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Neutral Citation Number: [2023] EWCOP 55

Case No: COP13735198

**IN THE COURT OF PROTECTION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24 November 2023

**Before :**

**MRS JUSTICE THEIS DBE**  
**VICE PRESIDENT OF THE COURT OF PROTECTION**

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**Between :**

	<b>The Health Service Executive of Ireland</b>	<b><u>Applicant</u></b>
	<b>- and -</b>	
	<b>A Hospital Provider</b>	<b><u>Respondent</u></b>

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**Mr Henry Setright KC and Mr Stephen Broach (instructed by Bindmans) for the Applicant**

Hearing date: 18<sup>th</sup> October 2023  
Judgment date: 24<sup>th</sup> November 2023

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 24<sup>th</sup> November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mrs Justice Theis DBE :**

### **Introduction**

1. This matter concerns RO, an Irish citizen in her twenties who is currently an inpatient at a specialist eating disorder facility, ('the Clinic'). The Clinic is in this jurisdiction, where RO has been since 2021. As RO remains habitually resident in Ireland, she is the responsibility of the Applicant Health Service Executive of Ireland ('the HSE'). The issue before this court is the HSE's application for recognition and enforcement of an order of the Irish High Court dated 5 October 2023. Holman J had previously recognised an earlier order in March 2021.
2. At the hearing on 18 October 2023 I made an order providing such recognition. This judgment explains the reasons for making that order.

### **Relevant Background**

3. RO is a young woman with a severe anorexic disorder, which is compounded by constellation of other needs arising from her Autistic Spectrum Disorder, mild intellectual impairment and severe depressive disorder.
4. Due to the extent of her needs the HSE applied in the Wardship jurisdiction in March 2021 to secure an order for RO to be placed in the specialist clinic here, and an order was made by the Irish High Court which provided for that to take place. That order was recognised and enforced by this Court by order of Holman J on 31 March 2021. RO was admitted to the Clinic in early April 2021. Since then there have been regular updates provided by the Clinic. Those updates were all before the President of the Irish High Court at the hearing on 5 October 2023.
5. At that hearing RO was represented by the General Solicitor and also by an independent solicitor, Mr L. They both appeared through counsel and the Clinic's medical director also attended the hearing. The medical director had provided an updated report dealing with specific matters raised by the Irish High Court and the parties.
6. Counsel for the HSE informed the President at the hearing on 5 October 2023 that his application was for orders in similar terms under the inherent jurisdiction, rather than in Wardship. During the hearing counsel for the HSE took the President through the matters identified by Mostyn J in *HSE of Ireland v Florence Nightingale Hospitals Limited [2023] 4 WLR 3 ('Re SV')* and the President was satisfied that each relevant matter was satisfied. Counsel for the HSE recognised that although there was a clinical consensus to extend the order, RO did not wish to continue under the court orders, and had expressed the wish to return to Ireland even if that was to have a serious impact on her health.
7. Following hearing submissions from all the parties the President gave a reasoned judgment and made the order sought by the HSE which authorised under the inherent jurisdiction RO's continued placement at the Clinic in this jurisdiction.

## Legal framework

8. Section 63 of and Schedule 3 of the Mental Capacity Act 2005 ('MCA') has given effect to the central provisions of the 2000 Hague Convention on the International Protection of Adults ('the Convention') as a matter of English law. Schedule 3 makes provision for the recognition, enforcement and implementation of protective measures imposed by a foreign court regardless of whether the Court is located in a Convention country. Consequently, the fact that the United Kingdom has not ratified the Convention in respect of England and Wales and Ireland has signed but not yet ratified the Convention is therefore irrelevant for purposes of the HSE's application.
9. For the purposes of Schedule 3 the definition at paragraph 4 in respect of a person over the age of 18 years is a person who '*as a result of impairment or insufficiency of his personal faculties, cannot protect his interests*'. This is a stand-alone definition for the purposes of Schedule 3 and the Court of Protection is consequently not required to consider whether the person is someone whom s 2(1) MCA applies (see *Re PA & Ors* [2015] EWCOP 38 at [41]).
10. Paragraph 5 of Schedule 3 defines a '*protective measure*' as a '*measure directed to the protection of the person or property*' and then sets out a non-exhaustive list of examples. It is clear that a protective measure can include a placement as described in this case (see *Re PA & Ors* at [42]).
11. By paragraph 20(1) of Schedule 3 an interested person may apply to the Court of Protection for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales, and paragraph 22(1) provides for a declaration as to whether such an order can be enforced. Paragraph 19(1) requires that the adult is habitually resident in the other country.
12. There is only a limited power of this Court to review the substance of the protected measure. Paragraph 21 provides that any finding of fact relied upon when the measure is taken is conclusive, including as to whether the individual is habitually resident in the country. By Paragraph 24 this Court cannot review the merits of the measures taken outside England and Wales '*except to establish whether the measure complies with this Schedule in so far as it is, as a result of this Schedule, required to do so.*' The general rule regarding review can only be disapplied in the limited circumstances outlined in Paragraphs 19 (3) and (4).

## HSE submissions

13. On behalf of the HSE, Mr Setright KC and Mr Broach submit this court can be satisfied that the criteria for recognition and enforcement of the order of the Irish High Court of 5 October 2023 are met.
14. RO is an 'adult' for the purposes of Paragraph 3. The protective measures contained in the order dated 5 October 2023 come within the provisions of Paragraph 5. RO was habitually resident in Ireland at the time the protective measures were taken and she had a proper opportunity to be heard before the High Court of Ireland in accordance with Paragraph 19(3)(b). The protective measures satisfy the criteria for detention

under Article 5(1) ( e) of the EHCR and she continues to be afforded a regular and effective right of review of her detention in the Irish High Court, which complies with the requirements of Article 5(4) EHCR. There is nothing to indicate that the recognition and enforcement of these protective measures is contrary to public policy for the purposes of Paragraph 19(4)(a) and/or would be inconsistent with a mandatory provision of the law of England and Wales for the purposes of Paragraph 19 (4)(b).

15. The HSE submits that the fact that the order sought to be recognised and enforced is now contained in an order made under the inherent jurisdiction, rather than the Irish adult Wardship jurisdiction, makes no difference providing the requirements under Schedule 3 are met. There is no requirement in Schedule 3 that any protective measure put forward for recognition and enforcement should be based on a legislative statute, rather than having a common-law or inherent jurisdiction basis. The important consideration, they submit, is that the order is valid in the domestic law of the state in which it is made. Prior to the Irish High Court making orders under its adult Wardship jurisdiction, orders made in respect of protected persons under the inherent jurisdiction in Ireland were approved for recognition and enforcement by the Court of Protection (see *Re PA & Ors* [46] and [103]).

### **Discussion and decision**

16. This application for recognition and enforcement is governed by the provisions set out in Schedule 3. If those provisions are met, and the case does not fall within the limited category of cases where the court can review the decisions made in the other jurisdiction in accordance with Paragraph 19(4) and/or the provisions of the ECHR, then this Court should make the order sought.
17. Schedule 3 sets out the requirements that need to be met and the helpful checklist provided by Mostyn J in *Re SV* provide a useful structure by which such applications should be considered.
18. It is clear in this case the relevant requirements under Schedule 3 are met in the way outlined on behalf of the HSE, none of the limited provisions apply by which this court can review the decision. On the information the court has seen this matter was given careful consideration by the President prior to the order being made on 5 October 2023, he considered the checklist and gave a reasoned judgment. The fact that the order was made under the inherent jurisdiction rather than the adult Wardship jurisdiction makes no material difference. It was in accordance with the domestic law in Ireland at the relevant time. As the President observed during the hearing on 5 October 2023 *'there's no doubt that the inherent jurisdiction exists, and there is no doubt that it can be – there's no doubt that it can be exercised on the appropriate facts in a case such as this. I have no doubt about that.'*
19. One issue raised on behalf of the HSE at the hearing before this Court related to the management of these applications.
20. Practice Direction 23A, which supplements Part 23 of the Court of Protection Rules 2017, provides as follows:

*16. An application under rule 23.4 for recognition and / or enforcement of a protective measure should be dealt with rapidly, and in reviewing the papers the*

*Court will consider whether the order sought can be made without holding a hearing.*

*17. A Schedule 3 application under rule 23.4 for recognition and / or enforcement of a protective measure which—*

*(1) purports to authorise a deprivation of liberty of the adult to which it relates (other than a temporary or transient deprivation of liberty associated with the transfer of the adult to or from a specified place); or*

*(2) purports to authorise medical treatment  
will usually—*

*(1) be determined after holding a hearing; and*

*(2) be allocated to the Senior Judge or a Tier 3 Judge.*

21. The Practice Directions provides that Schedule 3 applications that involve authorisation of a deprivation of liberty will ‘usually’ be determined after holding a hearing. This issue arose in *Re SV* where Mostyn J observed at [53] (iv)

*‘The reciprocal order sought will almost invariably authorise the deprivation of P’s liberty. In view of the seriousness of such a decision, as well as the international aspects, I agree with Mr Setright that such orders should be only be made by a Court of Protection Tier-3 judge (i e a permanent or deputy High Court judge), following an attended hearing in court. If the application is definitely proceeding by consent I would have thought that a listing of one hour would be appropriate. But if the application is not proceeding by consent, or there is doubt as to whether it is or is not contentious, then in my opinion the application should be listed for a day with an interim hearing of one hour being urgently fixed to consider making an interim order permitting the implementation of the foreign measure pro tem...*

22. What Mr Setright submits is that there may be certain categories of these Schedule 3 applications that could be considered without an attended hearing. He bases this submission on the recent jurisdiction changes in Ireland which means that a number of orders may in the future be made which, apart from the change to the use of the inherent (Irish) jurisdiction instead of the adult (Irish) wardship jurisdiction, replicate in every material respect the provisions of the orders that they replace. If that is the only material change which underpins the application under Schedule 3, Mr Setright submits a more proportionate way of managing the application in that situation could be by the matter being dealt with without the need for an oral hearing. He submits this procedure would only apply in cases where certain conditions are met, namely:

- (i) All parties, including the person who is the subject of the order, consent to the application;
- (ii) The person who is the subject of the order is already present in this jurisdiction and an order authorising the care arrangements for them has already been recognised and enforced by this Court; and
- (iii) The new order for which recognition and enforcement is sought involves no substantive change to the care arrangements for the person subject to the order, and merely extends the authorisation of those care arrangements under the inherent jurisdiction.

23. However, as Mr Setright realistically recognises in his written submissions on this issue, there may be real limitations in such clear demarcation lines being drawn. It may be there are not extant and unequivocal written consents to the application, in which case an oral hearing will be required. Also, in circumstances where there is a time lapse between the order to be replaced and the fresh order this Court will still need to be satisfied that the relevant core criteria under Schedule 3 are established at the date of the making of the new Irish order, by reference to the supporting material, as well as considering whether any matters of public policy arise. Whilst a skeleton argument, cross referencing the supporting material to the core criteria may help, it may in reality reduce delay if this was undertaken at an oral hearing, even if a relatively short one.
24. Finally, Mr Setright sets out, the inherent urgency of these cases often means they come before the court within 48 hours of the sealed Irish order becoming available. The transcript of the judgment sometimes comes later and the consents even later. In this case, the final order of the Irish High Court was provided on 16 October 2023 and this hearing took place two days later on 18 October 2023. This had consequent delays in the preparation of the bundle, which was not available until 11am the day before the hearing.
25. Now having had the opportunity to consider the further written submissions from Mr Setright, I do not consider there should be any change in the arrangements for considering these applications. In accordance with paragraph 17 of Practice Direction 23A the presumption is that these applications will be determined at an oral hearing if they involve authorising deprivation of liberty. There should always be a skeleton argument filed in support, that takes the court through the relevant criteria and directs the court to how the criteria are satisfied by the supporting material lodged. There remains the option for this Court to consider whether a hearing is necessary but due to the urgency with which these applications have to be dealt with and the inherent lateness of all the supporting material being available there are only likely to be limited circumstances when such a course is appropriate, even when, at the very least, the requirements outlined in paragraph 22 above are met. I agree with the observations made by Mostyn J in *Re SV* that due to the seriousness of the consequences of the reciprocal order being sought, as well as the international aspects, such orders should only be made by a Court of Protection Tier 3 judge following an attended hearing in court, unless the Tier 3 judge otherwise directs.
26. Finally, turning to the material that should be filed in support of a Schedule 3 application. I agree with the suggestion made by Mr Setright that there should be a core bundle filed which contains the relevant documents in support of the application.
27. The core bundle should contain the following: (i) the application; (ii) the skeleton argument; (iii) the draft order; (iv) the consents (if applicable); (v) the order of the Irish High Court; (vi) the transcript of the judgment and, in cases where this is necessary, the transcript of the hearing. This is to cover situations, such as here, where the ex-tempore judgment refers to exchanges during the hearing. Where the transcript is lengthy relevant passages should be marked up and linked to the skeleton argument.
28. In addition to the core bundle, there should be a separate bundle which includes the other relevant material from the proceedings in Ireland, so they can be referred to if required.

29. It is hoped this structure will enable these applications to be determined with minimum delay and enable this Court to ensure that is it satisfied that the criteria under Schedule 3 MCA are met, including consideration of matters of public policy, and recognising the inherent seriousness of the relief sought, namely the making of summary orders for detention and treatment, albeit the original order is made in another jurisdiction.