THE SUPREME COURT

Supreme Court Record No. S:AP:IE:2018:000122

Between:-

AC AND OTHERS

Applicants

-and-

CORK UNIVERSITY HOSPITAL AND OTHERS

Respondents

-and-

GENERAL SOLICITOR FOR MINORS AND WARDS OF COURT

Notice Party

-and-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

*Amicus Curiae*

AND

Supreme Court Record No. S:AP:IE:2018:000126

Between:-



AC

Applicant

-and-

[redacted] DIRECTOR OF NURSING AT [redacted] NURSING HOME AND OTHERS

Respondents

-and-

GENERAL SOLICITOR FOR MINORS AND WARDS OF COURT

Notice Party

-and-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

*Amicus Curiae*

## SUBMISSIONS OF THE *AMICUS CURIAE*

### A. INTRODUCTION

1. In the first appeal, the Health Service Executive ('HSE') appeals against a judgment of the Court of Appeal (*per* Hogan J) of 2 July 2018 on an application under Article 40.4.2 of the Constitution which found that Ms [redacted] a woman in her 90s from Co. Cork, was unlawfully detained by staff at Cork University Hospital ('CUH') on 23 June 2016. Proceedings were brought on

Ms [redacted] behalf by her son, [redacted]. In the second appeal, Ms [redacted] acting again through her son, appeals against the judgment of the High Court (Faherty J) of 3 August 2018, on an Article 40 application, that Ms [redacted] was not unlawfully detained in [redacted]s Hospital, Cork on 30 July 2018, an order having been made by the President of the High Court in wardship for her detention on 23 July 2018. Leave to appeal was granted in the appeals in determinations dated 25 September 2018 and 11 September 2018 respectively.

2. The Irish Human Rights and Equality Commission ('IHREC') was granted liberty to appear in these appeals as *amicus curiae* in accordance with section 10(2)(e) of the Irish Human Rights and Equality Commission Act 2014 by Order dated 17 October 2018. Under section 10(2)(e) of the Act of 2014, IHREC's statutory functions include making application for liberty to appear as *amicus curiae* in proceedings 'that involve or are concerned with the human rights or equality rights of any person.' The role of an *amicus curiae* is to assist the Court in determining the issues before it.[1]

3. As appears from the various notices of the parties, the determinations of the Court and the submissions already filed, the issues before the Court in the present appeals are:

(a) Whether Ms [redacted] was detained other than in accordance with law by the staff of Cork University Hospital on 23 June 2016 and thereafter;

(b) Whether the orders made detaining Ms [redacted] in the wardship proceedings on 23 July 2018 were made in accordance with the fundamental rights guaranteed by the Constitution and/or are incompatible with legally binding obligations under the European Convention on Human Rights 1950 ('ECHR'); and

[1] *HI v. Minister for Justice, Equality and Law Reform* [2003] 3 IR 197, 203.

(c) Whether [redacted] had *locus standi* to maintain Article 40.4.2 proceedings after Ms [redacted] was received into wardship by the President of the High Court on 19 August 2016, and to be heard in argument. Although this could in principle be regarded as a threshold issue, IHREC notes and supports the position of the HSE that the first two issues should be addressed in any event even if the HSE's appeal were to succeed.

4. The factual background to the appeals is set out in the judgments under appeal and in the submissions of the parties. IHREC notes that [redacted] who was born on [redacted] is now 96 years old and suffers from multiple medical conditions, including osteoporosis and epilepsy. While she has some cognitive impairment caused by the onset of senile dementia, she is nevertheless capable of expressing herself verbally. Ms [redacted] was made a ward of court on 19 August 2016, with the General Solicitor appointed as her Committee.

5. Ms [redacted] s long-term physical and mental impairments hinder her full and effective participation in society. She is therefore 'a person with disabilities' in the sense that that term is used in Article 1 of the United Nations Convention on the Rights of Persons with Disabilities 2006 ('UNCRPD'), which Ireland ratified on 20 March 2018.[2]

6. In IHREC's submission, the UNCRPD, though not directly incorporated, is a useful normative guide for the Court in interpreting the scope and content of Ms [redacted] s constitutional rights. The Constitution is 'a living document' which 'falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores'. International treaties are of assistance in identifying how principles and rights develop.[3] Ratification of the UNCRPD signals Ireland's embrace of an approach to disability which rejects

[2] United Nations Convention on the Rights of Persons with Disabilities 2006, UN Doc A/RES/61/106, Annex I, 2515 United Nations Treaty Series 3. . The Convention has yet to be added to the Irish Treaty Series.

[3] *McGee v. Attorney General* [1974] IR 284, 319; *Sinnott v. Minister for Education* [2001] 2 IR 454, 680; and *A v. Governor of Arbour Hill* [2006] 4 IR 88, 151; *NHV v. Minister for Justice and Equality* [2018] 1 IR 246, 314.

paternalism and emphasises the dignity, autonomy and equality of the individual person with disabilities, the removal of societal barriers to their enjoyment of the participation in the community, and the adoption of structural measures to assist them in maximising their capabilities.

7. The HSE's position in these appeals, which is supported by the Committee, is based on what it perceives to be in Ms [redacted]'s best interests. In defence of the CUH staff's decision not to allow Ms [redacted] to be discharged into the care of her family on 23 June 2016, the HSE argues that releasing her home in the absence of a comprehensive care package would not have been in her best interests. Equally, when the HSE applied to the President of the High Court for orders detaining Ms [redacted] in [redacted]'s Nursing Home (to which she had been transferred in December 2016), they argued that permitting her family to take her home was contrary to her best interests. In this regard, the approach of the HSE has been paternalistic, in that it centres not on what Ms [redacted] wants but on what the HSE thinks is good for her.[4]

8. Paternalism was until relatively recently the default approach of the Irish courts to cases involving people with disabilities. The first reference to it occurs in the 1949 case of *In re Philip Clarke*, which concerned a challenge to a provision of the Mental Treatment Act 1945 by a person detained under it. The Supreme Court (O'Byrne J) held:

> *The impugned legislation is of a paternal character, clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and well-being of the public generally. The existence of mental infirmity is too widespread to be overlooked, and was, no doubt, present to the minds of the draughtsmen when it was proclaimed in Art. 40, 1, of the Constitution that, though all citizens, as human beings, are to be held equal before the law, the State may, nevertheless, in its enactments, have due regard to differences of capacity, physical and moral, and of social function. We*

[4] B Kelly *Dignity, Mental Health and Human Rights: Coercion and the Law* (Ashgate, Dublin, 2016) 24.

*do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity, to remain at large to the possible danger of themselves and others.*[5]

9. In *Croke v. Smith (No 2)*, the Supreme Court (Hamilton CJ) quoted this statement twice, overturning the High Court judgment of Budd J who had ventured, optimistically, that 'the certainties implicit in the judgment in *Clarke*'s case in 1949 may be diluted by now.'[6] The *Clarke* precedent was endorsed again by the Supreme Court in *Gooden v. St Otteran's Hospital*.[7]

10. The paternalistic jurisdiction of the State to care for the disabled is a recurring leitmotif in the subsequent jurisprudence.[8] As recently as 2014, the Supreme Court in *FX v. Clinical Director of the CMH* could 'readily accept' that the Criminal Law (Insanity) Act 2006 should be given a paternalistic interpretation.[9] In the context of wardship, the paternalistic 'best interests' test is consistently applied.[10]

11. However, the paternalistic approach may need to be reviewed in light of recent developments in this area of the law. On 13 December 2006, the UNCRPD was adopted by the UN General Assembly by unanimous vote, signalling a global consensus on a new understanding of disability. Ireland voted for its adoption and signed it on 30 March 2007.[11] The UNCRPD restates rights guaranteed already by other international instruments –including the right to liberty - with particular reference to the needs of persons with disabilities, so that, for example, the right to equality and non-discrimination, already protected by the

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[5] *In re Philip Clarke* [1950] IR 235, 247-248.
[6] *Croke v. Smith (No 2)* [1998] 1 IR 112, 113 and 132. See also the judgment of the High Court, Unreported, Budd J, 27 and 31 July, 1995, p 124.
[7] *Gooden v. St Otteran's Hospital* [2005] 3 IR 617, 631 (McGuinness J) and 639-640 (Hardiman J).
[8] *MR v. Byrne* [2007] 3 IR 211, 224; *EH v. Clinical Director of St Vincent's Hospital* [2009] 3 IR 774, 788-789; *ET v. Clinical Director of the Central Mental Hospital* [2010] 4 IR 403, 415-416; *JB v. Mental Health (Criminal Law) Review Board* [2011] 2 IR 15, 33; *PL v. Clinical Director of St Patrick's Hospital* [2014] 4 IR 385, 410-411.
[9] *FX v. Clinical Director of the Central Mental Hospital* [2014] 1 IR 280, 307.
[10] *In re a Ward of Court (Withholding of Medical Treatment) (No 2)* [1996] 2 IR 79, 106.
[11] The UNCRPD came into force on 3 May 2008, 30 days after its twentieth ratification.

treaties such as the International Covenant on Civil and Political Rights 1966 and the ECHR, is reframed in Article 5 UNCRPD as follows:

> *1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.*
> *2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*
> *3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*
> *4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.*

12. The general principles of the UNCRPD are set out in Article 3:

> *The principles of the present Convention shall be:*
>
> *a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;*
> *b. Non-discrimination;*
> *c. Full and effective participation and inclusion in society;*
> *d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;*
> *e. Equality of opportunity;*
> *f. Accessibility;*
> *g. Equality between men and women;*
> *h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.*

13. That these principles - dignity, autonomy, equality, participation – must have application in the lives of persons with disabilities was recognised by the High Court (MacMenamin J) in *MX v. HSE*, as representing a 'paradigm shift' in the international legal approach to disability.[12] Fundamentally, the goal of the UNCRPD is:

> *[T]o move societies away from viewing persons with disabilities as passive objects of treatment, management, charity and pity (and sometimes fear, abuse and neglect), towards a world view of persons with disabilities as active subjects of human rights and dignity.*[13]

14. It was not until 20 March 2018 that Ireland ratified the UNCRPD, but by then a domestic 'paradigm shift' was already well underway with the adoption of progressive legislation designed to remedy structural barriers to the full participation in society for persons with disabilities.[14] For example, the Assisted Decision-Making (Capacity) Act 2015 will, when commenced, replace the wardship framework with a graduated system of assisted decision-making, co-decision-making and, *ultima ratio*, substitute decision-making, moving from a purely 'best interests' paradigm to one centred on a person's 'will and preferences.'

15. The philosophy of personalisation which has informed recent legislative developments has begun to inform the approach of the Courts to laws touching on disability.[15] For instance, in *PL v. Clinical Director of St Patrick's*

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[12] *MX v. HSE* [2012] 3 IR 254, 271.

[13] O Lewis 'The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities' in B McSherry et al (eds) *Rethinking Rights-Based Mental Health Laws* (Hart London 2010) p 101.

[14] See, further, the Equal Status Acts 2000-2015, the Disability Act 2005, the Citizen's Information Act 2007 (establishing the National Advocacy Service for People with Disabilities) and the Mental Health (Amendment) Act 2018 (which will replace the best interests principle for adults in section 4 of the Mental Health Act 2001 with a set of principles based on individual autonomy and preference, as yet un-commenced).

[15] For critical perspectives on paternalism in Ireland, see for example M Donnelly 'Legislating for Incapacity: Developing a Rights-Based Framework' (2008) 30 *DULJ* 395, 424; C Craven 'Signs of Paternalist Approach to the Mentally Ill Persists' *Irish Times*, 27 July 2009; D Whelan *Mental Health Law and Practice* (Round Hall Dublin 2009) 29-30; and C Murray, 'Moving Towards Rights-Based Mental Health Law: The Limits of Legislative Reform' (2013) 49 *Irish Jurist* 161, 180.

*University Hospital*, the Court of Appeal held that a voluntary patient in a psychiatric hospital who expresses a desire to leave a secure unit remains free in principle to do so at any convenient time and may not be restrained by the hospital from leaving save in accordance with the provisions of section 23 of the Mental Health Act 2001. The Court of Appeal reversed the High Court's finding that PL had consented to his confinement, albeit that he had been restrained and sedated, and that it had in any event been within the power of the hospital to decline to discharge him when he asked to leave if that was not in his best interests.[16] In overturning the High Court judgment, the Court of Appeal expressly held that a previous High Court decision, *MMcN and LC v. Health Service Executive*, which had been relied upon in *PL* by the High Court, was wrongly decided.[17] The applicants in *MMcN and LC* both suffered from advanced dementia and had been admitted as voluntary patients to an acute psychiatric unit notwithstanding that they lacked functional capacity to consent to their confinement. The High Court had held that their situation could not be seen as false imprisonment or unlawful detention because, given their level of vulnerability, it would be grossly negligent of the hospital to discharge them in circumstances where they had nowhere to go. The Court of Appeal reversal in *PL* is significant because, as one commentator observed, the High Court judgment demonstrated 'that paternalism remains the overriding attitude among the judiciary in relation to persons with mental disorders.'[18]

16. Further evidence of this ongoing recalibration is contained in the judgment of the Court of Appeal which is under appeal in the CUH proceedings. The Court, speaking by Hogan J, held:

> *The power claimed by the hospital amounts to a paternalistic entitlement to act in the best interests of the patients whose capacity is impaired and, in effect, to restrain their personal liberty and freedom of movement and, if necessary, to do at the expense of close family*

[16] *PL v. Clinical Director of St Patrick's University Hospital and Others* [2018] 1 ILRM 441.
[17] *MMcN and LC v. Health Service Executive* [2009] IEHC 239, Peart J., 15 May 2009.
[18] C Murray, 'Moving Towards Rights-Based Mental Health Law: The Limits of Legislative Reform' (2013) 49 *Irish Jurist* 161, 170.

*members. But ever before the enactment of the Constitution the common law has always rejected the claim that personal liberty could be compromised on such a basis.*

...

*In my view, this is true a fortiori of the post-Constitution state of affairs.*[19]

17. The recent judgments of the Court of Appeal referred to above contain scant reference to international law, suggesting that the values of personalisation enshrined in the UNCRPD have already become integrated into the domestic approach to the constitutional rights of persons with disabilities. Indeed, the emphasis on dignity and individual autonomy, freedom of choice and independence in Article 3 UNCRPD echoes the reference in our own Constitution's Preamble to the dignity and freedom of the individual as a key constitutional objective. In this regard, IHREC submits that the key principles which must inform the Court's approach to the issues before it today – human dignity, individual freedom, equality - have been present in the Constitution since its adoption by the People in 1937.

## B. WAS MS [redacted] UNLAWFULLY DETAINED?

*Deprivation of liberty*

18. Disability does not result in any diminution of the personal rights recognised by the Constitution.[20] Bearing in mind the principles of dignity, freedom and equality, the starting point for analysing an alleged deprivation of liberty such as that at issue in this appeal must be an acknowledgement that a person with disabilities is no less entitled to the protection of her liberty than anyone else. In her judgment for the Supreme Court of the UK in *Cheshire West and Chester Council v. P*, Lady Hale observed:

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[19] *AC v. Cork University Hospital and Others* [2018] IECA 217, Hogan J, 2 July 2018, paras 41-42.

[20] *AM v. Kennedy* [2007] 4 IR 667, 676, and *mutatis mutandis*, *In re a Ward of Court (Withholding Medical Treatment) (No. 2)* [1996] 2 IR 79, 126.

> *In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else.*
>
> ...
>
> *Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focused right, not to be deprived of that physical liberty.*[21]

19. Article 40.4.1 of the Constitution provides:

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

20. In *AB v. Clinical Director of St Loman's Hospital*, the Court of Appeal held:

> *Article 40.4.1° of the Constitution provides that no person shall be deprived of his personal liberty save in accordance with law. Any such legislative restriction on that right to liberty must, however, not ignore "the fundamental norms of the legal order postulated by the Constitution".... These fundamental norms include the dignity and freedom of the individual (as per the Preamble), the rule of law and a free society as part of the democratic nature of the State (Art.5) and the protection of the person and good name (Art.40.3.2°). Furthermore, Art.40.3.1° provides that any such law must respect and, as far as practicable, "defend and vindicate" these personal rights.*[22]

21. Outside of the criminal context, there are two statutory regimes providing for the detention of adults with mental disabilities in Ireland. The Mental Health Act 2001 provides a statutory mechanism by which persons suffering from

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[21] *Cheshire West and Chester Council v. P and Another* [2014] AC 896, 919.
[22] *AB v. Clinical Director of St Loman's Hospital* [2018] 2 ILRM 242, 257.

mental disorders may be deprived of their liberty in approved centres. Additionally, the power to detain wards of court is exercisable by the President of the High Court. This power is vested in him by section 9 of the Courts (Supplemental Provisions) Act 1961, and its scope, subject to the Constitution and section 2 of the ECHR Act 2003, is defined by reference to the powers conferred before independence on Lord Chancellors by the monarch. The Lunacy Regulation (Ireland) Act 1871, which establishes the framework within which the power is exercised, contains references to detention, as do historic treatises on the lunacy jurisdiction.[23] The nature of the procedural protections actually available in wardship are discussed in more detail below. Following the judgment of the Supreme Court in *In re FD (No 2)*, recourse is no longer had to the inherent jurisdiction of the High Court to detain vulnerable adults who lack capacity but who cannot for one reason or another be detained under the Act of 2001.[24]

22. IHREC's general view is that the Constitution provides a level of protection for human rights, including the right to liberty, equal to or greater than the level of protection guaranteed by the ECHR. Article 5(1) ECHR provides, in relevant part:

> *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 of unsound mind ...*

23. The right to liberty in Article 5(1) ECHR is not framed in absolute terms. The lawful detention of persons of unsound mind is expressly permitted subject to certain conditions which are set out in more detail below. Article 5(1) itself envisages procedural protection against arbitrary deprivation of liberty ('a procedure prescribed by law').

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[23] Lunacy Regulation (Ireland) Act 1871, 5th section. See also JM Colles *Lunacy Act and Orders* (2nd edn) (McGee Dublin 1895), 195 and LGE Harris *Law and Practice in Lunacy in Ireland* (Corrigan and Wilson Dublin 1930) 8.
[24] *In re FD (No 2)* [2015] 1 IR 741. As examples of the exercise of this jurisdiction see *Health Service Executive v. O'B* [2011] 1 IR 794 and *Health Service Executive v. VF* [2014] 3 IR 305.

24. Also relevant to the question before the Court is Article 14 UNCRPD, which contains a guarantee of liberty and security of the person for persons with disabilities on an equal basis with others:

> *1. States Parties shall ensure that persons with disabilities, on an equal basis with others:*
> *a) Enjoy the right to liberty and security of person;*
> *b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*
> *2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.*

25. The Committee on the Rights of Persons with Disabilities has interpreted Article 14 as requiring States Parties to eliminate detention on the grounds of mental disability.[25] On this interpretation, neither Article 5 ECHR nor domestic Irish practice would be compatible with the UNCRPD. In order to reconcile this tension, Ireland has made an interpretative declaration in respect of Article 14 UNCRPD (together with Article 12 UNCRPD on equal recognition) to the effect that:

> *Ireland recognises that all persons with disabilities enjoy the right to liberty and security of person, and a right to respect for physical and mental integrity on an equal basis with others. Furthermore, Ireland declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental*

[25] UN Committee on the Rights of Persons with Disabilities, Guidelines on Article 14, September 2015, paragraphs 6-9.

*disorders, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.*[26]

26. Article 14 UNCRPD has not been incorporated into Irish law, and given Ireland's interpretative declaration, its importance in the present context lies chiefly in its insistence that deprivation of liberty not be unlawful or arbitrary. The Court does not have to confront the broader challenge it lays down in these appeals.

*Legal Test*

27. According to the European Court of Human Rights, to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned. Account must be taken of a range of factors including the type, duration, effects and manner of implementation of the measure in question. This formula was derived by the European Court of Human Rights in *Guzzardi v. Italy*, from a similar rubric in *Engel v. The Netherlands (No 1)*, and followed in successive cases.[27]

28. The formula has since been adopted by this Court, though without express reference to the Strasbourg jurisprudence. In *SMcG and JC v. Child and Family Agency*, the Supreme Court considered whether the remedy provided for in Article 40.4.2 could be used to secure the return of children unlawfully removed from their parents, holding:

*In considering whether or not the circumstances involve deprivation of liberty, the starting point must be the concrete situation of the individuals concerned. One must have regard to a range of criteria,*

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[26] This declaration is not framed as a reservation which purports to exclude or modify the legal effect of the provisions in their application to the State. As such, on the international level, the State remains subject to the obligation contained in Article 14 UNCRPD, including the obligation not to deprive people of their liberty solely on the basis of mental disability.

[27] *Guzzardi v. Italy*, App No 7367/76, 6 November 1980, § 92; *Engel v. The Netherlands (No 1)* (1976) 1 EHRR 647, §§ 58-59; *HM v. Switzerland*, App No 39187/98, ECHR 2002-I, § 42; *Storck v. Germany*, App No 6160/03, ECHR 2005-V, § 71 and *Stanev v. Bulgaria*, App No 36760/06, ECHR 2012-I, § 115.

*including the type, duration, effects and manner of implementation of the District Court order. The situation was, in fact, that the children were placed under the complete supervision and control of the CFA. They would not have been free to leave the custody of the persons in whose care they were placed.* (emphasis added)[28]

29. The application of the *Engel/Guzzardi* rubric allows an important distinction to be made between deprivation of liberty and restriction of freedom of movement. For example, in *Austin v. United Kingdom*, the European Court of Human Rights distinguished deprivations of liberty from commonly occurring temporary restrictions on freedom of movement which members of the public were called to endure in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match. Considering the use of 'kettling' against a large crowd over a period of hours in volatile and dangerous conditions, the Court held, by a majority, that the measures employed against the crowd could not properly be described as 'deprivations of liberty' within the meaning of Article 5(1) ECHR because they were rendered unavoidable as a result of circumstances beyond the control of the authorities, they were necessary to avert a real risk of serious injury or damage, and they were kept to the minimum required for that purpose.[29]

30. Describing a situation as 'temporary' may not fully reflect the reality of the situation. The restrictions in *Austin* were temporary in the sense of being intended to persist only whilst the situation being managed by the authorities remained dangerous and volatile and in fact only lasted a few hours. Where a situation is indefinite and will persist until some other arrangement, as yet unagreed and unprovided for is in place, any consequent restriction on a person's liberty cannot truly be characterised as 'temporary'.

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[28] *SMcG and JC v. Child and Family Agency* [2017] 1 IR 1, 23.
[29] *Austin and Others v. the United Kingdom* [GC], App Nos. 39692/09, 40713/09 and 41008/09 ECHR 2012-II, § 59.

31. In *Regina (Ferreira) v. Inner South London Senior Coroner*, the Court of Appeal of England and Wales relied on *Austin* to avoid finding that the treatment of a woman with Down's Syndrome who died in the intensive care unit of an acute hospital amounted to a detention for the purposes of the Coroners and Justice Act 2009. The Court held that the patient was not deprived of her liberty at the date of her death because, dying of pneumonia, the root cause of any loss of liberty was her physical condition, not any restrictions imposed by the hospital.[30] However, where reliance is placed on the delivery of medical treatment for a physical condition at an acute hospital to justify what would otherwise be a deprivation of liberty[31], care must be taken to ensure that the patient is not detained beyond the point where her physical condition requires such in-patient treatment and to acknowledge that her status may change in line with her physical recovery.

32. European case law on Article 5 ECHR also indicates that the notion of deprivation of liberty comprises an objective and a subjective element. In *Storck v. Germany*, the European Court of Human Rights held:

> *[T]he notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question.*[32]

33. In Ireland, the Courts seem to have arrived at a similar conclusion independently. In *Kane v. The Governor of Mountjoy Prison*, the Supreme Court held:

> *The essential feature of detention in this legal context is that the detainee is effectively prevented from going or being where he or she*

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[30] *Regina (Ferreira) v. Inner South London Senior Coroner* [2017] 3 WLR 382.
[31] HSE's submissions, paragraph 63(1); General Solicitor's submissions paragraph 7.1
[32] *Storck v. Germany*, App No 6160/03, ECHR 2005-V, § 74.

*wants to go or be and is instead forced to remain or go where his jailer wishes him to go. When the applicant left Granard garda station, the evidence clearly establishes that what he wanted to do was to go to Cavan. He was free to do so and he achieved his purpose. There is no evidence of any description which could lead to the conclusion that any member of the Garda Siochana for any reason wished that the applicant should go to Cavan.*[33]

34. A person can only be considered to have been deprived of his liberty if, in addition to the objective element discussed above, s/he has not consented to the confinement in question. For instance, in *DPP v. Pringle, McCann and O'Shea*, the Court of Criminal Appeal was satisfied that a murder suspect who had been brought to hospital by Gardaí had remained there of his own volition to receive medical treatment and had not therefore been detained there against his will.[34] The same requirement appears in Strasbourg jurisprudence: in *HM v. Switzerland*, the European Court of Human Rights was satisfied that the applicant had validly consented to remain in the care home to which she had been transferred, and that she had not been deprived of her liberty.[35]

35. In order to consent to confinement, a person must have capacity to do so. In *HL v. United Kingdom*, the European Court of Human Rights considered the situation of a profoundly disabled man who had been admitted informally to an English psychiatric hospital. The man suffered from severe autism and was unable to speak. Although he had never attempted to leave, the Court observed that he was incapable of consenting to or disagreeing with the measures imposed on him by the hospital, and it was clear that, had he tried to leave, he would have been prevented from doing so. His concrete situation, the Court found, was that he had been under continuous supervision and control and had

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[33] *Kane v. The Governor of Mountjoy Prison* [1988] IR 757, 768.
[34] *DPP v. Pringle, McCann and O'Shea*, Unreported, Court of Criminal Appeal, O'Higgins CJ, 22 May 1981, 98-100.
[35] *HM v. Switzerland*, App No 39187/98, ECHR 2002-I, § 42.

not been free to leave, and on this basis the Court found that he had been deprived of his liberty.[36]

36. Importantly, the European Court of Human Rights has consistently held that the fact that a person lacks *de jure* legal capacity does not necessarily mean that he or she is *de facto* unable to understand his or her situation. In *Shtukaturov v. Russia*, *DD v. Lithuania* and *Kedzior v. Poland*, the objections of the applicants were considered to vitiate the consent offered to their confinement by their guardians.[37] Thus, it is not sufficient, in order to render a person's confinement voluntary, that a consent has been given on her behalf by a substitute decision-maker. Equally, a person has been deprived of legal capacity may actually possess sufficient functional capacity to communicate agreement, tacit or express, with a particular regime. In *Mihailovs v. Latvia*, the legally-incapacitated applicant was observed by the Court to have tacitly agreed to stay in one of his placements, and this factor, together with the nature of the regime operated by the institution in question, caused the Court to doubt that he had been deprived of his liberty there.[38] This is an important observation in the Irish context where the all-or-nothing nature of our wardship framework does not acknowledge that decision-making capacity fluctuates in time, and is issue-specific.[39]

37. Finally, the Strasbourg jurisprudence indicates that the confinement in question must be imputable to the State if the deprivation of liberty is capable of constituting a violation of Article 5 ECHR. In most cases, public authorities are directly involved in a person's detention, but even where a person is detained by a private actor, the deprivation may be attributable to the State if it has breached its positive obligation to protect the person against interferences with his or her liberty by private persons.[40]

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[36] *HL v. United Kingdom*, App No 45508/99, ECHR 2004-IX, §§ 91-94.
[37] *Shtukaturov v. Russia*, App No 44009/05, ECHR 2008-II, § 108; *DD v. Lithuania*, App No 13469/06, 14 February 2012, § 132; and *Kedzior v. Poland*, App No 45026/07, 16 October 2012, § 58.
[38] *Mihailovs v. Latvia*, App No 35939/10, 22 January 2013, §§ 138-140.
[39] S Mills and A Mulligan *Medical Law in Ireland* (Bloomsbury Dublin 2017) 156-160.
[40] *Storck v. Germany*, App No 6160/03, ECHR 2005-V, § 89.

38. In any argument that deprivation of liberty can be justified where it is necessary to protect or vindicate other fundamental rights such as the right to health and the right to life[41], care needs to be taken to ensure that the views of a detained person are heard as regards the respective importance to him or her of potentially conflicting rights. This is particularly so in the case of an elderly person for whom quality of life and the possibility of being at home with her family may be as, if not more important, than prolonging life itself. Declining medical or social supports which may ostensibly be in that person's 'best interests' does not of itself indicate a lack of capacity to make a valid decision as regards one's own future care.

*Observations on Ms [redacted] situation in Cork University Hospital*

39. It is submitted by the HSE and by the Notice Party that Ms [redacted] was not deprived of her liberty by the staff at CUH. Their argument is that she could not be discharged for reasons relating to her physical health, that this was unavoidable due to circumstances beyond the control of the authorities, and that the hospital's refusal to discharge her was necessary to vindicate her rights. In support of this argument, they rely in particular on the judgments in *Austin* and *Ferreira*. The HSE also disputes that Ms [redacted]'s situation was attributable to the State because the hospital's reasons for refusing to discharge her related to matters beyond their control, and because there were no orders detaining her.

40. IHREC submits that the present case is readily distinguishable from *Austin* and *Ferreira*. Ms [redacted]'s course of treatment had come to an end, and she had been deemed ready for discharge in March 2016. Unlike the patient dying of pneumonia in *Ferreira*, she was not so ill that she could not leave. Unlike the temporary emergency measures to which the demonstrators in *Austin* were subjected, the decision by CUH staff to prevent Ms [redacted] leaving the hospital was not unavoidable. It could have been avoided through compliance with the wish she expressed, in person and through her family, to leave the

[41] See in particular sections 7, 10 and 11 of her legal submissions.

hospital and to return to her home, albeit that this would not, in their view, be in her best interests. Instead, recourse was had to the hospital's security staff and to Gardaí to prevent Ms [redacted] going home with her family.

41. Ms [redacted] was confined to the premises of the hospital on 23 July 2016. This confinement persisted until December 2016, when she was transferred to [redacted]s Hospital by the HSE, having been made a ward of court in August. Considering the reality of her concrete situation, IHREC submits that the objective criterion of detention is satisfied in the present case.

42. Turning to the subjective element, IHREC notes that, on 23 July 2016, Ms [redacted] had not yet been deprived of legal capacity. However, medical staff had concluded that she did not have capacity to make decisions in relation to her placement on her own. Therefore, on the HSE's own account, she cannot have had sufficient functional capacity to agree to remain in hospital voluntarily like the applicant in *Mihailovs*. She was, of course, entitled to have the assistance of her family in expressing her wishes, and to the extent that her will and preferences are anywhere recorded, they were that she should leave the hospital as expressed with the assistance of her family. Put simply: if she lacked capacity, she could not consent to remain; and if she had capacity, she did not consent to remain. Either way, the conclusion that the subjective element of deprivation of liberty was present is unavoidable. Accordingly, IHREC submits that the Court should not disturb the finding of the Court of Appeal that Ms [redacted] was deprived of her liberty at the material time.

43. IHREC submits that neither the absence of any orders detaining Ms [redacted] in CUH, nor the hospital's reasons for refusing her discharge are material, contrary to the submissions of the HSE on the question of attribution. The decision to prevent Ms [redacted] going home on 23 July 2016 was made by staff at the hospital, which is operated by the HSE, a public body established by statute, and an organ of the State for the purposes of section 3 of the ECHR Act 2003. Ms [redacted]'s detention was therefore attributable directly to the State.

44. The question is whether this deprivation of liberty was in accordance with law for the purposes of Article 40.4.1 of the Constitution and Article 5 ECHR. At the material time, Ms [redacted] was not subject to any orders made under the Mental Health Act 2001, although the Acute Mental Health Unit at the hospital is an approved centre registered under the Act. It is equally clear that she was not subject to orders for her detention made by the President of the High Court in the exercise of his wardship jurisdiction, even though steps to have her made a ward had by that time already been taken. Neither were there any orders in place providing for Ms [redacted]'s detention in CUH made pursuant to any alleged inherent jurisdiction of the High Court. The HSE does not claim to possess any jurisdiction to detain people in their own best interests. Even if the common law doctrine of necessity could be relied upon, as it was in *HL v. United Kingdom*, it is apparent from the judgment of the European Court of Human Rights in *HL* that the absence of any procedural safeguards would render its exercise incompatible with Article 5 ECHR.[42] If IHREC is correct that Article 40.4.1 provides a level of protection equal to or greater than that provided by Article 5 ECHR, the exercise of such a power would, for the same reasons, be incompatible with the Constitution.

45. IHREC therefore submits that Ms [redacted] was deprived of her liberty in CUH on 23 July 2016, and that her detention there was other than in accordance with law.

## C. WERE ADEQUATE SAFEGUARDS PRESENT IN THE APPLICATION TO DETAIN MS [redacted]?

46. In its determination in the proceedings relating to Ms [redacted]'s detention in [redacted]s Hospital, the Court noted that Mr [redacted]'s primary contention in seeking leave to appeal was that that there are inadequate safeguards contained in wardship legislation for the protection of the rights of subjects of such proceedings/persons who might be detained. The Court granted leave to

[42] *HL v. United Kingdom*, App No 45508/99, ECHR 2004-IX, §§ 121-124.

appeal on this single issue: whether the orders made detaining Ms [redacted] in the wardship proceedings were made in accordance with the fundamental rights guaranteed by the Constitution or are incompatible with legally binding obligations under the ECHR. While not the subject of this appeal, IHREC notes that the 2016 Order admitting Ms [redacted] to wardship - which deprived her of legal autonomy in the subsequent application - was also made in circumstances where there are issues regarding the adequacy of the notice afforded to her and her family and the lack of opportunity for effective participation in the proceedings.

47. This question is of exceptional importance because the Courts have found that 'a fundamental denial of justice' in proceedings resulting in a person's detention, as is the case here, will justify a court in directing the person's release under Article 40.4.2 even where the warrant of detention is good on its face.[43] Faherty J found that the orders detaining Ms [redacted] in [redacted]'s Hospital were valid on their face in the judgment under appeal, and he refused leave to appeal that finding.

48. The exercise by the President of the High Court of his wardship jurisdiction is subject to the provisions of the Constitution.[44] This includes the guarantee of personal liberty in Article 40.4, which 'protects our citizens from arbitrary detention and imprisonment without legal warrant.'[45] In *RT v. Clinical Director of the Central Mental Hospital*, the High Court (Costello P) held that the State's duty to protect the rights of vulnerable citizens required that legislation which could deprive persons suffering from mental disorders of their liberty should contain adequate safeguards against abuse and error.[46]

49. Equally, the President is subject to the obligation in section 2 of the Act of 2003 to interpret his powers under section 9 of the Act of 1961 in a manner

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[43] *FX v. Clinical Director of the Central Mental Hospital* [2014] 1 IR 280, 301; *Ryan v. Governor of Midlands Prison* [2014] IESC 54, Denham CJ, 22 August 2014, para 13; and *AB v. Clinical Director of St Loman's Hospital and Others* [2018] 2 ILRM 242, 266-273.
[44] *In re of a Ward of Court (Withholding Medical Treatment) (No 2)* [1996] 2 IR 79, 106.
[45] *Ryan v. Governor of Midlands Prison* [2014] IESC 54, Denham CJ, 22 August 2014, para 23.
[46] *RT v. Clinical Director of the Central Mental Hospital* [1995] 2 IR 65, 79.

compatible with the ECHR, including Article 5 ECHR.[47] In *Winterwerp v. Netherlands* it was held that, in order to justify the detention of a person of unsound mind under Article 5(1)(e), three minimum conditions must be satisfied:

> (a) first, the person in question must reliably be shown to be of unsound mind;
> (b) secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and
> (c) thirdly, the validity of continued confinement depends upon the persistence of such a disorder.[48]

50. The Court also established that, except in emergency cases, medical evidence would be required to meet these criteria. As regards the second of the conditions, it appears from the jurisprudence that there are essentially two circumstances in which confinement may be necessary: where a person needs therapy, medication or other clinical treatment to cure or alleviate his condition; and where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons.[49]

51. Article 5(1) ECHR also affords a guarantee of due process in proceedings concerning deprivation of liberty. In considering whether a particular procedure was 'fair', the Strasbourg Court has observed that even people deprived of legal capacity who are factually capable of expressing a view on their situations should have access to court and the opportunity to be heard either in person or, where necessary, through some form of representation.[50] The fact that a person suffers from a disability cannot justify impairing the essence of the right, save in very exceptional circumstances, such as where a person is entirely unable to express a view. In fact, the European Court of Human Rights has found that special procedural safeguards may prove called

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[47] ECHR Act 2003, s. 2.
[48] *Winterwerp v. Netherlands* (1979-80) 2 EHRR 387, 403, § 39.
[49] *Hutchison Reid v. United Kingdom*, App No 50722/99, ECHR 2003-IV, § 52.
[50] *DD v. Lithuania*, App No 13469/06, 14 February 2012, § 118.

for in order to protect the interests of persons who are not fully capable of acting for themselves on account of their mental health issues.[51] Such procedures must be sufficiently precise to allow the person affected to foresee the consequences of a given action to a reasonable degree.[52]

52. Given the drastic consequences wardship has for a person's personal rights, , such proceedings must attract a guarantee of constitutional justice and fair procedures.[53] Whether approached by way of the right to natural and constitutional justice in Article 40.3 of the Constitution or through Article 5 ECHR, fair procedures in this context must embrace the principle *audi alteram partem*: that a person should not have a decision made about them without being given the best possible chance to put his side of the case.[54] This idea is inseparable from human dignity, for there is something profoundly degrading and exclusionary about having decisions made about you without your being consulted.

53. The right to be heard entails, necessarily, a right to communicate one's views.[55] In the context of a person with disabilities who has difficulty communicating, due process requires that the procedures employed be sufficiently flexible to permit, for example, a person to express themselves with the assistance of another person.[56] This is to ensure that the 'will and preferences' of the person, as they are referred to in Article 12 UNCRPD, can be given appropriate weight by the Court.[57]

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[51] *Winterwerp v. Netherlands* (1979-80) 2 EHRR 387, 403, § 60.
[52] *HL v. United Kingdom*, App No 45508/99, ECHR 2004-IX, § 114.
[53] *Re Haughey* [1971] IR 217, 264 and *Shatter v. Guerin* [2016] IECA 318, Finlay Geoghegan J, 10 November 2016, paras 21-35.
[54] *Desmond v. Moriary* [2018] IESC 34, McKechnie J, 27 July 2018, para 119; *Winterwerp v. Netherlands* (1979-80) 2 EHRR 387, 403, § 60.
[55] Even children have, by virtue of Article 42A.4.2 of the Constitution, a right to have their views ascertained and given due weight in proceedings concerning their welfare.
[56] *Winterwerp v. Netherlands* (1979-80) 2 EHRR 387, 403, § 60.
[57] A similar observation was made by the High Court in *MX v. HSE* [2012] 3 IR 254, in which MacMenamin J said, at p 288,in relation to a person suffering from a mental disability, that [t]he views of the patient might be expressed by carers, social workers or, perhaps most appropriately, by family members.' The language of 'will and preferences' is now incorporated into the Assisted Decision-Making (Capacity) Act 2015. Ireland's reservation to Article 12 UNCRPD is confined to reserving the right to retain a system of substituted decision-making.

54. In *In re of a Ward of Court (Withholding Medical Treatment) (No 2)*, the Supreme Court observed that the views of the ward's family had to be 'heeded' and given 'careful' consideration, and that 'they must carry considerable weight with the Court.'[58] Further, where a person who is the subject of wardship proceedings has difficulty communicating on their own, her family can play in important role in ensuring that her voice is heard by the Court. IHREC is therefore concerned by the measures adopted in this case to restrict Ms [redacted]'s contact with her family, especially given that, in the circumstances and having regard to the relationship of dependency between the adults involved, the family in question arguably attracts the protection of Article 41 of the Constitution.

55. IHREC acknowledges that there are circumstances in which a breach of the principle *audi alteram partem* might be excused. For instance, in *Fitzpatrick v. FK*, the High Court excused a failure on the part of a hospital to notify a patient of an application to transfuse her on the basis, *inter alia*, that she was at risk of death and had supplied misleading information about her religious beliefs to the hospital.[59] However, such circumstances are exceptional, and ought only to occur in emergency situations, being remedied as soon as possible.

*Observations on the application to detain Ms [redacted] in [redacted] Hospital*

56. The application for orders detaining Ms [redacted] in [redacted]'s Hospital was made to the President of the High Court on 11 July 2018. They were made in lunacy because Ms [redacted] had been made a ward of court on 19 August 2016, had been transferred to [redacted]'s Hospital in December 2016 by the HSE with the permission of the High Court and the agreement of her Committee, and had remained there ever since. The application made on 11 July appears to have been precipitated by arguments between Ms [redacted]'s children, [redacted] and [redacted] and hospital staff and officials of the HSE. The situation became increasingly antagonistic between 6 and 10 July, something

[58] *In re of a Ward of Court (Withholding Medical Treatment) (No 2)* [1996] 2IR 79, 106, 116.
[59] *Fitzpatrick v. FK* [2009] 2 IR 7, 101.

the HSE attributed to the judgment of the Court of Appeal on 2 July to the effect that Ms [redacted] had been unlawfully detained in CUH on 23 July 2016.

57. On 11 July 2018 the HSE issued a motion seeking orders in wardship that Ms [redacted] remain an in-patient in [redacted]s Hospital and that the staff there be permitted to regulate and restrict visits to her in her best interests. Further orders were sought permitting Gardaí to remove any person from the hospital who refused to comply with a restriction on visiting imposed by the hospital, granting any person dissatisfied with a decision made by the staff liberty to apply to the Court on 72 hours' notice to the HSE and Ms [redacted]s Committee. The motion was grounded on the affidavit of [redacted] solicitor for the HSE, who deposed to the fact that hospital staff alleged aggressive, threatening and intimidating behaviour towards them by Mr [redacted] and that the orders were necessary to protect Ms [redacted]s welfare and best interests. No medical evidence as to the necessity for these orders was adduced. The motion was issued on the same day that it was returnable, and it was served on Ms [redacted]'s Committee, the General Solicitor. It was not served on he or on [redacted] or [redacted] [redacted]. It does not appear that the Committee discussed or attempted to discuss the orders sought with Ms [redacted] to ascertain her views. The orders made by the Court go further than those sought by the HSE, in that the President also made orders expressly providing that [redacted] and [redacted] [redacted] be prohibited from attending at or entering the grounds of the hospital, and further, be prohibited from removing Ms [redacted] from the hospital. The Court also granted the HSE permission to issue and serve short a further motion returnable for Monday, 16 July.

58. In respect of the hearing on 16 July, again, there was no medical evidence before the Court of any necessity for Ms [redacted]'s continued detention. Ms [redacted]s voice was still absent from the proceedings, and her family were not present because there had been issues serving them with the application. Their access to her had in any event been restricted. Ms [redacted]'s Committee consented to her continued detention, and the orders were made accordingly. That same day, Mr [redacted] tried unsuccessfully to persuade two judges of the

High Court to open an inquiry into Ms [redacted]'s detention in [redacted]s Hospital.

59. A new motion in the same terms as that issued on 13 July was issued on 16 July and made returnable for Monday 23 July. Again, the motion was served on Ms [redacted]s Committee but not on her. There were further issues around service on Ms [redacted]'s family, and as appears from the submission of the HSE, when the matter came before the President on Monday 23 July, Mr [redacted] who was present in person, complained that he had not received any papers. No medical evidence was adduced, nothing was heard from Ms [redacted] and the orders already made were continued. Separately on 23 July, Mr [redacted] sought a third time to commence an Article 40 inquiry on behalf of his mother.

60. IHREC is concerned by two issues arising out of the sequence of events set out above and leading to the making of the orders detaining Ms [redacted] on 23 July 2018:

(a) No medical evidence was offered in support of the application to detain her; and

(b) Ms [redacted] played no role whatsoever in the process, whether by herself, through her Committee or through her family.

61. The *Winterwerp* test requires that medical evidence be present in all except emergency cases to justify detention on the grounds of unsoundness of mind under Article 5(1)(e) ECHR. While evidence of urgency was given to ground the application on 11 July 2018, it might reasonably be said to have abated by 16 and 23 July when the orders were continued. The medical evidence used to ground the decision to receive Ms [redacted] into wardship cannot have been sufficient because (a) it was addressed to a different test – whether Ms [redacted] was of unsound mind and incapable of managing her affairs, not whether her unsoundness of mind was of a kind or degree warranting compulsory

confinement; and (b) it dated from August 2016, and could not therefore be evidence of the persistence of unsoundness of mind.

62. The lack of any participation in the proceedings on Ms [redacted]'s behalf is problematic having regard to her right to be heard in relation to the application to detain her and to restrict her access to her family. Whether or not she could have made the journey to Dublin to be heard on the matter herself, she was not even served with the proceedings. IHREC notes that the rules governing the wardship procedure in the Act of 1871 and Order 67 of the Rules of the Superior Courts do not require that a ward be served with an application to detain him or her. There is a power in Rule 53 on the part of the Registrar for Wards of Court to give notice of proceedings 'to any of the ward's next-of-kin or to any person whose attendance he considers desirable in the ward's interests,' but its exercise appears to be discretionary. IHREC also observes there are no procedures in the 1871 Act or in Order 67 requiring a Committee to ascertain the attitude of the ward in advance of any application, including one to detain him or her or to prevent contact with family members. If a Committee wished to oppose the application, such opposition would have to be paid for out of the ward's estate, as the Legal Aid Board's Custody Issues Scheme does not apply. Further, it would have been difficult for Ms [redacted]'s views to be communicated to the Court by her family on 23 July because the access of [redacted] and [redacted] to their mother had been restricted since 11 July, and because there had been consistent difficulties serving them with the various applications. The absence of any clear channel for the voice of the respondent was noted as a systemic deficiency by the National Safeguarding Committee in its *Review of current practice in the use of wardship for adults in Ireland* in December 2017.[60]

63. For the foregoing reasons, IHREC submits that the orders made detaining Ms [redacted] in the wardship proceedings were not made in accordance with the fundamental rights guaranteed by the Constitution or are incompatible with legally binding obligations under the ECHR. IHREC further submits that the *Winterwerp* criteria were not satisfied, and the principle *audi alteram partem*

[60] National Safeguarding Committee *Review of current practice in the use of wardship for adults in Ireland*, December 2017, pp 41-44.

was not respected. IHREC believes that this appeal discloses a systemic deficiency in the procedures governing wardship, particularly as they relate to the participation of wards and their families in decisions affecting their human rights. There was a fundamental denial of justice in the manner the orders of 23 July 2018 were made, which was not excusable by reference to emergency circumstances. This denial of justice was, IHREC submits, sufficient to render the orders made on 23 July 2018 detaining Ms [redacted] unlawful.

64. For the sake of completeness, IHREC should note our understanding from the papers received in the context of Mr [redacted]'s application for interlocutory relief, that when the application to detain Ms [redacted] came before the President again on 8 October 2018, medical evidence was adduced in support of the application to continue the detention orders, and her Committee filed an affidavit which records that her wish was to leave hospital and go home.

## D. DOES MR [redacted] HAVE STANDING?

65. The HSE and the Committee argue that Mr [redacted] should be precluded from maintaining these appeals on his mother's behalf because she is ward of court. They also argue that he should not be heard in argument.

66. The Constitution expressly provides that a complaint of unlawful detention may be made 'by or on behalf' of any person. Article 40.4.2 thus expressly contemplates that one person has the right to complain on behalf of another that the other person is unlawfully detained.[61] The possibility of having another person make an application on one's behalf is an important protection for persons detained of their liberty, who are, for obvious reasons, often restricted in their ability to communicate with the outside world.

67. IHREC respectfully disagrees with the Committee's submission, based on the judgment of the Supreme Court in *In re K*, that all decisions as to litigation

[61] *The People (DPP) v. Pringle* (1983) 2 Frewen 57, 97.

involving wards are matters for the President.[62] The judgment can be distinguished on the basis that the proceedings sought to be initiated in *In re K* were judicial review proceedings, not Article 40 proceedings, which are *sui generis* in their importance, urgency and constitutional basis. In this regard, IHREC respectfully agrees with the remarks of Hogan J in the judgment under appeal in which he observed that Mr [redacted]'s right to apply on his mother's behalf for release pursuant to Article 40.4.2 'cannot be swept away by Victorian wardship legislation, no matter how venerable or long-established.'[63]

68. Under Order 15, Rule 17 of the Rules of the Superior Courts, a person of unsound mind may sue as plaintiff by his committee or next friend, and may defend by his committee or guardian appointed for that purpose. IHREC is aware of a practice that, before the President will give permission for proceedings to be commenced on behalf of a ward, the court must be provided with draft proceedings and the opinion of counsel justifying the action. In our submission, such a rule could not apply to Article 40 applications. As has already been observed the European Court of Human Rights has held that it is not sufficient that a person's substitute decision maker gives consent on his or her behalf.[64] It would be anomalous, then, if the Court, as substitute decision-maker in the context of wardship proceedings, could deprive a detained person of the possibility of having the lawfulness of his or her detention challenged, or could defeat an inquiry already underway by taking a person into wardship.

69. IHREC further observes that the practice of the European Court of Human Rights may be instructive with respect to the approach this Court should take to the issue of Mr [redacted]'s standing to maintain these appeals. In Strasbourg, a close relative may bring an application on behalf of a victim of an alleged violation of the ECHR, particularly having regard to the vulnerability of the victim or the poor state of the victim's health. Thus, in *Ilhan v. Turkey*, a Kurdish

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[62] *In re K* [2001] 1 IR 338. See the Committee's submissions in the Cork University Hospital appeal, p 22.

[63] *AC v. Cork University Hospital and Others* [2018] IECA 217, Hogan J, 2 July 2018, para 35.

[64] *Shtukaturov v. Russia*, App No 44009/05, ECHR 2008-II, § 108; *DD v. Lithuania*, App No 13469/06, 14 February 2012, § 132; *Kedzior v. Poland*, App No 45026/07, 16 October 2012, § 58.

man's brother was permitted to make a complaint on his behalf on the grounds that he had been incapacitated in an alleged assault by Turkish gendarmes.[65] Similarly, in *YF v. Turkey*, the Court accepted that, as a close relative, a husband could bring a complaint on behalf of his wife, who alleged that she had been raped by police and then, when she made a complaint, subjected to a forced gynaecological examination by prosecutors. The Court had particular regard to her vulnerable position in the special circumstances of the case.[66]

70. Further, it has been established that legal capacity will not affect the right of petition to the European Court of Human Rights. Thus, the Court may allow a person lacking legal capacity under domestic law to conduct Convention proceedings in their own right. For example, in *Zehentner v. Austria*, the applicant lodged an application to the Court notwithstanding that she suffered from paranoid psychosis. She was deprived of legal capacity under Austrian law, and her guardian wrote to the Court seeking to withdraw the application. The applicant, however, stated that she wished to proceed with her case, and the Court allowed her to do so.[67] It is clear then, that deprivation of legal capacity such as by reception into wardship will not deprive a person of victim status under Article 34 ECHR.

71. Applying these principles to the appeals under consideration, it appears to IHREC that Mr [redacted] would be permitted to make a complaint alleging a violation of Article 5 ECHR on his mother's behalf to the European Court of Human Rights, and that the decision to deprive her of legal capacity would not necessarily affect his maintenance of that complaint. In these circumstances, it would be anomalous if he were not permitted to make and maintain domestic proceedings making, essentially, the same complaint, under a provision of the Constitution which gives effect to Article 5 ECHR.

72. In arguing that Mr [redacted] has no right to be heard in relation to the applications, the HSE relies on the 1967 case of *Application of Woods*, in which

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[65] *Ilhan v. Turkey*, App No 22277/93, ECHR 2000-VII, §§ 53-55.
[66] *YF v. Turkey*, App No 24209/94, ECHR 2003-IX, § 31
[67] *Zehentner v. Austria*, App No 20082/02, 16 July 2009, §§ 39-41.

the Supreme Court held that while a stranger might make an application pursuant to Article 40.4.2 on behalf of another person, it did not follow that he had the right to be heard in argument.[68] This judgment is relied on as though Mr [redacted] were a stranger, but in circumstances where he is her son and his commitment to her welfare is beyond doubt, it is difficult to see the *Woods* case as particularly relevant.

73. On the subject of rights of audience of persons who are neither parties to proceedings nor legal professionals, the Supreme Court held in *Coffey v. Environmental Protection Agency* that the limitation of the right of audience to professionally qualified persons was designed to serve the interests of the administration of justice and thus the public interest, and that to afford completely unqualified persons complete parallel rights of audience in the courts would in particular tend to undermine the elaborate system of professional regulation to which the professions were subject. The Court conceded that exceptions to the strict application of this rule could be permitted where it would work particular injustice.[69] In the context of Article 40.4.2 applications by or on behalf of persons with disabilities, IHREC recalls that in *DD v. Lithuania*, the Strasbourg Court observed that 'special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental health issues, are not fully capable of acting for themselves.' In these circumstances, IHREC submits that there are grounds for a liberal approach to the strict rule restricting rights of audience to parties, solicitors and counsel.

## E. CONCLUSION

74. For all of the reasons set out above, IHREC submits that Ms [redacted] was detained other than in accordance with law in CUH on 23 June 2016. Accordingly, IHREC submits that the HSE's appeal should be dismissed.

75. Further, IHREC submits that the orders made in wardship detaining Ms [redacted] were not made in accordance with the fundamental rights guaranteed by the

[68] *Application of Woods* [1970] IR 154.
[69] *Coffey and Others v. Environmental Protection Agency* [2014] 2 IR 125, 138.

Constitution and were incompatible with Article 5 ECHR inasmuch as the *Winterwerp* test was not satisfied, and the principle *audi alteram partem* was not respected. IHREC submits that these defects constituted, in the absence of emergency circumstances, a fundamental denial of justice rendering the orders of 23 July 2018 detaining Ms [redacted] unlawful. Accordingly, IHREC submits that Ms [redacted]'s appeal against the judgment of the High Court of 3 August 2018 should be allowed.

76. Finally, IHREC submits that [redacted] has sufficient *locus standi* to maintain Article 40.4.2 proceedings after Ms [redacted] was received into wardship on 19 August 2016, and that, in cases concerning the liberty of persons with disabilities, it may be appropriate to make exceptions to the strict rules restricting rights of audience to ensure that the right to liberty protected by the Constitution and the ECHR is real and effective for everyone in Ireland, irrespective of disability.

**Colin Smith BL**
**Nuala Butler SC**
**24 January 2019**

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