Neutral Citation: [2014] IEHC 628

THE HIGH COURT

[2014 No. 134 IA]

BETWEEN

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

V. F. (A PERSON OF UNSOUND MIND NOT SO FOUND REPRESENTED BY HER NEXT FRIEND)

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered the 5th day of December, 2014

1. By notice of motion dated 2nd October, 2014, the plaintiff (the HSE) sought a number of reliefs, including:-

> (a) A declaration that the defendant lacked capacity to consent to the provision of necessary and appropriate medical, nursing, psychiatric treatment and welfare and therapeutic services, or to make directions regarding her accommodation;
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> (b) A declaration that in the existing circumstances the defendant is currently at serious risk as a result of which she is in need of special, therapeutic and welfare services, the effective provision of which requires that she be detained in a secure place;
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> (c) An order pursuant to the inherent jurisdiction of the court authorising the HSE, its servants or agents to place the defendant in the care, maintenance and custody of a nominated care facility for the purpose of the provision of welfare and therapeutic services in the said facility pending further order of the court;
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> (d) An order directing the HSE, its servants or agents to provide the manager and/or director of the facility with all necessary and/or incidental information concerning the care, protection and welfare circumstances of the defendant;
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> (e) An order permitting the manager and/or director of the centre to detain the defendant at the facility for the purposes of providing welfare and therapeutic services to her in the facility pending further order of the court;
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> (f) An order permitting the HSE to make all arrangements necessary to enable the defendant to travel to and in due course, if necessary, return from the said centre;
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> (g) An order permitting the manager and/or director of the facility to take all necessary or incidental steps (including the provision of consent for any educational, medical, psychiatric, psychological or other treatment or assistance) to promote and/or protect the care, protection and welfare circumstances of the defendant;
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> (h) An order permitting the manager or director of the facility to take all necessary steps to ensure the safety and welfare of the defendant in accordance with their policies and procedures.

2. In addition, orders were sought ancillary to the above orders permitting the Commissioner and members of An Garda Síochána to bring the defendant to the care facility and place her in the care and control of its manager or director and/or its servants or agents, and, if she were to abscond from it, to immediately search for, arrest without warrant, and detain her in their custody for a reasonable period of time and return her as soon as practicable to the custody of the manager or director of the care facility. Orders were also sought permitting the officers and staff of the facility to authorise and regulate in their discretion a regime of mobilities out of the centre as may be deemed appropriate, and providing for a regime of regular access between the defendant and her family as may be appropriate in her overall welfare and interests.

3. Orders were also sought permitting the Health Service Executive, its servants or agents to visit the defendant regularly in the care facility and to file reports in court detailing the up to date capacity, care, protection and welfare circumstances (including information on the therapeutic benefit of such a placement) of the defendant until further order, together with such additional orders as may be necessary to regulate her detention.

4. Ms. Anna Cogan, Solicitor, was appointed as *guardian ad litem* to the defendant in these proceedings pursuant to O. 15, r. 19 of the Rules of the Superior Courts. In a cross application the *guardian ad litem* seeks a declaration as to the defendant's capacity and such consequential orders as may be necessary, in respect of the formal review of any finding of lack of decision-making capacity on the part of the defendant. The *guardian ad litem* opposes the invocation of the inherent jurisdiction of the High Court and makes the case that the transfer to the care facility from the approved hospital in which the defendant is presently detained under the Mental Health Act 2001, could be effected under s. 22(1) of the Mental Health Act 2001, and consequently, seeks a declaration that:-

> "As a person detained pursuant to a renewal order made on 10th October, 2014, in accordance with the provisions of the Mental Health Act 2001, s. 15(3), (the defendant) may be transferred by the clinical director of St. Brigid's Hospital, Ardee, County Louth, to (the nominated care facility), pursuant to the provisions of the Mental Health Act 2001, s. 22, with such consequential orders as to the court seems meet in relation to her transfer thereto and detention therein."

In addition, the *guardian ad litem* seeks such consequential orders as may be necessary in relation to the disclosure to her of reports concerning any assessments and investigations carried out in respect of the defendant in the course of her treatment.

Summary of Evidence

5. Dr. MacDara McCauley, Consultant Psychiatrist at St. Brigid's Hospital, Ardee, Ms. F's treating psychiatrist, furnished a report dated 7th October, 2014. He was also in possession of a number of reports from Dr. Jacinta McElligott, Consultant in Rehabilitation Medicine,

Dun Laoghaire, dated 12th February, 2014, Dr. Ronan Gibney, Principal Clinical Neuropsychologist, dated 12th May, 2014, a psychiatric report from Dr. Raju Bangaru dated 19th June, 2014, and in-patient notes on the defendant together with a report from Dr. Suzanne Timmons, Consultant Geriatrician, which outlines the defendant's treatment on her admission to Mallow General Hospital on 8th October, 2009. On that admission she was diagnosed as suffering from Korsakoff/Wernickes Encephalopathy, an amnesic syndrome frequently precipitated by alcohol misuse.

6. Dr. McCauley's report outlines how, as a result of this diagnosis, it became untenable for the defendant to be maintained in the community. She is now 45 years old and exhibited repeated aggressive behaviour towards her parents, as a result of which a barring order was obtained. The defendant regularly breached this order and found herself in prison as a result of charges brought against her. Following a review within the prison it was considered that the local Mental Health Services in County Louth should identify a care plan for her. She was thereafter accepted as an involuntary patient with a view to transferring her to a more suitable neuro-rehabilitation unit. The defendant repeatedly declared that she wished to go home and lacked any understanding that there was anything wrong with her. She remained in the ward at St. Brigid's for several months. In a report obtained on 20th May, 2014, the Nua Health Service indicated that they were happy to offer the defendant a long term residential placement preceded by a standard three month assessment.

7. The defendant's stay at St. Brigid's has been turbulent. She was quite boisterous and wished to go home, and efforts were made to mollify her. She is on regular medication and there have been numerous recorded clashes between the defendant and fellow patients or members of staff. On at least two occasions this necessitated her placement in a seclusion room. It was concluded that the defendant's underlying problems were not suitably addressed within St. Brigid's. Overall, Dr. McCauley was of the opinion that the defendant suffered from an acquired brain injury, Korsakoff/Wernickes Encephalopathy, which is a result of her alcohol misuse over the years. As a result, she lacked the ability to care for herself or to be maintained safely in the community and, therefore, residential placement such as that available at the Nua Centre Facility was best suited to her complex needs. It was difficult to assess the extent of the defendant's cognitive impairment because repeated efforts by her psychologist at St. Brigid's to engage with her, were hampered by her unwillingness to do so.

8. Dr. McCauley informed the court that he had examined the patient the day before the hearing and assessed her capacity. He formed the view that she lacked the capacity to understand the reasons for or the nature of the treatment which she was receiving at St. Brigid's. She repeatedly expressed the wish to go home, though this is an impossibility having regard to the existence of the barring order which she breached in the past. She fails to understand that she is not entitled to return home. She has a serious cognitive defect and an inability to retain knowledge. She has short term memory problems. He was satisfied that she did not have the capacity to instruct a solicitor, or to carry out specific tasks. She lacked the capacity to make decisions concerning her care and welfare or where she should live. She did not have the competence to look after herself. She had a disordered sense of time. Though she was at St. Brigid's for approximately seven months, she maintains that she has only been there for three weeks. Her symptoms are similar to that of dementia in older people. The prognosis for any improvement in her condition is very poor. It is unlikely that her symptoms will be reversed. An MRI scan of her brain illustrated damage consistent with the diagnosis. He had serious doubts about her making any serious life choices, such as entering into a contract, a relationship or a decision to marry.

9. The doctor also stated that he had some concerns about whether the defendant could now be said to have a "mental disorder" as defined by s. 3 of the Mental Health Act 2001. The question of whether she had a mental illness, severe dementia or significant intellectual disability was something about which he had some concerns. However, he was quite satisfied that there was a serious likelihood of her causing immediate and serious harm to herself and to others if she were to leave the hospital. He disagreed with the suggestion that such risk was a "deferred" risk and not immediate (an opinion held by Dr. Larkin Feeney) because of the history of aggression and violence, both within the hospital and towards members of her family which had led to her imprisonment. He was also of the opinion that under s. 3(b)(ii), her continued detention in an approved centre was likely to benefit or alleviate her condition to a material extent because it offered her protection from herself and to others who might be at risk from her. He referred to the extensive report of Dr. Jacinta McElligott, Consultant in Physical and Rehabilitation Medicine at the National Rehabilitation Hospital, Dun Laoghaire in that regard.

10. Dr. McElligott's report sets out in detail Ms. F's personal and medical history. As a child she had obvious and significant difficulties. Her behaviour was regarded as confrontational and very disruptive of family life. She had a significant eating disorder, anorexia and bulimia and difficulties in socialising. She did not complete her secondary education. She attempted to work with her mother in a factory, but was let go for bad attendance. During her adolescence she had a termination of pregnancy at age sixteen, which was very traumatic for her. Her alcohol abuse began in her early teens and compounded an already fraught and difficult family situation. There had been several suicide attempts, persistent alcohol abuse and a number of psychiatric and/or admissions to alcohol and rehabilitation programmes. In 2008 an MRI scan showed encephalitis, secondary to alcohol abuse.

11. In 2009 Ms. F. was admitted "urgently" to hospital. Her parents attended and described her as being in very poor condition, very sick, confused and disconnected. She was admitted and diagnosed as suffering from Korsakoff's syndrome. She was hospitalised for approximately ten weeks and appeared to regain some of her faculties: prescribed medication appeared to assist her progress. However, she demonstrated significant short term memory problems and her family believed that she never recovered her pre-admission capacity. Ms. F left the facility and continued to abuse alcohol. She renewed a relationship with a former boyfriend, and returned to the family home when he was away travelling on business.

12. Matters deteriorated due to Ms. F's alcohol abuse which made her personally aggressive and confrontational and led to violent behaviour towards her parents and others. Further deterioration occurred. Her parents thought that she did not appear able to take care of herself. They accompanied Ms. F to psychiatric services but found them unsatisfactory as the personnel dealing with Ms. F changed on each visit. While Ms. F behaved appropriately at these visits, her behaviour at home continued to decline. She was asked to leave. Her parents provided an allowance for her. She ended up homeless. Her parents provided an apartment for her. She failed to look after her hygiene and her mother called to her every evening to prepare a meal. She was incontinent at times. She continued to attend psychiatric services but during this time made a number of suicide attempts. She was admitted to psychiatric hospitals on a number of occasions.

13. Dr. McElligott described attending upon Ms. F at the Dochas Centre on 12th February, 2014. The following is a summary of her overall impression:-

> • "This unfortunate 44 year old lady with a background history noted for what appears to have been quite a significant confrontational behaviour disorder. A personality disorder from early childhood. (She) was held back at school and did not complete her education. It is not clear whether (she) had a learning disability. She appears to have significant difficulties socialising, making friends and behavioural problems appear to have persisted into adolescence and adulthood.

• Alcohol dependence syndrome appears to have been present in early teenage years, to have persisted to this day and alcohol dependence syndrome appears to have complicated an already very difficult behavioural disorder further disrupting social and family life.

• (Ms. F) appears also to have a history significant for mental health disorders including behavioural, anxiety/depression, multiple psychiatric admissions, multiple suicide attempts, anorexia, bulimia and obsessive compulsive disorder.

• (She) also appears to have suffered a significant and severe acquired brain injury associated with Korsakoffs Encephalopathy in 2009. I have not sight of records from (the hospital). However, she apparently was hospitalised for about ten weeks and was apparently confused, disorientated and (in) poor condition on admission. The family was advised of diagnosis of Korsakoffs syndrome. Recent imaging is consistent with diffuse cerebral and cerebelar atrophy in excess of what could be expected for someone of (her) age. An improvement was noted by family over the course of weeks and months in (2009). However, family would note significant short term memory difficulties persisted in addition to confabulation, poor insight, decline in hygiene and personal care and an escalation of behaviour difficulties. It appears that after discharge from (the hospital in 2009) (Ms. F) never returned to her pre-morbid level of independence and self direction following brain injury associated with Korsakoffs syndrome."

14. Dr. McElligott gave her opinion concerning Ms. F's present state of impairment. She stated:-

• "In my opinion and in view of the very significant decline in self care, social and family functioning and escalating behavioural issues following brain injury in 2009 (Ms. F) appears to have been left with significant short term memory, insight judgment and reasoning deficits associated with Korsakoffs encephalopathy.

• Primary impairments appear secondary to moderate to severe brain injury associated with Korsakoffs syndrome. Clinical assessment of the extent and severity of acquired brain injuries is difficult and complex in view of the pre-existing complex behavioural, personality disorder and/or learning difficulties in addition to chronic alcohol dependency syndrome.

• In this limited clinical encounter it is not possible to tease out the extent of severity and impact of brain injury on cognitive function, executive memory, attention, judgment and reasoning. History and course of events since 2009 would be consistent with significant severe short term memory difficulties, confabulation and executive dysfunction impacting all aspects of cognitive functioning and behaviour. Within limits of my assessment (Ms. F) appears to have preserved abilities in reading, writing, language and mathematics.

• A formal in depth neuropsychological assessment would be necessary and most appropriate to evaluate the extent and severity of cognitive memory executive deficits associated with acquired brain injury and which are impacting all aspects of personal care function, social and family life.

• A formal in depth neuropsychological assessment would be necessary and most appropriate to evaluate the extent and severity of cognitive memory executive deficits associated with acquired brain injury which appear to be impacting mental capacity, judgment and reasoning.

Activity Limitation
• (Ms. F) requires 24 hour care and support in a structured supported environment with care givers who are trained in the management of persons with brain injury and alcohol dependence syndrome. (Ms. F) requires this degree of support to maintain basic nutrition, hydration, personal care and wellbeing.

Participation Restrictions
• (Ms. F) is unable to return to independent living. She is unable to return to independent community and/or social participation. (She) requires 24 hour care and support in a structured supported residential environment with care givers who are trained in the management of persons with brain injury and alcohol dependent syndrome."

15. Dr. McElligott set out a series of recommendations in her report emphasising that a formal in depth neuropsychological assessment was necessary and the most appropriate to evaluate the extent and severity of the cognitive, memory and executive deficits associated with Ms. F's acquired brain injury in order to evaluate these deficits which appear to be affecting her mental capacity, judgment and reasoning. Unless such a study indicated otherwise, her assessment was that Ms. F did not have the mental capacity to comprehend proceedings before the court (at the time criminal proceedings) or to instruct her solicitor. She recommended the consideration of a transfer or admission to an appropriate neuropsychiatric or neuropsychological in-patient programme for further evaluation and management of the complex issues related to her impairments. In the longer term a referral and admission to a dedicated neuro-behavioural brain surgery in-patient and residential service was considered appropriate following further multidisciplinary neuropsychiatric/neuropsychological and rehabilitation consultation and recommendation. Dr. McElligott also concluded that the prognosis was poor for neurological improvement related to brain injury four years after the event, and impairments at this time "would be anticipated to be permanent". However, she believed the prognosis for function improvement in relation to hygiene, nutrition, self care, social and community participation was fair to good in an appropriate structured residential environment with one to one supervision and support by trained carers and no access to alcohol. The prognosis for returning Mr. F to independent living was poor in view of the severity of her acquired brain injury and cognitive memory and executive deficits, as well as the background history of behavioural disorder and severe alcohol dependency syndrome. She advised long term planning for placement in an appropriate residential support facility.

16. In a letter dated 16th September, 2014, an initial needs assessment was carried out on Ms. F by Nua Health, which was capable of providing the services recommended by Dr. McElligott. That letter stated:-

"Based on our preliminary observations of (Ms. F) and having spoken to her staff on the ward and subject to receiving signed contracts we are happy to offer (her) a long term residential placement, preceded by a standard three month assessment. Nua Health Care reserve the right to refer the individual back to the HSE during that time if our service is deemed inappropriate. At this point in time we are confident that we can meet (Ms. F's) needs on an ongoing basis…"

The letter notes that (Ms. F) will be afforded access to a broad range of day services and outreach activities suitable to her needs, wants and aspirations. Her day plan would be developed in conjunction with her overall individual support plan. She would be registered with a general practitioner. During the assessment period she would have access to the centre's multidisciplinary team as required, which included psychiatry, neuropsychiatry, behavioural psychology and other services.

17. Dr. Raju Bangaru, a Consultant Psychiatrist, also furnished a report dated 20th June, 2014, having consulted with Dr. McCauley. He assessed Ms. F the previous day and reviewed the medical case notes available at St. Brigid's Hospital. He had access to various reports including that of Dr. McElligott and Dr. Ronan Gibney, a Clinical Neuropsychologist, and the information set out above. On that basis, and on his own assessment of the patient, he concluded that she fulfilled the criteria for mental disorder under s. 3(1)(a) and (b) of the Mental Health Act 2001. He was of the opinion that if there was no legal plan in place to effectively manage the risk of her absconding or re-offending while residing in the new proposed placement, the Nua Health Centre could not possibly manage her safely in the community and this was also likely to cause further deterioration in her mental condition, and increase her risk of re-offending. It would also cause more psychosocial stress to her parents. He recommended a speedy resolution to sorting out a legal plan to help with her new placement. He believed that until then, Ms. F's appropriate treatment in care could only be provided under s. 3(1)(a) and (b) of the Mental Health Act 2001.

18. Dr. Helen O'Neill, Consultant Forensic Psychiatrist, was asked to furnish an opinion by the judge presiding at Drogheda District Court in respect of Ms. F, which he did on 27th March, 2014. Ms. F had been remanded in custody charged with a number of offences, including contravention of a barring order at her parents home, theft, two counts of intoxication in a public place and assault contrary to s. 2 of the Non-Fatal Offences against the Person Act 1997. Dr. O'Neill liaised with the relevant clinical and HSE management personnel in the Louth area regarding a management plan for her. She concluded that Ms. F required a high level of support and supervision in the community in the long term. Without this, she would inevitably resume drinking and continue to offend in a similar pattern as evident from her history. She required a firm and comprehensive care plan to be put in place to meet her complex needs. She was also of the view that there was clinical imaging evidence that Ms. F was suffering from an organic brain disorder. This was secondary to alcohol abuse. She required a high level of support and supervision in the community in the long term. A management plan was, at that time, agreed with the HSE as follows:-

> "If Ms. F is released from custody on 28th March, 2014, she will be admitted to St. Brigid's Hospital, Ardee, under the Mental Health Act 2001, on that date. A team of nurses (Assisted Admissions Team) will transport Ms. F from Drogheda District Court to St. Brigid's. The necessary pre-admission forms have been completed and on arrival in St. Brigid's Hospital the receiving consultant psychiatrist there will complete the admission process.
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> As indicated in the attached correspondence to myself (undated) from Ms. Michelle Donnelly, Social Inclusion Manager, Primary Care Services, Dundalk, the HSE will further assess Ms. F during her admission to St. Brigid's with a view to placement in a residential service for an initial three months. The HSE will also seek to provide the appropriate setting for Ms. F based on that assessment for the long term…"

19. Having been detained in custody since December, 2013 this plan was put into place on 28th March, 2014, as agreed and Ms. F was detained in St. Brigid's initially until 15th May and thereafter, on a six month renewal order made on that date which was approved on 3rd June, and a further renewal order made on 10th October which expires on 10th December.

20. An independent report was commissioned by the *guardian ad litem* from Dr. Larkin Feeney, Consultant Psychiatrist Cluan Mhuire Service, Blackrock, who furnished a report dated 17th October. He had access to the medical records and the reports referred to above, and met with Ms. F on 15th October. He discussed the case with Dr. McCauley. He set out a history which accords with the history set out in the other reports reviewed in this judgment, and was satisfied that Ms. F had grossly disordered recent memory, reasoning, judgment and self awareness. Her immediate recall was relatively preserved, but she had no insight into her current situation. He thought it extremely unlikely that Ms. F would recover to the point of being able to live independently again. He concluded that her cognitive condition appeared to have been quite static in hospital over the previous six months, but the limited opportunity he had to assess her in that regard indicated that there had been little or no change since an assessment by an occupational therapist in April, 2014. He concluded that Ms. F would need long term care in a facility that caters to her complex needs. He stated:-

> "The Acute Admissions Ward of a psychiatric hospital is not the best place to meet these needs. There are risks associated with sustaining such an admission due to the frequent changes in personnel and the constant exposure to acute mental illness. In her case, I note the emergence of some institutional behaviour. A placement in a more suitable facility should lead to behavioural improvement as well as enhancing her quality of life."

21. Dr. Feeney recommended that Ms. F have access to a multidisciplinary team who would be able to plan a programme of care for her that would address her behavioural difficulties, minimise her stress, maximise her function and recovery and enhance her quality of life. He agreed that the Nua Health Care facility would be able to meet her complex needs. While noting that Ms. F could be admitted to this facility without a legal order in place in the same way that assenting persons without decision-making capacity may be transferred to long term facilities, he believed that in her case this would be an inappropriate manner in which to proceed. He concluded that she would very likely try to leave on a regular basis and "may behave in an aggressive manner if her freedom is restricted. I think in her case it will be important to have a legal framework in place in ensure that she continues to receive appropriate care". He accepted that on occasions patients have been transferred to nursing homes and other facilities having been given leave under s. 26 of the Mental Health Act 2001, during which period the order is revoked once the patient has settled into the new environment, but this was not a practical solution for Ms. F's serious difficulties.

22. Evidence also indicates a very high level of care and support and dedication to Ms. F by her parents throughout her life and, in particular, over the traumatic events of the last twelve months. They visit her daily and have offered her every conceivable material and emotional support, notwithstanding the enormous stress and demands made upon them by their daughter's condition and by what they perceive from time to time as the failure of the Health Service to embrace their daughter's problems fully when the occasion demands. The cause of that element of pain and frustration is, perhaps, exemplified by the legal conundrum which the court faces at this stage of their daughter's treatment. I should also note that it should be part of any management plan for Ms. F that the HSE should make full and adequate provision to ensure the level of access to her that the parents wish to maintain, is maintained, and that every assistance is given to them in this regard. They should be consulted and informed of developments and applications in relation to their daughter's welfare and care, and their views should be ascertained and considered.

23. From all of the above medical evidence it is clear that the proposed transfer of Ms. F to the Nua Health Centre is in accordance with the professional opinion of all those who have reviewed her case, and is in her best interests and welfare. I am satisfied on the balance of probabilities on the basis of the evidence adduced that she does not have the capacity to decide essential life matters for herself, such as whether to leave a hospital, or her future living arrangements. She has no capacity to instruct lawyers or understand the conduct of legal proceedings, civil or criminal. She had no understanding that she is barred from her parents home or that she had done anything wrong in the past. She is totally incapable of independent living and looking after herself or providing for her basic needs. How is Ms. F's health, safety and life to be looked after in the future?

The Mental Health Act 2001

24. Ms. F at present is detained under and in accordance with the provisions of the Mental Health Act 2001, at St. Brigid's Hospital, Ardee, having been admitted there on 28th March. No question arises in these proceedings as to whether she is lawfully detained there. However, the question of whether she may be transferred under the present detention order to the Nua Health Centre proposed under the provisions of the Mental Health Act, must be considered. The following sections of the Act are relevant:-

> "3.—(1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where—
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> (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
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> (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
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> (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…
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> 22.—(1) A clinical director of an approved centre may arrange for the transfer of a patient detained in that centre for treatment to a hospital or other place and for his or her detention there for that purpose.
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> (2) A patient removed under this section to a hospital or other place may be kept there so long as is necessary for the purpose of his or her treatment and shall then be taken back to the approved centre from which he or she was transferred.
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> (3) The detention of a patient in a hospital or other place under this section shall be deemed for the purposes of this Act to be detention in the centre from which he or she was transferred…
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> 26.—(1) The consultant psychiatrist responsible for the care and treatment of a patient may grant permission in writing to the patient to be absent from the approved centre concerned for such period as he or she may specify in the permission being a period less than the unexpired period provided for in the relevant admission order, the relevant renewal order or the relevant order under section 25 , as the case may be, and the permission may be made subject to such conditions as he or she considers appropriate and so specifies.
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> (2) Where a patient is absent from an approved centre pursuant to subsection (1), the consultant psychiatrist may, if he or she is of opinion that it is in the interests of the patient to do so, withdraw the permission granted under subsection (1) and direct the patient in writing to return to the approved centre."

Section 2 provides that "treatment" in relation to a patient "includes the administration of physical, psychological and other remedies relating to the care and rehabilitation of a patient under medical supervision intended for the purposes of ameliorating a mental disorder". Section 4 provides that in making a decision under the Act concerning the care and treatment of a person "the best interests of the person shall be the principal consideration and with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made". Section 4(3) states that in making a decision under the Act concerning the care or treatment of a person, due regard shall be given to the need to respect "the right of the person to dignity, bodily integrity, privacy and autonomy".

25. Under s. 8 a person who is involuntarily admitted to an approved centre following an application so to do under ss. 9 or 12 of the Act may be detained there on the grounds that she is suffering from a mental disorder. A person may not be detained pursuant to the Act in a place other than an approved centre, which the Nua Centre is not. An approved centre must be registered as such with the Mental Health Commission and is subject to the rules and guidelines imposed by the Commission. The Act contains a number of provisions prohibiting the operation of unregistered centres and provides a statutory framework for their registration and regulation.

26. Provision has been made for the transfer of a patient under the Mental Health Act to another approved centre under section 20. A patient or a person on behalf of the patient may apply to seek a transfer which must be approved by the clinical director of the centre. The Mental Health Commission must be notified if such a transfer takes place. The original detention order continues to remain in force in respect of the new approved centre.

27. Section 21 provides that where the clinical director of an approved centre is of the opinion that it would be for the benefit of a patient detained, or that it is necessary for the purpose of obtaining special treatment for such a patient, that he or she should be transferred to another approved centre other than the Central Mental Hospital, the clinical director may arrange for the transfer of the patient to that centre with the consent of that centre's clinical director. If it is proposed to transfer the patient to the Central Mental Hospital for the patient's benefit or for special treatment, this may be done but the Mental Health Commission must be notified in writing of the proposal which must be referred to a Tribunal.

28. Section 22 provides that a clinical director of an approved centre may arrange for the transfer of a patient "for treatment to a hospital or other place and for his or her detention there for that purpose". The duration of the detention in the "hospital or other place" may only be for "so long as is necessary for the purposes of his or her treatment" and the patient must then be taken back to the approved centre from which he or she is transferred. This period of detention is deemed to be detention in the centre from which he or she was transferred. As quoted above "treatment" includes "the administration of physical, psychological and other remedies relating to the care and rehabilitation of a patient under medical supervision intended for the purposes of ameliorating a mental disorder". While this section clearly covers the transfer of a patient to a general hospital for medical or surgical treatment and the patient's return to the approved centre following that treatment, the definition of "treatment" under s. 2 also embraces the temporary removal to a "hospital or other place" for the administration of remedies in relation to the care and rehabilitation of the patient under medical supervision which is intended to ameliorate "a mental disorder". The period spent in that "hospital or other place" is also deemed to be detention in the approved centre from which the person was transferred.

29. Section 22(2) clearly contemplates the return of the patient after treatment to the original approved centre. The evidence is that the section is used, in practice, only for temporary transfers for medical treatment in a hospital or medical unit designed to dispense such treatment to a mental health patient on a temporary basis, but is not used to transfer a patient to receive further psychiatric treatment at an unapproved centre for an unspecified period, or for a period that would last the full extent of the detention or renewal period permitted under the Act. I am satisfied that this practice is in accordance with the spirit, intention and the general

scheme of the Act. The purpose and intention of Part V of the Act is to regulate the conditions of detention of a person who has been deprived of his or her personal liberty for the purpose of treatment in an approved centre. It would be wholly incompatible with the statutory scheme if a patient were to be removed from an approved centre for an extended period of time or for the whole or part of the period of the detention order, and detained in an unapproved centre for treatment in respect of a mental disorder. If the section were to be applied in that way, a transfer to an unapproved place for an extended period could then take place without the protections applicable to a transfer to an approved institution under s. 21 which requires the clinical director to be of the opinion that a transfer would be for the benefit of the patient detained in the approved centre, or that it is necessary for the purpose of obtaining special treatment for that patient. In addition, the operation of the section in that way might lead to a more extensive use of unapproved centres for the treatment of mental disorder which is the very mischief which the regulation of Approved Centres is designed to avoid.

30. Section 26 of the Act provides for the granting of leave to a patient to leave the approved centre subject to conditions during the duration of the order. This is clearly a provision designed to assist in the treatment of patients to enable their return to the community as part of the management of their care. It does not address the issue which arises in this case, where a stage is reached in the treatment and care of the patient requiring her transfer to a care facility appropriate to her needs, but which necessarily involves and requires a restriction on her liberty in an unapproved centre.

31. It is submitted by counsel for the *guardian ad litem* that s. 22 contemplates the transfer of a patient to an unapproved centre for treatment the definition of which under s. 2 is wider than the ambit of treatment for mental disorder as defined under the Act, but includes such care and treatment as is necessarily required for Ms. F's condition. It is submitted that such a transfer may operate for the duration of the order made under the Mental Health Act. There are a number of difficulties with this submission. Firstly, Dr. Feeney is not satisfied that Ms. F qualifies as a person who ought to be the subject of a detention order at this stage or in the future, given the nature of her condition. Dr. McCauley has expressed considerable reservation as to whether she suffers from a mental disorder within the meaning of the Act and could be properly so regarded at this stage. Secondly, it is unlikely that a further detention order will be made beyond 10th December in her case, and this was confirmed to the court by counsel for the HSE. At that stage there will be no legal mechanism in place whereby Ms. F may be lawfully detained or returned to St. Brigid's in order to provide her with the essential treatment, care and attention that all agree is essential to her continued welfare and safety. Thirdly, the section clearly contemplates the return of the patient to the approved centre following a short term stay for treatment outside the approved centre. The length of the transfer proposed for Ms. F will be long term and probably life long. Fourthly, it is now agreed by all doctors who advised in this case that it is necessary to include a coercive element requiring an order depriving her of her liberty. The court is not satisfied that the provisions of the Mental Health Act may be used to effect her transfer under s. 22 to the unapproved centre when the reality is that she will not be returned to St. Brigid's, that the order will lapse on 10th December, and that she will, nevertheless, be required to be detained albeit not under section 3. There is, in the court's view, a lacuna in the legislation which does not provide for the making of a detention order for the purpose of treating a person with Ms. F's condition, and that failure to do so will result in a real and substantial risk to her health, safety and life which will be entirely contrary to her best interests and welfare. Since the Mental Health Act 2001, does not provide for the needs of someone with Ms. F's mental incapacities, or for her transfer and detention in an appropriate centre which does, I am satisfied, for the reasons which follows, that the inherent jurisdiction of the court may be invoked notwithstanding the existence of an order under the 2001 Act, in order to facilitate her transfer from St. Brigid's to a care centre which will provide for her needs in a secured environment made possible by an order of the court.

Jurisdiction of the Court

32. The HSE, because of the lacuna in the legislation which prevents the transfer of Ms. F to an approved centre, seeks to invoke the inherent jurisdiction of the court under the Constitution. It is submitted that in defined and exceptional circumstances the High Court in the exercise its inherent constitutional jurisdiction to respect, defend and vindicate the rights of citizens may, for defined periods and subject to periodic review by the court, order the detention of a person in a care unit in their best interests or welfare. The jurisdiction relied upon is similar to that exercised in respect of minors who may be at severe risk and in need of a high level of therapeutic care in a secure setting, even though they do not meet the criteria for detention under the Mental Health Act.

33. In *D.G. v. Eastern Health Board* [1997] 3 I.R. 511, the Supreme Court determined that the High Court had an inherent jurisdiction to order the detention of a child in the care of the HSE in his best interests and welfare, but only in very limited circumstances. The court held that the High Court had jurisdiction to do all things necessary to vindicate the personal rights of the child, and that it had an inherent jurisdiction to direct a child's detention in a prison because of the failure of the State to provide an appropriate facility to care for the particular needs of the child applicant. The child needed to be detained in a secure unit where he could be looked after appropriately. He was not mentally ill but was a serious danger to himself and others on the medical evidence available. He had absconded from non-secure institutions and failed to cooperate in the carrying out of a psychiatric assessment upon him in the past. Hamilton C.J. stated:-

> "It is obvious from a consideration of the judgment of the learned trial judge that he was confronted with a very difficult question of what he was to do with a view to vindicating the applicant's constitutional rights and ensuring, as best he could, the promotion of his welfare and that he was fully aware that in determining this issue he had to have regard to the welfare of the applicant as of paramount consideration to him, and that he was under an obligation to uphold the applicant's constitutional entitlements as a minor and to ensure insofar as he could that his needs were catered for…"

34. The learned Chief Justice noted that a number of constitutional rights were engaged in such an application, firstly, the right to personal liberty and secondly, the unenumerated rights which the child had under Article 40.3 of the Constitution. This conflict of rights was resolved by the detention of the child in his best interests. It was held that the welfare of the applicant took precedence over the right to liberty and there was ample evidence for the decision of the High Court in that regard. He added that:-

> "The jurisdiction, which I have held, is vested in the High Court, is a jurisdiction 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."

35. In what he regarded as a novel application, Birmingham J. in *J.O'B. v. Health Service Executive* [2011] IEHC 73, was invited to grant declarations that a young adult man lacked capacity to make decisions in respect of his treatment and welfare on the grounds that he was in need of an appropriate and continuous regime of clinical, medical and nursing treatment in an "environment of therapeutic security" and that this was in his best interests and welfare. A further declaration was sought that the Central Mental Hospital was the appropriate centre in Ireland to cater for his needs. He was not suffering from a mental illness or disorder as defined by s. 3 of the Act. The learned judge was satisfied, in accordance with the principles laid down in *D.G.*, to intervene to make the declarations sought. However, he noted the obvious difference that applied between the order sought in relation to children in need of therapeutic care and a case in which an order is sought to detain an adult in order to provide such care. In the case of the child, it

is hoped and expected that the period in secure care would be relatively brief and that the child would be able to move on to their families or a step down facility. In the case of *J.O'B.*, it was clear that the detention would be lengthy as it is in the case of Ms. F.

36. The court in considering the application must have regard to the constitutional and European Convention Rights of Ms. F. It is clear on the evidence that Ms. F. is of unsound mind in the sense in which that term is used in the case law of the European Court of Human Rights and suffers from a disabling lack of capacity as described in the medical evidence which requires that she be treated in a secure care unit. As stated by Hamilton C.J. in *In re a Ward of Court (No. 2)* [1996] 2 I.R. 79:-

> "The loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy, including self-determination and, [in that case] the right to refuse medical care or treatment." (At page 126)

37. Article 40.3.1 of the Constitution provides:-

> "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 citizen."

Article 40.3.2 states:-

> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

Article 40.4.1 provides:-

> "No citizen shall be deprived of his personal liberty save in accordance with law."

38. Ms. F. is also entitled to the protections of Articles 5, 6 and 8 of the European Convention on Human Rights.

39. The declarations sought involve a serious intrusion on Ms. F's right to liberty. In order to justify deprivation of her liberty, the HSE must demonstrate on the balance of probabilities that this exceptional measure is justified in order to maintain and preserve her health and life. In this case, there is overwhelming evidence of the threat posed to Ms. F's life and personal safety and security by her return to the community and that it is essential due to her lack of insight and capacity that she be placed in a secure unit because of her complete inability to take care of her most basic needs. The object of the detention is to provide that care and thereby protect her life, and bodily integrity in accordance with the obligation imposed on the State under Article 40.3.2. The court must strike a balance between the applicant's right to personal liberty and the danger posed by her condition to her right to life and personal safety, and the personal safety of others. The latter would be preserved and vindicated by the restriction of the former. The court considers the deprivation of liberty in those circumstances to be rationally connected to the pressing and substantial need to ensure her life, health and safety. It considers that detention in a secure unit is the least restrictive way of ensuring her wellbeing, care and safety and that the order sought is proportionate to that objective. It is also an order that has due regard to the nature and hierarchy of the rights in issue, and the paramount importance of her right to life. In that regard, the option of an open facility was considered by Dr. Feeney to be too much of a risk as she would abscond. The more high security psychiatric hospital was considered and thought to be detrimental to her wellbeing as she was dis-improving and becoming institutionalised. In reaching its decision, the court has also considered the best interests of Ms. F. as the paramount consideration in the application and is satisfied that the transfer is fully in accordance with her best interests and welfare.

40. In making this order, the court does not wish it to be understood that an order may be made as a matter of course. It is rare and exceptional order. The court is making this order in the unusual circumstances of the case and has been informed that there are no more than a handful of such cases with which it might be faced from time to time. However, these cases arise because of a lacuna in the legislation. As noted in *S.S. (A Minor) v. Health Service Executive* [2008] 1 I.R. 594, this type of application should not be allowed to evolve into a preferred option. I respectfully agree with MacMenamin J. in that case in respect of a lacuna in children's legislation which required a similar application that:-

> "The subject requires a legislative framework to remove the potential for over subjectivity in interpretation and application. The frequent invocation and exercise of exceptional constitutional powers, absent principles of application or, any statutory or regulatory framework is undesirable. The absence of a statutory framework in this area gives rise to yet further complexity by the frequent simultaneous exercise of jurisdiction by more than one court."

41. The danger is that the same difficulties will arise in respect of applications for long term care in secured therapeutic environments which are unapproved under the Mental Health Act. This will lead to applications to the High Court for further care orders which involve periodic review of the necessity for the continued detention of the patient. The oversight of the care and treatment of persons with mental incapacity on a day to day basis would be better addressed by the appropriate professionals within an improved statutory framework which with its present lacuna gave rise to this problem.

The European Convention on Human Rights

42. The following articles of the European Convention are relevant:-

> "Article 5
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:…
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind…
>
> Article 6
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…
>
> Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

43. It is clear from the case law of the European Court of Human Rights since *Winterwerp v. Netherlands* (24th October, 1979, Application No. 6301/73) that an individual cannot be deprived of his liberty as being of "unsound mind" unless three minimal requirements are met. The individual must be shown to be of unsound mind. The mental disorder must be of a kind or degree that warrants compulsory confinement. The validity of the continued confinement depends on the persistence of the disorder or unsoundness of mind. In *Winterwerp*, the court was satisfied that "persons of unsound mind" was a term "whose meaning is continually evolving as research and psychiatry progresses, an increasing inflexibility in treatment is developing and society's attitudes to mental illness change, in particular so that a greater understanding of problems of mental patients is becoming more widespread".

44. The court was satisfied that except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind" in the form of "a true mental disorder" which calls for objective mental expertise. The court required that the mental disorder must of a kind or degree warranting compulsory confinement. A review of the deprivation of liberty should be available at reasonable intervals.

45. In *Pleso v. Hungary* (Application No. 41242/08), the court emphasised that involuntary hospitalisation may be used only as a last resort for want of a less invasive alternative and only if it carries true health benefits without imposing a disproportionate burden on the person concerned. The core right of personal liberty was at stake. The contracting State's margin of appreciation "cannot be construed as wide in this field".

46. In *Mihalovs v. Latvia* (Application No. 35939/10, 22nd January, 2013), the court stated that the restriction on liberty should be "the least restrictive alternative". It held that domestic authorities should take a careful approach in assessing whether or not an applicant's condition warranted his placement in a secured unit as such detention could only be warranted for "very weighty reasons". In that case, there was no evidence that the patient would not submit to treatment voluntarily or that any consideration was given to a possibility of treating the applicant as an out patient.

47. I am satisfied that on the evidence set out above, very careful consideration was given by the doctors involved. The options available for her treatment and care are so limited that each of the doctors was satisfied that there was no less restrictive way of ensuring her life, safety and health than by placing her in a secure unit. The court is satisfied that this accords with the principles set out in the above case law. The making of the order sought will not infringe her rights under Article 5. However, it is imperative that her continued detention in the Nua Health Centre be reviewed at regular and short intervals. In any event, this is a necessary requirement under the provisions of Irish law having regard to the decisions in *D.G.*, *J.O'B.* and *S.S.*, cited above.

Review of Capacity

48. The court is also concerned that the precise cognitive deficit suffered by the applicant be investigated as recommended earlier this year by way of neuropsychological assessment. This may also assist in ascertaining the level of capacity at which the applicant is operating. All doctors are agreed that her functioning capacity in respect of major decisions in her life is severely deficient. She is unable to look after herself in terms of hygiene and other basic matters. However, there is a level at which she retains capacity which if possible needs to be identified so that her rights under Article 8 of the Convention and her rights to respect for her dignity and as a person under the Constitution may be respected and protected. The court will therefore direct the preparation of the neuropsychological assessment to assist the court in any future orders that may be required in that regard.

Conclusion

49. For all of the above reasons, the court will grant the declarations sought by the HSE and the relevant ancillary orders required in order to ensure Ms. F. obtains the appropriate care and attention in a secure unit. The neuropsychological report has already been sought but will take some time to prepare. The assessment by Nua Health Centre will take three months. In accordance with the principles set out in *D.G.*, *J.O'B.* and *S.S.*, a review must take place of Ms. F's detention and treatment in the Nua Centre following her transfer within a short period, followed by periodic reviews thereafter. Accordingly, the court will put the matter in for review two months from today.