Neutral Citation Number: [2011] IEHC 297

**THE HIGH COURT**

**2011 62 IA**

**IN THE MATTER OF GH**

**AND IN THE MATTER OF ARTICLE 40.3**

**AND ARTICLE 41 AND ARTICLE 42 OF**

**THE CONSTITUTION**

**AND IN THE MATTER OF CHILD**

**CARE ACT 1991**

**BETWEEN/**

**GH (A MINOR REPRESENTED BY HIS SOLICITOR AND**

**NEXT FRIEND, ROSEMARY GANTLY)**

**PLAINTIFF**

**AND**

**HEALTH SERVICE EXECUTIVE, S.F. AND J.H.**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Hogan delivered on the 18th day of July, 2011**

1. This is a sad and tragic case, the dismal and depressing nature of which cannot adequately be conveyed by a few weak words of mine. GH, the subject matter of this case, is now aged 16 and will turn 17 next November. He has been in care with the HSE since he was three years old. His parents are separated and both are chronic drug addicts. His grandparents have, however, sought to provide a home for him and did so until about two years ago when his behaviour made that an impossible task.

2. This young man has been diagnosed with oppositional defiance disorder and attention deficit hyper activity disorder. While it cannot be said that he is suffering from a mental illness within the meaning of the Mental Treatment Act 2001, he is nonetheless suffering from an acute behavioural disorder. This manifests itself in frequent and purely random acts of violence on his part, attacks which often contain a sexualised element directed at females. Mr. Aongus Hourican, a very experienced HSE social worker with extensive knowledge of highly troubled juveniles, described him in evidence before me as an exceptionally violent and very dangerous young man. It is scarcely surprising to record that GH has been out of the mainstream school system for many years.

3. This present application arose in the following way. GH was placed with a specialised team of three persons in a house, but this placement came to an end on 13th July, 2011. GH then presented at a Garda station where he became aggressive and had to be restrained. He was subsequently brought to Tallaght Hospital where he remained overnight at the accident and emergency section under the supervision of hospital security staff. It appears that GH took an overdose of drugs that evening. Mr. Lavery, his dedicated guardian *ad litem*, gave evidence before me that GH has repeatedly stated that he intends to take his own life.

4. The responsible authority, the National Admissions and Discharge Committee, decided on 13th July, 2011, identified a secure placement at a location in Scotland. However, the consent of the Central Authority under the Brussels II Regulation is required in respect of such a cross-border transfer and it is understood that this will take a further four to eight weeks.

5. On Friday evening 15th July, 2011, following an application to this Court on behalf of GH, Birmingham J. made an order providing that he be placed at a HSE unit with a dedicated social work team. GH gave personal undertakings that he would be of good behaviour, including that he would not assault staff or behave in an abusive fashion. Birmingham J. ordered that GH be produced before the Court later today (Monday, 18th July, 2011) at 4pm.

6. By 1pm on Saturday 16th July, GH's behaviour had deteriorated appreciably and the Gardai at Naas Garda Station were contacted. Sergeant Bowe gave evidence before me that the staff at the unit had been terrified and overwhelmed by his violent conduct. He confirmed that Garda records suggested that there had been over thirty incidents of violence involving this young man logged within a very short period of time. A Garda team then arrested GH and he was ultimately brought before a special sitting of this Court on Saturday night, 16th July, 2011.

7. At that sitting, counsel for the HSE, Mr. McEnroy SC, frankly conceded that the HSE staff could no longer treat this young man given his extraordinarily violent behaviour, although they remained absolutely committed to his welfare and they fully acknowledged their statutory obligations to him virtue of the provisions of ss. 3 and 5 of the Child Care Act 1991.

8. Mr. McEnroy SC then outlined what he suggested were the various options open to the Court. The first option was to treat the breach of the undertakings as a contempt of court. This was not a realistic possibility in the circumstances given that the court order had not contained a penal endorsement, but more especially because the young man had no separate legal representation. The second option was to exercise the Court's inherent jurisdiction and to order the civil detention of GH in St. Patrick's Institution in order to safeguard his welfare.

9. Unpalatable as these options were, there was, perhaps, a third option open to me, namely, to order direct the release of GH. Leaving aside the fact that it was a wet and unseasonably cold July night, GH had no place to go to and he would have been obliged to walk the streets. All three witnesses who gave evidence before me - Mr. Hourican, Sergeant Bowe and the guardian *ad litem* Mr. Lavery - all regarded this latter option as quite unrealistic and even dangerous. All considered that the overwhelming likelihood was that GH would confront members of the public at random and proceed to assault them. A further possibility - perhaps even likelihood - was that GH would present an acute risk to both members of the public and to himself.

10. In this situation, I found myself left with few options, none of them very palatable. I concluded that, subject to the question of my jurisdiction in such matters, the only option available to the Court was to order the civil detention of GH in St. Patrick's Institution pending his production in Court. I should stress that this detention was for the purpose of safeguarding his *welfare* and not for the purposes of punishment. It was desirable that GH be detained in a secure and safe place and St. Patrick's Institution was the only location then available for this purpose. Both Mr. McEnroy and Ms. Stewart SC, counsel for the guardian *ad litem*, both strongly urged that I should adopt this course of action.

**The jurisdiction of this Court**

11. There remains the question of the jurisdiction of this Court to make such an order. The orthodox common law position was that with the exception of the power of a member of An Garda Síochána to effect a purely temporary and transient detention for the purposes of restraining an immediate breach of the peace, the authority for civil detention of this nature had to found in legislation. This is classically illustrated by a decision of the old Irish Court of Appeal in *Connors v. Pearson* [1921] 2 I.R. 51. Here the police had detained a young boy who had been a witness to the Soloheadbeg incident at the start of the War of Independence for two months as a precaution against apprehended violence and intimidation. As Gibson J. observed ([1921] 2 I.R. 51 at 71):-

> "Imprisonment of a possible witness *quia timet* to protect him without his consent from unknown malefactors or intimidation is not within the common law principle of justification and must be authorised, if at all, by statute."

12. On appeal, the Court of Appeal was just as emphatic. As Ronan L.J. stated ([1921] 2 I.R. 75 at 91):-

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

13. Of course, in *Connors* the young boy in question was being detained on a more or less open ended basis by the police against the will of his parents who were willing and able to look after him. Although that case is very different from the present one, nevertheless the suggestion that this common law orthodoxy had been somehow diluted by the enactment of a Constitution which itself so carefully safeguarded personal liberty seems counter-intuitive and, at one level, unappealing. Yet, it must be recalled that Article 40.3.2 of the Constitution also requires the State by its laws to:-

> "protect as best it may from unjust attack and, in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen."

14. In my judgment in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, I stressed that by committing the State to protecting the "person", Article 40.3.2 protects "not simply the integrity of the human body, but also the integrity of the human mind and personality." In that case I held that prison conditions involving the detention of a prisoner in a padded cell for an eleven day period without almost no recreational outlets amounted to a breach of that constitutional obligation. The present case is, of course, again a very different one, but the underlying object and purpose of this constitutional provision is still the same, not least where the subject matter of the litigation is a young man whose personal circumstances cry out for care and attention.

15. In this context, the constitutional obligation to protect the person requires the Court to adopt a holistic approach to the protection of GH's welfare and general best interests. This is underscored by the provisions of Article 42.5:-

> "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of parents, but always with due regard for the natural and imprescriptible rights of the child."

16. The present case is, unfortunately, exceptional, given that the witnesses were at pains to stress the highly unusual behavioural pattern of this young man. While his parents are not represented before me, regrettably it is impossible to avoid the conclusion that, objectively, at least there has been a failure of duty on their part. While the Constitution tacitly recognises that the State can never supply the warmth of a parent's love or the habitual comforts - however modest or frugal - of an ordinary home, it must endeavour to meet that challenge by taking such proportionate measures as are in that child's best interests. The nature of this jurisdiction was fully set out in the judgment of MacMenamin J. in *SS (a minor) v. Health Service Executive* [2007] IEHC 189, [2008] 1 I.R. 594 and I gratefully adopt the elegant and comprehensive statements of principle contained in that judgment.

17. If, then, one poses the question this way: how can a court best effectuate this young man's best interests and thus vindicate his constitutional right to the protection of the person? While acknowledging that the exigencies of this very difficult case admit of no attractive options in the short term pending his transfer to the special Scottish unit, civil detention for a very short time for what I hope may be described as quasi-therapeutic purposes is the least worst option presently available.

18. The Hippocratic admonition - "First, do no harm" - may be thought to apply to decision makers in this environment as much as it does to medical practitioners. Civil detention for a fixed and short period under continuing and constant court supervision ensures that this young man is kept safe in a secure environment pending more elaborate steps being taken for his long term welfare in the relatively near future. Nor has this civil detention been imposed for punitive or even preventative purposes. Every step will be taken by the prison authorities to ensure that his welfare (including his medical needs) will be safeguarded and, should this prove necessary, this Court remains as a general supervisory authority which will act to ensure that these constitutional rights are safeguarded. In that regard and for these reasons, it would seem that this order satisfies the requirements of Article 5 ECHR in the light of the judgment of the European Court of Human Rights in *DG v. Ireland (2002)* 35 E.H.R.R. 1.

19. Nor, even at this stage, should the position of his parents and (not least) his grandparents (who previously acted in *loco parentis*) be overlooked. It is possible that at some future court hearing that they be able to contribute positively to the protection of his welfare, even if in the case of his parents, this prospect seems remote.

**Conclusions**

20. In summary, therefore, I would conclude as follows:-

A. In the light of the inherent jurisdiction so elaborately described by MacMenamin J. in SS, this Court has a power and a duty conferred by Article 40.3 and Article 42.5 of the Constitution to safeguard the constitutional rights of GH.

B. One of those express rights is the State's duty to protect the person in Article 40.3.2. In this particular context, the constitutional obligation to protect the person requires the Court to adopt a holistic approach to the protection of GH's welfare and general best interests. This is underscored by the complementary provisions of Article 42.5 which empowers the courts to intervene with appropriate steps to protect the rights of minors in exceptional cases such as the present one.

C. The civil detention which I have ordered is the least worst solution which was realistically available having regard to the exceptional nature of this case and the acute problems presented by GH's violent behaviour. Such detention was ordered for therapeutic purposes and not for the purposes of punishment or the prevention of crime. It is limited in duration and must be constantly reviewed. While GH remains in the custody of the Governor of St. Patrick's Institution, recourse may be had to this court to ensure that, should it prove necessary, decisions as to his welfare are reviewed by this Court.