



THE SUPREME COURT

[Supreme Court Record No. 2018/122]

[Court of Appeal Record No. 2016/353]

[High Court Record No. 2016/759 SS]

Chief Justice
O'Donnell J.
McKechnie J.
MacMenamin J.
O'Malley J.

BETWEEN:

A.C AND (BY ORDER) A.C. (A WARD OF COURT SUING BY HER COMMITTEE, PATRICIA HICKEY GENERAL SOLICITOR)

-AND-

PATRICIA HICKEY GENERAL SOLICITOR

-AND-

APPLICANTS/RESPONDENTS

CORK UNIVERSITY HOSPITAL AND THE HEALTH SERVICE EXECUTIVE

RESPONDENTS/APPELLANTS

-AND-

GENERAL SOLICITOR FOR MINORS AND WARDS OF COURT

NOTICE PARTY

-AND-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

BETWEEN:

[Supreme Court Record No. 2018/122]

[Court of Appeal Record No. 2016/389]

[High Court Record No: 2016/818 SS]

A.C AND (BY ORDER) A.C. (A WARD OF COURT SUING BY HER COMMITTEE, PATRICIA HICKEY GENERAL SOLICITOR)

-AND-

PATRICIA HICKEY GENERAL SOLICITOR

APPLICANTS/RESPONDENTS

-AND-

JOSIE CLARE, CORK UNIVERSITY HOSPITAL AND THE HEALTH SERVICE EXECUTIVE

RESPONDENTS/APPELLANTS

-AND-

GENERAL SOLICITOR FOR MINORS AND WARDS OF COURT

NOTICE PARTY

-AND-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

[Supreme Court Record No. 2018/126]

[High Court Record No. 2018/970 SS]

BETWEEN:

A.C.

APPELLANT

-AND-

**KAREN FITZPATRICK, DIRECTOR OF NURSING AT ST FINBARR'S NURSING HOME,
HEALTH SERVICE EXECUTIVE AND COMYN KELLEHER TOBIN SOLICITORS**

RESPONDENTS

-AND-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 17th day of October, 2019.

Introduction

1. Mrs. A. C. is an elderly lady, now aged ninety-six, who broke one of her hips in 2015. She was treated in Cork University Hospital ("CUH") and recovered sufficiently to be discharged into the care of her son, Mr. P.C. Unfortunately, she broke her other hip some days later and was readmitted to hospital. A chain of events thereafter, including two attempts by her son Mr. C. to remove her from hospital, led to a decision by the President of the High Court, on the 19th August 2016, to make her a ward of court. Subsequently, various orders were made directing that Mrs. C. was to remain in hospital, authorising covert administration of her prescribed medication and restricting visits and contact by her family members. The basis for admission to wardship was medical evidence to the effect that Mrs. C. suffered from dementia of a moderate degree and was incapable of making a decision to discharge herself from hospital or otherwise managing her own affairs, while the subsequent orders were made on the basis of the President's view that they were necessary for the protection of her health and wellbeing.
2. It must be stressed from the outset that at no stage has it been claimed by any party that Mrs. C. suffers from a mental illness of a nature that would warrant her confinement under the provisions of the Mental Health Acts.
3. The litigation, which has involved multiple proceedings, applications, orders, judgments and appeals, many of which overlapped with each other both in time and in relation to the issues raised, has its roots in disputes over medical treatment between two members of Mrs. C.'s family on the one hand, and the medical and nursing staff of two hospitals responsible for her treatment and care on the other. The Health Service Executive ("the HSE") was the moving party in the wardship. The three Article 40.4 applications now to be considered by the Court, although brought in Mrs. C.'s name, were initiated and, for the most part, argued by her son Mr. C. All the matters dealt with in this judgment arose in the context of applications brought by him seeking the release of his mother from the hospitals in which she has been resident since 2015. Mr. C. has consistently argued that his mother is not cognitively impaired and that she wants to leave hospital.
4. When Mrs. C. was made a ward of court, the General Solicitor for Minors and Wards of Court ("the General Solicitor") was appointed as her committee. The General Solicitor was then joined in the various proceedings as a notice party. The Irish Human Rights and Equality Commission ("IHREC") was heard in this Court as *amicus curiae*.

5. In very brief summary, the first issue to be resolved is whether the Court of Appeal was correct in finding that Mrs. C. was unlawfully detained in hospital on dates in June and July 2016, being the dates relevant to the first and second Article 40.4 inquiries in the High Court. The HSE contests that finding arguing that she was not, as a matter of fact or law, detained. The third inquiry relates to a date in July 2018, when the fact of detention is admitted. Subject to resolution of a dispute about the scope of the leave to appeal granted by this Court in relation to that case, determination of the lawfulness of the detention on that date may depend upon whether or not the process by which Mrs. C. was taken into wardship breached her rights under the Constitution and/or under the European Convention on Human Rights. In any event, there is an issue to be determined as to whether various subsequent orders, made in the wardship context, breached her rights.
6. What follows is necessarily a lengthy and detailed examination of the history, evidence and arguments in the case, but it may be helpful to start by giving a brief account of the relevant proceedings and main issues. Before doing so, it may also be necessary to acknowledge that medical and caring personnel may well be unused to and uncomfortable with the categorisation of their actions in terms of “unlawful detention” or “deprivation of liberty”. However, it must be borne in mind that the Court’s concern in this context is not necessarily with the criminal or tortious concepts of false imprisonment, but with the protection of the constitutional rights of vulnerable patients. The framework for resolution of this particular dispute is the constitutional guarantee of the right to liberty of all persons, including those whose capacity may be impaired. The primary question is whether the decisions or actions taken in respect of Mrs. C. sufficiently safeguarded and vindicated her rights.
7. The first appeal to be considered is the appeal of the HSE against the decision of the Court of Appeal, set out in the judgment of Hogan J. delivered on the 2nd July 2018 (see [2018] IECA 217). That judgment dealt with two unsuccessful applications made by Mr. C. in the High Court in 2016 for the release of his mother from allegedly unlawful detention in CUH. In brief, Mrs. C. had signed a letter of self-discharge, and later a letter stating that she was transferring to a different hospital, but on both occasions when Mr. C. arrived to collect her he was prevented from removing her from the hospital. This action was taken because the hospital staff were concerned about her capacity to make the decision to leave. They were also concerned about her safety, given the extent of her care needs and the perception that the information given to them about Mr. C.’s plans to meet those needs was inadequate. The President of the High Court found in each of the two cases that there was no unlawful detention, because the hospital would have discharged her if there was somewhere suitable for her to go, and because he considered that the evidence demonstrated that she was unable to make such decisions for herself. At the conclusion of the first inquiry he therefore directed an examination by a court-appointed medical visitor, under the legislation governing the process by which a person may be made a ward of court. This culminated in the making of a wardship order in August 2016. That order was in being by the time the appeals against the President’s two Article 40.4 rulings came before the Court of Appeal.

8. In allowing the appeals in principle, the Court of Appeal held that Mrs. C. had been prevented from leaving when she wished to go, and she was, therefore, detained within the meaning of the Constitution. It was considered that the protective motivation and purpose of the hospital actions did not affect that legal analysis, and that the impaired cognitive capacity of a patient did not of itself confer any legal power of detention, where the patient had decided to leave a hospital. However, no order for release was made because Mrs. C. had by then been moved to another hospital (St. Finbarr's) that was not a party in the proceedings under appeal.
9. The issues raised by the HSE in this appeal relate to the analysis of Mrs. C.'s wishes in the judgment of the Court of Appeal and its finding that she was in detention. This aspect will require detailed consideration of the evidence. The HSE also challenges what it characterises as a decision by the Court of Appeal that it is necessary to give effect to the wishes of a person who lacks capacity, *"without regard to either the best interests of the patient, the duty owed to a patient, or the constitutional rights of a frail, unwell and vulnerable patient viewed in their totality"*. In summary, the submission on this latter aspect is that if particular actions are taken in the interests of patients, any necessary restrictions on their liberty should not, in legal terms, be considered to amount to detention.
10. The General Solicitor, having been appointed as the committee of the ward, intervened in the Court of Appeal. She did not consider the continuation of the proceedings to be in Mrs. C.'s interests, and challenged the right of Mr. C. to maintain the appeal against her objection. The argument was that, as the ward's committee, the General Solicitor was entitled to take over or halt the litigation in her interests. The Court of Appeal disagreed, pointing to the text of Article 40.4 and its reference to a complaint being made "by or on behalf of any person". It held that Mr. C.'s right under the Constitution to apply on behalf of his mother could not be impeded by the provisions of wardship legislation.
11. Taking a slightly different approach in this appeal, the General Solicitor proposes that if an application is made under Article 40.4 on behalf of a person who lacks capacity, such application should be subject to a filter process, requiring the approval of the President of the High Court if it is to be made in the name of the person alleged to be detained. Otherwise it should be made in the name of the person making the complaint. The rationale is that an application in respect of a ward should not be permitted to be brought if it is not in the best interests of the ward, and should not be seen as a method by which a collateral attack may be made on orders in wardship.
12. On the question of detention, the General Solicitor agrees with the HSE that the protection of the right to liberty under Article 40 does not require a court to disregard all other constitutional rights, and that actions taken for the purpose of vindicating those other rights must be taken into account in determining whether or not a person has been detained. In this case, action was taken in the interests of the health and safety of Mrs. C. and the consequential effects on her liberty should be seen simply as necessary and appropriate restrictions on, rather than deprivation of, her liberty.

13. It is also argued that, if there was indeed a deprivation of liberty by the hospital, the President's decision to the contrary occurred in the context of independent judicial scrutiny and the commencement of a process that would vindicate Mrs. C's rights in a more appropriate manner than an order for release. If the medical visitor had found that Mrs. C. had capacity, her rights of autonomy and self-determination would have led to such an order in any event. If she was of unsound mind, and the situation required restrictions on or deprivation of liberty, all such measures would be subject to regular review and to the procedural protections in place under the wardship jurisdiction.
14. The second appeal is that of Mr. C. After the Court of Appeal judgment in 2018, he initiated a fresh Article 40.4 inquiry that was ultimately dealt with by Faherty J., with judgment being given on the 3rd August 2018 (see [2018] IEHC 570). By the time of the hearing the President of the High Court had made formal orders in the wardship list directing that Mrs. C. was to remain in St. Finbarr's Hospital, and restricting Mr. C.'s access to her. The judgment of Faherty J. records that on this occasion the HSE and the General Solicitor submitted that Mrs. C. was, at that stage detained on foot of a valid and binding order making her a ward of court, and that that order had never been appealed or set aside. Mr. C. had pleaded, *inter alia*, that the wardship order was not validly made, in circumstances where Mrs. C. had objected to it, had not been given a copy of the report of the medical visitor, and had been given insufficient time to contest the issue. At the hearing he argued that the effect of the Court of Appeal judgment in his appeals was that Mrs. C. was free to leave hospital, and that she had therefore been in unlawful detention since June 2016.
15. Faherty J. held that Mrs. C. was lawfully detained on foot of orders made by the President of the High Court exercising his wardship jurisdiction. She found that the foundation for those orders was the order of the 19th August 2016, taking Mrs. C. into wardship. That order had not been appealed or set aside, and was not affected by the judgment of the Court of Appeal. Faherty J. made no findings as to whether or not the wardship order was lawfully made.
16. Mr. C's appeal against that decision raises some fundamental issues in relation to the wardship jurisdiction. The exact scope of the issues, having regard to the determination of this Court when granting leave to appeal, is the subject of a dispute between the parties, which will be addressed in more detail in due course.

Preliminary matters

17. Certain issues should be clarified before embarking on a full analysis. The first is the status of Mr. C. in these proceedings. It may be noted that there has been a degree of confusion throughout the litigation as to his precise role. He certainly believes that he is speaking for his mother, but much of his conduct and his arguments are inconsistent with his belief that she is a person of sound mind and entitled to make her own decisions. He has frequently demanded that she be treated in accordance with his own views on medical matters. The evidence indicates that he prepared and typed all of the letters

signed by her that will be referred to below. He has complained that he has not been given her medical files, although there is no legal basis upon which he would be entitled to them. Similarly, he has complained that he was not put on adequate notice of some court applications.

18. Meanwhile, the other parties have frequently pointed out that Mr. C. did not appeal the order by which Mrs. C. was taken into wardship. Rather, he has challenged that order in his Article 40.4 applications, and has also attempted to challenge the validity of the underlying legislation both in these applications and in plenary proceedings taken in his own name. However, the absence of an appeal may be somewhat irrelevant. Mr. C. does not appear to have had standing to appeal the original order. The claim asserted on behalf of the General Solicitor – to be entitled to prevent him from maintaining any litigation in the name of Mrs. C. – is entirely inconsistent with any suggestion that he could have lodged and maintained an appeal in her name, and he was not a party in his own right. It now seems to be accepted that, at most, he had a right as an interested person to apply, in the High Court wardship list, to have the order set aside or discharged, or alternatively to seek directions on matters coming within the wardship jurisdiction.
19. In the circumstances it is necessary to bear in mind that the only status possessed by Mr. C. in each of the appeals now before this Court is that conferred by Article 40.4 of the Constitution – that is, he has the right to make a complaint on behalf of his mother that she is unlawfully detained. The General Solicitor and the HSE continue to challenge Mr. C.'s standing, as a person who is not a legal representative, in relation to whether or not that right to complain includes a right to address the court in the substantive inquiry subsequent to the initial complaint. However, he has in fact been heard in the High Court and in this Court in these proceedings. The issue in relation to his standing will be discussed in due course.
20. It must be made clear from the outset that in an Article 40.4 inquiry the primary remedy available, if a court considers that a person is detained otherwise than in accordance with law, is an order for release. It is also possible, since it is expressly envisaged by Article 40.4, that a finding of unlawful detention may involve a finding that legislation purporting to authorise the detention is unconstitutional. However, no other remedy is available in this process. Mr. C. cannot, therefore, seek any relief on behalf of Mrs. C., other than the relief prescribed by that Article, whether in relation to medical treatment or any other matter.
21. I think that it is worth noting here that Mrs. C. was afforded legal representation in the Court of Appeal in the two matters in which the appeals were allowed. When granting leave to appeal from the order of Faherty J., this Court drew Mr. C.'s attention to the existence of a scheme whereby unrepresented litigants are provided with legal representation before this Court on request. He did not avail of it – whether this should be seen as his own choice or an informed decision on the part of Mrs. C. is open to question.

In any event, it has in some respects proved to be an unfortunate decision. Mr. C., although widely read, is not legally qualified and has a tendency to confuse legal concepts. Thus, for example, he does not always distinguish between evidence, pleadings and submissions, and does not appear to fully appreciate the role of an appellate court. There are defined rules about the extent to which such a court can consider events that have taken place since the first instance hearing. Appellate courts can consider evidence that was not put before the court of trial only in limited circumstances. Mr. C. has tended to assume that if he made a particular argument, or raised a particular issue, in one set of proceedings it must be regarded as arising in all. Perhaps most significantly, there is the fact that he has been personally embroiled in the history of the case to a degree that makes it difficult for him to focus on legal issues rather than on disputes about the evidence. This Court cannot make findings of fact or law based simply on assertions about evidence by any representatives, whether professional or lay.

22. I mention these matters, not by way of criticism, but to make the point that while the Court is conscious of the difficulties faced by lay litigants, it seems to me that if a person who is offered legal representation does not accept it, the Court should perhaps be entitled to hold that person to the same standards as professional advocates. This is, of course, a separate issue to that of the dispute over the right of a lay representative to be heard in Article 40.4 inquiries.
23. One difficulty for the Court arises from the fact that Mr. C. maintains that the provisions of the Lunacy Regulation (Ireland) Act 1871 (which is still the primary procedural legislation dealing with wardship) are inconsistent with the Constitution. He first raised this issue in his appeals before the Court of Appeal in the first two Article 40.4 applications. Both of the occasions of alleged detention with which that court was concerned occurred prior to the making of the wardship order but, as already noted, that order was in being by the time the appeals came on for hearing. While the hearing in the Court of Appeal was still pending, the General Solicitor, whose role in the appeal derived, obviously, from her appointment as committee under the Act of 1871, attempted to bring the case to a close in reliance on her statutory status. Mr. C. served a notice on the Attorney General of the sort that is required, in respect of a constitutional challenge, under O.60 of the Rules of the Superior Courts. Service of the notice was acknowledged but the Attorney General made no appearance in the appeals and it appears that this aspect was not drawn to the attention of the Court of Appeal.
24. In any event it is clear that the notice was legally irrelevant since the issue of unlawful detention on the dates in question in that appeal could not and did not relate to any provisions of the Act of 1871. The Court of Appeal therefore had no jurisdiction to embark on the constitutional issue in that appeal, and did not do so. Its consideration of the wardship aspect was confined to the issue of Mr. C.'s standing, in circumstances where the General Solicitor was arguing that he was not entitled to maintain the appeal. The decision that he had standing did not require a finding in respect of any particular provision of the Act.

25. In the later Article 40.4 application in 2018, Mr. C. did raise the issue of the constitutionality of the Act of 1871 in the High Court, but no notice was served on the Attorney General either in that Court or in the appeal to this Court. It is also relevant to note that the Act of 1871 *regulates* certain aspects of wardship but does not *create* the wardship jurisdiction. It does not appear that any challenge was ever brought in respect of s.9(1) of the Courts (Supplemental Provisions) Act 1961, the provision that currently forms the basis for the exercise by the President of the High Court of the wardship jurisdiction.
26. Mr. C. submits that an O.60 notice can be served at any stage of proceedings, and even that this Court may be obliged to request the participation of the Attorney General at this point. However, the issue came to the attention of this Court only in the course of the oral submissions, as the service of the notice had not been mentioned in any of the previous judgments, in written submissions or in case management. In an interim ruling, the Court stated that it would consider, in the light of any decisions made on other issues in the case, whether the constitutionality of the Act still arose and, secondly, whether it can properly be raised in this case given the above procedural issues. Notwithstanding this ruling, Mr. C. proceeded to serve an O.60 notice on the Attorney General after the hearing had concluded.
27. It is well established that the Court will not consider the constitutionality of a statute unless the circumstances of the case make it necessary. In this case, the question whether it is necessary will depend in part on the resolution of the dispute about the scope of the appeal.

Background facts

28. It is clear that the relationship between the medical personnel responsible for Mrs. C.'s treatment and Mr. C. and one of his sisters deteriorated badly over the course of the time she spent in CUH. Having been initially complimentary in relation to the treatment of her fractures, Mr. C. and the sister in question came to believe that their mother was being neglected and mistreated in a manner that compromised her rehabilitation. An early view was that she was being prescribed inappropriate medications. This has developed into a belief that the medication caused her to fall and was thus responsible for the injury, that she would have recovered to the point of being able to walk independently but for mistreatment, that medical personnel were using her for drug tests, that she is being tortured and that her prolonged stay in the care of the HSE is part of an attempt to cover up its misdeeds.
29. It is necessary to stress that no evidence has been adduced to support these views, other than the assertions of Mr. C. The Court cannot act on such assertions, or on extracts of material that he has found on the internet that may appear to support his views on certain medical issues. This material is not to be compared with sworn evidence from witnesses who can be cross-examined. Neither Mr. C. nor the Court is in a position to evaluate its reliability or indeed applicability in Mrs. C.'s case. On the other hand, there is sworn evidence, in respect of which I see no grounds for disbelief, from a number of the qualified personnel engaged in Mrs. C.'s treatment. The evidence has not been subjected

to cross-examination and has not been challenged by expert evidence, or indeed by any evidence other than that of Mr. C.

30. It needs to be stressed that, despite Mr. C.'s objections, the affidavit evidence adduced on behalf of the HSE is admissible. The fact that a witness is employed by a party to litigation does not create a conflict such that their evidence should be disregarded. Mr. C. says that his mother has not waived her privacy rights in respect of medical matters – however, it is he (not she) who has put her medical condition in issue and accused the various hospital personnel of negligence, abuse and torture. They are entitled to adduce evidence to rebut such accusations. Mr. C. has also argued that “equality of arms” requires the Court to disregard the medical evidence because he has been refused access to his mother’s medical files. Apart from the fact that this is inconsistent with his invocation of her right to privacy, and also with the proposition that she is capable of making her own decisions, it is misconceived. Mr. C. is making a complaint on behalf of his mother, but he does not thereby acquire her rights in respect of her personal information. He is simply not entitled to his mother’s records. That fact cannot prevent the Court from receiving the evidence of those who created the records.
31. The disputes appear to have centred, at least initially, on the issues related to medication and rehabilitation. Mr. C. believed that his mother’s anti-epileptic medication was responsible for her falls, because it caused her to have spasms that “threw her to the ground”. The prescription was in fact changed after some time, with apparently beneficial results. Mrs. C’s seizures reduced. However, Mr. C. believed that Mrs. C. had in the meantime developed post-traumatic stress disorder, with a consequential fear of walking that was inhibiting her recovery. He therefore considered that she needed specialised trauma counselling. When the hospital requested Mr. C to attend a multi-disciplinary team (“MDT”) meeting in March 2016, to discuss his mother’s discharge and future care, he expressed the view that such a discussion was premature. He made it clear that he and his sister would not attend any such meeting until their mother had the benefit of counselling. However, the old age psychiatrist considered that Mrs. C. did not have the cognitive capacity to benefit from the services of a traumatic injuries counsellor-psychiatrist.
32. At the same time, Mr. C. believed that the hospital should do more to encourage his mother to work on her rehabilitation. He and his sister appear to have taken the view that their mother would be inclined to lie in bed unless persuaded to make an effort. At one point they brought an exercise bicycle into the ward and expected her to use it. The staff, on the other hand, believed that the C.s were unrealistic in their expectations of rehabilitation and might be putting inappropriate pressure on their mother. Such pressure included what the staff considered to be verbal abuse. It must be noted here that the staff did not doubt the good intentions behind such behaviour, but a concern was voiced in some of the records that pressure to take exercise might have led to Mrs. C.’s second fall. At some stage the C.s were asked to stay away from the rehabilitation sessions. Interactions between Mr. C. and the staff appear to have become increasingly fractious.

33. The other medication issue arose from the prescription of anti-psychotic drugs. Mrs. C. had presented symptoms of psychosis at an early stage of her second admission and the medical personnel believed that she benefited from medication. Mr. C. did not accept this view and attempted to dissuade his mother from taking the medication. At some point, the hospital adopted the practice of secreting it, and also her prescribed anti-epilepsy medication, in her meals. The C.s object strenuously to this. They place greater faith in natural remedies. On one occasion Ms. C. was found sprinkling cayenne pepper on her mother, in the belief that it would have a therapeutic effect.
34. From the start of the litigation, the parties have also been in dispute about Mrs. C.'s capacity to make decisions for herself. The MDT considered Mrs. C.'s case at a meeting on the 8th March 2016. With reference to her mental state, it was recorded that her judgment was impaired and that she was considered by the psychiatrist to lack the cognitive capacity required to make decisions about her discharge. The meeting reached the conclusion that she was medically fit for discharge but that her condition was such that she required long-term care. The minutes recorded that she needed the assistance of at least one person (sometimes two) to transfer from bed to wheelchair and that she had made no functional gain from physiotherapy.
35. It is worth noting here the view of the medical social worker, Ms. Oliver. The psychiatrist's assessment of cognitive capacity was accepted, but Ms. Oliver reported that there had been a number of conversations with Mrs. C. about discharge. Mrs C. had said that she believed that she needed a lot of help – "more than that which could possibly be provided by her family". She had also said that while she had felt well cared for by her family up to that point, she believed that she currently needed to be cared for in a nursing home. Her preferred option was the nursing home where her sister resided.
36. The record of the meeting was subsequently sent to Mr. C. He responded trenchantly, rejecting any suggestion of cognitive impairment and complaining again about the medications prescribed to his mother. He expressed his own view that she should take exercise and drink water, and take only one form of medication. He concluded by saying that if the hospital was unable to implement the programme that he believed to be necessary, it would have to send his mother to one of two other hospitals in the region until she could be discharged home.
37. In early May 2016 the hospital again communicated its view that nursing home care would be the most appropriate setting, and requested Mr. C and his sister to come to a meeting to discuss the matter. Mr. C responded with a list of instructions for the care of his mother pending her discharge. His letter concluded with the sentences:

"My mother wants to control her own destiny and she has expressed opinions herself that the hospital can send her to St. Finbarrs, or the South Infirmary and she will go by the plan they have outlined for her. On this basis she is making her own decisions."

38. On the 20th May 2016 Mrs. C. signed a one-line statement that she wanted “to come home”. On the 9th June she signed a statement saying that she did not want to be given specified medications. On the 16th June Mr. C wrote to the CEO of the hospital, accusing the staff of *inter alia* falsely imprisoning his mother by refusing to allow himself or his son to take her out of the ward, and of assaulting and falsely imprisoning himself.
39. It seems that the discharge coordinator then proposed a meeting with staff personnel. Mr. C. refused to meet with either the ward manager, the director of nursing or the consultant, accusing the latter of neglect and abuse. On the other hand, he considered that the presence of the occupational therapist was essential. He said that he had now built a “handicapped” bedroom and bathroom with physiotherapy facilities. He stated that all costs associated with his mother’s return home and her rehabilitation would be the responsibility of the hospital and the HSE. He also stated that compensation would have to be paid.
40. On the 22nd June 2016 Mrs. C. signed a letter stating that, because she had been given anti-psychotic medication without her consent, she had no confidence in the doctors and felt forced to discharge herself as of the following day. The letter also stated that the HSE and CUH would be held responsible for the full costs associated with her rehabilitation in her son’s home. It is necessary to point out that the evidence indicates that Mrs. C. did not compose the letter, but signed a document prepared by her son.
41. Mr. C. arrived at the hospital on the morning of the 23rd June, intending to take his mother to live with him, but was prevented from removing her. Gardaí were present at the request of the hospital. On the 26th June Mrs. C. signed a statement in which she said that she was being held against her will.
42. On the 28th June the medical social worker (Ms. Oliver) and the social work team leader (Ms. Maher) wrote to Mr. C. saying, *inter alia*, that they “very much” supported Mrs. C.’s discharge home, and requesting him to meet with them, the public health nurse and the home help organiser “to jointly set up a comprehensive care plan”.

The first Article 40.4 inquiry

43. In the first week of July 2016 Mr. C. appeared before the President of the High Court intending to move an application for an inquiry pursuant to Article 40.4 of the Constitution. Having discussed the matter with him for some time, the President persuaded Mr. C. to attempt to reach some form of compromise with the hospital. This did not bear fruit and on the 7th July Mr. C. moved his application. An order was made in the normal terms, directing that Mrs. C. be produced before the Court for the purpose of an enquiry on the 11th June. Mr. C. assured the President that she was fit for the journey to Dublin.
44. On the 8th June counsel for the HSE sought and obtained a variation in the order, dispensing with the requirement to produce Mrs. C. on the basis that she was not well enough to travel to Dublin. This application was grounded upon an affidavit sworn by the solicitor acting for the HSE. Notice of the application was given to Mr. C. only by way of

email at about 6.30 on the evening of the 7th June, and he was not present in court the following morning.

45. While the primary purpose of the application on that occasion was to put before the President evidence to the effect that Mrs. C. was not fit to be brought to Dublin to attend the hearing in the High Court, the solicitor exhibited a more expansive report from Dr. Josie Clare, the consultant orthogeriatrician treating Mrs. C. Dr. Clare stated *inter alia* that discharge plans had been discussed with Mrs. C. and that she “mostly” indicated that she would like to go home. She was aware that her care needs were high but believed that her son was taking care of the situation. She was unable to offer specifics as to how her needs would be met and did not retain conversations where staff indicated to her that she would be at risk if she went home without adequate care. It was noted in Dr. Clare’s report that Mrs. C. variably indicated that she would like to live in South Infirmary Victoria Hospital (which according to Dr. Clare was not an option) or in Midleton Hospital.
46. In relation to the letter of the 22nd June, Dr. Clare said that the clinical staff were not satisfied that Mrs. C. understood the implications of taking her own discharge against medical advice and had therefore asked for security and garda assistance to prevent her removal from the ward on the 23rd. Three days after this incident, Dr. Clare and the ward clinical nurse manager had met with Mrs. C. She was aware that she had signed a letter of self-discharge but, according to Dr. Clare, was unaware of the details of the letter and believed that her son had arranged appropriate care at home. She also said that she would not want to leave the hospital if the staff thought that she should stay, and “seemed relieved that she was not going to be discharged home”.
47. Mrs. C. had repeatedly asked that the discharge plans be discussed with her son. However, she had also repeatedly indicated that she did not want male carers, including her son. Mr. C. had refused to meet with the community services team to discuss a schedule of care, and there were concerns about her return home without an appropriate care package in place. Another member of the family (another of Mrs. C.’s daughters, who has taken no part in the litigation) had also expressed concern about this.
48. In describing Mrs. C.’s condition Dr. Clare said that it was the view of the therapists that Mrs. C. would not benefit from further rehabilitation input. She referred to the fact that her children had bought her an exercise bicycle, the use of which would not be in keeping with the advice of the inpatient physiotherapy team. She also mentioned the occasion on which Mrs. C.’s daughter, Ms. C., had visited her in the ward and covered her in cayenne pepper. Dr Clare stated:

“There has been a deterioration in [her] mental state and general well being over the past few days. This is likely to be a combination of not taking her anti-psychotic medications on the advice of her family, and stressful events. [She] indicates that she feels unwell. She is no longer aware of who I am, in spite of being involved in her care for the past 9 months. She is aware that her son has been to Dublin and informs me that he is working to release her from being a prisoner in hospital. Her

current belief is that the Gardai were called to the ward two weeks ago in order to arrest her if she attempted to leave hospital”.

49. In summarising her views, Dr. Clare stated that Mrs. C’s capacity “on superficial matters” had varied over the previous number of months. The decision to return home in her case was a highly complex one. Mrs. C. was “consistently unable to weigh up the information regarding the steps involved in sourcing care and funding of same”. Her reasoning and judgment about the implications of going home without care were “significantly impaired”. It was Dr. Clare’s view that Mrs. C. was vulnerable and was influenced by her son’s wishes. In conclusion it was stated that Mrs. C. “consistently” did not have the capacity to make a decision to go home.
50. After the President had considered the materials put before him there was a brief exchange, in which counsel informed him that the HSE had decided to make an application to have Mrs. C. made a ward of court.

Hearing 11th July 2016

51. Counsel for the HSE stated at the start of the hearing that the hospital’s position was not that Mrs. C. was lawfully detained, but that she was not detained at all.
52. For the purposes of the substantive hearing the court had before it the affidavit of Mr. C. and replying affidavits from Dr. Clare, the general manager of the hospital Mr. Tony McNamara, the consultant in old age psychiatry Dr. Aoife Ni Chorcorain, and the medical social worker Ms. Lynn Oliver.
53. Mr. McNamara averred that there was no therapeutic necessity for Mrs. C. to be maintained in an acute hospital setting, and that the hospital had no vested interest in keeping her there. The MDT considered that her care needs would be best met in a nursing home. While Mrs. C. had previously expressed a preference to be cared for in her home by female carers, the MDT was not satisfied that any of the necessary care arrangements had been put in place to ensure that this could happen safely. Mr. C. had not made himself available for a meeting as requested in the letter of the 28th June. Mr. McNamara therefore concluded that the reason that Mrs. C. had not been discharged was the failure of her family to “engage and cooperate in a reasonable way”.
54. Mr. McNamara said that a decision to progress a wardship application had been made by the MDT on the 7th July, as a means of resolving the current impasse concerning a “timely, safe and appropriate discharge”.
55. Dr. Clare gave it as her opinion that Mrs. C. had not had capacity to engage in discussions and decision making regarding discharge plans for some months after her second admission. Her mental health had improved with treatment. She had met with her on the 9th May 2016, at the request of the discharge planning team, for the purposes of completing an Assessment of Capacity report concerning the “Fair Deal” scheme (under the terms of the Nursing Homes Support Scheme Act 2009). The form to be completed stipulates that it requires assessment of capacity to make decisions in respect of certain

specified matters – making an application for a nursing home loan; consenting to the creation of a charge on an asset; and taking the necessary actions in connection with these two matters. The assessment is to be based on the person's ability to understand information relevant to these decisions, to retain the information, to use or weigh it as part of the process of making a decision and to communicate their decision.

56. Dr. Clare had concluded that Mrs C. had some ability to understand information but lacked understanding of her own progress and potential for improvement; did not retain details regarding previous conversations about discharge planning; was unable to retain or weigh up the information; and declined to discuss discharge "until she's better". As far as her wishes on that date were concerned, Dr. Clare recorded that she did not object to being in hospital and did not want either to go home or to a nursing home. An important point here may be the observation by Dr. Clare that Mrs. C. simply did not engage in discussions where staff indicated to her that she had reached her rehabilitation potential and that it was necessary to plan for discharge.
57. Having gone over the matters covered in the report already referred to, Dr. Clare averred that she had discussed the situation with the solicitor for the HSE on the 2nd June, when wardship was suggested. On the same day, Dr. Clare met Mrs. C. again. On this occasion she felt that Mrs. C.'s capacity and reasoning had improved from a few weeks earlier. Dr. Clare believed that she had "some" capacity regarding her discharge plans, in that she was aware of her needs and believed that her son would provide for them. However, until the hospital knew what care would be provided, they could not fully assess Mrs. C.'s capacity to make the decision.
58. When the letter of the 22nd June was received there was a discussion on the ward about whether a care package could be set up at this notice. There were two reasons why it could not – firstly, the community team was concerned about delivering a package of care without having had a meeting with Mr. C., and, secondly, the letter was premised on the erroneous belief that the HSE would be liable for the full costs of rehabilitation and care. Accordingly, the clinical team was not satisfied that Mrs. C. understood the implications of taking her own discharge against medical advice. It was for that reason that security and garda assistance had been requested to prevent Mr. C. from removing her.
59. Dr. Clare met with Mrs. C. again on the 27th June with two social workers and the ward clinical manager. On that occasion she formed the view that Mrs. C. had capacity to complete a Fair Deal application. However, she did not wish to do so while she believed that her son was going to provide the care she needed at home. She did say that she would not want to leave hospital if the medical and nursing staff thought that she stay there. If there were not sufficient persons to care for her at home, she would prefer to go to Midleton Hospital.
60. Dr. Ní Chorcorain, the consultant psychiatrist, said that she had first met Mrs. C. at the end of December 2015 and thereafter at least once a month. Before swearing her affidavit, she saw her on the 8th July. It is noted in her affidavit that Mrs. C. had a history of cognitive impairment, diagnosed in 2015 by the consultant geriatrician in CUH. She had

experienced a period of delirium after her operation and had developed persecutory beliefs in relation to her medication and the staff.

61. In recent months (i.e. before July 2016), Mrs. C.'s attention, orientation and recall had improved, with minor deficits on clinical testing. Her persecutory beliefs had resolved between February and May/early June. However, after assessing her for the Fair Deal application in mid-May, Dr. Ní Chorcorain had concluded that while she could verbally communicate her wishes, her ability to understand, retain and weigh up the relevant information was impaired. An assessment on the 14th June was more positive – Dr. Ní Chorcorain says that on that date she was of the opinion that Mrs. C. had capacity to the point that she could reason that she required a high level of care and that her son could arrange it. The preferred option at that stage was to see Mr. C's suggested arrangements in order to clarify the issue of capacity over a number of sessions.
62. Dr. Ní Chorcorain was contacted on the morning of the 23rd July, when Mr. C. was on the ward. Her advice was that as they had no information on the arrangements in place for Mrs. C., they had a duty of care to keep her in hospital. This was on the basis that she was a vulnerable adult whose capacity was questionable. Dr. Ní Chorcorain assessed her later that day and found that her mental state had deteriorated. She was presenting with distress and the conclusion was that she lacked capacity.
63. In the opinion of Dr. Ní Chorcorain, Mrs. C. lacked capacity, as of the date of swearing the affidavit, to decide where to reside on discharge, since she lacked capacity to evaluate the information to make an informed decision. She had been "consistent" in expressing a preference to reside with her son. While she appeared to acknowledge that she required a high level of assistance, she believed that he was arranging for it. She knew that she required two people to assist her from bed to chair, and wanted to have female care staff. It was apparent that she did not appreciate the full implications of her diagnosis, and that her rehabilitation potential was poor. When asked about specifics she repeatedly said that her son would arrange matters. She did not exhibit any awareness of the financial implications of a home care discharge – either the limits of a home care package or the cost of private care. She did not demonstrate an understanding that her daughter (who, according to Dr. Ní Chorcorain, has a history of mental illness) was unwell and might not be able to provide the level of care required.
64. Dr. Ní Chorcorain supported the decision to apply for Mrs. C's admission into wardship.
65. An affidavit sworn by the medical social worker, Ms. Lynn Oliver, exhibits a report written by her on the 7th July for the purposes of the Article 40.4 inquiry. It appears therefrom that the medical social work team became involved in the case because there were concerns on the part of the nursing staff that the family was putting undue pressure on Mrs. C. The report sets out the history of Mrs. C's stay in hospital and the various interactions with her son and daughter. Ms. Oliver considered that some of the behaviour witnessed by staff was particularly worrying because Mrs. C. was lacking in cognitive capacity, was extremely vulnerable and was unable to self-protect.

66. Like Mr. McNamara, Ms. Oliver was of the view that the hospital had been endeavouring to facilitate a safe and appropriate discharge since March 2016. The opinion of the MDT was that nursing home care would be the most appropriate care setting. Ms. Oliver reported a conversation with Mrs. C. (the date of which was not recorded) in which Mrs. C. had said that she wanted to return home to her daughter. She was asked whether, given her care needs, she would accept the doctors' recommendation for nursing home care and she said that she would. Subsequently she said that her family would not be able to manage her at home and she needed to live in "a hospital type of place".
67. With reference to the events of the 23rd June, Ms. Oliver reported that she had spoken to Mrs. C. while her daughter was dressing her for her departure, before Mr. C. arrived. The daughter initially refused permission for Ms. Oliver to speak with Mrs. C., and according to Ms. Oliver, handled her mother in a somewhat rough manner. Ms. Oliver was concerned for Mrs. C.'s wellbeing. The daughter having then stepped out of the room, Ms. Oliver spoke with Mrs. C.
68. Mrs. C. said she wanted to go home that day because her son had everything set up. Ms. Oliver explained to her that the hospital did not know for sure if there were any carers in place to assist her; that Mr. C. had said that it was the responsibility of the HSE; and that the HSE would not provide two carers for 24 hours a day. She asked her how she would feel about going home if there were not enough carers. Mrs. C. replied that she would not want to go home if there were not enough carers. Asked where she would like to go instead, she said the South Infirmary hospital. Mr. C. then arrived and put his mother in a wheelchair. Ms. Oliver said that he became angry and abusive when staff and security attempted to engage him in discussion. He said that he and his sister would be the night-time carers, and that he had organised carers for daytime. He declined to provide further details but showed a photograph of a man who would, he said, be one of the carers.
69. Later that day, after Mr. C. had departed, Ms. Oliver told Mrs. C. that they had not been given sufficient information about carers but that one of them was a man. Mrs. C. "categorically" stated that she did not want a male carer, and would not want to return home if the care plan was insufficient for her needs. In a further conversation on the 27th June, Mrs. C. said that she had been unaware of the statement in the letter she had signed about the liability of the HSE for the cost of care.
70. Ms. Oliver expressed concern that it was being proposed that Mrs. C. should live with her son and daughter, who in her view had demonstrated abusive and overly demanding expectations of her. She noted that Mrs. C. had broken her second hip within a short time after her first discharge. She concluded that Mrs. C. appeared to be controlled by her son, deferred to his wishes rather than her own, and had indicated to staff when not in the presence of her family that she would be happy to receive nursing home care.
71. This report, as an exhibit to Ms. Oliver's affidavit, was before the High Court but was, unfortunately, accidentally omitted from the papers presented to the Court of Appeal in the subsequent appeal.

Judgment 11th July 2016

72. Kelly P. delivered an *ex tempore* judgment in which he held that Mrs. C. was not in unlawful detention. He noted that there was no therapeutic necessity for her to be maintained in an acute hospital setting, and that the hospital had no vested interest in keeping her there. The opinion of the MDT was that her needs would best be met in a nursing home, and they were not satisfied that any of the necessary care arrangements had been put in place by her family to ensure that she could be discharged to them safely and in accordance with her best interests. He noted the letter of the 28th June, where Ms. Oliver had stated that the hospital would support a discharge but was anxious for a meeting to discuss a joint care plan. Mr. C. had not made himself available for such a meeting.
73. Kelly P. accepted the evidence of the two consultants that Mrs. C. lacked the capacity to make a decision pertinent to her own welfare. On the basis of that evidence he was satisfied that he ought to exercise his capacity "as successor to the Lord Chancellor as President of the High Court to exercise jurisdiction over wards of court". He accordingly made an order pursuant to s. 11 of the Lunacy Regulation (Ireland) Act 1871, appointing a medical visitor to report independently to the Court as to the capacity of Mrs. C. to make any decisions concerning her own welfare or property.
74. Mr. C. lodged an appeal on the 15th July 2016.

The second Article 40.4 application

75. CUH was notified, by way of a letter signed by Mrs. C., on the 14th July 2016, that she intended to transfer to the Mater Private Hospital in Cork on that day for the purposes of physiotherapy and trauma counselling. The letter said that there was a room available for her under the care of a named consultant, and asked that her file be prepared for the transfer. However, Mr. C. said that when he called to the hospital that afternoon the security staff attempted to remove him after five minutes. He moved a further application under Article 40.4. on the 22nd July 2016, asserting that his mother was being detained in hospital against her will and that he and his sister had not been allowed to see her since the 14th. He stated in his affidavit that the application was "strictly confined" to her right to transfer hospital.
76. As it happens, the medical visitor appointed by Kelly P. filed her report with the registrar for wards of court on the 22nd July.
77. In an affidavit sworn for this inquiry, the general manager of the hospital referred to the earlier proceedings and deposed that it remained the opinion of the MDT that Mrs. C. lacked capacity to evaluate the information required to make an informed decision regarding discharge. In the absence of such capacity, the hospital was lawfully entitled to manage a safe discharge "in accordance with her best interests by having due regard to her previously expressed wishes".
78. The hospital did not support the proposed transfer because it was not deemed to be in her best interests. In this regard, Mr. McNamara exhibited a letter from Dr. Clare. She stated that she had witnessed Mrs. C. signing the letter of the 14th July 2016, as did the

security staff, and in her opinion it was signed under duress. Dr. Clare was not certain that Mrs. C. had sufficient time to read the contents. However, if she had, she nonetheless did not have the capacity to make the transfer decision and to consider the funding issues and the question of a discharge plan from the Mater. It is noteworthy that Dr. Clare said that she and Dr. Ní Chorcorain had noticed a deterioration in Mrs. C's mental health, and further compromise of her capacity, in the days after the first court case. By way of example, Mrs. C. repeatedly asked Dr. Clare who she was, despite having been under her care for some nine months.

79. Mrs. C. had not had active orthopaedic issues for many months, and transfer to an acute orthopaedic service was therefore not appropriate. Dr. Clare was aware that Mrs. C. did not have private medical insurance. She was unable to speak to the consultant in the Mater, who was out of the country, but said that she discovered that the bed had been arranged for a few days only.
80. On the question of visits by Mr. C. and his sister, Mr. McNamara deposed that there had been two incidents where Ms. C. had attempted to give her mother some tablets of unknown substance. On the 14th July staff had attempted to give or read out a letter on this issue to Mr. C. but he became abusive and security staff were called. He had resisted and was ushered out or removed by four security men.
81. A letter was sent to Mr. and Ms. C. on the 20th July, from the manager of social work, but sent under covering letter from the hospital's solicitor, setting out the conditions under which they would be permitted to visit their mother in the future – that the curtain rails around Mrs. C's bed would remain open, and that no drug or other substance was to be given to her without permission. They were invited to a meeting to discuss this, failing which they would not be permitted to visit.
82. In subsequent correspondence, the hospital took the position that it was now for the President of the High Court to determine the next step.
83. The Article 40.4 inquiry was made returnable before Kelly P. and was heard on the 25th July 2016. Mr. C. asked him to recuse himself, on the basis that his orders in the earlier inquiry were under appeal, and submitted that it would not be possible for him not to have some element of bias. He said that the current issue related only to the proposed transfer to the Mater Hospital and should be looked at in isolation. The application for recusal was refused.
84. Mr. C. denied that the arrangement in the Mater was only for a few days, and said that he had organised two weeks of care and physiotherapy. He was now being prevented from visiting his mother or speaking to her on the telephone. He alleged, at some length, that the hospital was neglecting her.
85. Kelly P. told the parties that he had now received the report from the independent medical visitor, who had reported that Mrs. C. had senile dementia, and that she was of unsound mind and incapable of planning her care needs. Nor did she have the mental

capacity to make a decision about where she should reasonably reside. Furthermore, in view of her cognitive impairment she was vulnerable to exploitation by others. Kelly P. observed that this confirmed the views of the doctors looking after her. Mr. C. responded by reiterating that she was not receiving proper medical treatment.

86. The President again held that Mrs. C was not being unlawfully detained. The hospital had no desire that she should stay there but wanted her to be transferred in an appropriate manner to facilities that could look after her needs. The staff had been endeavouring to effect a safe and appropriate discharge. Mrs. C. was no longer, on the evidence before the court, capable of making decisions in that regard. In addition to refusing to make an order under Article 40.4, the President directed an inquiry as to the soundness or unsoundness of her mind, pursuant to the wards of court jurisdiction.
87. Mr. C. asked for a copy of the medical visitor's report. This was refused on the basis that he had no entitlement to it. In response to a further query from Mr. C., Kelly P. said that Mrs. C. might be entitled to it but that was a matter between the court and her. Mr. C. said that if he was being prevented from assisting her she would need legal representation. The President responded that Mr. C. should get legal advice for her if he thought it appropriate. He also warned Mr. C. that he might make an order restricting his access to his mother if he persisted in efforts to give her medication.
88. In his concluding remarks the President observed that the position of the hospital personnel was "crystal clear". They were quite happy that Mrs. C. should be discharged but they were not going to discharge her other than in circumstances where her welfare was properly addressed.
89. Mr. C. lodged an appeal on the 3rd August 2016.

The first and second Article 40.4 inquiries – the Court of Appeal

90. The two appeals lodged in relation to the 2016 decisions in the Article 40.4 inquiries were dealt with in a single judgment delivered in the Court of Appeal on the 2nd July 2018.
91. It may be noted here that Article 40.4 matters would normally be dealt with in a much shorter time span. Much of the delay appears to be due to the disputes between the General Solicitor and Mr. C. about their respective rights to engage in the appeals. Mr. C. objected to the joinder of the General Solicitor, while she maintained that he was not entitled to continue with the appeals in opposition to her view that it was not in the ward's best interests to do so. Her position, as set out on affidavit, was that, as the duly appointed committee, she was responsible for the person and the estate of the ward, to include dealing with any proceedings on her behalf "to the exclusion of any other person, including the Ward and her family".
92. In response, Mr. C swore an affidavit in which he relied upon his right under the Constitution to make a complaint that his mother was being unlawfully detained, and argued that there was no bar in terms of "following through" on the proceedings, "moreso if the law which allows their detention is invalid having regard to the provisions of the

Constitution". He "confirmed" that, "as already pleaded", he was challenging the constitutionality of the wardship legislation "in totality". He repeated that the process had breached Mrs. C's constitutional and Convention rights, and asserted that a person subjected to an inquiry must be entitled to an independent psychiatrist and to counsel.

93. The President of the Court of Appeal ruled that the General Solicitor was a proper person to be joined, since there was in being a valid wardship order. However, the entitlement of Mr C. to proceed to the hearing of the appeals was also accepted.
94. There were separate disputes about discovery, because Mr. C. wished to seek out evidence that his mother had not been of unsound mind at the time she was taken into wardship, and about other procedural rulings dealt with in case management of the appeals. Some of these were the subjects of unsuccessful applications for leave to appeal to this Court. Significantly, time was also occupied with appeals by Mr. C. against other High Court orders, whereby he had been enjoined against posting online videos of his mother and of hospital staff, with commentary by himself. He had been arrested by order of the court for breach of the injunction, had ultimately been found to be in contempt of court and had agreed to remove the material in question. His appeals against the orders in question were dismissed by the Court of Appeal on the 14th March 2018 (see *Re C., A Ward of Court* [2018] IECA 65).
95. Judgment on the substantive matters was delivered on the 2nd July 2018. In the judgment (by Hogan J.), it is noted that while the notice of appeal was in the name of Mrs. C., the appeal seemed to be pursued by Mr. C. on her behalf. It also appears (although, for the reasons discussed above, this is not dealt with in any detail in the judgment) that in his grounds of appeal relating to the second inquiry Mr. C. challenged the legitimacy of the wardship order. I note from the papers before the Court that he had alleged that Mrs. C. had been denied constitutional and natural justice; that she did not know the case she had to face; that no documents had been served on her; that the procedure breached her rights under the Constitution and the Convention; and that the President of the High Court had not disclosed at the start of the second inquiry that he had received the report of the medical visitor and thereby demonstrated bias. Mr. C. also argued that the jurisdiction of the President of the High Court, as "successor" to the Lord Chancellor, was inconsistent with the Constitution.
96. In discussing the history of the case Hogan J. observed that the concerns on the part of the MDT and the hospital about the attitude and behaviour of Mr. C. and his sister were well-founded. The Court expressed a clear view that Mrs. C. was receiving excellent medical care. However, the question before the Court was a legal issue and was not to be determined on the basis of views about the proper course of medical treatment.
97. On the issue of *locus standi*, Hogan J. noted that the language of Article 40.4 made it clear that a complaint of unlawful detention could be made "by or on behalf" of any person. There were therefore no *ex ante* rules precluding an application by a third party. While there were circumstances in which such an application might be regarded as abusive, he was satisfied that Mr. C. was motivated by genuine (if eccentric) concern and

had the appropriate standing to seek relief *qua* family member on behalf of his mother. In coming to this conclusion, Hogan J. noted the argument raised about the legal consequences of wardship. He did not see this as a bar to Mr. C's right to maintain the appeals, since the right to apply on behalf of another was constitutionally inviolate. The right guaranteed by Article 40.4 could not be abridged by legislation, and could not be "swept away" by Victorian wardship legislation.

98. It is, I think, important to note that this is the only part of the judgment that deals with any aspect of the wardship issues. It was obviously necessary for the Court to address the *locus standi* question raised by the General Solicitor, but the broader challenge raised by Mr. C. to the wardship legislation clearly could not have been determined in appeals against orders made before Mrs. C. had been admitted to wardship. Since the *locus standi* issue was determined by reference to the text of Article 40.4, there was no necessity to consider that broader challenge for any purpose related to the appeal. It may also be noted at this point that the analysis of *locus standi* in the judgment is concerned with the right to make a complaint, and consequently to appeal. There is no reference to any debate about Mr. C's right to be heard in the full inquiry after making the complaint.
99. On the issue of detention, some criticism was expressed in the judgment of the affidavits filed on behalf of the hospital. These did not, in the view of Hogan J., adequately address the question whether Mrs. C. was being detained and, if so, what the legal authority for the detention was. He considered that as a matter of fact, Mrs. C. had been detained by the hospital on the 23rd June when she was prevented from leaving. This finding was based on what was described as the "fundamental" principle, established in *Dunne v. Clinton* [1930] I.R. 366, that there is no half-way house between liberty "unfettered by restraint" and an arrest.
100. Hogan J. then concluded that, as a matter of law, the hospital was not entitled to prevent Mrs. C. from leaving (if at an appropriate time and in an appropriate manner), if that was what she wanted to do. The hospital personnel could lawfully attempt to persuade a patient not to leave, but could not use restraint in the absence of any statutory power equivalent to s.23 of the Mental Health Act 2001 (which enables a hospital to temporarily prevent a voluntary patient from leaving). He saw the position of the hospital as amounting to an assertion of a paternalistic entitlement to act in the best interests of patients whose capacity was impaired and, in effect, to restrain their personal liberty. That, he considered, was inconsistent with the common law, as demonstrated by the decision in *Connors v. Pearson* [1921] 2 I.R. 51 where O'Connor L.J. had said:

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

101. Hogan J. stated that this was true a fortiori of the position under the Constitution.

“It could not be otherwise in the context of a Constitution which commits itself to upholding the dignity and freedom of the individual (Preamble), that pledges a democratic State based on the rule of law (Article 5) and, most fundamentally of all, which contains guarantees to protect the person (Article 40.3.2) and personal liberty (Article 40.4.1) respectively. Some may think that a care-giver in the position of CUH should have the power akin to that contained in s. 23 of the 2001 Act to restrain an elderly patient suffering dementia from leaving the hospital premises where no suitable care plan has been put in place for her treatment following her discharge. That, however, is a matter of policy for the Oireachtas, and even if a s. 23-type power was to be so conferred by statute to deal with cases of this nature, it would also be necessary to have it hedged with appropriate safeguards if it were to have any prospect of surviving constitutional challenge.”

102. The “self-created power of detention” claimed by CUH might, if unchecked, be open to widespread abuse for reasons of convenience “or even less noble reasons”. The absence of any such legal power meant that it did not matter that in fact, in this case, the hospital believed that permitting Mrs. C. to leave was not in her interests.
103. The Court of Appeal therefore concluded that the hospital had not acted lawfully in restraining Mrs. C. and preventing her from leaving on the 23rd June 2016. To that extent, the appeal was allowed. However, since she was no longer detained in the CUH an order for release under Article 40.4 was unnecessary.
104. The judgment does not expressly deal with the events of the 14th July 2016 underlying the second Article 40.4 inquiry, but refers only to the events of the 23rd June 2016. However, I think that it must be assumed that the same view was taken in respect of each occasion.

The HSE appeal against the decision of the Court of Appeal

The HSE

105. The HSE has focused on three issues in this appeal, being the applicability of the concept of detention in the factual circumstances of the case, the relevance of a patient’s capacity in considering the obligation to give effect to her expressed wishes, and the entitlement of Mr. C., a third party, to prosecute and to be heard in Article 40.4 proceedings in respect of a ward of court.
106. The first question raised is whether Mrs. C. was actually detained on the 23rd June 2016. Kelly P. held that she was not, because the hospital had no desire to keep her and she was a person who lacked capacity to make decisions for herself. The Court of Appeal held that she was, because she was prevented from leaving when she wanted to go, and her lack of capacity did not give rise to a power to detain her.
107. The HSE maintains its argument that Mrs. C. was not detained. In the Court of Appeal, it seems to have put its case on the basis of the evidence in the case as to Mrs. C’s wishes. The argument is, essentially, that the typed letters and the attempted removals of Mrs. C.

by her son should not have been treated by the Court of Appeal as an expression of her true wishes but rather as reflecting the wish of her son and daughter that she should leave.

108. That analysis is maintained, with counsel describing Mrs. C.'s wishes as being of critical importance. She had made it clear that she did not want a male carer, and her expressions of desire to go home arose from a belief that there would be adequate care provision.
109. Counsel also points to the evidence of concern on the part of the medical staff, senior nursing staff, the social workers, Mrs. C.'s GP, the public health nurse, and her other daughter, and to their belief that she should be in long-term nursing care.
110. In addition, the HSE now relies upon aspects of the jurisprudence of the European Court of Human Rights (ECtHR) in relation to Article 5 of the Convention. It is submitted that the decision of the Court of Appeal, in its reliance on *Dunne v. Clinton*, was inconsistent with that jurisprudence even assuming that Mrs. C. did want to leave. It will be recalled that in *Dunne v. Clinton* it was observed that (in Irish law) there was no "half-way house" between liberty and arrest. It is submitted that, by contrast, the ECtHR (and, following the enactment in the United Kingdom of the Human Rights Act 1998, the UK courts) takes what the HSE describes as a more nuanced approach, based on a multi-factorial test that considers the type, duration, effects and manner of implementation of the measures in question. It is suggested that the judgment delivered by this Court in *Child and Family Agency v. McG and JC* [2017] 1 I.R. 1, where the concrete situation of the individual concerned was examined by reference to a range of criteria, closely mirrors this approach.
111. It is submitted that the appropriate criteria are those set out in *Stanev v Bulgaria* [2012] 55 EHRR 22, where the ECtHR analysed the issue by reference to objective and subjective factors. Was the person confined in a particular restricted space for a "not negligible" length of time? Was there continuous supervision and control? Could the person leave without permission? Was the person aware of the situation? Did the person give valid consent to the confinement in question? It may be lawful, in the context of a protective measure concerning a person with impaired mental faculties, to substitute the decision of another person. However, if the detained person is aware of his or her situation and wishes to leave, the subjective element will be present despite the lack of *de jure* capacity. Finally, the detention must (for Convention purposes) be attributable to the State.
112. The HSE submits that, applying these criteria, there was no detention. There was no desire on the part of the hospital to keep Mrs. C. there, and no formal placement, constraints or arrangements. The duration of any restriction was only to provide clinicians with an opportunity to try to persuade the patient to change her mind, in pursuance of their duty of care to her. She continued to be treated as she had been before the 23rd June, and to receive visitors as she had previously. It is submitted, on the basis of *HM v*

Switzerland [2004] 38 EHRR 17, that there is no detention if an admittedly incapacitated person does not take issue with her placement.

113. The HSE, citing the judgment of the Court of Appeal of England and Wales in *R. (Ferreira) v. Inner London Senior Coroner* [2017] 3 W.L.R. 382, submits that the ECtHR does not apply a “bright line” test as to deprivation of liberty, and that not every interference with a person’s liberty of movement involves a potential violation of Article 5 of the Convention. In *Ferreira*, the question to be determined (for the purposes of rules about the holding of inquests) was whether a person who died in intensive care in hospital had died while in “State detention”. The individual in question was a woman who had at all times lacked capacity to make decisions as to her care and treatment. She had been admitted for medical treatment, but her condition worsened over the course of a few weeks before her death. The Court of Appeal of England and Wales held that any deprivation of liberty resulting from life-saving treatment fell outside Article 5.1(e) of the ECHR (detention for the purpose of treatment of persons of unsound mind). The treatment given, requiring decisions to be made that might interfere with liberty, had been the same as would be given in the case of a person with full capacity. There was no requirement for safeguards against deprivation of liberty, where it was unavoidable as a result of circumstances beyond the control of the authorities and was necessary to avert a real risk of serious injury or damage. The treatment was neither arbitrary nor the consequence of her impairment.
114. Particular reliance is placed by the HSE on the judgment of Arden L.J., who found no evidence that the hospital would have prevented the patient from leaving if she had had capacity to make a lawful decision to leave, and had made such a decision. On that basis, she thought that the case was one of “continuous supervision and control” but not lack of freedom to leave.
115. Counsel has referred to the decision of the United Kingdom Supreme Court in *Cheshire West and Chester Council v P.* [2014] A.C. 896, but asks this Court to distinguish it, arguing that it is inconsistent with and goes further than the Convention approach because it applies an “acid test” designed to avoid the need to consider the details of the factual situation. This case is considered in detail below.
116. It is submitted that consideration of the “concrete” situation of Mrs. C. demonstrates that there was no detention. She had been admitted for treatment for her broken hip in the ordinary course of events; she had been considered fit for discharge from March 2016; the HSE would have readily discharged her to an appropriate nursing home; it was not possible to put arrangements in place with Mr. C. or his sister because they would not discuss them; Mrs. C. would have needed a comprehensive care plan if she was to be discharged home; and the hospital had no information as to any plan made.
117. The HSE accepts that a hospital must take a functional approach to capacity, and also that a person’s capacity may fluctuate, and must be assessed on a continuum. Indeed, the evidence indicated that the issue of capacity had been under consideration and assessment in the hospital for some months. Counsel says that this was a case where a

vulnerable person had presented a letter, prepared and emailed by her son, in circumstances where she had on at least some occasions indicated that she was happy to stay in the hospital and had invariably said that she did not want a male carer. The hospital did not know what care arrangements had been made. In such circumstances, it is submitted, the hospital had to have some margin to address the issue with Mrs. C. and to establish her true wishes. Those wishes had to be taken into account, but the issue of capacity also had to be considered. If she was assessed as lacking capacity, time would be needed for consideration of whether a court application would be necessary. The time taken for this purpose could not be characterised as detention.

118. It is important to note here that counsel accepted that if a person of full capacity attempted to leave hospital and was prevented, that would amount to detention for the purposes of Article 40.4.
119. It was in those circumstances that the hospital had to be concerned as to whether Mrs. C. had the capacity to weigh up the pros and cons of discharge, and to make that decision for herself. A hospital faced with a difficult situation such as this is entitled to attempt to persuade the patient not to leave. Given the fluctuating nature of capacity, it must also be entitled to an opportunity to reconsider or reassess capacity. A patient lacking capacity could not be asked to sign a waiver for the purposes of self-discharge. Counsel submits that the best interests of the patient have to be considered in this context. This was a case where, as Dr. Ní Chorcorain had indicated, it was desirable to assess capacity over a number of sessions.
120. Finally, on the question of detention, the HSE submits that the State had no involvement in the placing of Mrs. C. in CUH, and that therefore not all elements required for a complaint under Article 5 of the Convention have been demonstrated.
121. The HSE submits that the analysis by the Court of Appeal of the duty of a hospital to discharge a patient who wishes to leave is "radical" but "underdeveloped", in that it seems to rule out any consideration of the patient's best interests and does not take into account any duty owed to a patient. That duty must allow for an opportunity, in the best interests of the patient, to attempt persuasion and to assess capacity. Further, it does not take into account the patient's constitutional rights viewed in their totality, and the detrimental effects on Mrs. C. had an order for release been made. It is said to place medical, nursing and care staff in a position where, on the one hand, they have a duty of care to a vulnerable adult who lacks capacity to make decisions about her own welfare but, on the other hand, they may not restrain her from being removed by third parties if she has expressed a wish to leave. It is pointed out that this situation can arise where there is no question of the admission of the person concerned as an involuntary patient under the Mental Health Acts, but where an opportunity to fully consider the question of wardship may be necessary.
122. The submission is made that a hospital cannot be required to simply "open the doors" if a person who lacks capacity expresses a wish to leave. The issue at this point is the best interests of the patient. It is certainly accepted that the wishes expressed must be taken

into account in deciding what should be done. The wishes of family members, doctors and social workers are also relevant. Ultimately it may be necessary to apply to court.

123. The Court is referred in this context to the Guide to Professional Conduct and Ethics for Registered Medical Practitioners, produced by the Medical Council pursuant to s.7(2) of the Medical Practitioners Act 2007. Section 10 of the 2016 edition of the Guide directs the practitioner, when dealing with an adult patient who lacks capacity to make a healthcare decision, to take reasonable steps to find out if there is any person who has the legal authority to make decisions on the patient's behalf. If there is not, the practitioner must decide what is in the patient's best interests. This involves consideration of:

- Which treatment option would give the best clinical benefit;
- The patient's past and present wishes, if known;
- Whether the patient is likely to regain capacity;
- The views of persons close to the patient who may be familiar with her preferences, beliefs and values; and
- The views of other health care professionals involved in the patient's care.

124. Reference is made to the acknowledgment by Hogan J. that a hospital would be entitled to prevent a patient from leaving in a manner that was inappropriate or disruptive of other patients. It is submitted that it follows that the hospital must have a margin of discretion. If so, it must have a duty to have regard to the patient's condition and constitutional rights. That must encompass an entitlement to try to persuade the patient, and if necessary must allow for an assessment of capacity and consideration of options.

125. In relation to the issue regarding Mr. C.'s *locus standi*, the HSE submits that the Court of Appeal erred in holding that he must be deemed to have the necessary standing to make the applications on behalf of his mother. It is contended that the Court did not deal with the argument, based on the decision of this Court in *Application of Woods* [1970] I.R. 154, that there is a distinction between the right to apply for an inquiry and a right to be heard in the inquiry. It is also submitted that in permitting Mr. C. to maintain the appeal despite the opposition of Mrs. C.'s appointed substitute decision-maker, the General Solicitor, the Court of Appeal denied to a ward of court the same level of effective control over who might complain on her behalf that is enjoyed by a person with capacity.

The General Solicitor

126. The General Solicitor submits if there was in fact deprivation of liberty (and counsel accepts that there was, or at least that there was a restriction on liberty) in this case it was not unlawful, because its purpose was to vindicate Mrs. C.'s other constitutional rights. In this regard, reference is made to the judgment of McDermott J. in *Health Service Executive v. VF* [2014] 3 I.R. 305, where it was accepted that the HSE had demonstrated that an exceptional order of the court was required, with the effect of

placing the respondent in a secure unit that was not an authorised centre under the Mental Health Acts. This was for the purpose of protecting her life and bodily integrity in circumstances where she was completely unable to take care of her own basic needs. Similarly, the ECtHR takes into account all of the surrounding circumstances in determining whether or not there has been a deprivation of liberty.

127. It is submitted that, on the facts of the instant case, an order for the release of Mrs. C. in the first two Article 40.4 inquiries would have put her health and welfare in “real and immediate jeopardy”. However, the President of the High Court had not left her in a situation where her right to liberty was not protected by proper safeguards. Rather, in deciding to send out the medical visitor, he had commenced an independent judicial process designed to investigate whether or not Mrs. C. should be taken into wardship in order to protect her person and property. The course of action taken was thus intended to harmonise her various constitutional rights. It is suggested that in adopting that course, he was following a precedent set in *In Re D.* [1987] I.R. 449, where the commencement of wardship proceedings had the effect that it was unnecessary to conduct an Article 40.4 inquiry.
128. The General Solicitor submits that the issue of the appropriateness of proceedings instituted or maintained on behalf of a ward is, pursuant to the decision in *Re K (A ward of court)* [2001] 1 I.R. 338, a matter for the President of the High Court. The ward cannot institute proceedings in her own right, and the committee would probably require the approval of the President to make an Article 40.4 application. However, while the judgment in *Re K* does not indicate that there is any category of litigation excluded from this principle, counsel does not suggest that it means that an Article 40.4 application may not be made on behalf of a person lacking capacity. He submits, rather, that the application should be made in the name of the person making the allegation of unlawfulness, unless the President has given approval for it to be made in the name of the ward. This would reflect the reality of the situation, and also protect the ward against any order for costs.
129. It is accepted that there are good public policy reasons for applying the concept of *locus standi* relatively liberally in the Article 40.4 context, and that a person should be permitted to make an application so long as they have some form of legitimate interest in and connection with the case.
130. Apart from these considerations counsel has made it clear that the real concern of the General Solicitor is that persons generally should not be free to seek an Article 40.4 inquiry as means of bringing a collateral attack on orders in wardship.
131. On the broader issue, counsel submits, in effect, that while a person with capacity cannot be detained without lawful authority, the right to autonomy does not arise if a person lacks capacity to do or act. The President of the High Court was not satisfied that Mrs. C. had capacity and therefore started a process which would determine whether her right to autonomy needed to be respected or not. In counsel’s view, she had indeed been

deprived of liberty but that judicial process had built-in safeguards to protect all of her personal rights and would ensure that there was no unlawful detention.

132. The General Solicitor agrees with the HSE that a determination of the question whether there has been deprivation of liberty cannot leave out of account the other personal rights of the individual concerned. The actions of the hospital were required to protect Mrs. C.'s health and welfare. Any consequential effects on her liberty were simply a necessary and appropriate restriction rather than deprivation.

Mr. C.

133. Mr. C. has supported the reasoning of the Court of Appeal to some extent. For him, however, the issue is more clear-cut in that his view is that his mother is and was of sound mind, and therefore the question of the duties or powers of a hospital in respect of persons lacking capacity does not arise. He queries the factual basis for the medical visitor's report, which he has not seen, and says that his mother may have been suffering from drug intoxication, as an effect of the prescribed medication, on the day that she was seen by the visitor. He sees the exchange between the President and counsel for the HSE on the 8th July 2016, in his absence, as indicating a pre-determined view on the part of the former in relation to the questions of capacity and wardship.

IHREC

134. Counsel for IHREC has advocated that the Court should approach the case as one involving the rights of a person of "limited capacity", submitting that there is an increasing recognition in the fields of law and medicine that capacity is not a black-and-white issue. It is something that can fluctuate in any individual person, and may be possessed in relation to some matters and not others. This thinking is reflected in the Assisted Decision Making (Capacity) Act 2015 and the Mental Health (Amendment) Act 2018 (neither of which have yet been fully brought into force). The HSE is described as taking a traditional "paternalistic" approach to the issues. Counsel submits that the Court of Appeal judgment does not in fact rule out "best interests" considerations, but rather it asks who is to determine a person's best interests, and how the person in question is to be heard in a decision-making process affecting her rights. The point is made that lack of capacity to decide to leave would have to imply a lack of capacity to decide to stay, but there had been no suggestion that Mrs. C. should be made a ward of court until it seemed that she disagreed with the perception of the hospital personnel as to where her best interests lay.
135. As IHREC sees it, the issues at the heart of the appeal concern rights that each individual possesses as part of their fundamental human personality, being dignity, autonomy and the freedom to make choices. This includes the freedom to go against advice and make bad choices. In the instant case, it concerns the right of an elderly person to choose to live with her family even if she would be better off in hospital. However, it is not suggested that a body such as the HSE is obliged to facilitate that person's choice to the extent of providing unlimited funding for home care.

136. Counsel suggests that if the hospital had come to the view that the patient did not have capacity to sign a waiver for the purposes of self-discharge, it was incumbent upon them to seek the assistance of the court at an early stage, whether through invocation of the wardship jurisdiction or under the Mental Health Acts. In this case the situation had been building up for some months. The Commission's concern about the case arises from the fact that no procedural safeguards were applied in the hospital. There was no legal framework within which Mrs. C.'s entitlement to make a decision about her own discharge passed to the HSE. The hospital had simply made a decision to override a clearly-expressed wish, and had implemented that decision by removal of Mr. C. and his sister from the premises. No mechanism had been available by which Mrs. C.'s voice (as opposed to the competing voices of the hospital staff and the family members) could be heard in a meaningful way. The lack of process and lack of safeguards when she was prevented from leaving meant that there was unlawful detention.

The background to the third Article 40.4 inquiry – the wardship orders and plenary proceedings

137. It is now necessary to return to the summer of 2016, and the making of the original wardship order. On the 29th July 2016, the solicitors for the hospital had served on Mrs. C. an originating "notice of order on report" pursuant to s.12 of the Lunacy Regulations (Ireland) Act 1871. This document recited that the medical visitor had reported to the President, on the 22nd July, that she was of unsound mind and incapable of managing her person and property, and that the President of the High Court had provisionally ordered an inquiry as to whether that was so. She was informed that if she objected to the inquiry being held, or to any declaration being made, or if she wanted the inquiry to take place before a jury, she would have to serve a notice signed by herself and attested by her solicitor within seven days.

138. An affidavit of service records that the solicitor who served the notice on Mrs. C. explained its contents to her.

139. In response, the notice (or a copy of it) was returned to the registrar annotated with a handwritten note, dated the 4th August 2016 and signed by Mrs. C. attesting as follows:

"I object to any inquiry. I am of sound mind. I do not have a solicitor. You must provide legal representation."

140. A typed letter was sent on the same date, also signed by Mrs. C., complaining that the notice was not a "certified copy" and that it did not include a copy of the medical visitor's report. It was asserted that she was entitled to representation to be provided under the Attorney General's scheme, and second opinions from a neurologist and a psychiatrist. It was further stated that she had appealed the orders made by Kelly P. on the 8th, 11th and 25th July 2016, and that this included the applications made on those dates in respect of the wardship process. The letter also included a number of demands, not related to any aspect of wardship, in respect of the facilities available to her in the hospital.

141. The registrar replied on the 5th August, informing Mrs. C. that he could not seek medical opinions on her behalf or address the question of legal representation.
142. A further typed letter, signed by Mrs. C., was sent on the 14th August. The letter said that it had come to her attention that the registrar's role was not limited to wardship, but that he had a quasi-judicial administrative role. As a person who was being unlawfully detained against her will, contrary to what Kelly P. thought, she asserted that she was entitled to "a proper inquiry from you". She stated that she was not free to leave the hospital to get the treatment she needed, or to see a solicitor, or get second opinions from a neurologist or psychiatrist. In the circumstances the registrar had a duty of care to her. The letter continues:
- "Please make your inquiry, and obtain a proposal from the hospital and solicitor who brought the application against me. They are responsible for bringing me and you into the process, and therefore my entitlements must be met."*
143. On the 16th August 2016 the registrar wrote to Mrs. C. telling her that the court hearing would be on the morning of the 19th August. He repeated that if she wished to object, her objection should be supported by medical evidence. She was also told that she could seek her own legal advice. There is a dispute between the parties as to whether this letter was received by her on the 17th or the 18th. It does appear that Mrs C. gave the letter to her daughter on the 18th. The factual dispute cannot be resolved by this Court, but I think it fair to observe that either way this would have to be seen as very short notice of a hearing with such potentially significant consequences.
144. The matter was listed before the President on the 19th August. Mrs. C. was not present and nor, it would appear, was any member of her family. From the very short DAR transcript it is clear that the President had read the medical evidence presented in affidavits sworn on behalf of the HSE. He stated that he was satisfied that Mrs C. was suffering from dementia and was unable to manage her affairs. He therefore made an order that she be taken into wardship. The order recites that the President considered, *inter alia*, the affidavit of Dr. Ní Chorcorain, which does not appear to have been served on Mrs. C. and which Mr. C. says he was not furnished with until much later. The report of the medical visitor, similarly, was not served and has not been seen by any of the parties or by this Court.
145. On the 23rd August 2016 a typed letter, signed by Mrs. C., was sent to the registrar. In it, complaint was made that Mrs. C. had not been given four clear days' notice of the hearing; that she could not attend because she was being detained against her will; and that she needed legal aid. It was also asserted that since the original notice of the inquiry was dated the 29th July, the last day of the legal term, and since time did not run during the long vacation, the seven days for her response would not expire until the 8th October 2016. (This latter point is incorrect. Order 122 provides that no pleading shall be delivered during the long vacation unless directed by the court. The notice did not require to be answered by a pleading – it informed Mrs. C. that a provisional order had been

made for an inquiry and invited her to make known her objection, or a demand for a jury.)

146. In December 2016, Mr. C. and his sister were invited to attend a meeting to discuss a proposal by the HSE to transfer Mrs. C. from CUH to St. Finbarr's Hospital. This latter hospital, which specialises in the care of the elderly, had been identified as having the appropriate facilities, and as being willing to accept Mrs. C. subject to certain conditions about visits from her son and daughters. Mr. C. and his sister attended but left shortly after the meeting began. It may be noted here that Mrs. C.'s other daughter attended and agreed with the proposal. The General Solicitor and the President of the High Court approved the transfer, and the President agreed to impose the requested conditions restricting the rights of family members in respect of visits. Such visits were to be "limited and supervised", to be confined to specified days and times in the case of each family member, and to include a prohibition on giving any food, drink or medication to Mrs. C. without the consent of the hospital.
147. The President's approval was conveyed by letter, rather than by formal court order. It is necessary to note here that wardship provides for a regime of substituted decision-making in respect of persons who have been found by the court to lack capacity to make their own decisions. Many such decisions will thereafter be made by the person or persons appointed as the committee of the ward, subject in certain instances to the written consent of the High Court. For example, a committee cannot change the ward's residence except by leave of the judge or registrar (O.67, r.60 of the Rules of the Superior Courts). Where consent is required and is given, there will, in the absence of any dispute being brought before the court, normally be no necessity for a formal court order.
148. However, the HSE was advised by the General Solicitor that any application for further directions in respect of Mr. C. and his sister should be made in open court by way of motion served on them, and on notice to the committee.
149. Mrs. C. was not, it would seem, personally notified of these developments. At that stage, of course, the formal legal position was that the General Solicitor was entitled to make decisions on her behalf and in those circumstances she was, at least technically, admitted to St. Finbarr's on a voluntary basis. The insistence by Mr. C. that there should have been a court order at that time authorising her detention in St. Finbarr's is therefore mistaken.
150. In July 2017 Mr. C. issued plenary proceedings in his own name against the Minister for Health, the HSE, the General Solicitor, the registrar for wards of court and a number of individuals employed by the HSE. He subsequently issued a notice of motion seeking an extensive range of interlocutory reliefs largely concerning the medication administered to his mother and the restrictions imposed on visiting her. In response, the HSE filed affidavits from its solicitor, the consultant geriatrician (Dr. Norma Harnedy) and the director of nursing in St. Finbarr's (Ms Catherine White). It was emphasised that Mr. C. had never adduced any expert evidence contradicting the views of the medical personnel, who saw his opinions as entirely unsubstantiated and medically incorrect. In particular, Dr. Harnedy averred that the changes in the medication sought by Mr. C. would be

harmful to Mrs. C.'s health and welfare and would put her life at risk, and that she was not capable of engaging in physiotherapy. Ms. White averred that Mrs. C.'s condition had been comfortable and stable after her transfer to St. Finbarr's, but that her health had been deteriorating since the 10th June 2017, with increased mental anxiety. This was attributed by the medical team to the "persistent advice" from her son and daughter not to take her medication, which they believed to be poison. Mrs. C. had started refusing her oral medication, meals and fluids.

151. The motion was initially moved before a vacation judge on the 8th August 2017, but, against Mr. C's objection, was adjourned into the President's list for the 9th October 2017. Mr. C. did not attend court on that date. Having heard from counsel for the defendants, Kelly P. made an order dismissing the application for interlocutory relief; staying the proceedings and prohibiting Mr. C. from taking any further steps in them save on application to the court on four days' notice to the defendants; and prohibiting him from taking any proceedings which addressed the life, liberty, health or welfare of his mother other than by application in the wardship proceedings, brought on notice to the General Solicitor. It appears that this was done of the Court's own motion, rather than by way of an application on notice to Mr. C.

152. The order of the 9th October 2017 is currently under appeal to the Court of Appeal.

The third Article 40.4 inquiry

153. The proximate events leading up to the third substantive Article 40.4 inquiry occurred shortly after the judgment of the Court of Appeal in relation to the first two applications was delivered on the 2nd July 2018. The order was perfected on the 9th July. There appears to have been an escalation in incidents involving the family at St. Finbarr's around this time, summarised in affidavits sworn by the HSE's solicitor David Hickey and Karen Fitzpatrick the Acting Director of Nursing.

154. On the 6th July Mr. C.'s sister visited and removed her mother's Butrans patch. When challenged by staff she became verbally abusive and threatening, accusing them of poisoning and murder, and stating that she had a right to do what she liked with her mother. Ms. C. returned to the hospital the following day in the company of two men who claimed to be friends but whose names Mrs. C. did not appear to recognise. Staff refused to let them into the ward. Ms. C. said that she would take her mother away in the next few days.

155. Staff cancelled the visit scheduled for the next day but overheard four or five phone calls from Mr. C. to his mother, in which he repeatedly asked her if she was being tortured. Eventually she stopped answering the phone. It was reported that staff had heard a number of calls from Mr. C. over the previous days in which he had been abusive to her, calling her a "stupid fucking woman" and instructing her to tell the management that she was leaving in a few days. He told her that she was being poisoned and tortured. Mrs. C. was distressed by these calls.

156. On the 10th July 2018 Mr. C attempted to visit his mother, stating that he was going to take her home, and was prevented from so doing. He demanded a copy of any order detaining her in St. Finbarr's but none was produced. Mr. C. (who was accompanied by a man taking video footage of the staff) complained to gardaí called to the scene that his mother was being poisoned by the forcible administration of unsuitable medication. He had a copy of the Court of Appeal judgment, which, as the gardaí pointed out, had nothing to do with St. Finbarr's. Mr. C. alleged that his mother was unlawfully taken to St. Finbarr's. He said that he would return, and if there was no court order he would take his mother home.
157. On the 11th July the HSE applied to the President, by way of motion on notice to the committee, for a number of orders with a view to setting out the precise legal status of Mrs. C.'s stay in St. Finbarr's. In an affidavit sworn for this purpose, the solicitor for the HSE said that it had become necessary to obtain orders regulating and restricting visits, due to a number of incidents since the delivery of the judgment. He exhibited staff memos relating to the various incidents. The gardaí had advised that they could not remove Mr. C. from the hospital unless he became threatening to someone or acted in breach of the peace.
158. The orders sought were to continue the direction that Mrs. C. should remain in St. Finbarr's as an inpatient along with further orders preventing Mr. C. and his sister from removing her; to authorise the medical and nursing staff to take all necessary and/or incidental steps to promote and ensure the care, protection, safety and welfare of Mrs. C., including the provision of any treatment deemed to be clinically appropriate including the administration of medication either overtly or covertly; to authorise the hospital to regulate or restrict any or all visits to Mrs. C. as deemed necessary in her best interests and to authorise the gardaí to remove any person refusing to comply with such regulation or restriction. The President observed that Mr. C. and his sister should be put on notice as respondents to the application, with a view to making orders against them. He therefore made the orders on an interim basis only, until the 16th July 2018.
159. In an affidavit sworn for that hearing the Acting Director of Nursing in St. Finbarr's, Ms. Karen Fitzpatrick, described the behaviour of Mr. C. and his sister as constituting a form of abuse of both Mrs. C. and the staff. She referred in particular to allegations of threatening behaviour and to the consistent efforts of Mr. C. and his sister to persuade their mother not to take her prescribed medication by telling her that the hospital was trying to poison her. This behaviour caused worry and distress to Mrs. C., was clearly contrary to her best interests, and had previously led to a general deterioration in her condition in 2017 when she had stopped taking her oral medication. She had suffered two grand mal seizures on the 10th June 2017. For this reason, the medication was administered in food or drink if Mrs. C. refused it.
160. Ms Fitzpatrick apprehended that unless they were restrained by the Court, Mr. C. and his sister would continue to try to remove Mrs. C. from St. Finbarr's, to "berate" the staff and to carry on with "abusive and disruptive conduct contrary to the best interests of [Mrs.

C.]". In particular it was feared that they would use any access they had to persuade her that she was being poisoned and should refuse to accept her medication. Ms. Fitzpatrick stated that their ongoing conduct, including the video recording of hospital personnel, was placing an intolerable strain and burden on health care staff seeking to provide care and residential services for vulnerable older persons, and had required the intervention of security and gardai.

161. Ms. Fitzpatrick averred that it had come to her attention on the 12th July 2018 that a series of posts about Mrs. C. had been posted on a Facebook page, with photographs and videos of Mrs. C. and of staff.
162. Counsel's submission was that, while the President had previously given his consent to the placement, in view of the ongoing dispute with Mr. C. it was now necessary to have a formal order that could be produced if demanded. The hospital authorities and staff believed that the behaviour of Mr. C. and his sister, in the ward and over the phone, was interfering with Mrs. C.'s medical treatment and was causing her distress.
163. The General Solicitor consented to the application. Counsel said that a medical visitor had visited in June, and was perfectly satisfied with the medical treatment and nursing care being received by Mrs C. The General Solicitor had also arranged for a visit by an independent social worker in March, and he was likewise very satisfied.
164. On the 16th July neither Mr. nor Ms. C. were present, and the Court was informed that there was a question about service of the documents grounding the application. The HSE sought a continuation of the interim orders for a further short period of time, along with new orders covering the monitoring of phone calls to Mrs. C. believed to be from Mr. C. or his sister, and a power to terminate such calls if they engaged in verbal abuse or tried to persuade her not to take her medication. Such calls, it was said, were causing her distress and were not in her best interests. A further order was sought prohibiting the taking of photographs or the making of recording of persons going in and out of the hospital. These orders were made by the President and the matter was then adjourned to the 23rd July 2018.
165. On the 23rd July Mr. C. was present. Counsel for the HSE informed the President that Mr. C. had made an application under Article 40.4 to Noonan J. on the 16th July. It did not appear that an inquiry had been opened but the application had been endorsed for return in Court 6 on the 23rd. Counsel had informed the judge sitting on that date in that court of the order made by the President on the 9th October 2017 (which, it will be recalled, *inter alia* prohibited Mr. C. from making any application regarding the liberty, health or welfare of Mrs. C. other than in the wardship list), and had told the judge that it would be more appropriate if the matter was mentioned before the President. It may be noted here that in fact between the 10th and the 23rd July Mr. C. had made a number of Article 40.4 applications to various judges, none of which had been refused, as such, but none of which had resulted in an order for an inquiry. However, he had at one point been served by the HSE (which thought at the time that such an inquiry had been directed) with a "certificate of detention" exhibiting a copy of the order of the 16th July.

166. Mr. C. said, in the course of an exchange that was intemperate on his part, that he would not move the Article 40.4 application before Kelly P. because he was conflicted and should recuse himself.
167. As Mr. C. said that he had not yet received any papers in respect of the HSE application, it was adjourned to the 8th October 2018 with the interim orders to continue until then in the same terms. Mr. C. was given until the 17th September to file any replying affidavit. There was liberty to all parties to apply on four days' notice. In the event, neither Mr. C. nor his sister filed any affidavit.
168. On the 30th July 2018 the Court of Appeal held that the High Court judges in question had erred in not directing an inquiry under Article 40.4. Mr. C. then moved another High Court application, on the 31st July 2018.
169. For the purposes of this application Mr. C. lodged a notice of *ex parte* application in which, apart from the holding of an inquiry and an order for release, a large number of orders and declarations were sought. In summary, as far as the nursing home was concerned, it was pleaded that Mrs. C. was unlawfully detained in St Finbarr's; that there was no duly perfected High Court order to justify the detention; and that the finding of the Court of Appeal that CUH had acted unlawfully on the 23rd June 2016 meant that Mrs. C was still in unlawful detention. A number of interim orders were claimed in respect of contact and visits between Mrs. C. and her children and in respect of her medication.
170. Specific relief was sought in respect of the order of the 16th July 2018, which was asserted to have been founded upon the "irrational" decision of the President of the High Court to diminish the rights of Mrs. C. to choose her place of residence and her form of treatment; to be visited by her children; and to express her opinions without hindrance or surveillance.
171. A declaration was sought to the effect that the Lunacy Regulation (Ireland) Act 1871 was inconsistent with and repugnant to the Constitution, and was incompatible with the European Convention on Human Rights.
172. Finally, there were claims for damages and costs.
173. Under the heading "Grounds", it was asserted that the order of the 19th August 2016 was invalid and of no legal force because, *inter alia*, Mrs. C. had objected to it in writing; had received insufficient advance notice; did not have legal representation or a doctor or psychiatrist; and was not present in court for the hearing. Mr. C. described the evidence that she suffered from moderate dementia and was of unsound mind as "entirely untrue", and asserted that the witnesses had a conflict of interest because they were employed by the HSE. He also raised various technical arguments based on the Rules of the Superior Courts.
174. By way of certification of detention, the respondents produced the order of the President made on the 23rd July 2018 which, as noted above, directed that Mrs. C. was to remain

in St. Finbarr's as an in-patient pending further order of the Court. It is important to stress that the HSE expressly referred to this as a "certificate of detention". In the circumstances as they had developed, no argument was now being made that there was no detention.

175. The HSE relied on an affidavit sworn by its solicitor Mr. David Hickey, who referred to and quoted from the affidavits sworn earlier in July by the medical personnel. He also set out the history of the litigation, including the (by then stayed) plenary proceedings and stated that many of the reliefs being sought by Mr. C. in the Article 40.4 inquiry (in respect of medication, visits, the constitutionality and compatibility with the ECHR of the Lunacy Regulations (Ireland) Act 1871, and the claim for damages) duplicated reliefs sought in those plenary proceedings. The affidavit also refers in detail to the previous orders of the President and the reasons for them. However, it does not deal with the process by which Mrs. C. was taken into wardship in August 2016.
176. As noted above, the order of the 23rd July 2018 gave liberty to Mr. C. to apply on notice to vary or discharge the order made on that date. The respondents appear to have argued, or were understood by Faherty J. to have argued, in the Article 40.4 hearing that this meant that Mr. C. could apply to discharge the wardship order but that he had not done so, and nor had he appealed the making of the wardship order. Counsel submitted that the wardship was an important intervening event between the detention found by the Court of Appeal to have been unlawful and Mrs. C.'s current circumstances. It is clear that in response Mr. C. argued that the process by which Mrs. C. was made a ward of court was unlawful.
177. Counsel also submitted, based on the affidavit of Mr. Hickey, that there was an overlap between the issues now being raised by Mr. C. and those raised by him in his plenary proceedings. This submission seems to have related to Mr. C.'s arguments about the Act of 1871 and the alleged procedural deficiencies in the wardship process. The submission made by the HSE was that these issues required to be dealt with in the plenary proceedings. While those proceedings had been stayed, Mr. C. had liberty to apply to lift the stay and had in any event appealed it. According to counsel acting for the HSE in this appeal, the major issue before Faherty J. was a separate one – whether the judgment of the Court of Appeal had any "knock-on" or "domino" effect in respect of Mrs. C.'s status.

Judgment of Faherty J.

178. Faherty J. delivered judgment on the 3rd August 2018 (see *A.C. v Fitzpatrick* [2018] IEHC 570). In finding that Mrs. C. was not unlawfully detained, she emphasised that the wardship order of the 19th August 2016 had not been the subject of an appeal or an application to set aside. It is however noted in the judgment that Mr. C. had argued that the wardship order was made without proper notice and that Mrs. C. had objected to the claim that she was of unsound mind. It is further noted that he had challenged the wardship proceedings in his plenary proceedings, in his application for leave to this Court and in his objection to the participation of the General Solicitor in his appeals before the Court of Appeal.

179. Mr. C. had argued that the Court of Appeal must be taken to have accepted all of the grounds of appeal he had put before it, including those relating to the wardship process, but Faherty J. was entirely satisfied that the judgment of Hogan J. did not address the validity of the wardship proceedings.
180. The trial judge believed that, given the safeguards enumerated in the recent judgment of the President in *HSE v A.M.* [2017] IEHC 184, it was open to Mr. C. to go back to the President of the High Court to challenge the finding that Mrs. C. was of unsound mind.
181. At paragraph 55 of her judgment Faherty J. said:

“The sole, central and most important issue with which the Court is concerned in this application is whether A.C.’s placement in St. Finbarr’s Hospital is unlawful, as contended for by P.C. The Certificate of Detention relies on the Order of Kelly P. of the 23rd July, 2018 in Wardship as the lawful basis for that detention. The foundation for that Order, and indeed similar Orders made by Kelly P. since August, 2016, is the Order of the learned President of the High Court of the 19th August, 2016 taking A.C. into Wardship. I am satisfied that, as matters stand, that Order has not been appealed or set aside.”

182. Mr. C. had submitted that wardship did not afford the same protections as those set out under the Mental Health Act 2001. However, Faherty J. noted that, in accordance with the statements made by Kelly P. in *HSE v A.M.*, Mrs. C.’s placement in St. Finbarr’s was subject to ongoing review by the court.
183. Faherty J. therefore concluded that Mrs. C.’s detention was based on the order of the President made on the 23rd July 2018, in the exercise of his statutory jurisdiction under s. 9 of the Courts of Justice (Supplementary Provisions) Act 1961, and that the necessary safeguards were present in that regular reviews were conducted by the President and all interested parties (in which category she included the ward) had a right to apply on short notice.
184. I note here an argument made by Mr. C. arising from the fact that in the text of her judgment Faherty J. left the words “Supplementary Provisions” out of the title of the Act of 1961. He believes that an error of this nature cannot be corrected, and invalidates the decision of the trial judge. This is entirely misconceived – even if the phrasing used was not merely an abbreviated version of the title of the Act, a simple error of this sort in a written judgment does not go to the validity of the decision and does not require correction as, for example, some kinds of mistake in a court order might. Mr. C. also asserts that the mistake demonstrates that the judgment of Faherty J. was not written by her. This unusual, and entirely unmeritorious, claim is based on the fact that Kelly P. omitted the same two words in his judgment in the case of *HSE v A.M.* There is simply no significance to be attached to that fact.

The orders of October 2018

185. The HSE applications that had been made in July 2018 came before the President on the 8th October 2018, and were adjourned into the following day. The General Solicitor, Ms. Hickey, had sworn an affidavit that week in which she reported that she had visited Mrs. C. on the 5th September. She expressed satisfaction with the accommodation and care provided to Mrs. C. She explained to her that she was her solicitor, and would be representing her at the next court case in the High Court. Ms. Hickey said that Mrs. C. appeared to understand this and was “pleased to engage and chat”. Mrs. C. told her that she did not want to be held in St. Finbarr’s and wanted to go home.
186. Ms. Hickey asked Mrs. C. where she would go and how she would be cared for if she was discharged. She replied that the doctors and nurses could come with her, and she would stay with her daughter. She said that she did not feel well, and that her quality of life was such that she would be better off dead. She reported pain in her back, legs and heels. Asked about pain killers, she said that she was being poisoned. According to the affidavit, Mrs. C. repeatedly asked Ms. Hickey what her name was.
187. Ms. Hickey said that she was told by the clinical nurse that Mrs. C. was happy when visited by her other daughter and her grandchildren, but was distressed by visits from Ms. C. She believed she was being poisoned because her son told her so. The clinical nurse was of the view that Mrs. C. had capacity, and queried her status as a ward of court. However, the nursing notes included a report from the medical visitor in September 2017 that Mrs. C. had dementia with paranoid delusions. In October 2017 another psychiatrist had referred to increased agitation and a belief that her bed was on fire. Ms. Hickey had concluded that an updated psychiatric report should be obtained.
188. Accordingly, a report was obtained from Dr. Pádraigín O’Sullivan, a consultant in geriatric medicine. Dr. O’Sullivan assessed Mrs. C. on the 19th September 2018 and discussed with her the context of her being in St. Finbarr’s, the choices available to her (i.e. living at home or in St. Finbarr’s) and the consequences of those choices. She found Mrs. C. to be alert and easily engaged in conversation. However, her conclusions were as follows:
- “While her speech was spontaneous, she was very perseverative, returning to persistent persecutory delusions regarding ‘poisoned food’. Despite persecutory delusions, she was ‘incongruently’ comfortable and content.*
- Her insight into affairs, reasoning and judgment were very limited.*
- She could not understand the complexity of discharge process.*
- In my opinion, [Mrs. C.] lacks capacity to decide re: discharge.”*
189. On the 9th October 2018 Mr. C. was present in court. He had not filed an affidavit, and the case he made was, essentially, that Kelly P. was *functus officio* because his orders were under appeal. This was a misunderstanding of the concept.
190. In an *ex tempore* ruling, the President noted that the General Solicitor had visited Mrs. C. in September, and had reported that Mrs. C. wanted to leave and to go home. She also

reported that one of the nurses on the ward had expressed the view that Mrs. C. might have capacity, and that she had therefore sought a report from a consultant in geriatric medicine. The consultant had seen Mrs. C. on the 19th September and found that she had insight into her affairs but that her reasoning and judgment were very limited, she could not understand the complexity of the discharge process and she lacked the capacity to make decisions concerning discharge.

191. The President then continued the orders previously made, listed the matter for further review on the 11th December, and gave Mr. C. and his sister liberty to apply to discharge or vary the order on 72 hours' notice.
192. On the 9th November 2018 Dr. Norma Harnedy, consultant physician in geriatric medicine, gave an extensive medico-legal report on Mrs. C. She noted the history in relation to the anti-epilepsy medication (in brief, that she did not have seizures while taking the medication, that her compliance was variable, that she had had two seizures on the 10th June 2017 when she stopped taking it, and that she had since been commenced on medication again). Dr. Harnedy averred that it was vital that Mrs. C. take the medication on an ongoing basis. She was at high risk of recurrent seizures, which could develop into *status epilepticus* (a state of continuous seizure activity that could result in aspiration pneumonia or death).
193. Dr. Harnedy noted from the records that Mr. C. had repeatedly requested that his mother's medications be discontinued in favour of herbal medications and cannabidiol oil, which were not licenced for use or of proven benefit. He had been witnessed by staff trying to administer such medications to his mother, and recommending to her that she not take her prescribed medication. (This refers to the period in CUH.)
194. Having reviewed Mrs. C. for the purposes of this report, Dr. Harnedy stated that Mrs. C. had moderate cognitive impairment and lacked insight into her medical condition, the importance of medication compliance and the risks associated with further seizures. She had limited short-term memory and was unable to remember previous conversations with Dr. Harnedy. She had significant care needs, requiring a hoist for getting in and out of bed, and could not mobilise. She had failed to make any functional recovery of mobility while in CUH and further physiotherapy would not be tolerated by her, or be of benefit to her.
195. Dr. Harnedy noted that Mrs. C. had demonstrated psychotic features while in CUH, and reported that she could still become quite agitated and verbally aggressive. This necessitated a low dose of an anti-psychotic medication, to which she had not shown any adverse side effects. She also had recurrent psychotic symptoms of visual and tactile hallucinations, which could be quite distressing for her.
196. Dr. Harnedy concluded that Mrs. C. continued to lack the mental and decision-making capacity to decide on her residence due to moderately advanced dementia. She was unable to realise the consequences of her choices and outcomes if she was not administered her medications regularly. While she sometimes requested to return home,

she frequently admitted that she was happy with her care and happy to stay there. In view of her significant physical care needs and complex medical conditions, Dr. Harnedy considered that her care could only be met in a supervised nursing home environment.

The parameters of Mr. C.'s appeal to this Court

197. Mr. C. sought leave to bring leap-frog appeals against the decision of Faherty J. and the order of Kelly P. made on the 16th July 2018. The decision to grant leave is set out in *A.C. v. Fitzpatrick* [2018] IESCDET 125. At paragraph 12 the following passage is to be found:

"It was necessary to set out that history in a little detail in order to understand the issues which potentially arise on any appeal which might be brought against the order of Faherty J., whether it be an appeal in the ordinary way to the Court of Appeal or a so-called leap-frog appeal to this Court. It is important to note that the orders sought to be appealed are not only the order of Faherty J. but also the order of Kelly P. of the 16th July 2018 which formed the basis of the finding of Faherty J. that Mrs. C.'s detention in St. Finbarr's was lawful. Indeed, there is a sense in which a consideration of the validity of the order of Kelly P. logically comes first for if that order ought to be overturned then the legal basis for the continuing detention of Mrs. C., as found by Faherty J., would disappear."

198. In paragraph 13 it was noted that it could reasonably be said that Mr. C. was questioning the underlying validity of the order made in the wardship proceedings that directed that Mrs. C. was to remain an in-patient in St. Finbarr's.

199. In paragraph 15 reference was made to the question raised by Mr. C. as to the interaction of the historic wardship legislation with modern mental health legislation, and his argument that the wardship procedure did not offer sufficient safeguards in the context of the detention of persons allegedly suffering from a mental disorder, as compared with the procedures under the Mental Health Act 2001. Reference was made to the case of *AM v HSE* [2019] 2 I.L.R.M. 119, in which judgment was, at that time, pending, and the Court noted an overlap to the extent that both cases involved questions concerning the wardship jurisdiction in the context of modern mental health legislation.

200. In paragraph 17 it was recorded that the Court had had some concerns about the potential necessity to examine detailed questions of fact, or issues concerning the application of established law to the facts of the case (in which case an appeal to the Court of Appeal might have been seen as more appropriate). Mr. C. had been written to seeking clarity. The court had received a reply to the effect that the principal focus of his challenge was what he contended to be the invalidity of the orders made in wardship by the High Court, based on what were said to be the inadequate safeguards contained in wardship legislation for the protection of the rights of persons who might be detained.

201. At paragraph 19 it was noted that leave was being given:

“solely to permit an argument to be put forward to the effect that Mr. C. may, in the context of the Article 40 application, challenge the validity of the orders made in the wardship proceedings on the grounds that such orders are said not to have been made in accordance with fundamental rights guaranteed by the Constitution or in circumstances which are incompatible with legally binding obligations under the European Convention on Human Rights.”

202. Finally, in paragraph 20, the Court noted that there was in place an order of the High Court which was, on its face, valid and which justified the continuing detention of Mrs. C.:

“While the appeal will, therefore, arise in the context not only of those wardship orders but also in the context of the Article 40 application, it is clear to the Court that the focus of the appeal must be on the validity of the wardship orders, for unless those orders can successfully be challenged there will remain a valid basis for the continued detention of Mrs. C. and thus no jurisdiction to make an order under Article 40.”

203. I noted above that there was some disagreement between the parties as to the scope of the leave granted in this appeal.

204. The representatives of the HSE and the General Solicitor appear to have understood the Court to have been referring only to the orders made in 2018, at a time after Mrs. C. was taken into wardship, and not to the original wardship order itself (the making of which did not of course involve the General Solicitor). Counsel for the HSE says that this view was taken because, despite the breadth of Mr. C.’s pleadings, the issues about the original wardship order were not pursued in the hearing before Faherty J. The focus at that stage was on the effect of the Court of Appeal judgment. This occurred because it was submitted to the trial judge that the references in Mr. C.’s papers to the 1871 Act and to procedural deficiencies overlapped with the issues in the plenary proceedings and were required to be dealt with in the latter. It is submitted that the shared understanding of the parties is that the Court is now concerned with the events and orders of July 2018, and whether or not there was a fundamental denial of justice at that point.

205. Counsel also makes the point that the affidavit sworn by Mr. Hickey for the purpose of the 2018 application did not address in detail what had happened in 2016, and that the factual matters are therefore not before the Court in any coherent manner.

206. However, I note that on the 9th October 2018 counsel then acting for the HSE informed the President of the High Court that the leave granted to appeal against the decision of Faherty J. was on the question whether “the wardship jurisdiction generally” was compatible with the Constitution and the Convention.

Submissions in Mr. C.’s appeal

Mr. C.

207. It is difficult to summarise Mr. C.’s arguments. Despite the terms of the leave granted, he has again raised numerous complaints in relation to the treatment of his mother and of

himself, and seeks to characterise almost all of the evidence tendered on behalf of the other parties as false. He makes allegations, not only against the medical, nursing and caring staff but against legal practitioners, registrars, judges and the compilers of court transcripts. It is not possible for this Court to make any findings in his favour on those matters. I will therefore attempt to describe the legal arguments raised, insofar as they touch upon the central issues arising in the appeal from the decision of Faherty J.

208. Mr. C. submits that Faherty J. addressed the wrong issue and failed to “remain within the bounds” of Article 40.4. Firstly, he says that his argument was concerned with the certificate exhibiting the order of the 16th July, and the court should not have addressed itself to the order of the 23rd. Secondly, the case was decided on the basis of the wardship jurisdiction.
209. Part of the case made by Mr. C. is that there was no court order that Mrs. C. was to be detained either in CUH (after the 19th August 2016) or St. Finbarr’s (to which she was moved on the 14th December 2016). He therefore argues that such detention could not be justified simply by reference to the wardship. However, as pointed out above, the nature of the wardship status means that no formal order was required.
210. In relation to the original wardship order, Mr. C. makes a number of points. He claims that the notification of the hearing listed on the 19th August 2016 was posted on the 17th and received by his mother in the evening post. She gave it to her daughter the following day, and by the time he saw it there was no time for him to do anything about it. He challenges the court process, whereby in a very short listing the President had stated that he had read the medical reports and was satisfied that an order should be made. Mr. C. makes the case that his mother should have been properly notified, should have had the assistance of medical specialists and should have been present in court. Mr. C. submits that the provisions of the Lunacy Regulation (Ireland) Act 1871 are not compliant with the ECHR.
211. Mr. C. submits that the order exhibited with the certificate produced by the HSE said that Mrs. C. was to remain in St. Finbarr’s as an inpatient, but did not refer to the fact that she was being detained. The Act of 1871 does not specify how long a person may be detained for, and no procedures are laid down for review. He relies in particular on the judgments of the European Court of Human Rights, which will be discussed below.
212. Mr. C. has also raised some arguments that simply have no legal viability at all and can be dealt with very briefly. One is that the provisions of the Courts of Justice Act 1924 dealing with wardship were never brought into force.
213. Part 1 of that Act dealt with the creation of the High Court and Supreme Court. Section 19 (which is in Part 1) provided for the transfer to the Chief Justice of “all such jurisdiction in lunacy and minor matters as was lately exercised by the Lord Chancellor of Ireland and is at the passing of this Act exercised by the Lord Chief Justice of Ireland”. Section 2 of the Act provided that it was to come into operation on such day or days as might be fixed therefor by order or orders of the Executive Council.

214. Mr. C.'s argument that s.19 was never brought into force is made on the basis that the National Archives possesses only a draft of a commencement order for Part 1, and he contends that there is no officially "enrolled" version.
215. In any court proceedings initiated since 1925, an order of the Executive Council of Saorstát Éireann may, pursuant to s.4 of the Documentary Evidence Act of that year, be proved by production of the relevant extract from Iris Oifigiúil. The printed volume containing the set of commencement orders for the Courts of Justice Act 1924 has been produced in court. It is clear that Part 1 of the Act was brought into operation on the 5th June 1924, on foot of an order made by the Executive Council on the 4th June 1924. The absence of a copy from the National Archives has no legal significance.
216. In any event this argument is beside the point. The wardship jurisdiction now exercisable by the High Court is vested by s.9 of the Courts (Supplemental Provisions) Act 1961.
217. Mr. C. contends that it is unconstitutional for the President of the High Court to purport to be the "successor" of the Lord Chancellor. This argument is based in part on the terms of Article 40.2 of the Constitution, prohibiting the conferral by the State of titles of nobility and the acceptance by any citizen of a title of nobility or honour without the prior approval of the Government. It is also submitted that the Lord Chancellor's powers were exercised on behalf of the Crown through the sign manual, and could not have been validly given to the High Court of Ireland. Mr. C. has written to Queen Elizabeth II in this regard.
218. This argument involves a complete misunderstanding of what is meant when the President of the High Court is described as the "successor" to the Lord Chancellor. It is simply a shorthand term for describing the powers exercisable by the President in wardship matters. Those powers are conferred, moreover, by legislation enacted by the Oireachtas – specifically, by s.9(1) of the Courts (Supplemental Provisions) Act 1961. As Finlay C.J. said in *In Re D.* [1987] I.R. 449, this section did not "transfer" any jurisdiction. Rather, it directly vested in the High Court a jurisdiction described and identified by reference to jurisdictions previously exercised or vested.

IHREC

219. Counsel for IHREC had also originally understood the terms of the Court's determination granting leave as being concerned only with the detention order made in 2018. However, at the oral hearing she expanded on her submissions to deal also with the original wardship order made in 2016. She has approached this on the basis that the constitutionality of the Acts of 1871 and 1961 are not in issue, but that the procedures prescribed thereunder must be read and applied in compliance with the Constitution and the Convention. In that light, it is submitted that what happened in Mrs. C.'s case, in both 2016 and 2018, was unlawful and failed to adequately respect her rights. The chief concern here is what is seen as the lack of procedural safeguards enabling the voice of Mrs. C. to be heard. Three elements in particular are identified in respect of the wardship process – the lack of notice provided before the hearing, the lack of access to the reports

of the medical visitor and the independent social worker, and the lack of an effective opportunity to participate in the process.

220. In specific criticisms, the notice served in August 2016 is said to be phrased in formal, difficult legal language, while the time was inadequate for the organisation of legal and medical representation, particularly in the case of a frail, elderly person incapacitated in hospital. The hearing proceeded without her, and without any representation on her behalf. This is contrasted with the procedures mandated by the Mental Health Act 2001, where legal aid is available. In the wardship process, any legal representation must be paid for from the ward's estate. The transfer to St. Finbarr's, and the conditions imposed there on her family's access, was approved in correspondence without any notice to Mrs. C. Similarly, there was no indication that she was aware of the application for the orders in 2018.
221. IHREC does not dispute the quality of care provided to Mrs. C. but says that the issue in July 2018 should have been whether she suffered from a mental disorder that required compulsory confinement. The legal basis for the placement in St. Finbarr's had been changed by the orders made at that point. However, it is suggested that the order was made, not because of any change in the patient's mental capacity, but in order to assist the hospital in dealing with her family. Counsel submits that if, in a hypothetical case, a hospital is concerned that a vulnerable person might be positively mistreated by her family, it would still be necessary to have a process whereby the voice of the patient could be heard, and a decision made by an independent person. It is noted that Mrs. C. does not lack capacity to the same extent as some persons with profound disabilities. The fact that a patient would be better off in hospital than with her family would not in itself justify an order of this nature.

The General Solicitor

222. The General Solicitor accepts that the wardship legislation must be interpreted and applied in a manner that is consistent with the requirements of the Constitution and the Convention. Those requirements are that there be protection from arbitrary detention. The central point is that a person's liberty will not be removed or restricted save on foot of an order of the court made following a hearing before an independent judge. It is essential, for a person to be taken into wardship, that there be adequate evidence that she is of unsound mind, but over and above that it must be both necessary and appropriate to make the order. There is regular review of any person detained under the wardship jurisdiction, and applications can be made a short notice between reviews.
223. Counsel for the Solicitor General does not make the case that Mrs. C.'s mental capacity had altered, in 2018, such that her detention could be said to have become justifiable where it had not been earlier. The point made in this respect is different – it is that in July 2018 there was a threat to Mrs. C's physical health and to her life, arising from the attempts of Mr. C. and his sister to persuade her not to take her anti-seizure medication. There has never been any medical evidence to indicate that she was not being properly

treated since being taken into wardship. She had been visited by the medical visitors as well as being reviewed by the Court.

The HSE

224. Counsel for the HSE disputes the argument that the notice of the hearing date for the wardship inquiry was too short. She points to the correspondence between Mrs. C. and the registrar before the hearing, and to the fact that there was no application for an adjournment.
225. It is stressed that, in any event, even if there was a procedural deficiency at that point, invalidation of the formal order taking Mrs. C. into wardship would not invalidate the later orders made by the President. The wardship process was in being, and the court had jurisdiction to make such orders even where the process had not concluded.
226. It is accepted that the legal effect of the orders made on the 23rd July 2018 was to bring about “a form of detention”. The submission is that their principal purpose was “self-evidently” to protect the health, welfare and life of the ward from the harmful acts of her son and daughter, and to prevent Mr. C. and his sister from continuing to abuse and harass staff members. However, the criticism advanced by IHREC – that the orders of July 2018 were sought to resolve an administrative, or managerial, problem with Mr. C. and his sister – is rejected on the basis that the principal ground of concern related to the likelihood that if Mr. C. removed his mother she would not take her medication, with detrimental effects on her health. This was an urgent situation, and there was a medical basis for the orders.

The wardship jurisdiction and procedures

227. Wardship procedures in general are governed by the provisions of the Lunacy Regulation (Ireland) Act 1871 and O.67 of the Rules of the Superior Courts. The jurisdiction in wardship is conferred on the President of the High Court (or such judge as he assigns) by s.9(1) of the Courts (Supplemental Provisions) Act, 1961. That section provides, in relevant part, as follows:

- 9.-(1) There shall be vested in the High Court the jurisdiction in lunacy and minor matters which –*
- (a) was formerly exercised by the Lord Chancellor of Ireland,*
 - (b) was, at the passing of the Act of 1924, exercised by the Lord Chief Justice of Ireland, and*
 - (c) was, by virtue of subsection (1) of section 19 of the Act of 1924 and section 9 of the Act of 1936, vested, immediately before the operative date, in the existing High Court.*
- (2) The jurisdiction vested in the High Court by subsection (1) of this section shall be exercisable by the President of the High Court or, where the President of the High*

Court so directs, by an ordinary judge of the High Court for the time being assigned in that behalf by the President of the High Court.

(3) *References in the Lunacy Regulation (Ireland) Act 1871, and the rules and orders made thereunder to “the Lord Chancellor entrusted as aforesaid” shall be construed as references to the judge of the High Court for the time being exercising the jurisdiction vested in the High Court by subsection (1) of this section.*

228. In *In Re D.* [1987] I.R. 449 Finlay C.J. (with whom the other members of the Court agreed) held that this provision must be construed as vesting in the High Court a jurisdiction, the extent of which was described and identified by subclauses (a) and (b) by reference to jurisdictions formerly exercised, and by subclause (c) by reference to jurisdictions previously vested in the High Court. It did not transfer any jurisdiction (unlike the previous position in respect of s.19 of the Act of 1924) but directly *vested* it.
229. The question in *In Re D.* was whether the wardship jurisdiction could be invoked in the case of a person who was of unsound mind and in need of protection, but who had no property. The issue arose because the Act of 1871 is largely concerned with the management of property. In answering the question in the affirmative, Finlay C.J. referred to the judgments of Ashbourne L.C. in *In Re Birch* (1892) 29 L.R.Ir. 274 and *In Re Godfrey* (1892) 29 L.R.Ir. 278. In summary, the point was that the duties of the Lord Chancellor, under the delegation of the Crown’s prerogative jurisdiction in lunacy, was not confined to any particular class of person of unsound mind but extended to directing such inquiries and examinations as justice to the persons concerned might require, if it came to his notice that their liberty or happiness required his intervention. Finlay C.J. considered, therefore, that this aspect of the jurisdiction exercised by the Lord Chancellor was now vested by the Act of 1961 in the High Court. As described by Geoghegan J. subsequently in *In Re Francis Dolan* [2007] IESC 26, the Act of 1871 is however merely a regulatory one, and the tenor of Finlay C.J.’s judgment was to the effect that the jurisdiction of the former Lord Chancellors of Ireland was much broader. It followed that the jurisdiction now exercisable by the courts is broader than, and does not depend upon, the applicability of the Act of 1871.
230. There are two ways in which the wardship process can be initiated – by petition under s.12 of the Act of 1871, or by the decision of the President to send out a medical visitor under s.11 (as occurred in this case). It follows from the nature of the jurisdiction that such a decision does not depend upon a specific request having been made by any party. If the attention of the President is drawn to a particular situation giving rise to concern, he can initiate the process himself.
231. In *F.D. v Registrar of Wards of Court* [2004] 3 I.R. 95, the High Court had approved a settlement in a medical negligence action. The plaintiff’s representatives told the court that an application would be made to have him admitted to wardship, and an order was accordingly made for the bulk of the award to be deposited with the Accountant. The registrar of wards of court then commenced correspondence with the plaintiff’s family. However, they did not wish to initiate the wardship process, their preference being for the

creation of a trust. The then President of the High Court made an order directing a medical visitor to inquire into the plaintiff's state of mind and his ability to manage his affairs. A subsequent order was made enabling the gardaí to assist in securing access if necessary.

232. After the first visit the plaintiff and members of his family issued proceedings and sought an injunction to restrain further visits. The application was refused by Kelly J. (as he then was), on the basis that the sending out of the visitor was a judicial act that could only be done by a judge. It was "part and parcel of a judicial process" and a necessary precondition to the hearing of an application for admission to wardship. It could not therefore be restrained by another judge of the High Court. The order could be arrested only by an application to set it aside or by appeal.
233. Order 67 r. 85 provides that the report of the medical visitor is to be considered as strictly confidential, and as being solely for the information of the judge. However, it may with the leave of the judge be made available for use by the respondent or any other person. Counsel for the General Solicitor agrees that, in principle, a respondent would be entitled to the report if it is to be relied upon by the judge, or if it might be relevant to cross-examination. There is no standard procedure by which it is provided, but a respondent can ask for it.
234. Where he considers it appropriate, the President may treat the report as a petition. Under the Rules, the President may, when making an order for an inquiry, direct that notice of the petition (if there is one) or report and of the order for inquiry should be served upon any other person in addition to the respondent.
235. Where a respondent receives a notice of inquiry, she may demand that the matter be heard by a jury, by serving notice to that effect within seven days. If she does, the President may require her to attend, or be produced, before him for personal examination. The result of that may be a determination by the President that she is not competent to form and express a wish for a jury.
236. The respondent may, without demanding a jury, simply object to the inquiry being held or to any declaration being made. The matter will then be set down for hearing "as soon as practicable". There is no particular requirement in respect of the length of notice for the date of hearing.
237. Where there is no jury, the inquiry is to be heard on affidavit. Witnesses may be cross-examined on their affidavits. The affidavits must be filed two clear days before the inquiry, but there is no rule requiring or providing for them to be served on the respondent. Counsel for the General Solicitor has informed the Court that if the respondent wishes to see them she can ask for them on the day of the inquiry, and agrees that if a respondent then needs time to consider the contents that time must be afforded.

238. In *F.D.*, referred to above, Kelly J. discussed the substantive arguments made by the plaintiffs to the effect that the medical visitation should be stopped because it was part of a process that would lead “inexorably” to the making of a wardship order. Counsel for the defendant had stated that there would be a full hearing before the President of the High Court, in which the plaintiffs could call evidence, make submissions and receive a judicial determination. Kelly J. pointed out that this was what was provided for in O.67, r.6 of the Rules of the Superior Courts, and that the making of a wardship order was a judicial function that must be exercised in accordance with the Constitution and with constitutional propriety. In this regard he referred to the judgment of Finlay C.J. in *In Re D.*, and to that of Denham J. in *Eastern Health Board v M.K.* [1999] 2 I.R. 99. Denham J. had stated that wardship proceedings must be fair and in accordance with constitutional justice, and continued:

“the constitutional rights of all parties, the children and the parents, must be protected. Where rights are in conflict they must be balanced appropriately. Due process must be observed by the court while exercising this unique jurisdiction. Consequently, if a legal right or a constitutional right is to be limited or taken away by a court, this must be done with fair procedures. Fundamental principles such as those enunciated in In Re Haughey [1971] I.R. 217 apply. There must be fair procedures.”

239. There is no provision in the legislation (dating, as it does, from 1871) for any form of legal aid, by way of either advice or representation. Legal aid is not available from the Legal Aid Board for wardship hearings, since they are not covered either by the Civil Legal Aid Act, as amended, or by the Custody Issues Scheme (formerly known as the Attorney General’s Scheme, but now administered by the Legal Aid Board).
240. The Court has been told that it is the practice for the HSE to fund representation (or to be ordered to pay costs) in cases where it is seeking a detention order such as in *HSE v A.M.*. I think however that this must refer only to that category of cases where wardship is originally sought by the HSE with a view to invoking the power of detention. In the instant case, there was no legal representation available to Mrs. C. for the wardship procedure. The General Solicitor was acting as the committee when the subsequent detention order was made, and on that basis Mrs. C. is said to have had legal representation.
241. Where the judge declares it to be established to his satisfaction that the respondent is of unsound mind and incapable of managing her affairs, he proceeds to direct an inquiry into the details of the ward’s mental incapacity, the appropriate persons to be appointed as the committee, the extent of her property and matters of that sort.
242. The practical extent of any right of appeal is unclear. Since the ward’s decisions are now made by the committee, the ward cannot initiate an appeal on her own. The committee, having accepted appointment to that position, is scarcely likely to take the view that the order should not have been made and should be appealed. (I do not suggest here that the committee would not act in the ward’s best interests and in particular I do not

suggest that the committee would not, where appropriate, seek at a later stage to discharge the order if the ward's mental capacity improved.) It would seem that another person who was not a party would not have an independent right of appeal. Such a person would, like the committee, have to seek the approval of the court to appeal. The role of the President in deciding whether or not litigation is in the best interests of the ward was confirmed by this Court in *Re K.* [2001] 1 I.R. 338, although it was stated by Denham J. that such decisions were for the benefit of the ward and were not intended to exclude him from the court's process or from access to justice.

243. The only option (other than the possible use of Article 40.4) appears to be an application to the President of the High Court to set aside the wardship, by way of a petition for traverse. The procedure, which is subject to strict time limits, is set out in ss.97 to 101 of the Act of 1871. It does not appear to be frequently invoked.

Relevant authorities on wardship and the Mental Health Acts

244. The various statutory provisions for persons lacking capacity were, in the past, frequently described in the case law as having a "paternal" or "paternalistic" intent and character (see e.g. *In Re Philip Clarke* [1950] I.R. 235 and *E.H. v. Clinical Director of St. Vincent's Hospital* [2009] 3 I.R. 774). That description, as used in those cases, was clearly intended to characterise a benign and protective purpose, covering actions taken in the best interests of the person concerned. However, it will be seen from the short summary of the submissions in this case that the "paternalistic" approach, and its association with the making of decisions by others in the best interests of a person with impaired capacity, is increasingly under attack as failing to afford sufficient importance to the right of individuals to make their own decisions.
245. The question whether the "best interests" approach is compatible with a view more focused on personal autonomy was discussed in *M.X. v Health Service Executive* [2012] 3 I.R. 254. There, the High Court was concerned with the rights of persons in involuntary treatment under the Mental Health Act 2001. The plaintiff was suffering from paranoid schizophrenia and had been found by her doctors to lack capacity to make decisions about her own welfare and treatment. This was based on evidence that she did not understand the information given to her about her mental health and treatment options and lacked the ability to reason about the options and to compare their potential consequences. In dismissing her challenge to the treatment regime to which she was subjected, MacMenamin J. acknowledged that the regime involved medical treatment against the plaintiff's will and thus a very significant incursion into those constitutional rights described as "personal capacity rights" ("the Article 40.3 values of self-determination, bodily integrity, privacy, autonomy and dignity", as well as the right to equality before the law). However, he held that the relevant sections of the Mental Health Act 2001 provided sufficient protection and that the rights in question were vindicated "as far as practicable" as required by Article 40.3 of the Constitution and by the ECHR. Certain of the necessary safeguards against arbitrariness were expressly set out in the Act, such as the requirement for regular and independent reviews, while others could be read into it. The right of access to the court was always present.

246. Part of the plaintiff's case was that the statutory procedures resulted in paternalistic "substituted" rather than "assisted" decision-making. MacMenamin J. considered that there was nothing inconsistent between the avowedly paternalistic nature of the legislation and ensuring that the wishes and choices of a person suffering from a disability should be guaranteed in a manner that vindicated, as far as practicable, a patient's personal capacity rights. This required reading the Mental Health Act as recognising those rights, and therefore reading it as acknowledging the right of the patient to have her views heard in the decision-making process. If she could not speak for herself, she could be assisted in her participation by speaking through another such as a carer, a social worker or a family member. Her decision or choice, however conveyed, would not always be determinative but must be recorded and due regard must be given to it.
247. The plaintiff in *M.X.* indisputably did not have capacity to make decisions. However, MacMenamin J. believed that assessment of capacity on an all-or-nothing basis would not vindicate rights as far as possible, since it would not take account of those with fluctuating capacity, or those with episodic illness, or those who could make decisions in particular spheres. It was accepted that failure to make the "prudent" decision was not always an indicator of absence of decision-making capacity. However, the quality of the patient's capacity, the nature of the decision and the dangerous nature of her wishes had to be a factor, in the light of the court's constitutional duties to her and to the public.
248. It should be noted that in coming to his conclusions MacMenamin J. had regard to both the European Convention on Human Rights (with which he found no incompatibility) and the Convention on the Rights of Persons with Disabilities ("CRPD") which, at that stage, had been ratified by the European Union but was not part of domestic law. It was ratified by Dáil Éireann in 2018.

HSE v A.M.

249. The appellant had been a prisoner, sentenced for violent offences, who suffered from chronic schizophrenia and was detained in the Central Mental Hospital in the course of serving his sentence. A few days before his release date he was made a ward of court, on the application of the HSE, and an order was made continuing his detention there. His complaint to the court was that he had been subjected to the wardship procedure by the HSE for the purpose of facilitating an application for the detention order, when he ought to have been dealt with under the Mental Health Act 2001. On the evidence, there was no doubt but that he would have met the criteria for committal under the Act, and had he been committed he would certainly have been confined in the Central Mental Hospital. However, the HSE considered that the committal procedures as structured under the Act were impossible to operate in the particular circumstances of the case.
250. The appellant resisted the proposed admission into wardship. Apart from arguing that there was indeed a method available by which he could have been committed (a proposition that was not accepted in the High Court or on appeal), he submitted that his

procedural and substantive rights under the Mental Health Acts would have been superior to those in wardship, and were being circumvented by using the latter process.

251. In making the order admitting the appellant to wardship, Kelly P. rejected this latter argument (see *In Re A.M., A Proposed Ward of Court* [2017] IEHC 187). He stressed his acceptance of the requirement that the detention of a ward of court be consistent with the Constitution and with the ECHR. To that end, he operated a system of regular review, whereby every case was examined at least every six months, with many being reviewed more frequently. The ward was entitled to appear and/or be represented at each review. On each occasion a report was presented by the treating consultant psychiatrist, with the contents of the report being made known to the committee of the ward. If necessary, the psychiatrist could be required to give oral evidence. If he (Kelly P.) had any doubts about the report it was open to him to order the medical visitor to conduct an examination and make a separate, independent report. Detention orders did not authorise restraint unless there was a specific application for such authorisation, grounded upon appropriate evidence.
252. Kelly P. also pointed out that all detention orders were made with liberty to apply on very short notice. No more than forty-eight hours was ever required and in some cases the period of time had been much shorter.
253. Giving the sole judgment in this Court on appeal (see *HSE v A.M.* [2019] IESC 3), MacMenamin J. referred to the jurisdiction of the court to make orders for the placement of a ward of court in a particular centre or facility. The duty includes giving directions with regard to the care, maintenance and wellbeing of the ward. MacMenamin J. noted that in making such decisions the court will apply the “best interests” test. He further observed that the jurisdiction, although wide, must be seen in the light of the Constitution and the Convention. In giving effect to the jurisdiction, the court is empowered to make such ex parte or interlocutory orders as are necessary for the protection of the rights, interests and welfare of the person involved.
254. The judgment refers to the safeguards enumerated by Kelly P., along with the additional feature that in many cases, where the applicant for a detention order was a statutory body such as the HSE, it would be ordered to discharge the costs of representation of the person detained. It continues:

“That these protections to vindicate the rights of wards are now in place is important. But I would go further and say that without the range of such protection and those others necessary in each case, questions might arise as to constitutional and Convention compliance.

More generally, for Constitution and Convention compliance, any law in this area which has the effect of a deprivation of liberty must be precise. It must be clear in its application. That clarity must be such that a citizen, or other person, can ascertain what will be the circumstances in which a procedure will be invoked and how that procedure will be applied. An individual who is to be subject to an order

must reliably be shown to be of unsound mind. The continued validity of any such a person's detention must depend upon it being shown that the situation which warranted involuntary detention continues. There must be available a speedy, effective and periodic system of review. (See, in particular, Winterwerp v. The Netherlands (cited at para.103 above) and H.L. v. The United Kingdom (App. No. 45508/99) (2005) 40 E.H.R.R. 32). Needless to say, also, any order must be proportionate. Fair procedures must be observed. (See Eastern Health Board v. MK [1999] 2 I.R. 99 (Denham J.)."

(Emphasis in the original.)

255. The parties in the instant case were offered the opportunity to file additional submissions after delivery of the judgment in *HSE v. A.M.* (on the 29th January 2019).
256. With reference to the specified safeguards, the HSE points out that reviews in this case have taken place, sometimes at intervals shorter than six months, since July 2018. The uncontradicted evidence has been that it would be contrary to Mrs. C.'s best interests to require her to attend court but the General Solicitor (as her committee) has been legally represented at each review and recorded Mrs. C.'s views in her affidavit in September 2018. The President had a report from a consultant in geriatric medicine for the review in October 2018, and the medical visitor reported to the President on three occasions. No orders for restraint had been sought. Liberty to apply had been provided for in the July 2018 orders. While the four days' notice stipulated in the order was longer than the forty-eight hours referred to in *A.M.*, it was proportionate and reasonable in this case. Costs have not yet been determined in respect of the 2018 applications brought by the HSE but in the ordinary course it would be ordered to discharge the costs of "those parties representing the interests of the person detained".
257. The General Solicitor submitted that the orders made in 2018 were both appropriate and lawful, and constituted a vindication of Mrs. C.'s constitutional and Convention rights.
258. IHREC submitted that the right to appear or to be represented has not been vindicated. Mrs. C. was not served with the application for the detention order, and her views were not ascertained or communicated to the Court. It is noted that the Custody Issues scheme does not apply to detention orders in wardship, and that legal aid is not available under the provisions of the Civil Legal Aid Act.
259. IHREC also reiterated its concern that the detention application was not supported by medical evidence showing that Mrs. C.'s condition was such as to warrant confinement.
260. Mr. C. has, in his submissions, largely focused on the facts of the case giving rise to *A.M.*'s conviction and sentence, rather than on the legal principles relating to wardship. He also submits that it is not relevant to his mother. He asserts that this Court delayed giving judgment in *A.M.* until it had seen the submissions in the instant case, with a view to finding grounds for attaching legitimacy to the wardship procedures, and that the judgment was intended to exonerate Kelly P. for misusing his powers.

261. Mr. C. is incorrect in these assertions.

The ECtHR authorities

262. Article 5(1) of the Convention guarantees the right to liberty and security of person. No one may be deprived of his liberty save in specified categories of cases, and "in accordance with a procedure prescribed by law". For deprivation of liberty to be in accordance with "a procedure prescribed by law", it must accord not only with the procedural and substantive rules of national law, but with the Convention.
263. Article 5(4) provides that every person who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
264. The authorities cited before the Court in this case relate for the most part to paragraph 1(e), which envisages the lawful detention of persons of unsound mind. There are several judgments dealing with the criteria for lawful detention in such cases. However, it must be borne in mind throughout the consideration of these authorities that, as stated at the outset of this judgment, no party in this case argues that Mrs. C.'s mental condition, on its own, would warrant detention.
265. The ECtHR has frequently considered disputes as to whether the circumstances of a particular case amounted to deprivation of liberty or merely a restriction on liberty of movement (the latter being governed by Protocol No. 4, set out in Schedule 3 of the European Convention on Human Rights Act 2003). It has consistently stressed since the case of *Guzzardi v Italy* (1980) 3 E.H.R.R. 333 that the determination of such a dispute requires assessment of the "concrete situation", taking account of a whole range of criteria such as "the type, duration, effects and manner of implementation of the measures in question". Deprivation of liberty involves an objective element, being "confinement in a particular restricted space for a not negligible length of time", and a subjective element, being the absence of valid consent (*Stanev v Bulgaria*). In addition, in mental health cases the Court asks whether there was a valid consent. It has observed that even where a person lacks legal capacity, he or she may be able to understand the situation and wish to leave it.
266. An early significant judgment on the criteria is *Winterwerp v Netherlands* [1979] E.C.H.R. 4, concerning detention in a psychiatric hospital. Under Dutch law, such detention entailed automatic loss of legal capacity.
267. The Court stressed that a measure depriving a person of his liberty should issue from and be executed by an appropriate authority and must not be arbitrary. At paragraph 39 it said:

"In the Court's opinion, 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". The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise.

Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."

268. The Court found that the applicant's confinement constituted the lawful detention of a person of unsound mind, and was thus within the exception in Article 5(1)(e), as the decision had been made on appropriate medical evidence and could not be considered arbitrary. While concerns were expressed that an emergency confinement had lasted for six weeks, this was not so long as to render the detention unlawful. The confinement was also found to be in accordance with the prescribed law. Accordingly, there was no violation of Article 5(1).

269. However, the Court found a breach of the applicant's rights under Article 5(4). In examining this issue, the Court stated that the very nature of the deprivation of liberty under consideration would appear to require the availability of a review of lawfulness by a court at reasonable intervals in order to comply with Article 5(4). It was essential that the person concerned should have access to a court and the opportunity to be heard, as otherwise he or she would not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty. The judgment continues:

"Mental illness may entail restricting or modifying the manner of exercise of such a right (see, as regards Article 6 para. 1 (art. 6-1), the above-mentioned Golder judgment, p. 19, para. 39), but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves."

270. On the facts of the case, it was noted that the applicant had not been involved, either personally or through a representative, in the proceedings leading to the various detention orders made against him and was never notified of the proceedings or of their outcome. He had not been heard by the courts or given the opportunity to argue his case. Furthermore, the early decisions ordering or authorising his detention had been issued by persons who either did not possess the characteristics of a "court" or, alternatively, failed to furnish the guarantees of judicial procedure required by Article 5(4).

271. In addition to the breach of Article 5(4), therefore, the Court held that there was a violation of Article 6.(1) in that the applicant had not been given a fair hearing on the question of his civil capacity. The Dutch government had argued that the national legislation safeguarded the rights of a detained person who, by reason of mental illness, needed to be protected against his own inability to manage his affairs. The Court found that, while there might be a justification for depriving a person of unsound mind of the capacity to administer his property, the guarantees laid down in Article 6(1) must nevertheless be respected.

272. The Court has also consistently stressed the need for procedural safeguards if a person is to be confined, or to be deprived of legal capacity, on grounds of mental illness. In *Sykora*

v Czech Republic [2012] E.C.H.R 1960 the Court found that the detention of the applicant in a psychiatric hospital could not be considered lawful because there were insufficient safeguards against arbitrariness. While the applicant had undergone two independent medical examinations on his admission, and his detention was thus initially based on objective medical expertise, no domestic court had reviewed the lawfulness of his detention and judicial review was not available in the Czech Republic under such circumstances. The only possible safeguard against arbitrariness in respect of his detention was the requirement that his guardian consent to the detention. However, the guardian had consented to the detention without ever meeting or even consulting the applicant. This did not constitute a sufficient safeguard. The Court found that the entirety of the period constituted a deprivation of liberty within the meaning of Article 5(1). The court also held that the applicant's rights under Article 5(4) had been breached as there were no proceedings in which the lawfulness of the applicant's detention could have been determined and his release ordered.

273. The applicant also complained that the total removal of his legal capacity had interfered with his rights under Article 8. The Court found that that the procedures, on the basis of which the national court had deprived him of legal capacity, suffered from serious deficiencies, and that the evidence on which the decision was based was not sufficiently reliable and conclusive. The interference with the applicant's private life was thus disproportionate to the legitimate aim pursued and was in violation of Article 8.
274. *X and Y v Croatia* [2011] E.C.H.R. 1835 concerned two applicants who were mother and daughter. The mother was of an advanced age and required the constant help and care of another person. At the relevant time she resided in a home for elderly and dependant persons. The daughter suffered from muscular dystrophy and had been twice previously hospitalised in a psychiatric ward. The mother had been divested of her legal capacity by the Municipal Court. The ECtHR found a violation of Article 6(1) of the Convention in respect of those proceedings, because she had been unable to participate personally in any form and the decision had not been served on her. Furthermore, the judge who made the decision had ignored the daughter's arguments in his assessment, although her mother had authorised her to represent her in the proceedings at a time when she still had legal capacity. This ran contrary to the guarantees of a fair hearing and also deprived the mother of adequate procedural safeguards in proceedings where a decision adversely affecting her private life was adopted.
275. The applicant in *MS v Croatia* [2015] E.C.H.R. 196 had been detained under restraint in a psychiatric facility. There was no evidence that restraint was necessary for her own safety or for the safety of others. The Court held that she had been subjected to degrading treatment within the meaning of Article 3, and also that there was a breach of fair procedures contrary to Article 5. She had not had access to a court or the opportunity to be heard in person or, where necessary, through some form of representation. Specific findings were made that the applicant was not given adequate representation, given that her lawyer had never met her and had made no submissions on her behalf at the hearing.

276. *Shakulina & ors v Russia* [2018 E.C.H.R. 464, concerned the Russian procedure whereby individuals could be deprived of capacity. The Court stressed that in an Article 8 context, States had a wide margin of appreciation. The margin depended both on the seriousness of the deprivation (particularly if the individual is part of a vulnerable social group) and the quality of the procedure. Key factors to be considered included the opportunity for the individual to participate in proceedings, the possibility of an appeal, the presence of any form of automatic regular review and neutrality of the expert assessment(s). In this case the Court found a breach of Article 8, and also emphasised that a key factor is the potential for domestic courts to provide context-specific remedies.
277. The Court also found a breach of Article 5 due to procedural defects and a lack of consideration of the applicant's views. A key issue was that the authorities treated the consent of the appointed guardian as a form of vicarious consent for detention, and therefore did not even accept that Ms. Shakulina was *prima facie* being detained against her will.
278. The relevance of the purpose of the alleged detainer and the reaction or attitude of the alleged detainee has been raised in some cases, and at first sight the case-law may not appear entirely consistent.
279. In *HM v Switzerland* [2002] 38 E.H.R.R. 157, the applicant was an elderly lady who lived with her son. She was in poor health, and her living conditions were cold and unhygienic. She needed a wheelchair but did not have one. Her son, who was himself an invalid, frequently did not admit the local health visitors when they came to provide her with necessary care. The local authorities eventually ordered her placement in a nursing home, against her wishes, on the basis of serious neglect. She subsequently said that she would be willing to stay on a voluntary basis but appears not to have followed through on this. At the hearing of an appeal against the order, the applicant stated that she had no reason to be unhappy with the nursing home and that, as she could no longer walk, it would be better for her to stay there. However, she also said that she wanted to leave. The Appeals Commission concluded that she had senile dementia to an extent justifying the order even in the absence of neglect, and that if she was released she would return to her son, who could not care for her. She was "hardly aware of the deprivation of liberty", which was "minimal" and in fact mainly affected her son. Shortly afterwards she agreed to reside in the nursing home voluntarily and the order was lifted.
280. The ECtHR, having reviewed the facts, concluded that the applicant's placement in the nursing home did not amount to deprivation of liberty but was "a responsible measure taken by the competent authorities in the applicant's interests".
281. The case of *HM v Switzerland* was distinguished in *HL v United Kingdom* (discussed further below). It was emphasised that it had not been established that HM was legally incapable of expressing a view on her position. She had often stated that she was willing to enter a nursing home and, within weeks of moving in, had agreed to stay. It was an open institution that allowed freedom of movement and encouraged outside contact. The

facts, therefore, were not “of a degree or intensity” sufficiently serious to justify a finding of detention.

282. *Austin v United Kingdom* [2012] E.C.H.R. 459, is a case that arose from a police “kettling” operation in the course of a public demonstration. Members of the public, not all of whom were involved in the demonstration, had been caught up in the cordon for up to seven hours. The High Court found that the police actions were a proportionate response to the risk of damage to property, physical injury and even death. The opinions delivered in the House of Lords, in their consideration of the applicability of Article 5 of the Convention, similarly laid emphasis on the intentions of the police. The conclusion was that what was in issue was a crowd-control measure, and not deprivation of liberty, although Lord Walker noted that the ECtHR had never included “purpose” in the list of factors to be taken into account in deciding whether or not there had been detention.

283. In agreeing that there had been no violation the ECtHR stated that Article 5 could not be interpreted in such a way as to make it impracticable for the police to fulfil their duty to maintain public order and protect the public, provided that they complied with the underlying principle of Article 5 – the protection of the individual from arbitrariness. However, it is important to note that the Court agreed with Lord Walker’s observation. It was, it stated, clear from the Court’s case-law that an underlying public interest motive had no bearing on the question whether an individual had been detained or not, although it might be relevant to the subsequent inquiry as to whether the detention was justified.

“The same is true where the object is to protect, treat or care in some way for the person taken into confinement, unless that person had validly consented to what would otherwise be a deprivation of liberty...”

284. *HM v Switzerland* is not mentioned. However, in *Austin* the Court did emphasise that the requirement to take account of the “type” and “manner of implementation” of the measure in question enabled the court to have regard to the specific context and circumstances where what was involved did not come within the paradigm of confinement in a cell.

285. In *Creanga v Romania* [2013] 56 E.H.R.R. 11, which involved an allegation of unlawful detention in the course of a criminal investigation, the Court noted that in a number of earlier decisions (by the European Human Rights Commission) purpose had been considered to be decisive. Thus, for example, the Commission had found that a person brought to and kept in a police station for humanitarian reasons was not deprived of liberty. However, the Court stated that the case-law had evolved and that the purpose of measures taken in respect was no longer decisive in determining whether they had been deprived of liberty. It was now seen as something to be taken into account in the later stage of the analysis, when the compatibility of the measures with Article 5(1) was being examined.

286. In *Stanev v Bulgaria* [2012] E.C.H.R. 46 the Court summarised much of its earlier case law. It emphasised, as it had since *Guzzardi*, that the difference between deprivation of

liberty and restrictions on freedom of movement was merely one of degree or intensity and not one of nature or substance:

“Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of article 5 depends. In order to determine whether someone has been deprived of his liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measures in question.”

287. It was pointed out that the Court had previously held that a person could be regarded as being detained even in an open hospital ward, with regular unescorted access to the unsecured grounds and the possibility of unescorted leave (*Ashingdane v United Kingdom* [1985] E.C.H.R. 8). Deprivation of liberty had been found where the applicant had been declared legally incapable and admitted to a psychiatric hospital at the request of his legal representative (*Shtukurov v Russia* [2008] E.C.H.R. 223); where the applicant had initially given her consent to admission to a clinic but had subsequently tried to escape (*Storck v Germany* [2005] E.C.H.R. 406); and where the applicant was an adult who was incapable of consenting to admission but had never attempted to leave (*HL v United Kingdom*, discussed in more detail below).
288. The Bulgarian government had argued that the restrictions on the applicant’s freedom were necessitated by the obligation to protect his life and health. The Court, however, considered that it had not been shown that the applicant’s state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb.
289. The Court found that the applicant was under constant supervision and was not free to leave, and that the duration of the measures was indefinite. The objective features of deprivation of liberty were accordingly present. On the subjective features, it was noted that the applicant had never given explicit consent to the placement. It observed that there were situations where the wishes of a person with impaired mental faculties might validly be replaced by those of another person acting in the context of a protective measure, and also that it was sometimes difficult to ascertain the true wishes or preferences of the person concerned. However, the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation. The applicant had explicitly expressed his desire to leave and to have his legal capacity restored. There was, therefore, deprivation of liberty. The Court proceeded to find breaches of Article 5(1) and (4).
290. It is important to note that the Court also reiterated its view that Article 5(1) must be construed as imposing a positive obligation on the State to protect the liberty of those within its jurisdiction:

“Otherwise there would be a sizable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The state is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge. Thus, having regard to the particular circumstances of the cases before it, the court has held that the national authorities’ responsibility was engaged as a result of detention in a psychiatric hospital at the request of the applicant’s guardian and detention in a private clinic.”

HL v United Kingdom [2004] E.C.H.R. 471

291. This case involved a person who suffered from autism and was described as profoundly mentally retarded. He was unable to speak, had a limited level of understanding and lacked the capacity to consent or object to medical treatment. For thirty years he was cared for in a National Health Service Trust hospital, until he was discharged to live with carers with whom he got on well. However, he was transferred back to the hospital’s intensive behavioural unit on the recommendation of a consultant psychiatrist, following an incident where he became agitated and was sedated. A medical officer concluded that he needed inpatient treatment but that it was not necessary to detain him compulsorily under the Mental Health Act 1983, as he was compliant and had not resisted admission or tried to run away. He was therefore admitted “informally”, a concept specifically envisaged in the Act. The evidence was that if he had attempted to leave, he would have been prevented and his involuntary committal under the Act would have been considered. He remained in the hospital for several months.
292. Proceedings were initiated seeking leave to apply for judicial review of the hospital’s decision to admit him and for a writ of *habeas corpus*. Following a decision of the Court of Appeal in his favour, the House of Lords unanimously allowed the appeal of the health trust responsible.
293. All parties in the case agreed that there were two questions, to be addressed separately – had HL been detained, and, if so, was the detention lawful. The majority ruled that he had not been detained but had been lawfully admitted as an informal patient, as envisaged by the legislation; that all actions taken had been in his own best interests; and that any invasion of his rights was justified by the common law doctrine of necessity. The minority agreed that the actions taken by the hospital were lawful, having been carried out in the best interests of HL and in accordance with its duty of care to him, and justified by the doctrine of necessity. They differed only on the question about detention, believing that he was indeed detained. The significance of the disagreement on the detention issue was stressed by Lord Nolan, who was concerned that if HL was not found to be detained there would be no ground in law upon which the hospital and its staff could be called upon to justify their unwillingness to let him leave. It may also be noted that Lord Steyn considered the result to be unfortunate, since the doctrine of necessity made no provision for safeguards such as applied in cases of involuntary committals.

294. The doctrine of necessity was described as applying where there was a necessity to act, but it was not practicable to communicate with the assisted person, and the action taken was such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person. It applied where a person, for whatever reason, lacked capacity to take decisions about medical treatment. It then became necessary for others with appropriate qualifications to take such decisions.
295. It is worth noting the subsequent observation of the ECtHR that the approach of the majority involved an examination of the criteria for the tort of false imprisonment, rather than the Convention criteria for deprivation of liberty. Thus, for example, Lord Goff considered that the applicant had not demonstrated that there had in fact been a total deprivation of liberty, because he had not been detained in a locked ward. The fact that compulsion would have been used had he tried to leave did not mean that he was subjected to false imprisonment.
296. HL complained to the ECtHR that his treatment had amounted to deprivation of liberty in violation of Article 5(1), and that the procedures available to him for a review of the legality of his detention did not satisfy the requirements of Article 5(4). He argued that the doctrine of necessity was too imprecise to provide a lawful basis for detention, and that there were insufficient safeguards against arbitrary detention claimed to be on grounds of necessity. The UK government submitted that a finding of "detention" in such a case would have onerous legal and other implications for patients who were compliant but incapacitated and for anyone responsible for their care.
297. The ECtHR agreed with the minority of the House of Lords that HL had been detained. The Court rejected the contention that this issue was a question of fact that had been resolved by the domestic court and could not be gone behind, noting that the question had been considered by the House of Lords in terms of the tort of false imprisonment rather than the Convention concept of "deprivation of liberty". With reference to *Guzzardi*, it reiterated the necessity to consider the concrete situation of the individual and a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. It did not consider the distinction drawn in the House of Lords between actual restraint of a person (which would amount to false imprisonment) and restraint which was conditional upon his seeking to leave (which would not constitute false imprisonment) to be of central importance under the Convention. Rather the key factor was that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the day on which he presented acute behavioural problems. Accordingly, the concrete situation was that he was under continuous supervision and control and was not free to leave.
298. The Court was also unimpressed by the argument that HL had been treated in the same way as a person who had the capacity to consent, neither objecting to their admission to hospital.

"The Court reiterates that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single

reason that he may have given himself up to be taken into detention (see De Wilde, Ooms and Versyp v. Belgium, judgment of 18 June 1971, Series A no. 12, p. 36 && 64-65), especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.”

299. The next question, therefore, was whether the detention was “in accordance with a procedure prescribed by law” and “lawful” within the meaning of Article 5(1)(e). The Court accepted that HL had suffered at the relevant time from a mental disorder of a kind or degree warranting compulsory detention (as discussed in *Winterwerp*), and further that the common law doctrine of necessity accommodated the minimum conditions for lawful detention of those of unsound mind. However, detention had to be in conformity with the essential objective of Article 5(1), which was to prevent individuals from being deprived of their liberty in an arbitrary fashion. That required the existence in domestic law of adequate legal protections and “fair and proper” procedures. The doctrine of necessity was deficient in this regard because there were no fixed procedural rules by which the admission and detention of compliant incapacitated individuals was conducted. Specifically, there were no procedures indicating who could propose admission, or for what reasons, or the nature of the medical or other assessments required. There was no specific requirement for a continuing clinical assessment of the disorder. There were no time limits. This contrasted significantly with the safeguards available to those who were involuntarily committed under the legislation – here the Court made particular reference to the provision for the appointment of a representative of the patient, who could make objections or applications on his or her behalf.
300. The key factor was that as a result of the lack of procedural regulation and limits, the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments, completed as and when they considered fit. By contrast, the purpose of procedural safeguards was (as Lord Steyn had said) to protect against “misjudgments or professional lapses”.
301. The Court further held that there had been a violation of Article 5(4) in that it had not been demonstrated that the applicant had available to him a procedure to have the lawfulness of his detention reviewed by a court. The requirements of the Article were not satisfied, as was suggested by the United Kingdom Government, by the availability of judicial review and *habeas corpus* proceedings. It was pointed out that the Court had previously found (in *X. v. United Kingdom* [1981] E.C.H.R. 6) that *habeas corpus* was insufficient as a remedy in cases of detention on the basis of unsoundness of mind, since under United Kingdom law the procedure did not allow a determination of the merits of the question as to whether the mental disorder persisted. The Court further rejected the submission that a civil claim for damages for negligence, false imprisonment and for trespass to the person, or any reliance on the declaratory jurisdiction of the High Court, would be sufficient for this purpose.

302. The events dealt with in HL took place in the late 1990s. By the time the ECtHR determined the case, the United Kingdom was in the process of amending its mental health provisions. Legislation introduced in 2005, and amended in 2007 in response to the HL decision, required the deprivation of liberty in the case of mentally incapacitated persons to be authorised either by the Court of Protection or under statutory administrative procedures. (Separate provisions deal with deprivation of liberty where necessary for the giving of life-saving treatment, or to prevent a serious deterioration in a person's condition pending a court hearing.) "Deprivation of liberty" is expressly defined as having the same meaning as in the Convention. The "deprivation of liberty" safeguards are capable of applying in a range of situations falling short of involuntary committal.
303. In the *Cheshire West* case the issue was whether the living arrangements established by local councils in respect of each the three appellants, in domestic home-like settings rather than institutions, amounted to deprivation of liberty such as to require the application of the statutory safeguards. None of them was seeking to be "released" as such – the question was whether the circumstances of each case were such as to require periodic independent checks under the legislation.
304. The lead judgment of the majority is that of the President, Lady Hale, who summarised the features of the cases as combining: a person who lacked both legal and factual capacity to decide upon his or her own placement but had not evinced dissatisfaction with or objection to it; a placement, not in a hospital or care home but in a small group or domestic setting which was as close as possible to "normal" home life; and the initial authorisation of that placement by a court. She described the safeguards being aimed at securing professional assessment, by persons independent of the hospital or care home in question, of (a) the capacity of the person concerned to make his or her own decision about accommodation in the hospital or care home, and (b) whether it was in his or her best interests to be detained. The point was to ensure that the person does indeed lack capacity to make his or her own decisions and that the arrangements made for them are in their best interests.
305. Having examined the Strasbourg jurisprudence, Lady Hale considered, firstly, the question whether the concept of physical liberty was the same for everyone, regardless of mental or physical disability. She rejected the view that, in the case of disability, limitations and restrictions should be seen simply as the inevitable corollary of the disability – to take that approach was to confuse the concept of deprivation of liberty with the justification for imposing such deprivation. Further, the ECtHR had, in *Austin*, specifically rejected the suggestion that a beneficial purpose might be relevant. The right to liberty was the same for persons with disabilities as for those without, and deprivation of liberty meant the same thing for everyone. The fact, therefore, that individuals might not be able to survive without the measures in question did not mean that they were not deprived of liberty.
306. For similar reasons, the suggestion that a person could not be deprived of liberty if he or she lacked capacity to understand and object to his or her situation was also rejected, as

it had been by the ECtHR in *HL*. It was clear that a person could be deprived of his or her liberty without knowing it, or without having the capacity to understand the concept. Lord Neuberger (who agreed with Lady Hale) observed that otherwise conditions, no matter how confining, might be held not to amount to deprivation if the person concerned lacked capacity to object. Alternatively, there would be a different test for those who could object and those who could not. In addition, absence of objection could not justify what would otherwise be deprivation of liberty, unless it could be said to amount to consent. Lord Kerr also agreed, adding that “liberty means the state or condition of being free from external constraint”, an objective state that was not dependent on a wish to depart and was not diminished by lack of capacity.

307. Lady Hale noted that in none of the more recent Strasbourg cases was the purpose of the confinement considered relevant to the question whether there had been deprivation of liberty. She commented that if it were otherwise, and the fact that a particular placement was designed to serve the best interests of the individual meant that there was no deprivation of liberty, then deprivation of liberty safeguards would scarcely ever be necessary.
308. The judgment poses the question whether there is an “acid test” for the deprivation of liberty in such cases. Lady Hale considered that it was not appropriate to lay down a prescriptive set of criteria, although it was necessary to indicate the factors that were not relevant. These were the compliance or lack of objection on the part of the individual, the relative “normality” of the placement and the reason or purpose behind it. Looking at the Strasbourg jurisprudence, she considered that the features consistently regarded as “key” arose if the person was under the complete supervision and control of those caring for her, and was not free to leave.
309. In each of the cases being dealt with, the appellants’ lives were completely under the control of others. None were allowed out without supervision, and two occasionally required physical restraint. Looked at overall, they were being deprived of liberty. Their “tacit acceptance” was not relevant in circumstances where they were probably not capable of expressing a view either way.

The Article 40.4 procedure

310. Article 40.4.1 prohibits deprivation of personal liberty save in accordance with law. Article 40.4.2 commences with the words “Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained” and then sets out the procedure to be followed where such complaint is made. Although the great majority of cases under Article 40.4 concern detention by State agents, it is not confined to that sphere and has in the past been utilised in private disputes about the custody of children.
311. In the important case of *Application of Woods* [1970] I.R. 154 this Court considered a number of procedural aspects of the Article 40.4 provisions. The applicant, Mr. Woods, was a prisoner serving a sentence. The complaint was made to the High Court by a fellow prisoner, a Mr. Tynan. The first High Court judge to whom the complaint was made

refused to direct an inquiry because he was not prepared to accept that Mr. Tynan had Mr. Woods' authority. The President of the High Court subsequently refused, on the basis that there had been a previous Article 40.4 hearing and appeal, in which Mr. Woods had been found to be lawfully detained. Mr. Tynan lodged an appeal against the refusals. One of the issues raised in the appeal was whether Mr. Tynan was entitled to be heard in argument. Mr. Woods was present and confirmed that he wanted Mr. Tynan to represent him as he was not in a position to engage legal representation and was unable to argue the appeal himself. The Court heard Mr. Tynan's submissions on this question and decided that he had no right to be heard on the substantive issue. The detailed reasons for this ruling were left over to another date and unfortunately do not appear to have been reported (see pp.157 -158 of the report).

312. It must be noted that in so determining, Ó Dálaigh C.J. made it clear that any person had the right to complain to the High Court on behalf of another, and that the right to complain included the right to state the grounds put forward for the inquiry. The High Court, in turn, was entitled to require the complainant to furnish further information or assistance as it saw fit.
313. Counsel for the Attorney General informed the Court that the Attorney had authorised him to say that where an application was made by or on behalf of a prisoner who could not procure the services of solicitor and counsel, the Court might consider it proper to assign counsel and solicitor, and the Attorney General would defray the cost. This appears to have been the origin of what was known as "the Attorney General's scheme" (now the Legal Aid - Custody Issues scheme administered by the Legal Aid Board). The Court declined to adopt that suggestion in the case of Mr. Woods, having come to the view that the arguments raised were not well-founded.
314. The Custody Issues scheme is a relatively informal means for ensuring that legal representation can be procured in Article 40.4 applications (amongst other categories of case). Parties may choose their own lawyers, and all that is required is an application to the court, at the outset, for a recommendation. The recommendation will rarely be refused provided the grounds argued are stateable.
315. The question whether a layperson can represent an applicant in Article 40.4 proceedings was recently examined by Humphreys J. in *Knowles v Governor of Limerick Prison* [2016] IEHC 33. In refusing to permit such representation in that case, he noted the fundamental status of the principle that, in general, an individual natural person has the right to represent themselves in legal proceedings. He went on:

"However, where a person is not representing themselves, it is a fundamental postulate of the legal system that they must be represented by a qualified legal professional, who in turn owes professional duties to the court. This is also true where the entity being represented is a legal rather than a natural person, and therefore by definition cannot appear directly itself (see my decision in Pablo Star Media Ltd. v. E.W. Scripps Co. [2015] IEHC 828).

This fundamental principle has been reaffirmed on numerous occasions, including in the habeas corpus context: see for example The State (Burke) v. Lennon [1940] I.R. 136 (where it was said that Article 40 was not to be taken as allowing an applicant to be represented by a third party where he was able to make the application himself), and Application of Woods [1970] I.R. 154, where the Supreme Court specifically and unanimously rejected the argument that another prisoner could, on behalf of the applicant, make substantive submissions following the return to a habeas corpus order. However the Supreme Court in that case did allow the prisoner in question to address it on the issue of his entitlement to represent the applicant, as I did in this case. (See also The State (Egan) v. Central Mental Hospital (Unreported, High Court, Kenny J., 27th January, 1972).

The principle has also been reaffirmed in cases such as Battle v. Irish Art Promotions Ltd [1968] I.R. 252 and Re Coffey [2013] IESC 11. At para. 37 of Coffey, Fennelly J. said that the general principle was subject only to “rare exceptions” where the general rule would cause “particular injustice”. Such rare exceptions include Coffey v. Tara Mines [2008] 1 IR 436, where Ó Néill J. allowed a wife to represent a husband, where the latter would otherwise not be able to make his case due to disabilities rendering it impossible to conduct the proceedings. The Legal Aid Board refused to assist and the plaintiff’s wife was unable to obtain a solicitor despite her best efforts. That was truly an exceptional case and furnishes no support for the argument advanced by Mr. Gilroy.

Representation by a family member is in a different category in any event as such representation is permitted more generally in the District Court under O. 6, r. 2 of the District Court Rules 1997 in cases of “infirmity or other unavoidable cause”, and so does not infringe any fundamental principle of the legal system.”

316. Humphreys J. also noted that in some recent instances the High Court and Court of Appeal had heard a layperson advocating on behalf of an applicant under Article 40.4. He assumed that, in the light of the Supreme Court jurisprudence on the issue, either the court concerned considered the particular circumstances to be one of the “rare exceptions” envisaged by *Re Coffey*, or alternatively heard the person concerned on a *de bene esse* basis without its attention being drawn to the caselaw on this issue.

“Either way, it is abundantly clear from that caselaw that there is no category of exception for Article 40 applications which would allow lay persons to represent applicants as a matter of generality, or at all, except in exceptional circumstances. O’Shea v. Governor of Mountjoy Prison [2015] IECA 101 is an ex tempore judgment of Ryan P. for the Court of Appeal in which while it was noted that Mr. Beades had made submissions on behalf of the applicant in that case, essentially as a concession, although no caselaw is referred to, the court specifically stated at para. 15 that “the Court does not want to set a precedent” in this regard. It would appear that it is at least possible that some persons may have misinterpreted limited concessions afforded in particular cases as giving rise to a misconception that there

is a general acceptance by the courts that there is no difficulty with the general principle of lay "representation" in Article 40 cases, thereby giving rise to unrealistically heightened expectations in that regard in subsequent cases such as the present one. To that extent, it may be that for the courts to afford such an audience in a substantive hearing (as opposed to the initial application for the inquiry) as a concession could be to create (or reinforce) more problems than it might solve, even apart from the fact that such a concession could only arise in exceptional circumstances having regard to the Supreme Court decisions referred to."

317. It may be noted here that the principle applied in *Battle v Irish Art Promotions* [1968] 1 I.R. 252, was confirmed by this Court more recently in *Allied Irish Banks v Aqua Fresh Fish* [2018] IESC 49.

Discussion

318. Remarkably, despite the mass of case-law presented in these proceedings (only a small proportion of which is referred to in this judgment), there appears to be little guidance on some of the central issues raised. Thus, none of the extensive range of ECtHR authorities relied upon deal with the situation of a patient in hospital who is medically fit to be discharged, and is not said to suffer from a mental illness warranting confinement. That absence of authority may, in itself, be an indicator of the rarity of such a situation in any country whose health system is based on the principle of voluntarism.
319. The Court is of course obliged to have regard to the jurisprudence of the European Court of Human Rights, and has frequently said that in construing the fundamental rights guarantees of the Constitution it may find assistance from that jurisprudence. However, it must be remembered that the ECtHR does not take the position that the Convention should be applied in member States as a surrogate constitution. It is not intended to weaken rights established in national law, and is primarily concerned with ensuring the application of minimum standards rather than with imposing uniformity. The suggestion made by the General Solicitor that the Court should not "inappropriately and unnecessarily move ahead of the Strasbourg jurisprudence" comes at the issue from the wrong direction.
320. That said, I do not think in any event that the approach of the Strasbourg jurisprudence on the issues before the Court differs to any significant extent from that required by the Constitution.
321. The consideration of the debate on "deprivation of liberty" in the pre-wardship inquiries must, as MacMenamin J. said in *McG* and as the ECtHR has constantly stressed, begin with reference to the concrete situation. In my view, consideration of the concrete situation in this case involves starting with a factual question – did Mrs. C. actually want to leave the hospital on either of the days in question? It seems to me that in this case this question should be answered first, before the consequences of any doubts over capacity are considered. That is because, in some circumstances, the first issue faced by the hospital may be whether the patient in fact wants to leave, or whether the reality is

that third parties want to remove her. There may, at least in some circumstances, be a potentially significant difference between preventing a cognitively impaired and vulnerable patient from acting on an unwise decision to leave, and preventing third parties from removing such a patient in circumstances where she is compliant but does not in fact wish to go. This is particularly so if there are objective reasons for fearing a threat to her health and well-being.

322. In my view this initial factual question was not adequately addressed in either the High Court or the Court of Appeal in respect of the 23rd June 2016. In the High Court, the evidence that Mrs. C. lacked capacity to decide on self-discharge appears to have been decisive and there is no reference in the *ex tempore* judgment to either the letter of the 22nd June 2016 or any other evidence as to what her wishes might have been. If it is accepted that, in principle, impairment of capacity should not lead to total disregard of the wishes of the person concerned, the expressed basis for the decision of the High Court was flawed to that extent.
323. Conversely, in the Court of Appeal, the signed letter of the 22nd June 2016 appears to have been considered to be the only relevant evidence, and there is no discussion of any evidence that might tend to show that the letter did not in fact fully reflect Mrs. C.'s wishes. As noted above, this may have been due to the fact that the report of the medical social worker was omitted from the papers furnished to that Court. However, even without the benefit of the evidence as to the conversations that Ms. Oliver had with Mrs. C. on the 23rd June, I think that there was sufficient evidential material before the Court, including the evidence as to capacity, to require an analysis of whether or not the presence of Mrs. C.'s signature on the letter meant that it truly stated her wishes.
324. The High Court and Court of Appeal decisions in the second Article 40.4 application (concerning the proposed move to the Mater for treatment by an orthopaedic consultant) do not engage with the evidence at all. This is perhaps surprising, since the proposal was for a transfer from the care of one hospital to another and did not, on the face of it, involve any question of taking Mrs. C. into a risky environment. The finding in the High Court was the same as in the first case – that Mrs. C. lacked capacity and the hospital did not want to detain her. There is no discussion of the proposed transfer to the private hospital, although I accept that it must be implicit in the ruling that the President agreed with the doubts expressed by the CUH deponents as to the circumstances in which the letter was signed, the lack of necessity for orthopaedic treatment, the inability to make contact with the consultant in the Mater and the relatively short length of stay arranged (whether that was a few days or two weeks). It seems to me that the issue of duress would have to be central here, since otherwise a decision to prevent Mrs. C.'s departure on the 14th July might be difficult to justify. Furthermore, there is no evidence as to what, if any, contact was made with the Mater after that date. If the consultant there had accepted Mrs. C. as a patient, and believed that he might have been able to improve her condition, it is unclear why this should have been prevented, if it was what Mrs. C. wanted. Finally, there is no suggestion that the Mater, which would have its own duty of care for its patients, would be any less concerned for Mrs. C.'s welfare than CUH.

325. The Court of Appeal judgment does not deal with this incident, but in stating that it would not make an order for release because Mrs. C. was no longer in CUH, it must be assumed that the Court saw the incident in the same light as the one of the 23rd June 2016. Again, there is no discussion of the evidence of Dr. Clare that Mrs. C. signed the letter of the 14th July 2016 under duress. Evidence of duress, or undue influence, would be of crucial importance to the court if what was in question was a contractual or testamentary document, and I cannot see that it is of lesser importance in this context.
326. I make the comment at this point that the approaches of both courts involved the making of decisions about Mrs. C., and assumptions about her wishes or her best interests, without investigation or assessment of her own views. This is in fact the most striking feature of all of the litigation and all of the court-mandated procedures to date – that it has proceeded to this point on the basis of arguments between third parties, and decisions of courts, as to what Mrs. C. wants and what is in her best interests, without her voice being heard. This is despite the fact that the hospital personnel have never suggested that she cannot express wishes or that she entirely lacks capacity, while Mr. C. says she has full capacity. It may also be noted that in the course of a judgment on an interlocutory application in the proceedings (*C. v. Fitzpatrick* [2018] IESC 64), this Court observed that recordings of telephone conversations between Mr. C. and his mother suggested that she was not incapable of expressing her wishes and that she wanted to go home.
327. It is however the case that hospital staff at all levels appear to have engaged with Mrs. C. and kept careful note of what she said. The only real difficulty that I see in this respect is that the same staff were interacting with Mr. C. and his sister. Not only was the relationship a fractious one, but staff had obviously formed strong views as to their suitability as carers. There does not appear to have been any person not involved in the disputes who could have taken on the role of ascertaining, so far as possible, Mrs. C.'s wishes and if necessary advocating in favour of the proposal that she go home with her family. I do not suggest that this is a legal requirement, the absence of which necessarily invalidated any actions taken, but simply that it might have assisted in resolving the matter if there had been an independent person through whom her views could have been put forward.
328. However, at this stage it is necessary to consider what legal principles apply to the actions of the hospital, on both the 23rd June 2016 and the 14th July 2016. If Mrs. C. did want to leave, certain legal questions follow. The first is whether, in law, she was deprived of her liberty. The second is whether, if she was deprived of her liberty, it was in accordance with law. The issue arises because the hospital asserts that it can lawfully prevent the departure of a patient who is medically fit and not suffering from a mental illness requiring confinement, but whose capacity is impaired, on the basis of a protective concern that she may be going into an environment where her health and well-being will be put at risk. In answering these questions, there is also the question of the weight to be attached to the wishes of the patient and the process by which they can be ascertained.

329. The analysis must start with the express constitutional provision in Article 40.1 that no citizen may be deprived of his or her personal liberty save in accordance with law. It is true that most of the cases concerned with this Article arise in the context of the exercise of various coercive powers of detention by agents of the State, but its sphere of operation is not limited to such matters – see, for example, the discussion of its use in cases involving children in *McG*.

330. “Deprivation of liberty” is not a particularly complex concept. In *Dunne v Clinton* [1930] I.R. 366, a case that, obviously, pre-dates *Bunrecht na hÉireann*, the plaintiffs had gone voluntarily to a police station and were then kept there for about forty hours before being formally arrested and charged. They subsequently issued proceedings for damages in the Circuit Court. On appeal, Sullivan P. said:

“It is, in my opinion, hopeless to contend that the detention of the plaintiff did not amount in law to imprisonment; it was a total deprivation of liberty, imposed on him by action of the guards against his will.”

331. In similar vein, Hanna J. said:

“The first question that arises is whether this detention is something different from arrest or imprisonment. In law there can be no half-way house between the liberty of the subject, unfettered by restraint, and an arrest. If a person under suspicion voluntarily agrees to go to a police station to be questioned, his liberty is not interfered with, as he can change his mind at any time. If, having been examined, he is asked, and voluntarily agrees, to remain in the barracks until some investigation is made, he is still a free subject, and can leave at any time.”

332. Hanna J. also remarked that there was no such thing as “notional liberty”.

333. On the assumption, for the purposes of this part of the discussion, that Mrs. C. wanted to leave and had capacity, I think it would be impossible to conclude that she was not deprived of her liberty in that she was physically prevented from acting on that wish. She was not free to leave. The President commented that the position of the hospital was clear – they would discharge her only if satisfied with the care arrangements. Accordingly, whether one applies the *Dunne v Clinton* analysis, the *Guzzardi/Stanev* criteria or the *Cheshire West* “acid test”, she was not free to leave. The measures taken involved restraint, pursuant to which she was kept in the hospital for an indefinite period under the control and supervision of those caring for her.

334. The next question is whether that finding – that Mrs. C. was in fact detained – is in any way altered if it is assumed that she did not have capacity. In my view it cannot be, for the reasons identified in the ECtHR jurisprudence and by the UK Supreme Court in *Cheshire West* (and indeed, in some of the comments made by members of the House of Lords in *HL*). Firstly, I consider that the constitutional guarantee of the right to liberty protects mentally impaired persons to the same extent as everyone else – deprivation of liberty must in all cases be in accordance with law. To hold that persons cannot be found

to be “detained” if they are not capable of making a valid decision to leave for themselves, or if they are not aware of or able to object to their situation, would not simply permit restrictions on their freedom of movement for their own protection. It would also have the far-reaching consequence of denying to vulnerable persons in this category the benefit of the constitutional guarantee that they will not be deprived of their liberty otherwise than in accordance with law. It is possible for a person of full capacity to be detained without necessarily being conscious of that situation, and, equally, it is possible in the case of a person with impaired capacity. Both are entitled to legal protection.

335. For the same reason, a benevolent or protective motivation or purpose for whatever measures have been taken cannot be considered to alter the legal *fact* of detention. I agree with the doubts expressed by Lord Nolan in *HL* and the analysis of Lady Hale in *Cheshire West* in this regard. If benevolent intentions meant that there was no deprivation of liberty, and therefore no grounds for inquiry into the legality of deprivation of liberty, there would be no legal basis upon which the courts could ask whether the measures taken were justified and were in fact in the individual’s best interests. This would, in fact, leave vulnerable people without legal protection against arbitrary or unnecessary detention. The persons or institution that takes charge of them would thereby appoint themselves as a substitute decision-maker without legal process. Neither the Convention nor the Constitution permit of this result.
336. However, motivation and purpose may in some cases be relevant to the next issue, which is whether deprivation of liberty was sanctioned by law. A malign motive is clearly relevant, but benign intentions will not necessarily transform a breach of rights into lawful action under either the Constitution or the Convention. I note here the observations of Walsh J. in *The People (DPP) v. Howley* [1989] ILRM 629:

“Either his detention is lawful or it is not. There is no intermediate position. There can be no question of competing or predominant issues which can determine that question. If the arrest is not lawful it is not rendered so by the seriousness or importance of the offence being investigated...It is not legally possible to justify an illegal detention even though where extraordinary excusing circumstances can be proved to exist it may be excused so far as the admissibility of evidence is concerned. Where a person is suffering illegal detention the High Court and this Court is bound by the Constitution to order his release and there can be no question of any consideration being given to permitting the detention to continue because of some dominant motive.”

337. It must, of course, be borne in mind that this was said in a context where the “competing or predominant issues” being urged upon the Court related to the desires of the gardaí to detain the suspect while investigating matters other than the offence in connection with which he had been arrested. There was no question of a duty to consider the potentially conflicting rights of the person being detained.

338. The motivation of the detainer was one of the issues raised in *Connors v Pearson*, relied upon here in the Court of Appeal judgment. The plaintiff in the case was a young boy who had been in the vicinity when two policemen were murdered. Investigating policemen were questioning him at the scene when his father arrived. The police clearly apprehended that the father would prevent his son from speaking further to them, and decided to bring him to the barracks. After a few days he was transferred to Dublin and was kept in police custody for some weeks until his father brought a *habeas corpus* application.
339. In the civil action for damages, the police argued that the boy's safety had been at risk from persons who might wish to interfere with witnesses to the event. The jury found, however, that he had been detained for the purpose of questioning, and declined to answer the question whether he was detained for his own protection. On appeal, the notion of "protective custody" was rejected by the Court of Appeal, with the view being expressed that the boy would have been perfectly safe with his father, since the latter would have ensured that he did not assist the police investigation. It was in that context that O'Connor LJ. went on to say that a person could not be incarcerated simply because he wished to do something that exposed him to danger.
340. I think it is worth making some comment on that observation. The plaintiff was a child, and the liberty of children is normally subject to the decisions of those who have lawful custody of them. In most cases that will be the child's parents. A child would not, therefore, normally be considered to have a "right" to make dangerous choices. The courts in 1921 would have been perfectly familiar with the power to take children out of the custody of their parents if the parents were a source of danger to them, and also with the restrictions on personal liberty imposed on wards of court in the interests of their personal safety. In such circumstances the reasons for the curtailment or deprivation of liberty would have been central to an assessment of legality. It is clear that neither the trial court nor the Court of Appeal in *Connors v Pearson* believed that the plaintiff was at any risk while in his father's custody.
341. Returning to the instant case, I think that the starting point in the assessment of legality must be the evidence before the court as to the reasons why the hospital acted as it did. The key evidence here, in my view, is that of Dr. Ní Chorcorain, the consultant psychiatrist. She said that when she was contacted on the 23rd June and was informed about what was happening, she advised that since the hospital had no information as to the arrangements in place for Mrs. C., they had a duty of care to keep her in hospital. This was on the basis that she was a vulnerable adult whose capacity was questionable. When Dr. Ní Chorcorain assessed Mrs. C. later that day she concluded that she lacked capacity.
342. It is obviously correct to say that a hospital has a duty of care to its patients. Litigation relating to that duty may most commonly arise in relation to disputes about clinical treatment and care, but I think there is little difficulty in holding that it extends to a duty to take reasonable steps to protect hospital patients against threats to their health and

safety arising while they are in the hospital. Thus, a hospital would be entitled (and in some cases obliged) to take action where such a threat is posed by third parties coming into the premises.

343. The question becomes more difficult in the context of discharge. The HSE has guidelines for the advice to be given where a patient wishes to leave against medical advice. Those guidelines are clearly designed to be implemented in cases where the patient can understand the advice given and make his or her own decision. If, in those circumstances, the patient chooses to disregard the advice the position is clear – the patient is asked to sign a waiver and is obviously entitled to leave. But what is the appropriate course of action if the hospital believes that the patient cannot understand the advice, or is incapable of weighing up the information, or repeatedly changes her mind, or appears to have made a decision conditional on certain criteria that, to the belief of staff will not be fulfilled, or is simply liable to agree with whichever person is speaking to her? Signature on a letter of waiver in such circumstances might seem quite meaningless.
344. These questions demonstrate an essential difference between the cases involving police detention under statutory power and the issues that may arise in the context of discharge from hospital. In the former, the issue is binary – the person has been either lawfully or unlawfully arrested and detained. Consent is generally irrelevant to the lawfulness of an arrest (as opposed to some of the examples found in the cases of voluntary attendance for questioning), and therefore the validity or effect of consent does not arise as an issue. However, in a healthcare system founded on the principles of voluntarism and the duty of care, hospitals will frequently have to deal with far more complex and nuanced situations. The problem in this case was how to reconcile those two fundamental principles.
345. The Court of Appeal was prepared to hold that a hospital could prevent a patient with dementia from leaving at an inappropriate time, or in an inappropriate manner. Thus, for example, if such a patient tries to leave in her nightwear at three o'clock in the morning, in the belief that it is time to go to Mass, or to work, the Court would hold the hospital was entitled to stop her. However, what if the same patient wants to leave at three o'clock in the afternoon, with the expressed intention of walking home along a busy motorway in the erroneous belief that her family will be waiting for her at home? The reasoning of the Court of Appeal would suggest that she cannot be stopped unless, presumably, there is someone on the spot who can make a diagnosis that the dementia has progressed to the point where confinement under the Mental Health Acts would be justified. But if a hospital were to permit such a patient to leave in those circumstances, it seems to me that her family might well claim that there had been a breach of the hospital's duty of care. An action in negligence could hardly be described as unstatable.
346. A similar issue would, in my view, arise if the hospital simply permits a patient to be removed by third parties if there is reason to feel concern for her safety. Such a concern need not necessarily be grounded on evidence of hostility, or indications of abuse or exploitation. Good intentions can sometimes be dangerous too. It seems to me that the duty of care extends to a requirement, in a discharge context, to ascertain in the first

instance whether the patient actually wants to leave, and has given some consideration to the consequences, rather than simply facilitating departure on the spot. If hospital authorities believe on reasonable grounds that, as a matter of fact, third parties are unduly pressurising a vulnerable patient to comply with their instructions to leave, it must, I think, be legitimate to prevent such departure for a brief period while the situation is assessed.

347. The question of capacity is relevant to this assessment. It is of course the case that a hospital may attempt to persuade a patient that it is in her best interests to stay. But the very concept of persuasion implies capacity to consider what is being said and to make a decision. If the hospital concludes that the patient does not have capacity, or has impaired capacity, and is potentially vulnerable to dangerous or exploitative conduct by the third parties in question it should have the opportunity to clarify this and, if necessary, invoke the assistance of the courts. This may involve taking measures to prevent her departure for a brief period of time but, in my view, the requirement to seek assistance from the courts will apply whether or not the patient is persuaded to stay. This is not because the wishes of a cognitively impaired patient are to be disregarded, but because the facts of the case may be that they are not, in truth, her own wishes or that they are the product of entirely mistaken ideas contributed to by her impairment.
348. In suggesting that the hospital could prevent departure for a brief period, it may be necessary to stress both the word "brief" and the grounds upon which I would consider that such action is permitted. It must be clearly understood that the hospital has no overriding legal right to appoint itself as a substitute decision-maker for the patient, no legal power to decide how the right to liberty is to be balanced against the other rights and general welfare of the patient and no general power to detain. It does, however, have the legal power to take such measures as can be justified under the doctrine of necessity.
349. To recap, the doctrine of necessity applies where there is a need to take action but it is not possible to communicate with the assisted person, and the action to be taken is such that a reasonable person would take in the best interests of the assisted person in all of the circumstances. It applies where a person, for whatever reason, lacks capacity to take decisions about medical treatment, making it necessary for others with appropriate qualifications to take such decisions. Hospitals are familiar with it as the basis for the treatment of, for example, unconscious patients, but in general it is broad enough to permit, in a situation of urgency, actions taken in the interests of a person who lacks capacity. As the ECtHR said in *HL*, it is sufficiently clear and precise to constitute legal justification for the short-term detention of a person in their own interest. However, since it is in the nature of the doctrine of necessity that it is designed only to deal with urgent situations, it lacks formal safeguards and procedures and it cannot be relied upon for more than a temporary justification of such detention.
350. The hospital must, therefore, make its assessment and decide what, if anything, it should do within as short a time as is reasonably practicable. It may be, of course, that in a case

such as this the patient may change her mind anyway. If the hospital concludes that she has capacity to make that decision there is no further problem.

351. However, if the hospital concludes that the patient lacks capacity to make the decision, it must, if it has serious concerns for her welfare, seek the assistance of the court within a reasonably short time. In this case matters had clearly come to a head by the 23rd June 2016. The decision to apply for wardship was not made until the 7th July and had not yet been acted upon by the 11th July (the date of the first Article 40.4 hearing). It was in fact the President of the High Court who initiated the wardship procedure by sending out the medical visitor. I appreciate that the hospital is a busy one, with obligations towards many patients. I also accept that the situation was extremely fractious, and that the hospital may well have been unclear as to its legal position. However, in the light of the clarification offered in this judgment, I think it should be noted that two weeks would in most cases be too long.
352. In summary, therefore, I think that the assessment of the evidence by the Court of Appeal in both of the pre-wardship Article 40 applications was inadequate, in that there was insufficient attention paid to the totality of the evidence relating to the actual wishes of Mrs. C. A fundamental question was not addressed by that Court, being whether Mrs. C. was attempting to leave or whether other persons were attempting to remove her. Further, while it was accepted that the hospital could attempt to persuade a patient to stay, there was no consideration given to the obligation to assess whether the patient has sufficient capacity to be persuaded, or to the applicability of the doctrine of necessity.
353. It is now necessary to turn to the third Article 40.4 inquiry. By that stage Mrs. C. was a ward of court. Her residence in St. Finbarr's had been approved by the President of the High Court and subsequently confirmed by formal order. Various orders had been made restricting the contact between her and her son and daughter. The hospital had also been authorised to administer medication covertly if believed necessary, because of her belief that she was being poisoned. In these circumstances, there could be no dispute as to the fact of detention as of the 31st July 2018. The issue between the parties is as to legality.
354. The dispute as to the scope of this appeal was referred to above. It will be recalled that the HSE and the General Solicitor believed that the validity of the original wardship order was not before this Court, because it had not been dealt with in the High Court.
355. Looking at the summary above of part of the range of issues raised by Mr. C. in this Article 40.4 application it is clear that he challenged both the constitutionality of the Act of 1871, and the fairness of the procedures leading up to the order of the 19th August 2016. The argument as to the procedures is referred to in the judgment, but is not the subject of any discussion or findings. The trial judge appears to have found such discussion or findings to be unnecessary because (although this is not entirely clear) Mr. C. had not appealed the wardship order and had not sought to lift the stay on his plenary proceedings, where these issues were also raised. Counsel then appearing for the HSE appears to have submitted that the issues should more properly be considered in the context of appeals against those orders.

356. The situation may also have become confused by Mr. C's insistence, in what seems to have become the central focus of the hearing, that the decision of the Court of Appeal meant that Mrs. C.'s detention was unlawful from the 23rd June 2016 onwards. This was clearly a misconceived argument.
357. However, in my view the trial judge should not have accepted the HSE arguments as to the restricted ambit of the issues. The validity of the order of the 19th August 2016 was manifestly key to her findings on the validity of the orders made thereafter. But an express challenge had been made to that order, both on the procedural grounds and in relation to its constitutional validity.
358. The fact that the same issues had been pleaded in the (stayed) plenary proceedings did not mean that they could not, or should not, be considered in the context of an Article 40.4 inquiry. The stay would not have grounded any plea of *res judicata*, since the proceedings had not been determined on the merits. Article 40 expressly contemplates the making of an application based on a contention that the legislation justifying the applicant's detention is unconstitutional.
359. At this point it is necessary to distinguish between the constitutional challenge and the fair procedures argument. A challenge to the constitutional validity of a statute must, under the Rules of the Superior Courts, be made on notice to the Attorney General. As described above, Mr. C. served such a notice, but only in relation to the appeals in the pre-wardship Article 40.4 inquiries. He did so in circumstances where, after the wardship order had been made, the General Solicitor had intervened in the appeal. She wished to prevent him from continuing with the appeal, while he challenged her right to appear in it. It was in that context that the Act was challenged. The President of the Court of Appeal pointed out, in a ruling made before the substantive appeal was heard, that the General Solicitor was entitled to be heard so long as the wardship order was in being.
360. However, as already stated, the issues in the substantive appeal had nothing to do with the Act of 1871. The Court of Appeal could not have embarked on a consideration of the constitutional issue when exercising its appellate jurisdiction in a case where that issue had not been determined in the High Court. The O.60 notice was therefore ineffective.
361. In his third Article 40.4 application, where he had in his pleadings raised a direct challenge to the Act of 1871, Mr. C. did not serve a notice. In those circumstances it would have been inappropriate for the High Court judge to make any decision on the validity of the legislation. In my view it would be equally inappropriate for this Court to do so. A notice was eventually served, after a three-day hearing in this Court. While there is precedent for joining the Attorney General at the appellate stage, I do not believe that the delay, cost and inconvenience to the parties of reconvening the Court at this stage (not to mention the delay and inconvenience that would be caused to other litigants awaiting a hearing) would be justified in this case. That is primarily because the Act of 1871, as previously pointed out, is a regulatory statute only. It is not the source of the wardship jurisdiction, which the Court has previously held to be broader than the statutory provisions. Its constitutional validity is not key to any aspect of the case.

362. The same considerations do not apply in relation to the fair procedures arguments. On one view they lay at the heart of the case, since the validity of the August 2016 order was the basis upon which Faherty J. found that the detention of Mrs. C. was in accordance with law.
363. While one might, with hindsight, note a degree of ambiguity in the references in the determination of this Court to “the orders made in the wardship proceedings” and “the wardship orders” it seems to me that the Court made it clear, particularly in paragraph 20, that the detention of Mrs. C. would be legally justified on a continuing basis unless the validity of the wardship orders was successfully challenged. I do not read the determination as *excluding* consideration of the order of the 19th August 2016, or see any rationale upon which the appeal should have been restricted to the orders of 2018. In any event, (and this is a point relied upon by the HSE in respect of the 2018 orders) as a matter of law the “wardship proceedings” commenced with the decision of the President on the 11th July 2016 to send the medical visitor to assess Mrs. C. and report back to him. The order of the 19th August 2016 was, therefore, an order made in the wardship proceedings.
364. I think, therefore, that the Court is entitled to examine the circumstances in which Mrs. C. was taken into wardship, as well as the subsequent orders, but on the assumption that the 1871 legislation can be read as being consistent with the Constitution. Since the jurisdiction to make protective orders in the wardship jurisdiction exists once the wardship proceedings have commenced, it is possible to distinguish between the order taking into wardship and the orders made thereafter. Thus, if the order of the 19th August 2016 was invalid, it does not necessarily follow that every order made since then was unlawful.
365. I have come to the conclusion that, as operated in this case, the process concerning Mrs. C. was flawed in respect of the original order, but that the orders made thereafter were fully lawful.
366. My concern in respect of what happened in August 2016 is that the process lacked certain fundamental safeguards for the interests of the proposed ward. To return to a theme discussed above, one of the most salient aspects of that process was the absence of Mrs. C.’s voice, whether speaking for herself, or through a legal representative, or through a person such a guardian *ad litem*.
367. In response to the originating notice, Mrs. C. had requested legal representation. However, there is no provision for legal aid in the area of wardship. This contrasts with, for example, the procedures established under the Mental Health Acts, or in the field of asylum applications, or in the process for taking children into care. While it is true that there is no general constitutional right to legal aid in civil matters, it is clear that it has been accepted by the State, in some circumstances, that certain types of decision warrant the provision of at least the opportunity for legal representation. Furthermore, the HSE has in practice funded legal representation in wardship applications where it is seeking a detention order. In my view the decision of a court to deprive an adult of all legal capacity

is of such significance that the absence of legal assistance may, in some circumstances, render the process unfair.

368. However, that is not to say (since the issue has not been argued to the extent that would be desirable for a decision of this nature) that there is necessarily a constitutional right to legal aid in wardship. The more basic point is that there must, in my view, be at least a mechanism by which the views of the proposed ward can be ascertained and her interests protected. In particular, it must be open to the proposed ward to contest the evidence being put before the court, and to make the case that the medical criteria have not been met or that, in any event, wardship is not necessary or appropriate. In the circumstances of this case, it was highly unlikely that Mrs. C. would have been able to attend for the hearing. Her children, had they appeared in court, might have been heard in their own right as persons with a legitimate interest but they would not necessarily have been afforded a right to represent Mrs. C.
369. It does not appear that the medical visitor (whose independence and expertise I have no reason to doubt) currently has the role of representing the interests of the proposed ward, since her statutory function seems to be limited to the assessment of capacity. It is possible to envisage an expansion of that role, or of the role of the General Solicitor, or of some other mechanism such as the appointment of an independent guardian *ad litem*, in the absence of a full entitlement to legal aid.
370. The need for a procedural safeguard before the hearing is underlined by the procedural consequences of the order. Once it is made, the committee of the ward (appointed by the judge who made the order) takes over the decision-making capacity of the ward, subject to the approval of the President of the High Court. Since the committee has accepted the appointment, the overwhelming likelihood is that it will agree with the order and will not, for example, seek to appeal it on the grounds that it should not have been made. As I said earlier, no other person appears to have a right of appeal, but (and even this is not entirely clear) at most a right to apply, under the wardship jurisdiction, for the order to be discharged. I do not consider that this can be seen as equivalent to an appeal. If the submissions of the General Solicitor are to be accepted, even an application under Article 40.4 could be subject to the prior approval of the President. The difficulties of finding a procedural path by which it can be established that an order should not have been made are manifest.
371. The notice given for the date of the hearing, whether it was received by Mrs. C. on the 17th or the 18th August 2016, was simply too short to allow for any meaningful arrangements to be made for her views to be conveyed to the court, even if those arrangements would only involve the presence of a family member in court.
372. A further issue of concern, in this particular case, arises from the fact that the decision on wardship was taken by a judge who had already determined, in the earlier Article 40.4 proceedings, that Mrs. C. lacked capacity. In making the wardship order, he acted on the basis of the report of the medical visitor and on affidavit evidence adduced by the HSE. The affidavits were not served on Mrs. C. The report, by statute, is confidential and can

only be disclosed to any person with the leave of the court. It was not furnished to Mrs. C. in advance of the hearing, or at any point thereafter. Mr. C.'s request to see it was refused, and there was no other person who could have asked for it on Mrs. C.'s behalf. It has not been seen by any of the parties in these proceedings or by this Court. I do note however that Kelly P. referred to at least part of its contents in open court on the 25th July 2016.

373. It may be useful to refer here to the recent decision of this Court in *P. v. Minister for Justice and Equality* [2019] IESC 47. The central issue in the case was the right to reasons, in circumstances where the Minister relied upon an asserted right not to provide the details of those reasons on grounds of national security. In the course of his judgment Clarke C.J. summarised the well-established case-law on the duty to give reasons and the right to be informed of the material upon which an adverse decision might be based:

"The obligation of a public law decision maker to give reasons is, of course, well established...

But it is also clear that a person who may potentially be directly and adversely affected by a public law decision is entitled to be heard in the decision making process and, in that context, will ordinarily be entitled to be informed of any material, evidence or issues which it might be said could adversely impact on their interests in the decision making process. See, inter alia, the judgments of this Court in State (Gleeson) v Minister for Defence [1976] I.R. 280, Kiely v Minister for Social Welfare [1977] I.R. 267 and State (Williams) v Army Pensions Board [1983] I.R. 308.

The entitlement to know the case against you is itself a fundamental part of the right to be heard, for the right to be heard would be of little value if the person concerned did not know the issues which might adversely affect their interests in the relevant decision making process."

374. All of these considerations apply to the court process. As Clarke C.J. pointed out, it does not appear that Irish law (subject to certain limited exceptions not relevant here) allows a court, making a substantive decision on the merits in adversarial proceedings, to have regard to information that is not available to both parties. This principle is not, in my view, to be seen as weakened by the fact that the process in question is inquisitorial rather than adversarial in nature. As Denham J. said in *Eastern Health Board v M.K.* [1999] 2 I.R. 99, wardship proceedings must be fair and in accordance with constitutional justice. The decision to deprive a person of legal capacity cuts at the autonomy of the individual in a fundamental way, and it should not be made upon the basis of evidence that cannot be challenged by the person concerned. This is particularly so where any challenge to the evidence in question would inevitably require the individual concerned to adduce her own evidence or explanation.
375. The issue in relation to the medical visitor's report is fundamental to the question whether the criteria for admission to wardship have been met. This Court does not know the

extent to which the medical visitor took into account Mrs. C.'s capacity to make decisions in general, or whether the report focussed solely on the capacity to discharge herself from hospital. Unlike the ward in *HSE v A.M.* she had not been suffering from a recognised mental illness to an extent that would bring her within the ambit of the Mental Health Act 2001, and the degree to which her decision-making capacity was reduced was accordingly less. The all-or-nothing approach of wardship to decision making capacity does not appear to take account of such variations in decision-making ability. As noted in the National Safeguarding Committee's review of current practice in the use of wardship for adults in Ireland, there is a strong constitutional argument that assessment of capacity, for the purposes of a court, should focus on whether a ward has the capacity to make a particular decision, at a particular time, in a particular context.

376. This argument may also be strengthened by the lack of clarity in relation to the legal test under the Lunacy Regulation (Ireland) Act 1871 for deciding if the individual is of unsound mind and incapable of managing his or her affairs. It would appear that there is no definitive judicial definition of what "unsound mind" means. The lack of clarity around this definition, on which the wardship jurisdiction is founded, may also present a cause for concern given the scope of the jurisdiction – when a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward. Without access to the report, it is extremely difficult to make effective arguments by or on behalf of a proposed ward to the effect that she is not of unsound mind, or that her capacity is sufficient to make certain decisions.
377. In my view the circumstances in which the order of the 19th August 2016 was made breached the constitutional rights of Mrs. C. to fair procedures.
378. However, as I said earlier, the same is not necessarily the case with respect to all or any of the subsequent orders. The wardship proceedings here commenced with the appointment of the medical visitor (which is a judicial rather than an administrative act). The proceedings would have come to an end if it was determined that wardship was not necessary or appropriate. Since that determination was not made, and the President of the High Court continued to be of the view that Mrs. C. required the protection of the Court, the proceedings were therefore still in being even if the order made on the 19th August 2016 was invalid. The breadth of the wardship jurisdiction permits protective measures to be taken when such proceedings are in being. The orders made by the President therefore fall to be considered by reference to the principles discussed in the decision of this Court in *F.X. v. Clinical Director of Central Mental Hospital* [2014] 1 I.R. 280. An order of the High Court that is valid on its face should not be subject to an order under Article 40.4. unless there has been some fundamental denial of justice, or other fundamental flaw. In most cases, where some less fundamental error is alleged, the appropriate remedy is an appeal. The doubts expressed about Mr. C.'s rights, or lack of rights, in the context of a potential appeal against the making of the original order do not arise here, since he is a person directly affected by the terms of the detention orders and must therefore have a right to appeal against them.

379. The orders made from July 2018 onwards were made in the circumstances described above. In the light of the uncontradicted evidence as to the behaviour of Mr. C., his sister and whatever persons accompanied them at the hospital premises, I consider that the President was fully justified in finding that they posed a threat to Mrs. C.'s welfare necessitating the orders made. I am satisfied that, in particular, the evidence in relation to attempts to interfere with her medication and to persuade her not to take it demonstrates that there was a real risk to her life, especially in view of her epileptic condition. It bears emphasis that neither Mr. C. nor his sister took the opportunity, between July and October 2018, of filing any affidavit challenging the evidence. As a separate consideration, apart from the risks posed to Mrs. C., it should be stated that hospital staff do not have to tolerate the type of behaviour described.
380. Insofar as Mrs. C.'s procedural rights were concerned, the evidence is that the General Solicitor visited her, recorded and reported to the Court on her wishes, and acted upon the views expressed to her by the nurse in order to ensure that the question of capacity was addressed in an up-to-date report. That report concluded that she did not have capacity to make decisions about discharge. While I have expressed concern in relation to the role of the General Solicitor in the context of the right of appeal, there is no reason to suppose that she is not a proper person to represent the interests of the ward in the context of the ongoing review.
381. There are legitimate questions to be asked about the necessity for that part of the order directing that Mrs. C. remain an inpatient in St. Finbarr's, in that Mrs. C.'s condition, *on its own*, would not warrant confinement under the Mental Health Acts. Equally clearly, it does not meet the Convention criteria for cases of mental health. In principle, where the risk to a patient comes from a third party, it seems to me to be preferable that appropriate legal measures should be directed at the persons creating that risk (as they were in this case), rather than unnecessarily depriving the patient of her liberty, notional as that liberty may be in practice.
382. The HSE and the General Solicitor argue that the detention order was necessary to protect Mrs. C.'s life and health, while IHREC suggests that it was put in place simply to resolve a management problem with Mr. C. and his sister. The situation is, I think, a more complex one than the IHREC analysis acknowledges. I think that in truth the problem was Mrs. C.'s vulnerability, arising from her cognitive impairment, to the actions and words of her children. Their persistence in attempting to interfere with her treatment and to remove her from the hospital created the necessity for orders restricting their access to her, prohibiting any attempt by them to remove her and justifying, where necessary, the intervention of the gardaí. It was also necessary to direct the order against any persons acting in concert with them. Because they had persuaded her to fear the prescribed medication (in circumstances where she may have been prone, in any event, to persecutory delusions), it was necessary to authorise the hospital staff to treat her in accordance with their judgment and to secrete medication in her food and drink. The reality is that the combined effect of these measures could be seen as amounting to detention in law, even without the explicit direction that she was to remain an inpatient in

St. Finbarr's. In my view, protective measures of this nature come within the ambit of the wardship jurisdiction and are lawful provided that the appropriate safeguards are applied.

383. Reference has been made to the decision of this Court in *A.M. v. Health Service Executive* [2019] IESC 3, where it was held that, despite the fact that the appellant could have been the subject of an application under the Mental Health Act 2001, his admission into wardship was, on the facts of the case, permissible provided that the essential safeguards and protections as regards procedural rights, review by the courts, consent and treatment would be no less than if he had been admitted to the Central Mental Hospital under the Mental Health Acts. The Court referred to the range of protections in place to vindicate and protect the rights of wards, which were outlined by Kelly P. in his judgment in that case in the High Court, and stated that without the range of such protections and those others necessary in each case, questions might arise as to constitutional and Convention compliance.
384. The submissions of the HSE in the instant case engage with each of these criteria as specified in *A.M.* and it would appear that those protections are in place in order to ensure that the rights of Mrs. C. are vindicated. In particular, the detention order has been subject to regular reviews at which she has been legally represented by the General Solicitor. In terms of the medical treatment of Mrs. C., appropriate reports have been presented. She has been seen on several occasions by the court's medical visitor and on occasion by an independent social worker.
385. Finally, I wish to turn to the question of the standing of a lay person who wishes to represent an individual in an Article 40.4 inquiry. When a complaint is made, the High Court judge who receives it will direct an inquiry (unless, of course, satisfied that there are no grounds upon which such inquiry should be held).
386. The general rule is that any person may represent himself or herself in court, or be represented by a lawyer. Lay advocates are not permitted, although lay persons representing themselves may have the assistance of a "MacKenzie friend". The reasons for this rule are obvious, and are discussed most recently in *Allied Irish Banks v. Aqua Fresh Fish* [2018] IESC 49. There are certain legally established exceptions relevant to this case. Article 40.4 provides for a complaint being made to the High Court "by or on behalf of any person", and that has always been construed as permitting the initiating complaint to be made by a lay person. However, this Court determined in *Application of Woods* that such a person was not entitled to act as representative in the substantive inquiry. The second relevant exception, which was noted by Humphreys J. in *Knowles*, is the provision made in O.6, r.2 of the District Court Rules for representation by a family member in cases of "infirmity or other unavoidable cause". While the District Court Rules obviously are not applicable to the High Court, the provision does, as Humphreys J. said, indicate that such representation is not entirely unknown in the court system. Finally, it is the case that the courts have on occasion, where it was considered appropriate, exercised a pragmatic discretion in favour of hearing what lay representatives have to say.

387. The Article 40.4 procedure is of such high constitutional significance that the courts should be wary of any proposal that might have the effect of restricting its availability. One suggestion made in this case is that an application on behalf of a ward of court should be subject to the approval of the President of the High Court. That would, I think, require a limitation to be read into Article 40 that would be plainly contrary to the words to be found there – the application may be made to “any” judge of the High Court. Furthermore, the difficulties in the way of any form of appeal against the making of a wardship order render it particularly undesirable that any extra restriction should be read into Article 40. The title of the proceedings, on the other hand, seems to me to be irrelevant. I cannot see that the ward is likely to have a greater exposure to costs simply because she is named as applicant.
388. However, the decision whether a lay person ought to be heard in the inquiry is, I believe, a matter where the final decision should be left to the trial judge. The general rule against lay representation applied in *Woods* remains, but in some particular circumstances the vindication of the constitutional right to liberty of a person unable to present their own case might lead the judge to conclude that a lay person should be given permission to speak on behalf of the detained person. This is more likely to occur in the case of a close family member, although even there, in most cases, the availability of the Custody Issues scheme may justify a refusal of permission. It would require exceptional circumstances for an unconnected lay person to be permitted to take on the role of advocate.

Conclusion

389. This case concerns a person who, on the evidence, suffers from a degree of mental impairment but who is not suffering from any mental illness such as would warrant confinement under the Mental Health Act 2001, as amended. The judgment describes the circumstances in which she came to be a long-term hospital patient and a ward of court. The legal principles discussed here, and the conclusions reached, are intended to be applicable to that situation and are not to be seen as necessarily applying in full to private or family care arrangements. It may be that wholly different considerations would arise in respect of such arrangements.
390. The first two appeals dealt with in this judgment are the HSE appeals against the finding of the Court of Appeal that Mrs. C. was unlawfully detained on two dates in July 2016. I have come to the conclusion that the analysis of that Court was flawed insofar as it did not sufficiently engage with evidence indicating that Mrs. C. might not, in fact, have wanted to leave hospital on those occasions but was simply complying with the wishes of others. Furthermore, I think that the Court was wrong in finding that her cognitive impairment was irrelevant to the hospital’s duties to her. However, since the cases are moot no order is required from this Court.
391. In the course of my analysis I have concluded that a hospital faced with a situation such as the one that arose in this case, giving rise to a concern for the welfare of a patient, should take the following steps.

392. The first question is whether the patient truly wants to leave, or is in reality being removed by third parties in circumstances where there is a real risk to her health and welfare. If it is a case of removal, rather than a wish to depart, the hospital's duty of care extends to protecting her against such third parties. If she does indeed wish to go, and has capacity to make that decision, all that the hospital can do is attempt to persuade her that it is in her own interests to stay.
393. If, however, the hospital is concerned that the patient lacks capacity to make the decision, that issue must be addressed. Persuasion will not necessarily be the appropriate legal solution, since the lack of capacity implies an inability to process the information provided and to make decisions upon it. The hospital is entitled to take some brief period of time to make its assessment of capacity. It may be helpful if some person can be found who has not been involved in any dispute concerning the patient and who can act as her intermediary or advocate. If it is concluded that the patient has capacity, no further issue arises. If she lacks capacity, the hospital must bear in mind that it has no general power of detention and no general right to make itself a substitute decision-maker. It must therefore seek the assistance of the courts, if it is felt that the patient is at risk. In my view, the doctrine of necessity permits the hospital to detain the patient, in the interests of her personal safety, provided that such detention lasts no longer than is necessary to take appropriate legal steps. It is essential to bear in mind that compliance on the part of a patient who lacks capacity will not on its own amount to justification, since if the patient cannot give a valid consent then some other lawful authority is necessary if other persons are to make decisions for her.
394. From the courts' point of view also, it must be borne in mind that a patient's lack of capacity to make a decision is not, in itself, an answer to a complaint of unlawful deprivation of liberty. People with impaired mental abilities are protected by the same constitutional guarantee as any other person – that they will not be deprived of liberty otherwise than in accordance with law. Similarly, the fact that the measures taken by the hospital are in the best interests of the patient is a matter that goes to the justification of deprivation of liberty, and not to the question whether there is detention in fact. In determining whether a person has been unlawfully deprived of liberty, in breach of the constitutional guarantee, the court must start with the factual circumstances and ask whether the individual has in fact been deprived of liberty. In this case, that question is answered by the finding that Mrs. C. (if she wanted to leave) was physically prevented from so doing and was subjected to complete control and supervision.
395. The second part of the court's analysis will then focus on the justification offered for the deprivation of liberty. If the hospital has acted in accordance with the process I suggest, then there will in my view have been no unlawful deprivation of liberty. It will then be for the court to determine whether the situation requires protective orders, in the best interests of the patient, which affect the right to liberty. Such orders must, of course, respect the substantive and fair procedure rights of the individual.

396. Moving on to Mr. C.'s appeal, I have found that the procedures applied to the making of the wardship order in August 2016 were flawed in that Mrs. C.'s fair procedure rights were not vindicated. The notice given of the hearing date was, I believe, too short. She should have been furnished with the evidence that was to form the basis for the Court's decision, and should have had an adequate opportunity to challenge it. The absence of legal aid for such cases is a matter of real concern, given the consequences of a wardship order, and it seems to me that if a person is not in a position to get legal representation it may be necessary to appoint a guardian *ad litem* to protect her interests.
397. I am conscious of the fact that, in making the order that he did, Kelly P. was already aware of both the medical evidence and the personal circumstances of Mrs. C. However, he had not, at that point, heard what might have been put forward on her behalf by someone who was not, unlike Mr. C., personally embroiled in the situation. It is essential that the voice of the individual be heard in the process, and if she cannot speak for herself then some person must be found, who is not otherwise involved in any dispute, who can speak for her.
398. As far as the orders made in 2018 are concerned, I have concluded that the wardship proceedings were and are still in being, having commenced with the judicial act of sending out the medical visitor. This is so despite any flaws attached to the order of August 2016. In the circumstances, the Court had jurisdiction to take urgent protective measures in the interests of Mrs. C. in the circumstances as they presented themselves after the Court of Appeal judgment. Those measures were fully justified by evidence that was never challenged on affidavit. Those parts of the orders affecting the direct interests of Mr. C. were upheld on appeal. Therefore, while I would suggest that the High Court should revisit the order made in August 2016, the claim of unlawful deprivation of liberty is not made out.
399. Finally, I do not believe that the procedure for the vindication of the right to liberty under Article 40.4 can be restricted in the manner proposed by the General Solicitor. The plain text of the Article requires the High Court, or any judge thereof, to receive a complaint made by or on behalf of any person. The objection of the committee appointed as substitute decision-maker in the wardship process is relevant to the outcome, but cannot pre-determine that outcome. This constitutional safeguard may be seen as particularly significant in relation to a statutory scheme of wardship where the right of appeal is restricted.
400. However, it should be borne in mind that the judge who receives a complaint is not obliged to proceed to direct an inquiry if the complaint is manifestly baseless. The principles of abuse of the court's process apply to Article 40.4 as in any other litigation. Furthermore, while the complaint may be made by any person, the general rules about representation apply to the inquiry. A lay person may not represent another individual unless, exceptionally, the judge hearing the matter grants permission. Such permission is more likely to be granted in the case of a family member than where an unconnected person wishes to act as an advocate.

401. In the circumstances I would make no order in the HSE appeals and would dismiss Mr. C.'s appeal.