THE HIGH COURT

[2020] IEHC 639

[Record No. 2020/1765 SS]

BETWEEN

S.M.

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

THE DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

NOTICE PARTY

JUDGMENT of Ms. Justice Hyland delivered on 7 December 2020

Summary of Decision

1. This case concerns the circumstances in which otherwise legal detention can be rendered unlawful by a failure to provide appropriate medical treatment, thus entitling an applicant to an order of habeas corpus under Article 40.4 of the Constitution.

2. As identified by O'Donnell J. in *SMcG & JC. v. CFA* [2017] 1 I.R. 1

> *"… the remedy of an inquiry under Article 40 is the great constitutional remedy of the right to liberty…It is and remains the classic remedy when a person's liberty is detained without any legal justification, or where the justification offered is plainly lacking. However, the right it protects is a right not to be deprived of liberty save in accordance with law. More difficult issues arise when it is sought to justify detention by the production of a valid order which is regular on its face, but which it is asserted is liable to be quashed because of some defect in procedure. The High Court on an Article 40.4 inquiry does not have jurisdiction to make any order other than release or to refuse release… Given the importance of the remedy, and its power, I do not doubt that it is possible in a fundamental case for the High Court to as it were "look through" an otherwise validly issued order, or at least an order which has not yet been quashed by a court with jurisdiction to do so and direct the release of the applicant."*

3. This is a case where "more difficult issues" arise. The applicant is awaiting trial for murder and has been remanded in custody in Cloverhill Prison. It is asserted that, despite the valid orders detaining the applicant pending his trial, nonetheless his detention is invalid because it fails to vindicate his right to bodily integrity and/or his right to medical treatment. This is in circumstances where the evidence discloses that he requires a place in the Central Mental Hospital (CMH) due to his psychotic state with homicidal ideation but where there is currently no bed for him due to pressure on resources.

4. Of course, not every illegality impacting upon a prisoner will justify an order of habeas corpus. Quite the opposite is the case. The case law makes it clear that there must be an egregious breach of the fundamental rights of a person such as to render their otherwise lawful detention unlawful. In SMcG, O'Donnell J. held the breach must be exceptional:

> *"However, the Court in an exceptional case has the capacity to direct the release of the applicant notwithstanding the existence of the order, in the same way in which an exceptional case, post-conviction, it may proceed to direct the release of an individual notwithstanding the existence of an order convicting him or her which has not been set aside on appeal in the circumstances considered by Henchy J. Any such case however is exceptional and the breach must be so fundamental that the obligation of the administration of justice and the upholding of constitutional rights requires the court to proceed in that fashion."*

5. The nature of the test has been expressed in various ways in the case law. In *J. H. v. Russell, Clinical Director of Cavan General Hospital* [2007] 4 I.R. 242, it was held that only a complete failure to provide appropriate conditions of treatment could render a detention unlawful. In the case of *Kinsella v. Governor of Mountjoy Prison* [2012] 1 I.R. 467, it was held that as far as sentenced prisoners are concerned, the jurisdiction could only be used in quite exceptional cases. In *F.X. v Clinical Director of Central Mental Hospital* [2014] 1 I.R. 280 it was held that an order of the High Court good on its face should not be subject to an inquiry unless there has been some fundamental denial of justice.

6. The immediacy and simplicity of the remedy of habeas corpus may be seen from the wording of Article 40.4.2:

> *"Upon complaint being made by or on behalf of any person to the High Court… alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court … and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such persons from such detention unless satisfied that he is being detained in accordance with the law."*

7. The lack of procedural rules in respect of an Article 40.4 application is striking. There is no mechanism put in place to establish a detailed analysis of the situation. It is designed to address an obvious and overwhelming illegality.

8. In this case, having regard to the detailed evidence before me in respect of the applicant's treatment, I am not persuaded that, to the extent the applicant's rights of bodily integrity are breached by the current failure to admit him to the CMH, such a breach is sufficiently egregious or exceptional or fundamental to render unlawful his detention. I therefore refuse the application for habeas corpus.

Facts

9. The facts of this case are undoubtedly tragic, above all for Mr. O, the victim of a fatal assault but also for the applicant, Mr. M, and his family. The applicant is aged 25. He grew up with his parents and three siblings, attending secondary school and college. He

had some mental health issues while attending both school and college. He suffered from OCD and from epilepsy.

10. In 2018 his mental health worsened and he spent some time in a psychiatric hospital in Newcastle. On release, he was no longer able to work and became homeless. He lost contact with his family but was picked up by the Gardaí in June 2019 in Santry and was admitted to St. Vincent's Hospital in Fairview, a psychiatric hospital, where he received a diagnosis of psychosis. He left St. Vincent's Hospital in April 2020 and went to live in a supported hostel. He unfortunately stopped taking his medication during the end of his stay in St. Vincent's according to his own account of matters and while living in the supported hostel.

11. He was living with a Mr. O in the supported hostel when, on the relevant date, he woke up at around 5am, went into a kitchen to get a knife that he had bought a few weeks before and entered the victim's room where the victim was asleep. He stabbed Mr. O a number of times, killing him, following which he immediately went to the local Garda station and asked to be arrested.

12. He was remanded to Cloverhill Prison on 14 August 2020 and was assessed by a nurse within two hours of committal. He was then transferred to D2 wing, a wing reserved for inmates assessed as potentially vulnerable. He was interviewed on 17 August by Dr. Conor O'Neill of the National Forensic Mental Health Service, a consultant lead in-reach psychiatric clinic in all the prisons within the reach of Dublin including Cloverhill. He is currently being treated by the prison medical team in conjunction with the in-reach team. The evidence shows he has had interviews with forensic psychiatrists on 17 August, 18 August, 31 August, 8 September, 22 September, 29 September, 6 October, 13 October, 20 October, 3 November, 12 November and 17 November 2020.

13. Dr. O'Neill describes the applicant as suffering from a psychotic illness, with a working diagnosis of schizophrenia. His case notes record previous diagnosis of OCD, atypical psychosis and epilepsy. The applicant is described as continuing to experience homicidal ideation and intrusive thoughts in the context of OCD.

Case Law

14. Turning now to consider the case law in a little more detail, the first case in which this jurisdiction identified was *The State (C) v. Frawley* [1976] I.R. 365 where the prosecutor serving a sentence of imprisonment claimed that the conditions under which he was detained rendered his detention unlawful, specifically the failure to meet his psychiatric needs. Finlay P. noted that the executive had failed to provide the type of specialised psychiatric treatment needed to address his personality disturbance but nonetheless held that it was not the function of the court to fix the priorities of the executive's health and welfare policy and that accordingly the State was not in breach of any constitutional obligation in that regard. However, he left open the possibility that the conditions in which a prisoner was detained might be such as to deprive the detention itself of legality. In *The State (McDonagh) v. Frawley* [1978] I.R. 131 O'Higgins C.J. noted that for habeas

corpus purposes, it was insufficient for a prisoner to show there has been a legal error or impropriety.

15. In the *State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82, Barrington J. was considering a situation where the applicant contended that because of the slopping out regime and lack of adequate toilet facilities, her detention was illegal. He contemplated the release by habeas corpus of a prisoner suffering ill-treatment at least in some cases. He held as follows:

> *"It would clearly not be possible to enumerate in advance what are the conditions which would invalidate a detention otherwise legal. If a court were convinced that the authorities were taking advantage of the fact that a person was detained consciously and deliberately to violate his constitutional rights or to subject him to inhuman or degrading treatment, the court must order his release. Likewise, if the court were convinced that the conditions of a prisoner's detention was such as to seriously endanger his life or health, and that the authorities intended to do nothing to rectify these conditions, the court might release him…the position would be similar if the conditions of a prisoner's detention were such as to seriously threaten his life or health, but the authorities were, for some reason, unable to rectify the conditions."*

16. In *Kinsella*, the High Court was considering an application for habeas corpus given the conditions in which the prisoner was being held. Concerns for his safety coupled with a shortage of single cells in the prison resulted in the applicant being detained in a small padded observation cell without access to facilities 23 hours per day. Having been confined to the cell for eleven days, the applicant applied for his release pursuant to Article 40.4.2 alleging his detention had become unlawful by reason of the prison conditions. Hogan J. held that the conditions under which the applicant had been detained constituted a violation of his constitutional rights for protection of the person and that the State had failed to vindicate that right in the manner required by Article 40.3.2. He went on to consider whether the breach of his constitutional rights would entitle him to immediate and unconditional release, observing that a relevant factor might be the intentional violation of the prisoner's rights. Hogan J. held that he could not presently say that the continued detention had been rendered entirely unlawful by the breaches of the applicant's constitutional rights given the real and genuine concern for the applicant's safety on the part of the prison authorities and the difficulties they had encountered in finding suitable accommodation for him. He upheld the claim for violation of a constitutional right but sought to give the authorities a fair opportunity to remedy the situation before granting an order under Article 40.4.2 (while observing that the opportunity to remedy matters could only be measured in terms of days). He noted the Article 40.4.2 jurisdiction could only be used "*in quite exceptional cases*" and the case did not presently come within the exceptional category. He noted that if the conditions were to continue for much longer, the applicant would be justifiably entitled to make a fresh application to release under Article 40.4.2. As it transpired the case note shows that on the day after the judgment a prison place became available in Cloverhill Prison.

17. In *Russell* the applicant had been admitted to Cavan General Hospital as a patient under the Mental Treatment Act 1945 and that period of detention was extended on a number of occasions. The applicant complained he was being unlawfully detained and an inquiry was ordered under Article 40.4, Clarke J. concluded that the applicant's detention had been unlawful as the statutory regime had been breached. He also considered the alternative ground i.e. that the detention of the applicant was invalid by reason of the failure to afford him appropriate treatment. Clarke J. accepted for the purposes of argument that (a) the conditions on which a person may be detained as a mental health patient might fall so far short of acceptable conditions as to render unlawful a detention which might otherwise be regarded as lawful and (b) amongst the relevant conditions would be the treatment or lack thereof being afforded to the person concerned.

18. Referring to *Richardson*, Clarke J. noted that by a parity of reasoning with the jurisprudence of the courts in respect of persons detained within the criminal justice system, "*it does not seem to me that anything other than a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful".* He noted that unless such a complete failure existed, other legal remedies ought to be pursued and that in many cases the issues might well centre around the availability of resources for more appropriate treatment. He characterised such cases as complex and requiring the court to consider the legal entitlements of persons in the context of a lack of resources available to provide more appropriate treatment, observing:

> *"It does not seem to me that such cases are properly determined in the context of an application under Article 40.4 of the Constitution which is concerned with the narrow question of the validity or otherwise of the detention of the person concerned. In my view counsel for the respondent was correct when he argued that cases involving resources issues are not ones that can properly be dealt with within the narrow parameters of an Article 40.4 inquiry.*
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> *In those circumstances I was not satisfied that the undoubted questions which arise as to the appropriateness or otherwise of the treatment of the applicant are ones which, even from the high watermark of this case, could conceivably result in a conclusion that his detention was on that ground alone unlawful. … If…there is any merit to his contention that his treatment falls short of that to which the law entitles him, then his entitlement should be determined in appropriate proceedings designed to obtain appropriate declarations or orders concerning the nature of the treatment to which he is entitled rather than in proceedings which question the validity of his detention." (paragraph 53).*

19. It should be emphasised that this dicta was *obiter* since Clarke J. had already ordered the release of the applicant on a different ground. However, his view about the inappropriateness of Article 40.4 in a lack of resources case is nonetheless important. Here, the applicant is undoubtedly making what may be described as a "resource case" because it is accepted by all parties that the reason the applicant is not obtaining the

necessary treatment in the CMH is due to lack of resources. Nonetheless, the applicant argues that because there is a complete failure to provide appropriate conditions/treatment it is appropriate to bring an application under Article 40.4. Given that Clarke J.'s observation was *obiter* and that he accepted that the particular circumstances of each case must be examined, I do not think it appropriate to exclude the applicant from the relief sought solely on the basis that this is a "resources" case. Nonetheless, it makes the case for release more problematic than one which was based, for example, on a restraint of some sort imposing by the detainer, the lifting of which would not have resource implications.

20. The above principles were applied by Costello J. in the case of *RA v. The Governor of Cork Prison* [2016] IEHC 504, a case similar to the present one, where the applicant was charged with theft, was remanded in custody and was then identified as being acutely psychotic and in need of psychiatric admission to prevent deterioration in his presentation. He was placed on the waiting list for admission to the CMH and an application under Article 40 was brought *inter alia*, on the basis that the failure to afford him treatment in a hospital setting was of such magnitude as to render his continued detention unlawful. Reliance was placed upon *Richardson, Kinsella, The State (C) v. Frawley, JH v. Russell*. At para. 41 Costello J. accepted the legal basis for releasing an applicant otherwise lawfully detained where the conditions of detention were such as to render the continued detention unlawful, provided something in the order of a complete failure to provide appropriate treatment existed. She observed that the courts would afford the detainer an opportunity to remedy the matters complained of prior to making an order under Article 40. In that case, the facts did not meet the threshold since, although the applicant was unwell and required treatment, he had in fact received some inpatient treatment and therefore the circumstances were not such as to render his detention unlawful.

Treatment of the applicant

21. Professor Harry Kennedy of the CMH expressed the following conclusions on the applicant's treatment, as set out in his Affidavit of 26 November 2020:

> *"16. I say and believe that in order to fully treat the applicant's mental health needs, a transfer to the CMH is necessary as the applicant presents as a person who is a danger to other people and is in need of inpatient care in a setting providing specialist therapeutic security. The only setting in the State that can provide the required level of specialist therapeutic security is the CMH …*
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> *20. I say and believe that pending admission to the CMH, that the Applicant's immediate needs can be catered for in the D2 wing of Cloverhill and because of the psychiatric in-reach services that are extended to him there along with the medical care that he also receives that he is likely to be more safely cared for from a medical and psychiatric point of view in Cloverhill than if he were released into the Community."*

Dr. O'Neill, in his preliminary psychiatric court report of 24 November 2020, concludes:

- that the applicant remains actively psychotic,
- that he has been on the waiting list for the CMH for an extended period,
- that he requires appropriate inpatient psychiatric care and treatment which cannot be provided at this time in a prison setting,
- that he would benefit from treatment with antipsychotic medication and assessment with a neurologist to exclude an organic component to his presentation and
- that the risk of him causing harm including fatal harm to others is of such immediacy and severity that he could not be appropriately managed in a community setting or inpatient setting of a level of security less than the CMH.

22. The treatment the applicant is currently being receiving has been set out in detail by Dr. O'Neill in his reports to the court, exhibited to the affidavit of Professor Kennedy, and also by Professor Kennedy himself. In summary, the position is as follows:

- The applicant remains on wing D2 in Cloverhill, for vulnerable prisoners.
- He has his own cell.
- He is receiving specialist psychiatric treatment from the forensic in-reach services.
- He is seen twice a day by nursing staff.
- He has been prescribed epilim for his epilepsy and is taking same.
- He has been prescribed olanzapine and sertraline, inter alia for his psychosis.
- He is at times taking this medication and at times refusing it due to his concern about side effects (weight gain and sedation) and because he feels it is not effective for his OCD symptoms.
- He has been offered a three-monthly intramuscular injection depot of paliperidone, an antipsychotic, is considering whether to take it but at present does not wish to.
- The waiting list and the placement of patients on it for the CMH is reviewed every week and the position of each person awaiting admission is reviewed afresh each week, meaning that if their condition either improves or deteriorates, that will be potentially impact upon their place on the list.

Treatment outside prison

23. In relation to the applicant's position if he were not in prison, the evidence suggests that the applicant is in fact in a better position insofar as access to the CMH is concerned within prison since, were he not a prisoner, he could only access the CMH if he is already in an approved centre and the evidence is that no approved centre would take him due to the risk he poses.

24. He is also receiving more consistent medical treatment and greater access to psychiatric services than he would in the community as the evidence strongly suggests that if he were released he would not engage with services in the community.

25. Therefore, unlike the situation in certain of the cases discussed above, where the conditions of incarceration were causing the alleged breach of constitutional rights, such as lack of adequate toileting facilities or the placing of the prisoner on 23 hour lockdown in a padded cell, the alleged breach in this case, i.e. lack of appropriate medical care, is not being caused by the incarceration but by the absence of a place in the CMH, agreed to be the only hospital in the State that can provide the applicant with the secure therapeutic environment that he requires.

26. I did consider whether the absence of a causative link meant that the detention could not be considered unlawful even if a breach of the applicant's rights were established. However, on balance, having heard the applicant and notice party on this point, both of whom considered detention could potentially be unlawful absent causation, I have decided to consider the legality of the applicant's detention in view of the alleged infringement of his rights. Nonetheless, I have taken into account the level of care that the applicant would receive in the community in considering whether his current care constitutes an egregious or fundamental breach of his rights.

Is there a fundamental breach of the applicant's rights?

27. I come now to the difficult question as to whether the applicant's current situation is so egregious and the breach of his rights so fundamental that his detention is unlawful. The rights alleged to be infringed are the right to bodily integrity and the right to medical care.

The applicant's submissions

28. The applicant proceeded on the basis that because there was an acknowledged need for identified medical treatment that was not being met, *ipso facto* his rights were breached. Medical treatment was defined in the written submissions filed on the applicant's behalf as being treatment appropriate to his particular condition and situation (paragraph 26). It was accepted that the lack of treatment derives from a lack of resources and that not all breaches of constitutional and legal rights are co-terminus with vitiating an otherwise lawful detention. It was further accepted that only in exceptional cases would a breach vitiate the lawfulness of the detention in question. However, in this case, the applicant says the breach is exceptionally grave and at the higher end.

The governor's submissions

29. The governor of Cloverhill, on the other hand, says there is not a complete failure of treatment having regard to the care being provided as identified above and in particular relies on the fact that there has been no breach of Rule 33 of the Prison Rules which requires that all prisoners receive health care at least equal to that available to a medical card holder. The governor identifies that appropriate medication is available to the

applicant, but he is refusing to take it save in respect of his epilepsy medication as he fears he may have a seizure. He says the applicant is not being deprived of care he could access if in the community and that it is not in the applicant's interests to be in the community.

The notice party's submissions

30. The notice party submits that the case being made by the applicant ignores the provision of in-reach care by the forensic services, by the specialist carers and the medical and nursing staff of Cloverhill, as well as his placement on the D2 wing in Cloverhill. It also fails to take into account that the applicant is receiving a degree of medical supervision and immediate care that he would not receive were he not living in the community. There is no explanation as to why the applicant has ceased taking anti-psychotic medication. It is submitted that there is nothing so egregious in the applicant's detention that disregards his rights under the Constitution or the ECHR.

Consideration and conclusion

31. I must consider whether the applicant's bodily integrity is being breached by the failure to provide him the treatment he undoubtedly requires in the CMH. There is a spectrum of possibilities in respect of the provision of adequate medical treatment. At the level of principle, there is treatment that fulfils every requirement identified by relevant medical personnel. At the other end, there is no treatment at all. In between there is a range, starting with inadequate treatment that fulfils few requirements, up to treatment that fulfils the majority, but not all, requirements.

32. The question as to what level of deficiency will invalidate a detention will depend not just on the level of inadequacy of treatment but also on the type of treatment required, the context in which the treatment is delivered and the source of the inadequacy. As noted above, in *Russell*, Clarke J. was of the opinion only a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention unlawful.

33. In this case, the treatment is admittedly not fulfilling the medical needs of the applicant. But nor is the applicant receiving no treatment. He is subject to a treatment regime that ensures he is under the care of a psychiatrist from the CMH and is being offered the same medication as would be available to him in that setting. The applicant has chosen not to consistently take medication aimed at ameliorating his current psychotic state. I have been given no evidence as to whether he has capacity to make that choice, but I do have evidence that he remains actively psychotic. In those circumstances, I think it is inappropriate to take into account as a relevant factor the applicant's decision to take his medication only sporadically.

34. Critically, because of the different legal regime in prisons as compared to the CMH, he cannot be compelled to take medication against his wishes in the prison setting, although that can be done in the CMH pursuant to the Mental Health Act 2001.

35. I have uncontradicted evidence to the effect that the applicant's immediate needs can be catered for in the D2 wing of Cloverhill and that he is likely to be more safely cared for from a medical and psychiatric point of view in Cloverhill than in the community.

36. There is no evidence that the current treatment regime is making the applicant's mental state worse than it was when he entered Cloverhill, or that any deterioration is irreversible or will make his condition more difficult to treat when he enters the CMH.

37. On the applicant's case, the infringement of his right to bodily integrity results from the failure to afford him treatment he can only get in the CMH i.e. an omission, rather than a positive act, and not one the Governor can remedy. This does not make the impact upon the applicant any less serious. But it is important to understand that his detention is not stated to be the cause of his mental state.

38. When evaluating the adequacy of the applicant's treatment in custody, it is instructive to consider how the applicant would be treated outside of custody to place his current treatment in context. In both *Richardson* and *Kinsella*, had the applicants not been in prison, they would likely not have been subject to the conditions they were experiencing in prison i.e. slopping out and continual confinement in a padded cell. Here, on the other hand, it is accepted that release would do nothing to remedy the position of the applicant but rather make it significantly less likely that he would access even the treatment he is currently receiving and undermine his chances of being admitted to the CMH. Because the applicant is on balance better off in prison than in the community, that mitigates against his current treatment reaching the necessary level of egregiousness.

39. In summary, I am not persuaded that, to the extent the applicant's rights of bodily integrity are breached by the current failure to admit him to the CMH, such a breach is sufficiently egregious or exceptional or fundamental to render unlawful his detention. In so deciding, I have had particular regard to the following factors:

    - the nature of his existing treatment as identified above, including the supervision by psychiatrists from the CMH:
    - the absence of any deliberate or intentional breach by the governor;
    - the fact that his position from a treatment point of view would be worse if he was released into the community;
    - the fact that he would find it more difficult to access the CMH if he was released from detention;
    - the fact that his condition is neither being caused, nor being actively worsened, either on a temporary or permanent basis, by the current failure to admit him to the CMH;
    - the fact that he is being actively considered for admission to the CMH on an updated basis from week to week.

Judicial review

40. Submissions were made on both sides about whether an application for judicial review ought to have been brought rather than an application for habeas corpus. I do not need to decide that question. The applicant decided to seek an order directing release from his detention. All parties were agreed that such an order was not available by way of judicial review. There is no jurisdiction in the court under Article 40.4 whereby a person otherwise entitled to an order directing release can be refused that relief on the basis that an alternative remedy exists. Therefore, even if I was of the opinion that judicial review might lie in respect of some allied complaint, that is irrelevant to my consideration of this application. In any case, the applicant still has to meet the test of egregiousness in the context of an application under Article 40.4.2.

Stay

41. Finally, although I am not ordering the release of the applicant for the reasons set out above, for the sake of completeness I will deal with an issue that occupied some time at the hearing i.e. whether a stay could be put on any order for release. Counsel for the applicant identified a jurisdiction to stay any such order and urged me to do so in this case given the consequences should the applicant be immediately released from prison. Counsel for the State and the CMH referred to the very limited nature of the jurisdiction to stay an order for release and observed that should the applicant be released, and then re-arrested, he would have to be released again as the same set of circumstances would present themselves.

42. The essence of the remedy provided by Article 40.4 is the immediate release of the prisoner. This is unsurprising as the purpose of the provision is to ensure persons are not detained where there is no legal basis for their detention. This is absolutely clear from the wording of Article 40.4.2 identified above.

43. The question of whether an order for release can be the subject matter of a stay pending some action by the detainer has been considered by the courts on a number of occasions.

44. In FX, Denham C.J. reviewed the case law on this point including *The State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550 and *N v. HSE* [2006] 4 I.R. 374, observing as follows:

> *"The next issue is whether the High Court, satisfied that the detention of the respondent was unlawful, could place a stay upon the order for release under Article 40.4.2 of the Constitution.*
>
> *There is well established jurisprudence that no stay could be put in place on an inquiry under Article 40.4.2. Walsh J. in The State (Browne) v. Feran [1967] 1 I.R. 147 considered the process under Article 40.4.2 as laid down by the Constitution at p. 166 and stated:-*
>
> > *"All successful complaints or claims are followed by a court order implementing the decision which upholds the complaint or claim. Undoubtedly these constitutional provisions do not permit any qualification or*

stay upon the order for release, but that is something which does not justify writing in a provision to the effect that the decision on the question of the lawfulness of the detention cannot be the subject of an appeal."

(emphasis added) (paragraph 71*).*

...

The existence of a power of the court to place a stay on an order for release pursuant to Article 40.4.2 of the Constitution was also rejected in [Trimbole] In that case the prosecutor was not in court, for reasons associated with his physical health, at the time of the making of the order for release, and as a result was not immediately released. An application was made on behalf of the applicant for a stay on the order of release. Finlay C.J. stated at p. 570 that:-

*"10 … having regard to the express obligation imposed by Article 40.4.2 upon the High Court, unless satisfied as to the legality of the detention of a person seeking an inquiry under that Article to order his release, that it would be inconsistent with the Constitution for this Court to exercise any right to stay such an order…"(*Paragraph 72*).*

There is no provision in the Constitution for a stay. Consequently, any order, such as was made in N. v. HSE, is made in the process of controlling the release, for the purpose of protecting the person who is incapable of protecting themselves." (Paragraph 78).

45. It is certainly the case that in *N v. HSE*, where a child was being returned to its natural parents after being placed for some time with foster parents pursuant to an Order under Article 40.4, an arrangement was put in place to facilitate the transfer of the child. Having pointed out that a successful application under Article 40 would normally lead to an order for the release of the person from the unlawful detention, Murray C.J. qualified that finding as follows:

"In my view, the court has jurisdiction, in the circumstances of a case such as this, involving as it does a minor of very tender age, to make ancillary or interim orders concerning the immediate custody of such infant which are necessary in order to protect her rights and welfare pending effect being given to the substantive order of the court".

46. Similarly, in *Russell*, the court put in place an arrangement whereby, after granting the order pursuant to Article 40..2 at roughly 11am, Clarke J. directed that the applicant should not be released under 6pm that same day to allow the authorities to put in place a regime which would allow for a fresh application for detention to be made in accordance with the process in the relevant legislation. In his judgment, he referred to Murray C.J.'s decision in *N v. HSE*, as well as to *DG v. Eastern Health Board* [1997] 3 I.R. 511 and observed that although both those cases concerned under age persons, he saw no reason

why that jurisprudent should not equally apply in an appropriate case to persons under a mental disability. He noted:

> *"The underlying logic of the approach of the Supreme Court in both these cases was that under the normal rule (i.e. immediate release) might not be appropriate in all circumstances involving persons whose detention was, at least in significant part, designed for their own good. A similar situation arises in the case of involuntary patients".*

47. Counsel for the applicant urged me to adopt such an approach here, on the basis that a jurisdiction existed to delay immediate release for the good of the applicant in circumstances where his detention was, at least in part, for his own good. I fully accept that release into the community would not, having regard to the evidence in this case, be in the applicant's interests nor that of the community.

48. However, given the comments of Denham C.J. in FX, it seems to me that any jurisdiction ancillary to Article 40.4.2 permitting further detention must be very limited. Here, the applicant is at present seventh on a waiting list for a bed in the CMH following a weekly transparent system of triage by the CMH. Any priority given to him would, in the words of Professor Kennedy, "*require me to either discharge someone currently in hospital in need of treatment or to exclude someone who has been triaged ahead of the applicant as having greater need to be in the CMH*" (paragraph 18).

49. An open-ended order staying release as sought by the applicant could only be lifted in one of three ways. If the waiting list took its course, and the applicant was admitted when a bed became available in the normal course, the stay order would likely, due to pressure on beds in the CMH, be in place for months. That would be quite inappropriate bearing in mind the nature of the remedy of habeas corpus. Second, the order might have the effect of the CMH abandoning its triage system, permitting the applicant to leap frog those six people currently ahead of him on the waiting list, thus placing him at the head of the queue. That would advantage the applicant and disadvantage those currently ahead of him on the waiting list. Third, the order might have the effect of putting pressure on the executive of expending resources to increase the number of beds in the CMH. That would undoubtedly be desirable from the point of view of the welfare of the applicant and that of other people waiting for beds in the CMH. But as has been identified by the courts on various occasions (see in particular *ET v. Director of CMH* [2010] IEHC 378), it is inappropriate that courts make orders that require, either directly or, as in this case, indirectly, the executive to expend resources or to interfere with the operation of hospitals.

50. For all these reasons, had I concluded the applicant was entitled to an order directing release under Article 40.4, I would have been obliged to direct his release either immediately or shortly thereafter.