THE HIGH COURT

WARDS OF COURT

[2024] IEHC 394

[WOC 9162]

IN THE MATTER OF M.D., A WARD OF COURT

RESPONDENT

***Ex tempore* ruling of Mr. Justice Mark Heslin delivered on 13th June 2024**

1. In terms of the background facts, the respondent is a young man in his twenties who was admitted to wardship in November 2017. According to the reporting before the court he has very complex needs and his diagnoses comprise of treatment-resistant schizophrenia, personality disorder, mild learning disability, and hearing difficulties. The evidence speaks to the respondent being someone who requires specialist care, given his very complex needs.

2. The respondent is someone who currently resides outside of Ireland in a specialist facility, not available in this jurisdiction at this time. His placement in [named] was made under an order of the 21 February 2018 which provided *inter alia* for his detention, assessment, and treatment in that specialist placement. That Order was subsequently recognised and enforced by the courts of England and Wales in March of 2018. It has been the subject of regular intensive reviews since then under this Court's wardship jurisdiction.

3. In terms of recent background, this matter was before the court on 25 January. The evidence at that stage, including from both a treating consultant psychiatrist and an independent consultant psychiatrist (and I will refer to the latter as the "ICP"), was that the respondent suffered from a mental disorder with the meaning of s.3 of the Mental Health Act 2001. Of relevance is that s.108 of the Assisted Decision-Making Capacity Act 2015 relates to detention in institutions other than approved centres and his current placement in the United Kingdom is very obviously not an approved centre.

4. In light of the evidence then before the court, an order was made under the court's wardship jurisdiction on 25 January extending the respondent's detention as well as extending non-detention orders which speak to his welfare and ensure that it continues to be promoted. As of the 18 April of this year no report had been received from an ICP for the purposes of a further review under s.108. At that point Dignam J. adjourned the matter on the basis that the current wardship orders would continue, and this was to allow for the preparation of an application under the court's inherent jurisdiction, should that be necessary. It did appear at one point that an ICP report might be available, but this

ultimately proved not to be the case and all of the factual background is set out in the papers I have carefully considered, including the averments made by Mr. H, solicitor for the H.S.E., in his 11 June affidavit.

5. From a first principles analysis of the 2015 Act, I am satisfied that as a matter of law it is not open to this court to dispense with the requirement for an ICP report. I say that, having regard to the explicit provisions of s.108, interpreted in context, and considering the legislation as a whole in particular Part 10. The legislation uses the mandatory term *"shall".* In particular, s.108(5) states as follows:-

> *"The wardship court when reviewing a detention order shall hear evidence from the consultant psychiatrist responsible for the care or treatment of the person concerned and from an independent consultant psychiatrist."* (emphasis added)

6. Subsection 6 goes on to specify the function of the ICP, namely, "*to examine the person concerned and report to the wardship court on the results of the examination, in particular whether, in the opinion of the psychiatrist, the person concerned is suffering from a mental disorder*." I pause to say that s.s.(6) refers only to the ICP and ascribes to the ICP, not to the responsible consultant psychiatrist, a specific and critical function. It is also the case that the very role of an ICP is a creation of statute and the 2015 Act also provides for a statutory panel in that regard. Indeed, the role and function of ICP's in the 2015 Act mirrors the system established in the Mental Health Act 2001, in particular, in light of s. 17 of that legislation.

7. Given the function of the ICP, which the Oireachtas has deliberately chosen to ascribe to the ICP alone, the absence of reporting from the ICP means that the court today lacks evidence which is *essential* to the carrying out of a review under s. 108. I take this view because the 'core' issue in a s.108 review is whether the relevant person is or is not suffering from a mental disorder (with that term having the meaning set out in s.3 of the Mental Health Act 2001). It is the ICP who is to report to this Court on that question (*per* s. 108(6)) with this Court obliged to hear evidence from the ICP (*per* s. 108(5)). For these reasons, I am satisfied that a plain reading of the legislation means that the lack of any opinion from the ICP on the core question of whether the mental disorder definition applies, renders it impossible for this Court to carry out a s.108 review.

8. I have also had the benefit of very detailed submissions provided by Mr. Brady BL, for the H.S.E. and, having thanked him sincerely for those, it seems to me that the views I have expressed so far, based on simply a literal interpretation of the legislation, accord entirely and are consistent with the views reached by the President in a recent authority, to which Mr. Brady's submissions direct the court, namely, the President's decision in *HSE v M.C.* [2024] IEHC 47, with paras. 121-124 being of particular relevance. That was a case in which, for the purposes of a s.108 review, the relevant person did not in fact have a responsible consultant psychiatrist. The question in *M.C.* was whether the court should

take the view that a s.108 review could not proceed in the absence of a report by a responsible consultant psychiatrist, and whether the review should be discharged or terminated. The President noted that the court cannot be compelled to hear evidence from a responsible consultant psychiatrist where there was no such person. He was satisfied that this impossibility could not affect the proper interpretation of s. 108 (1).

9. In deciding that the Part 10 review could and should take place in *M.C.*, the President drew a distinction between the respective roles of the responsible consultant psychiatrist and the ICP for the purposes of a s.108 review. Whilst recognising the very important role played by the responsible consultant psychiatrist, the President found that the role of the ICP is *crucial* in the context of a s.108 review. In these circumstances, the President was satisfied that on a proper interpretation of s.108(1) a review of the relevant person's detention was required, despite the fact that there was no responsible consultant psychiatrist and the respondent in that particular case was not suffering from a mental disorder as opined by the ICP.

10. In view of the facts which I have outlined, the position in the present case is materially different. Evidence which is essential to the s.108 review, critical in the view of the President having regard to the expressed functions of the ICP, and which this Court is mandated to consider, is simply missing. In these circumstances I am satisfied that it is impossible for this Court to discharge its obligations on a s.108 review. I also accept as entirely correct the submission made by Mr. Brady on behalf of the applicant that this Court can find no solution in the 2015 Act as to how to circumvent noncompliance with what is an explicit statutory provision.

11. That being so, I am satisfied that no issue can be taken with an application being made pursuant to the court's inherent jurisdiction. On the facts of this case s. 4(5) of the 2015 Act which makes explicit that this courts inherent jurisdiction is preserved, is a jurisdiction which plainly arises to be invoked given that the statute can take us no further. In other words, we are certainly not in a situation which could fairly be described as "*expressly and completely delineated by statute law*"(to quote from the decision of Murray J, as he then was, in *G. McG. v D.W.* (No. 2) [2002] 4 I.R. 1 at pp. 26 and 27). That is this court's decision on this net question, and the reasons for it.