committee of the Ward to transfer A.C. from Cork University Hospital to St. Finbarr's subject to seven conditions, and enquiring about what further procedural steps might be needed as additional orders were required relating to A.C.'s family.

9. By letter dated 9th December, 2016. Mr. James Finn, Registrar, confirmed the President's consent to discharging A.C. from Cork University Hospital and to her transfer to St. Finbarr's. In light of P.C.'s submissions to the Court in the within inquiry, it is, I believe, worthy of note that the transfer to St. Finbarr's arose subsequent to A.C. having been taken into Wardship.

10. By email dated 9th December, 2016, Ms. Lally wrote to Ms O'Keefe confirming that the President of the High Court had given his consent to the transfer on the seven conditions specified and noting that an application would need to be made on notice to A.C.'s family in respect of the additional orders about which Ms. O'Keeffe has raised queries.

11. Separately, P.C. has been the subject of a number of Orders made under the Wardship jurisdiction concerning the welfare of A.C. In 2017, three appeals were filed by P.C. with the Court of Appeal arising from those matters. According to Mr. Hickey, all of these appeals were refused by the Court of Appeal on 14th March, 2018 (in the matter of A.C. [2018] IECA 65) and the Orders of Kelly P. upheld.

12. I should say that at the outset of the hearing of the within inquiry, counsel for the General Solicitor appeared and submitted that the General Solicitor should be a notice party to this inquiry and he sought a recommendation from the Court in respect of the General Solicitor's costs.

13. Objection was raised by P.C. to any entitlement on the part of the General Solicitor to be part of the within inquiry

14. However, the Court is satisfied that the General Solicitor is a proper notice party to the within inquiry. In this regard, I note the approach of then President of the Court of Appeal, Ryan P., in a judgment delivered 24th February, 2017 by way of case management of the appeals taken by P.C. against the 2016 refusals of the Article 40 applications. Ryan P. opined as follows:

"The lady in question, is rightly or wrongly, a ward of court. She is represented by the General Solicitor for Wards of Court who has a statutory function, which is a very important function in people who are brought into Wardship; there has to be somebody to act on their behalf. So, that motion is an irresistible and it actually promotes the further hearing of the case because the case has to be ventilated. In this case, they have appeals under the habeas corpus Article 40 jurisdiction. The case could not be properly disposed or debated without having the General Solicitor for Wards of Court. I have no difficulty in making that order and I think it is an irresistible application that is made by Mr. Shorthall on behalf of the General Solicitor."

15. To return now to the history of this case. As previously stated, P.C.'s appeal to the Court of Appeal against the decisions of Kelly P. refusing the Article 40 application was determined by the judgment of the Court of Appeal dated 2nd July, 2018.

16. The fundamental issue dealt with on appeal by the Court of Appeal is eloquently set out in the judgment of Hogan J. He stated as follows:

"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."

17. Hogan J. also determined that P.C. had the requisite *locus standi* to bring the Article 40 application on behalf of his mother. In this regard, the learned judge opined:

"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.

18. As to whether Cork University Hospital was entitled to detain A.C., Hogan J. stated:

"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."

19. Hogan J. found that while hospital was entitled to take appropriate steps to regulate its own affairs in an orderly way, it was not entitled "*to prevent Ms. A.C. from leaving the hospital at any appropriate time and place if this is what she wanted to do*." The learned judge found no power either under statute law or under the common law equivalent to s. 23 of the Medical Health Act, 2001 (which enables a psychiatric hospital to detain a voluntary patient leaving the hospital for a 24 hour period) which would enable Cork University Hospital to detain the patient in such circumstances.

20. Hogan J. went on to state:

"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.

…

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."

21. Following delivery of the Court of Appeal's judgment on 2nd July, 2018, the Health Service Executive applied to the High Court for certain orders in respect of the care and welfare of A.C.

22. Following an interim Order of 11th July, 2018, a further Order was made by the President of the High Court directing that A.C. should remain an in-patient at St. Finbarr's Hospital, pending further Order of the High Court. Other Orders were also granted, including an Order preventing P.C. and his sister, V.C. making efforts to remove A.C. from St. Finbarr's.

23. In tandem with the above, and more particularly in the wake of the judgment of the Court of Appeal of 2nd July, 2018, on 16th July, 2018, P.C. applied to the High Court for an order pursuant to Article 40.4.2 of the Constitution directing an inquiry into the legality of A.C.'s detention in St. Finbarr's.

24. The High Court judge to whom he sought to make the application for an inquiry directed him to the more senior judge on the day, then sitting in an adjoining court. P.C. then sought to apply to the more senior judge. The judge, having read the papers, felt that the application raised weighty and complex issues. He gave P.C. leave to issue a motion returnable to the Non-Jury list for 23rd July, 2018 on notice to the first and second respondents herein.

25. On 23rd July, 2018, the matter was listed before a third judge of the High Court who was then presiding over the Non-Jury list. On this occasion, the HSE drew the judge's attention to an Order of Kelly P. made on 9th October, 2017. That Order was made in plenary

proceedings which were issued by P.C. under High Court Record No. 2017/6224 P. against the Minister for Health, Health Service Executive, Katherine White, Tom Tobin, Norma Harnedy, General Solicitor for Minors and Wards of Court, Patrice O'Keeffe, Registrar of Wards of Court Ireland, Aoife Ní Chorcorain, Lynn Oliver, Josie Clare and Tony McNamara (hereinafter "the plenary proceedings").

26. The said plenary proceedings had issued on 11th July, 2017. On 12th July, 2017, P.C. was granted liberty to issue a notice of motion seeking a number of interlocutory reliefs in his plenary proceedings. P.C.'s grounding affidavit was duly served on the defendants. On 18th July, 2018, by Order of the High Court (Gilligan J.), the matter was listed for 8th August, 2017, with the defendants to file any replying affidavit within ten days and P.C. to file any further affidavit within seven days.

27. Some two days later, the solicitors for the HSE (the second respondents herein) were served with another notice of motion in respect of P.C.'s appeal to the Court of Appeal against Kelly P.'s refusal of the two Article 40 applications made in 2016. P.C.'s motion in this regard sought a trial of "certain Preliminary Issues … for the herein inextricable … bound up Article 40 lis inter partes appeals … and the Matter of Wards of Court …" The notice of motion also stated that the lawfulness and validity of "all Reports, Directions, Petitions, and Orders is challenged for the Matter of Record No. WOC8900 … on the basis that the initial Wardship application moved on 8th July, 2016 without a *mother document, is an abuse of power devoid of due process of law*, and therefore the legal effect … is questioned." Further orders by way of injunctive relief were sought prohibiting the prescribing of certain named drugs to A.C. on the basis that same were fatal for elderly persons. Much of the submissions made by P.C. to this Court related to the medical treatment currently being afforded to A.C.

28. Various declaratory reliefs were also sought by P.C in the motion before the Court of Appeal, including that A.C. had been wrongly adjudged to be of unsound mind.

29. As advised to the Court by Mr. Hickey in his affidavit, the reliefs sought in P.C.'s notice of motion were refused by Ryan P. on 28th July, 2017.

30. Mr. Hickey also avers that the reliefs sought in the notice of motion which was before the Court of Appeal on 28th July, 2017 duplicated much of the content of P.C.'s interlocutory application in the plenary proceedings. It is also apparent to this Court that many of the reliefs sought in the within Article 40 inquiry duplicate those being pursued by P.C. in the plenary proceedings.

31. The HSE respondents in the within application filed three affidavits in respect of P.C.'s interlocutory application in the plenary proceedings, namely an affidavit of Patrice O'Keeffe, Solicitor with the HSE, sworn 28th July, 2017, an affidavit of Norma Harnedy (Consultant Geriatrician at Cork University Hospital) sworn 28th July, 2017 and an affidavit of Catherine White (Director of Nursing at St. Finbarr's Hospital, Cork) sworn 28th July, 2017. Mr. Hickey emphasises that in their respective affidavits, Dr. Harnedy and Ms. White addressed and refuted all of the complaints raised by P.C. regarding the medication and care afforded to A.C. He refers to Dr. Harnedy's affidavit wherein she avers that the changes to A.C.'s treatment as sought in P.C.'s interlocutory application "would be harmful to her health and welfare and put her life at risk". In her affidavit, Ms White, avers as follows:

> "[A.C.'s] condition was comfortable and stable after her transfer to St. Finbarr's Hospital with seizures completely controlled on current medication. From 10th June, 2017, however, it became evident that [A.C.'s] health was beginning to deteriorate with increased mental anxiety. [A.C.'s] medical team believed that this was due to the persistent advice from [P.C.] … and from [V.C.] to discontinue taking prescribed medication perceived by [P.C. and V.C.] as 'poisoning' [A.C.]. As a result of this persistent behaviour and despite continuous attempts by staff to prevent it [A.C.] started to refuse her oral medication, meals and fluids, which resulted in a general deterioration in [A.C.'s] condition."

32. Mr. Hickey also avers that the General Solicitor filed a replying affidavit in the plenary interlocutory application, as did the Registrar for Wards of Court. P.C. filed a further affidavit on 4th August, 2017.

33. The interlocutory application in the plenary proceedings was called on for hearing on 8th August, 2017 and was ultimately adjourned to come before the President of the High Court on 9th October, 2017. On 9th October, 2017, the application was duly called on before Kelly P. P.C. was not present when the matter was first called. It was put to second call. P.C. was again not present at second call. (In the course of the hearing of the within application, P.C. advised the Court that he was outside of the jurisdiction).

34. Having heard brief submissions from counsel for the defendants, Kelly P. made the following orders:-

> "(i) that the Plaintiff's application be and the same is hereby dismissed;
>
> (ii) that these proceedings be stayed and that the Plaintiff may take no further steps in these proceedings save on application to this Court on four days notice to the respective Defendants;
>
> (iii) that the Plaintiff be prohibited from taking any proceedings which address either the life the liberty the health or the welfare of his mother [A.C.] other than by an application in the Wardship proceedings and such application not to be brought unless two clear days notice is given to the General Solicitor for Minors and Wards of Court the Committee of [A.C.]."

35. According to Mr. Hickey, no application has been made by P.C. to the President of the High Court to take any further steps in the 2017 plenary proceedings.

36. To return again to the events of 23rd July, 2018. After counsel for the HSE drew the Order of Kelly P. of 9th October, 2017 to the attention of the judge of the High Court who was presiding over the Non-Jury List on 23rd July, 2018, the judge declined to hear the Article 40 application and transferred the matter to the President of the High Court. It appears however that P.C. did not move the Article 40 application before the President of the High Court.

37. P.C. duly appealed to the Court of Appeal against the various orders of the three ordinary judges of the High Court in relation to his Article 40 application.

38. In a judgment delivered on 30th July, 2018, the Court of Appeal determined that the judges of the High Court to whom the Article 40 application was presented "*each fell into error by failing to hear and determine the application for an inquiry under Article 40.4.2 of the Constitution once Mr. P.C. sought to move it*". The Court of Appeal went on to state:-

> *"In the circumstances, Mr. P.C. remains free should he wish to do so, to make an application ex parte pursuant to the provisions of Article 40.4.2 to any judge of the High Court for an inquiry into [the] legality of his mother's detention at*

St. Finbarr's Hospital."

39. As already set out, P.C. duly moved an application before this Court for an inquiry on 31st July, 2018. In his grounding affidavit, he avers that "by express phone conversation on 10th July 2018, and 30th July 2018, with my mother, [I am] authorised to make Article 40 Habeas Corpus and fundamental rights proceedings on her behalf". He avers that he seeks "urgent relief for the refusal of St. Finbarr's Nursing Home…to allow my mother leave that facility, and return home on 10th July 2018." He further avers:-

> "I went there to bring my mother home, after she telling me on the phone at 9.01am that morning, that she wanted me to collect her that day, as she did not want to stay another day.
>
> I confirm when I attended at approximately 2pm to collect my mother and her property, the security personnel team…told me I was prohibited from visiting my mother or being on the hospital campus. I asked him for proof in the form of an order, to corroborate his statement.
>
> I then asked him if he had a copy of the Order to prove that my mother should be forcibly transferred to St. Finbarr's on 14th December 2016, and detained there against her will. I confirm he had no corroborative proof that my [mother's] detention is lawful."

40. P.C. further states:-

> "I further say neither [the Nursing Director of St. Finbarr's], her HSE principals, the Minister for Health, the General Solicitor for Minors and Wards of Court, nor Comyn Kelleher Tobin Solicitors have been willing or able to provide proof that an order was made by President Kelly confirming my mother should be removed from Cork University Hospital by force and transferred to St. Finbarrs Nursing Home on 14th December 2016, to remain there with no chance of leaving, such that she is de facto doomed to a life of confinement with no fundamental rights; to leave if she chooses, determine her form of preferred medical treatment with choice of doctor, refuse dangerous drugs that adversely endanger her life, to have visitation, privacy and love of her family members."

41. This Court made the matter returnable for 2pm on 1st August, 2018 and, as I have said, directed that the basis of A.C.'s detention be certified.

42. At the outset of the hearing on 1st August, 2018, upon application by counsel for the respondents, the Court made an order under pursuant to s. 27(8) of Civil Law (Miscellaneous Provisions) Act 2008 directing that the identity of the applicant and members of her family should not be disclosed.

43. By Certificate dated 31st July, 2018, Ms Ber Power, General Manager of St. Finbarr's Hospital, certified as the grounds of detention of A.C. the Order of the President of the High Court made on 23rd July, 2018. The Order was made on foot of a motion dated 18th July, 2018 brought by counsel for the HSE in the presence of counsel for the General Solicitor, with P.C. also present in person. The said Order directed that A.C. "shall remain an in-patient at St. Finbarr's Hospital, Douglas Road, Cork, pending further Order of this Honourable Court".

44. Further Orders were made by Kelly P. prohibiting P.C. and V.C. from removing A.C. from St. Finbarr's Hospital and that P.C. and V.C. be prohibited from attending at or entering the grounds of the said hospital pending further order of the Court. The Order also directed that the medical and nursing staff at St. Finbarr's Hospital responsible for the care of A.C. be permitted to take all necessary and/or incidental steps to promote and/or to ensure the care, protection, safety and welfare of A.C., including the provision of any physical, medical or psychiatric assessment, treatment or assistance deemed to be clinically appropriate, including but not limited to the administering of medication either covertly or overtly. The General Manager of the hospital and his or her servants or agents were also authorised and permitted, at their discretion, to supervise any phone calls to A.C. believed to emanate from P.C. or V.C., their servants or agents or any person acting in concert with them. The Order also provided that P.C. and V.C. were at liberty to file a replying affidavit on or before 17th September, 2018. It further provided that "[P.C. and V.C.] be at liberty to apply to discharge or vary this Order on 4 clear days notice to the Court, the Health Service Executive and the Committee". Liberty was given to apply.

45. In his replying affidavit, Mr. Hickey avers that the Orders made by Kelly P. on 23rd July, 2018, in relation to P.C. and V.C. were grounded on four affidavits sworn by staff at St. Finbarr's Hospital which affidavits were before the President of the High Court on 16th July, 2018, and 23rd July, 2018. Mr. Hickey goes on aver:-

> "For completeness, I note that on 11 July and again on 16 July and on 23 July 2018, the President of the High Court stated that placement of [A.C.] at St. Finbarr's is reviewed on a periodic basis by an independent medical visitor appointed by the Court and that the President had recently received a report from the Court's medical visitor relating to a recent visit to the Ward at St. Finbarr's. The President stated that the medical visitor was satisfied that [A.C.] was appropriately placed and cared for at St. Finbarr's. This was also recorded by the Court of Appeal at paragraph 3 of its … judgment on 30th July, 2018."

46. Counsel for the respondents submits that the Order of Kelly P. of 23rd July, 2018 is the lawful basis for A.C.'s placement at St. Finbarr's. It is further submitted that, as the Order of Kelly P. demonstrates, P.C. is at liberty, on four days notice, to apply to discharge the Wardship Order but that no such application has been brought to date by P.C. Nor, counsel submits, has any appeal been brought by P.C. in relation to the Wardship. In aid of her submissions in this regard, counsel points to the judgment of Ryan P. on 14th March, 2018, delivered on foot of three appeals made by P.C. arising from orders made by the President of the High Court in respect of the publication by P.C. of video and other material on social media which concerned, pictured and described A.C.'s treatment. In the course of his judgment, Ryan P. stated:-

> *"[I]t bears emphasising that Mr. C. has not appealed the substantial determination of Kelly P. as to Wardship."*

47. The learned judge went on to state:-

> *"7. The three appeals that are the subject of this judgment are the order granting the injunction (dated 20th March 2017); the order of attachment directed to the gardaí to arrest Mr. C. and bring him before the Court (dated 25th April 2017) and the order holding him in contempt and awarding costs against him (dated 3rd May 2017). It seems to me that there is no basis for these appeals. Moreover, the court was satisfied that Mr. C.'s real complaint concerns the fate that his Article 40 application met with and the circumstances in which his mother was taken into Wardship. In that circumstance, the court reserved judgment on the three instant appeals and offered to provide assistance to Mr. C. to*

pursue the underlying matters of apparent substance that seemed to be what he wanted to dispute. Solicitor and counsel have now been engaged to assist Mr. C. on these other questions. Obviously, the court is not making any comment on the merits or the availability of an entitlement to challenge in respect of those matters.

8. The reasons why there is no basis for these appeals is clear from what I have said above. Ms. C was taken into Wardship on the basis of evidence that was before the High Court. The General Solicitor was entitled and, indeed, obliged to move the court for prohibition of publication of video and verbal commentary of and about the Ward and also of those treating her whose privacy had also been disrespected. Therefore, as to the propriety of the injunction granted by the High Court, there is and can be simply no issue. Similarly, since the material was not taken down in observance of the court order, the move to enforce it by attachment and committal cannot be criticised. Matters of service of the order could be debated at the committal hearing as the court complains about the manner in which the Gardaí executed the warrant. Any complaints that Mr. C has in that latter regard may be pursued by him independently. Faced with the option of imprisonment or compliance with the court order, Mr. C wisely chose obedience. I do not think that because he agreed to remove the material under threat of court process of enforcement means that he cannot appeal. The reason why I reject his appeal is not because he is prevented from appealing, but rather because there is no basis of appeal.

9. On these motions and appeals, there is a simple path of logic. Mr. C.'s mother was made a Ward of Court. The material that he put up on social media represented an invasion of her dignity and privacy and also of those caring for her. The High Court, when moved on the application of the General Solicitor, the proper person to make such an application, granted an injunction. Mr. C. did not obey the injunction and was brought to court to answer his alleged contempt. He was faced with the choice at that point of enforcement by the court of its own order or obedience. The court then did not proceed to enforcement or punishment of past contempt, but did make an order for costs. Nothing in that process gives rise to any legitimate complaint on the part of Mr. C.

10. It follows, in my view, that there is nothing in these appeals to give any ground for setting aside these orders."

48. Counsel for the respondents also submits that the important intervening event between what was declared by the Court of Appeal on 2nd July, 2018 to be the unlawful detention of A.C. at Cork University Hospital on 23rd June, 2016 and A.C.'s present circumstances is that A.C. is now in Wardship. Counsel contends that there is nothing in the judgment delivered by the Court of Appeal on 2nd July, 2018 which relates to or impugns A.C.'s placement in St. Finbarr's. Both counsel for the respondents and counsel for the General Solicitor contend that the Order of Kelly P. of 19th August, 2016 is a valid and binding Order which has never been appealed or set aside.

49. In his submissions to the Court, P.C. refutes the contention the A.C.'s detention is legitimate. He maintains that the Wardship Order was made without proper notice to A.C. and in circumstances where A.C., by letter of 4th August, 2016, and in subsequent correspondence dated 23rd August, 2016, objected to the claim that she was of unsound mind.

50. P.C. also refutes the argument that he did not appeal or move to set aside the Wardship Order. In this regard, he refers to his plenary proceedings wherein he says he challenges the Wardship proceedings. He further points to his application to the Supreme Court for leave to appeal the order of Ryan P. made 24th February, 2017 permitting the General Solicitor to be added as an applicant in A.C.'s Article 40 proceedings both in her capacity as General Solicitor and also as Committee for A.C. P.C. maintains that in the course of his leave application to the Supreme Court he pointed to the unlawfulness of the process by which A.C. was made a Ward of Court.

51. As regards the leave application, on 5th September, 2017, the Supreme Court, after reciting, *inter alia*, P.C.'s submissions on the alleged unlawfulness of the Wardship process involving A.C., determined as follows:

> *"In this case, the two applications under Article 40.4 were moved on the basis of Mr. C.'s unhappiness with the medical treatment being afforded to his mother. That issue, and the correctness of the two refusals of relief by Kelly P., is independent of any arguments as to the validity of the wardship process. It must be noted that no challenge to the appointment of the Committee has been brought, either in the High Court or by way of appeal against the High Court orders. Instead, the procedure adopted by Mr. C. has been, in effect, to argue the lawfulness of the wardship process within the Article 40.4 appeals. He has attempted to obtain a ruling in this respect by seeking to have the General Solicitor excluded from the appeal procedure in relation to the Article 40.4 applications. However, as Ryan P. said, the wardship order was made and it subsists unless set aside. While it is in being, the General Solicitor is entitled to act on the basis that it was properly made. The argument as to the entitlement of Mr. C. to maintain the appeals has not been closed off by the decision of Ryan P. and remains to be determined by the Court of Appeal. Similarly, his arguments as to the correctness of the procedures and findings of the High Court have yet to be determined. There is, therefore, no issue at present which would justify a grant of leave to appeal to this court."* ([2017 IESCDET 97)

52. P.C. also argues that Kelly P. clearly intermingled the Wardship issue in the course of the hearing of P.C.'s Article 40 applications in 2016. P.C. maintains that this is evidenced by two Orders made by Kelly P. at the time of the Article 40 applications, namely, the Order of 11th July, 2016 wherein the President of the High Court directed that one of the High Court's Medical Visitors visit A.C. at Cork University Hospital for the purpose of inquiring into her state of mind, and the subsequent Order of Kelly P. of 25th July, 2016 that the Report of the Medical Visitor, made consequent upon the visit to A.C., be proceeded with as a Petition for an Inquiry as to the soundness or unsoundness of mind of A.C.

53. P.C. further takes issue with the fact that the Orders of 11th July, 2016 and 25th July, 2016 have not been perfected by a Registrar of the High Court, as required by O. 115, RSC. He maintains that this is also the position with regard to the Order of Kelly P. of 23rd July, 2018 upon which the respondents rely to certify A.C.'s detention.

54. He further contends that the Originating Notice on A.C. dated 29th July, 2016, while making reference to the report of the Medical Visitor, failed to attach a copy of the said report to the Notice which was served on A.C. P.C. also questions the independence of the Medical Visitor. He contends that all of these matters go to the veracity of the Certificate of Detention which the respondents have put before the Court. He also maintains that on foot of the judgment of the Court of Appeal of 30th July, 2018, A.C. is entitled to leave St. Finbarr's. He contends that the Certificate of Detention produced by the respondents is merely a backtracking exercise and that it does not in any event cover A.C.'s status when P.C. made his Article 40 applications on 16th July, 2018 and 23rd July, 2018 on foot of A.C.'s expressed wish to leave St. Finbarr's, as communicated to P.C. on 10th July, 2018. He asserts that A.C. remains in unlawful detention since 23rd June, 2016. He further asserts that the transfer of A.C. from Cork University Hospital to St. Finbarr's cannot be used a mechanism to bypass the unlawfulness of A.C.'s detention.

Considerations
55. The sole, central and most important issue with which the Court is concerned in this application is whether A.C.'s placement in St. Finbarr's Hospital is unlawful, as contended for by P.C. The Certificate of Detention relies on the Order of Kelly P. of 23rd July, 2018 in Wardship as the lawful basis for that detention. The foundation for that Order, and indeed similar Orders made by Kelly P. since August, 2016, is the Order of the learned President of the High Court of 19th August, 2016 taking A.C. into Wardship. I am satisfied that, as matters stand, that Order has not been appealed or set aside. It is, however, the case that in his plenary proceedings, which are presently stayed, P.C. seeks to challenge the constitutionality of the 1871 Act. It is also the case that P.C. has not sought to apply to lift the stay which was imposed by Kelly P. on his plenary proceedings on 9th October, 2017. P.C. has however appealed the Order of Kelly P. of 9th October, 2017 staying his plenary proceedings. That appeal is listed for hearing before the Court of Appeal on 28th June, 2019.

56. It remains, however, a fact that P.C. has not appealed the substantive determination of Kelly P. as to Wardship, a fact noted by Ryan J. in his judgment of 14th March, 2017, and a matter also noted by the Supreme Court in its Determination dated 5th September, 2017.

57. One of the threads of P.C.'s submissions to this Court is that it flows from the judgment of the Court of Appeal delivered on 2nd July, 2018 that A.C.'s detention in St. Finbarr's is unlawful. However, I am satisfied that insofar as the Court of Appeal ruled on the lawfulness of A.C.'s detention, it did so solely vis-à-vis her circumstances as of 23rd June, 2016 while a resident in Cork University Hospital.

58. While, in the course of his judgment delivered on 2nd July, 2018, the learned Hogan J. adverted to the fact that A.C. had been taken into Wardship, he did so largely in the context of his finding that the very fact of A.C.'s Wardship did not and could not prevent P.C. from applying on her behalf pursuant to Article 40.4.2 of the Constitution - an entitlement which is "*constitutionally inviolate*". I am entirely satisfied that the judgment delivered by the Court of Appeal on 2nd July, 2018 did not address the validity of the Wardship proceedings.

59. A question which arises is whether the invalidity which attached to A.C.'s detention in Cork University Hospital on 23 June, 2016 has had a domino effect with regard to her now placement in St. Finbarr's Hospital. I am satisfied, however, that that is not the case, on the authority of the Supreme Court's decision in *E.H. and the Clinical Director of St. Vincent's Hospital and Ors*. [2009] 3 I.R. 774. In *E.H.*, the applicant was admitted to the psychiatric unit of St. Vincent's Hospital as involuntary patient. The renewal order under which the applicant was detained was revoked by the Mental Health Tribunal, which was of the view that it lacked jurisdiction for the renewal of this order due to the omission of a date from a renewal form. The applicant then agreed to remain in the unit as a voluntary patient. However, when the applicant attempted to leave the unit, she was detained pursuant to ss. 23 and 24 of the Mental Health Act, 2001, which detention was affirmed by the Mental Health Tribunal. The applicant sought an inquiry into the lawfulness of her detention. The High Court found the detention to be lawful. The applicant appealed to the Supreme Court. In his judgment for the Supreme Court, Kearns J. did not believe that any domino effect applied. He found, inter alia, that "*it is not contested that any procedural irregularity has attended the various orders detaining the applicant from the 22nd December, 2008".*

60. It is also, to my mind, an important factor in this case that P.C. has not gone back to the President of the High Court to say that he believes A.C. to be of sound mind, a process which is open to P.C., as evidenced from the decision of Kelly P. in HSE v. A.M. [2017] IEHC 184. In the course of his judgment in that case, Kelly P. stated:

> *"53. In paras. (xv), (xvi) and (xvii) of the extract from the respondent's written submissions which I have reproduced it is pointed out that if he were to be detained under the Act he would be the beneficiary of regular statutory review by an independent Mental Health tribunal and would be under the general monitoring of the Mental Health Commission. He would also have access to the Inspector of Mental Health services. Furthermore, his treatment would have to conform to the provisions of ss. 56-60 of the Act and seclusion and restraint would be subject to s.69 and rules made by the Commission.*
>
> *54. It was suggested in argument that these rights are superior to any rights which he would have if detained as a ward of court.*
>
> *55. I am not persuaded that there is any merit in this argument. Wards of Court who are detained pursuant to the exercise of the jurisdiction conferred under s.9 of the 1961 Act have their rights just as effectively secured and respected as if detained pursuant to the procedure set out in the Act.*
>
> *56. First, the detention of a ward pursuant to s.9 has to be operated in a manner consistent with the Constitution and with the European Convention on Human Rights. This is achieved in part by a system of regular review. Certainly since I took up my present office I have made it clear that any orders made for the detention of a ward of court must be subject to regular reviews at least every six months. In many cases a shorter period of review has been ordered. On such review there is an entitlement on the part of the ward to appear and or to be represented. Each review involves a report being presented to the court by the treating consultant psychiatrist, the contents of which are made known to the committee of that ward. If necessary, the psychiatrist will be required to give oral evidence. If I have any doubts concerning the report presented it is open to me to order a Medical Visitor to conduct an examination and to make a separate and independent report to me on the condition of the Ward.*
>
> *57. In addition, detention orders made under the wardship jurisdiction are just that. They do not authorise the use of restraint unless such an order is specifically sought and then it is granted only on appropriate evidence as to its necessity being tendered.*
>
> *58. Furthermore, all detention orders are made with liberty to all interested parties to apply on very short notice. Certainly never more than 48 hours notice is required in order to apply to court. In practice it is often a much shorter notice period that is involved.*
>
> *59. Indeed, I believe it may be said, that in some respects the entitlements of a ward of court subject to a detention order are superior to those of a person detained under the Act. A long term detainee under the Act has his position reviewed every 12 months. The review period for a ward of court is never more than 6 months. In addition, the ward of court has immediate access to the High Court if any change in circumstances occurs whereas there is no such automatic entitlement to a patient detained under the Act."*

61. While P.C. argues in the within application that Wardship does not afford A.C. the protections and benefits of a review by the

Mental Health Commission, it is, as Kelly P. has stated in *HSE v. A.M.*, the case that A.C.'s placement in St. Finbarr's is subject to ongoing review by the President of the High Court.

62. In the course of the within hearing, P.C. took issue with the face of the Order of 23rd July, 2018. He argued that it did not comply with O. 115, RSC. However, as pointed out by counsel for the respondent, Order 115 is not the regime which pertains to Wardship. Order 67, RSC provides that Wardship orders are issued out of the Wards of Court Office. Moreover they are invariably signed by the President of the High Court, as were the Order of 23rd July, 2018 and all prior Orders relating to A.C.

63. P.C. also argued that in its judgment of 2nd July, 2018 the Court of Appeal accepted all of his grounds of appeal. He maintains that the Court of Appeal's decision was based on the grounds of appeal furnished by him, including arguments advanced by him with regard to the denial to A.C. of natural and constitutional justice "in regard to purported lawful Wards of Court application … on 25 July 2016". In this regard, P.C. points to his appeal submission that the procedure adopted in the Wardship Proceedings "is repugnant to the fundamental rights of [A.C.] pursuant to the Constitution, and is in breach of the fundamental rights pursuant to Articles 5 and 6 of the European Convention on Human Rights."

64. I am not satisfied that P.C.'s contention that all of his submissions were ruled on by the Court of Appeal is correct. To my mind, a perusal of the judgment of the learned Hogan J. shows that the issue dealt with by the Court of Appeal on 2nd July, 2018 related to whether Cork University Hospital's refusal to let A.C. home on 23rd June, 2016 was a valid one. The Court of Appeal did not embark on a consideration of the validity of the Wardship proceedings.

65. In all the circumstances of this case, I am satisfied that the basis of A.C.'s detention is the Order of Kelly P. of 23rd July, 2018. It is also apparent from Mr. Hickey's affidavit that A.C.'s placement in St. Finbarr's is reviewed on a periodic basis by an independent Medical Visitor appointed by the High Court. Specifically, Kelly P. has, in the immediate timeframe prior to the making of the Orders of 16th July, 2018 and 23rd July, 2018, received a report from the Court's Medical Visitor relating to a recent visit to A.C. at St. Finbarr's, a fact also noted by Hogan J. in his judgment of 30th July, 2018. The Medical Visitor was satisfied that A.C. has been appropriately cared for by the staff of the hospital, albeit as stated by Hogan J., "it is not really in dispute that [A.C.] is, in effect currently detained in St. Finbarr's Hospital."

66. In all the circumstances of this case, and having considered the submissions of the parties, I am satisfied that A.C.'s is lawfully detained in St. Finbarr's Hospital pursuant to the Order of Kelly P. of 23rd July, 2018, made in the exercise of his jurisdiction as conferred under s.9(1) of the Courts of Justice Act 1961. I am further satisfied that the important and necessary safeguards as referred to by Hogan J. in his judgment of 2nd July, 2018 are evident and present in this case, not just by virtue of the regular reviews conducted by the President of the High Court in the exercise of his jurisdiction in Wardship, but also by virtue of the entitlement of all interested parties (not least the Ward) to apply to the President of the High Court on short notice.

67. For all of the above reasons, I find that A.C. is not in unlawful detention and, accordingly, the relief sought pursuant to Article 40. 4. 2 of the Constitution is refused.