THE SUPREME COURT

Record Nos. 131/20 and 132/20
(Joined appeals)

IN THE MATTER OF J.J.

LEGAL SUBMISSIONS OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Contents

Introduction

1. The primary focus in the High Court hearing, and judgment, was on two aspects of John's hospital care:
   (i) the future administration of pain-killing treatment, which had the potential to cause him respiratory failure, and
   (ii) the proposed withholding by medical staff of invasive measures should his condition deteriorate.
2. In the absence of parental consent for (i), the Hospital sought legal authority from the court to administer the treatment; in respect of (ii), the Hospital, it seems,

sought clarity that its medical position was lawful (by way of a permissive order, even though a doctor can lawfully withhold treatment which he regards as contrary to a patient's interests).

3. Despite this particular and discrete focus, the High Court made John a ward of court, thereby removing all decision-making capacity from his parents and vesting responsibility for his care and welfare in the court.
4. Further, rather than then making a decision on John's behalf on what particular treatment should be administered or withheld, the court granted a permissive order in the widest of terms, permitting the medical staff to carry out whatever treatment "they consider in the exercise of their clinical judgment to be appropriate and in the best welfare and health interest of the Minor".
5. The Commission questions whether the exercise of wardship in these circumstances was a proportionate interference with John's parents' right to make decisions on his behalf, and with John's corresponding right to have his parents decide important matters in respect of his future; and, whether Article 42A of the Constitution, and a 'best interests' test, were correctly applied by the High Court.
6. In summary, the Commission submits the following:
   (a) Article 42A requires that a child's fundamental rights be protected and vindicated, and this duty applies where it is proposed to displace a child's parents' right to make decisions on the child's behalf.
   (b) However, Article 42A.2.1° states that it is only "in exceptional cases" that the parental decision-making right will be displaced, thereby providing strong protection of that right and acknowledging the child's own right to be brought up, provided and cared for, by his or her parents.
   (c) The reference to parents "failing in their duty to their children" in Article 42A.2.1° must be read carefully, with particular focus on what is meant by "duty". It does not require wrongdoing, or some form of culpability, on the part of a parent. But there must be an act, omission or pattern of conduct which is likely to damage "the safety or welfare of the child", and to do so in a serious way (Article 42A.2.1° only applies to "exceptional" cases). The duty to safeguard a child is a grave one, and applies strictly, regardless, for example, of motive or fault.
   (d) The State can only interfere with parental decision-making "by proportionate means as provided by law". The well-established *Heaney* test of

proportionality requires (in part) that such interference should impair the parental rights and the child's rights "as little as possible".[1]

(e) It is difficult to see how the invocation of wardship proceedings was, to use a like phrase to that in *Heaney*, the least restrictive option available, in respect of both John's and his parents' rights – if it was there is a serious lacuna in the law.

(f) Further, the order made by the High Court is in the widest terms, calling into question its proportionality, and level of scrutiny going forward, particularly where it has displaced the parents' decision-making right.

(g) The legal criteria required to be met before a child is made a ward of court appear unclear, as are the procedures (for example, there is no formal mechanism to oppose an inquiry) – this raises a question as to whether any interference with the family's rights are "as provided by law".

(h) Where a court must intervene in a case involving medical treatment for a child, and it becomes necessary to conduct a 'best interests' assessment, a balancing of the child's rights is required which should be done objectively, including having regard to the child's likely desires and preferences if those can be ascertained; but it is incorrect to try "to determine the bests interests of the child subjectively" (as referred to at para. 153 of the High Court judgment).

Article 42A

7. Article Art.42A.2.1° states:

In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

[1] *Heaney v. Ireland* [1994] 3 IR 593, at p.607.

"*regardless of their marital status*"

8. Prior to the entry into force of Article 42A, a significant distinction was drawn between the children of marital and non-marital parents, particularly as regards State intervention in decisions concerning the children.[2] However, Art.42A.2.1° dispenses with the distinction.
9. John's parents are not married to each other. His father is a guardian within the meaning of s.6(1)(a) of the Guardianship of Infants Act 1964.[3] He has that status by virtue of s.2(4A) of the 1964 Act,[4] which expanded the statutory definition of 'father' to include a father who is not married to the child's mother, but who has cohabited with the child's mother for at least twelve months, including three months living with both the mother and the child.
10. For practical day-to-day purposes, the fact of being a guardian within the meaning of the 1964 Act gives a parent statutory recognition of their decision-making role. In constitutional terms, the position is more complex, but Article 42A.2.1° has disposed of any distinction between marital and non-marital couples. Moreover, the child/parent natural bond exists regardless of whether the parent is married.

"in exceptional cases"

11. Article 42A.2.1° has retained the opening phrase "in exceptional cases" which also opened Article 42.5. This is a significant threshold requirement before any intervention is permitted in parental decision-making for the child, and imples that in the vast majority of decisions concerning children, the parents have sole responsibility free from any 'horizontal' or 'vertical' limitations.[5] It continues a strong protection for the right of parents to make decisions for their children, free from State interference, and the case law in respect of the phrase under Article 42.5 remains relevant. Under the former Article Art.42.5 the jurisprudence permitted

[2] *In re JH* [1985] IR 375; *North Western Health Board v. HW* [2001] IESC 90, [2001] 3 IR 622; *N v. Health Service Executive ('Baby Ann')* [2006] IESC 60, [2006] 4 IR 374.
[3] As amended by the Children and Family Relationships Act 2015.
[4] Inserted by s.42(c) of the Children and Family Relationships Act 2015.
[5] *Gorry v Minister for Justice* [2020] IESC 55, para.21.

intervention *either* for compelling reasons *or* a failure of duty.[6] This approach was acknowledged by the Learned Trial Judge.[7] But it may have to be recast somewhat under Article 42A.

12. As was acknowledged by O'Donnell J. in *Re JB and KB (Minors)*, there was a concern that the pre-42A constitutional position "*might lead to cases being resolved in a way which subordinated the interests of the child to that of a family, and in effect, therefore, of parents."*[8]
13. This may imply that Article 42A.2.1° should constitute a *lowering* of the threshold for State intervention but, it is submitted, it is more appropriate to conceptualise it as *changing the approach*, when read as part of Article 42A as a whole.

"rights of all children"

14. Article 42A.2.1° is placed immediately after an express clause recognising the child as a rights holder (Article 42A.1) which states:
    The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.
15. The two sub-Articles, 1 and 2, must be read together and, plainly, require a particular focus on the child's rights, perhaps more than was envisaged under the former Art.42.5.
16. It is for the courts to interpret what rights are protected by Article 42A.1. The Referendum Commission Guide for Article 42A stated:
    The new Article 42A.1 includes a statement in respect of children's rights which is explicit, is concerned solely with the rights of children and recognises and affirms such rights in a single clause. The rights referred to in the proposal are not listed. It will be a matter for the Courts, on a case by case basis, to identify the rights protected by this provision.[9] (underlining added)

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[6] *Re JH* [1985] IR 375 ('*JH*') at 395; *North Western Health Board v. HW* [2001] IESC 90, [2001] 3 IR 622 (p.689 *per* Keane C.J.; p.724 *per* Denham J.).
[7] Para.117 of the High Court judgment.
[8] *Re JB and KB (Minors)* [2019] 1 IR 250, at para. 5.
[9] Referendum Commission (Chair: Ms Justice Mary Finlay Geoghegan) *Referendum Commission'Independent Guide The Children Referendum* (2012) (p.6). See further the view of Professor Conor O'Mahony (who is currently the Special Rapporteur on Child Protection):

17. Article 42A.1 can be taken to guarantee children's rights that were previously recognised under the Constitution, and must include rights above and beyond those set out in Article 42A.2-4. To find otherwise would be to find that Article 42A.1 serves no purpose distinct from the subsequent sections of Article 42A.
18. Importantly, the rights are for children *qua* children. One specifically child-based right is to the care and company of their parents. In *Chigaru v. Minister for Justice and Equality*, Hogan J. stated the position, post-Article 42A:

> *…the right of children to the care and company of their parents is a core constitutional value which is inherent in the entire structure of Article 41, 42 and Article 42A of the Constitution. This point has been [made] repeatedly by the Supreme Court even before the enactment of the new Article 42A.*[10]
>
> …
>
> *The children have a constitutional right derived from Article 41, 42 and Article 42A of the Constitution to the care and company of their parents.*[11]

19. The reference to a 'derived' right in *Chigaru* is instructive and is in keeping with subsequent observations of the Supreme Court on such rights.[12]
20. Children, as rights holders, are entitled to the 'care' of their parents which necessarily encompasses more than the provision of basic necessities. It includes responsibility, authority and the making of significant choices when the children are of an age in which they cannot make those decisions for themselves, in order to promote and protect the child's welfare . This is in line with the approach taken by Art.18(2) of the UN Convention on the Rights of the Child ('UNCRC'):

> *States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*

"When Article 42A was inserted by the Thirty-First Amendment to the Constitution, it did not elaborate on what rights might be included within Article 42A.1; the Referendum Commission explained that it was 'a matter for the courts, on a case by case basis, to identify the rights protected by this provision' …. Thus, far from being undemocratic, judicial creativity in the interpretation of this provision would be in line with what the people approved in the 2012 referendum" in O'Mahony, C 'Unenumerated Rights After NHV' (2017) 40(2) Dublin University Law Journal 171 (p.187fn) (emphasis added); and 'Promises and Pitfalls of Constitutionalising Children's Rights' in Dwyer (ed), *The Oxford Handbook of Children and the Law* (Oxford, Oxford University Press, 2019).

[10] *Chigaru v. Minister for Justice and Equality* [2015] IECA 167, at para. 29.

[11] *Chigaru v. Minister for Justice and Equality* [2015] IECA 167, at para 39.

[12] *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49, Clarke C.J. (para.8.6)

21. Whilst Article 18 UNCRC's purpose is to impose a duty on parents, the corresponding right which flows from that is the right of the child to have decisions taken on his or her behalf by their parent, rather than by another person or agency. Of course, it is a qualified right, but it requires that an assessment of whether State intervention is required must be done not only by reference to the rights of the parents, but through the lens of *the rights of the child*.
22. The rights protected by Article 42A.1 are of significant constitutional weight. In the recent case of *Gorry v. Minister for Justice,* McKechnie and O'Donnell JJ. differed on the extent to which the term 'imprescriptible' should be taken at face value or used to signify and emphasise the importance of the rights to which it applies.[13] O'Donnell J. acknowledged that '*the language of imprescriptiblity was retained and, if anything emphasised*' by Article 42A. Whether this term is to be taken on its plain meaning or as a signifier of importance, the rights guaranteed by Article 42A.1 are clearly substantial ones.
23. Other rights of the child which arise in this case include:
    - the right to protection of the person (including the right to bodily integrity and the right to freedom from inhuman treatment)
    - the right to privacy, including autonomy
24. They have a particular character when applied to the child. A child's right to life, and protection of the person, will include elements of development and vulnerability that are specific to children and require particular care for children *qua* children. Rights may be enhanced or circumscribed, depending on the child's circumstances, such as their age; so, for example, the right to autonomy may be qualified and fall to be exercised by others on the child's behalf, most naturally the child's parents.
25. The UN Convention on the Rights of the Child ('UNCRC') gives express protection to rights for children *qua* children (the right to life, Article 6; the right to dignity of the disabled child, Article 23; the right to freedom from inhuman treatment Article 37).

[13] *Gorry v. Minister for Justice* [2020] IESC 55 (para.133 *per* McKechnie J.; para.38 *per* O'Donnell J.).

26. The constitutional value of dignity underpins these fundamental rights. In *Friends of the Irish Environment v. The Government of Ireland*, Clarke C.J. referred to 'derived rights' as a preferred term to 'unenumerated rights' because:

> *... it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole.*[14]

27. Other recent cases show a similar emphasis of the constitutional value of dignity. The Supreme Court has recognised dignity as an '*overarching constitutional value'*[15] and acknowledged that '[t]*he dignity of the individual and the right to personal autonomy are a central element of the human personality as understood in our law'*.[16] The Court has also recently held that:

> *the right of privacy and the value dignity … are attributes of personhood, and, along with other values such as autonomy, are aspects of the protection of the person afforded by Article 40.3 of the Constitution.*[17]

28. The constitutional value of dignity, then, underpins other rights, and would apply to decisions on the administration of medical treatment to a child in John's situation, whether taken by parents, a *guardian ad litem*, doctors or a court. As the above passages indicate, dignity recognises the inherent worth of every human being, from which their rights to equality, autonomy, privacy and liberty derive as part of their personhood, and which requires a baseline of respect or "*a minimally acceptable standard.*"[18]

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[14] *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49 at para. [8.6] (emphasis added).
[15] *PC v. Minister for Social Protection* [2018] IESC 57, at para. 6 *per* MacMenamin J.
[16] *MC v. Clinical Director of Central Mental Hospital* [2020] IESC 28, at para 52 *per* Baker J.
[17] *Simpson v Governor of Mountjoy Prison* [2019] IESC 81, at para. 93 *per* McKechnie J. See also *Simpson v Governor of Mountjoy Prison* [2019] IESC 81, at para. 10 *per* O'Donnell J.; *NHV v. Minister for Justice* [2017] IESC 35; [2018] 1 IR 246, at para. 16.
[18] *Simpson*, cited above. A survey of US Supreme Court case law reflects a similar position, according to "*The Dignity Canon"*, Lindell, Cornell Journal of Law and Public Policy, (2017), Vol. 27, 415-67,

29. In John's case, his right to life must be given great weight in the context of his value as a person and his individuality (reflecting the concepts of personhood, autonomy and privacy). His parents are best placed to vindicate his personhood and individuality as those who know him so well, and with whom he has a natural bond. Their right to make decisions for him, and his corresponding right that that is respected, should, as the Constitution states, only be intruded on by the State in exceptional circumstances. This should require very clear and compelling justification.

"fail in their duty"

30. Art.42A.2.1° has dispensed with the qualifiers of '*physical and moral'* duty but retains the language of parents who '*fail in their duty*' whilst adding a specific reference to a likely prejudicial affect on the safety and welfare of the child. The removal of the physical and moral qualifiers indicates that the Constitutional test for State intervention is no longer dependent on culpability or blameworthiness on the part of the parents. This is in keeping with a recognition of the gravity of protecting a child's welfare, not least because of the vulnerability of a child. So 'duty' has to be read in the context of the gravity of the responsibility. Thus, *fault* is not really the issue. The objective is fulfilment of the *duty of protection*. It is not relevant whether the parent was intentional, reckless, careless, ambivalent, carefree, or totally without fault – the duty is to safeguard the child's welfare. So 'failure', when corresponding to a duty of that absolute-type nature, does not require fault.
31. Situations can arise where the safety and welfare of a child are prejudicially affected through no *fault* of the parents; rather, the threat to the child is beyond the

which states: *the Court has employed dignity in a wide range of cases; from these cases we can delineate three core principles that give dignity a more definite shape. First, the Equal Protection and Due Process Clauses evince a commitment to "equal dignity." This means that a government cannot single out groups for special burdens or lesser protections, or provide individuals with significantly unequal rights. Second, dignity contains an element of adequacy. There is a certain minimum level of treatment that the tate and federal governments must provide to all human beings, including to suspected criminals and prisoners. And third, the Court's substantive due process jurisprudence adds a liberty component to dignity. A government cannot pass laws that significantly intrude on traditional areas of personal autonomy or otherwise impede people's ability to make certain private decisions for themselves.* (p.423).

relative competence of the parent(s) to overcome. This is well illustrated by considering two separate examples from the operation of the Child Care Acts 1991 to 2015 ('the CCA').

32. Under s.18 of the CCA, a child can be taken into the care of the Child and Family Agency ('the CFA') if one of three sets of circumstances are proven on the evidence. These include neglect of the child's health, development or welfare. A parent in active addiction may not be able to meet a child's developmental needs (arranging attendance at school, regular nutrition, personal hygiene etc.) That parent's relative competence is such that the day to day business of a child's development cannot be managed and so posing a risk to the child's safety and welfare within the meaning of Article 42A.2.1°. This would constitute a failure of duty to the extent that the child's needs exceed the parent's relative competence. While it might also be considered blameworthy by some, depending on the perspective taken, however, blameworthiness is not a necessary ingredient of either the statutory or constitutional test.
33. Under Part IVA of the CCA, a child can be placed into special care by the CFA where a child's behaviour poses a real and substantial risk of harm to his or her life, health, safety, development or welfare. In this circumstance, the threat to the child is profound. Children with severe behavioural difficulties of this type have raised constitutional questions for decades.[19] Behavioural disorders of severity may be beyond the relative competence of most parents to manage in the home. Without the intervention of special care, there is a clear threat to the child's safety and welfare. Orders under Part IVA are commonly made in the absence of any culpability or blameworthiness on the parents' part, and clearly entail the risk of the child's safety and welfare being prejudicially affected if the State does not act. Again, these cases technically meet the threshold of 'failure of duty' within the meaning of Art.42A.2.1° even though there is no culpability or blameworthiness on the parents' part. Any other reading would render Part IVA of the CCA unconstitutional. The same logic applies to applications under s.25 of the Mental Health Act 2001, which allow detention orders to be made placing a child in an institution for their own benefit, at the instigation of the Health Service Executive.

[19] *FN v Minister for Education* [1995] 1 IR 409; *TD v Minister for Education* [2001] 4 IR 259; *HSE v WR* [2008] 1 IR 784.

34. If Article 42A.2.1° requires proof of blameworthiness or culpability on the part of parents then Part IVA of the CCA and s.45 of the 2001 Act would potentially be unconstitutional, which would be paradoxical given their importance in vindicating the rights of some of the most vulnerable children in the State.

"*by proportionate means as provided by law*"

35. Article 42A.2.1° has imported a proportionality standard and a requirement that any intervention be by law. The effect of this in John's case will be addressed below.

Summary

36. The Commission respectfully submits that the relevant principles under Article 42A in this appeal are, in summary:
    - Article 42A draws no distinction as to marital status of the parents for State intervention;
    - Article 42A.1 anchors the Article in a specific recognition of the rights of the child which are to be derived by the Court;
    - the rights of the child himself are the focus of the analysis;
    - State intervention under Article 42A.2.1° is only permitted where:
        - it is an exceptional case;
        - the safety or welfare of the child is at risk to an extent that exceeds the relative competence of the parents to address;
    - a finding of failure of duty by the parents no longer implies any element of blameworthiness;
    - the balancing of constitutional rights should include giving weight to the right of the child to be cared for by his or her parents;
    - any intervention must be necessary and proportionate, including a requirement that an interference with the parents' decision-making right must be done in the least restrictive way.

The use of wardship

Proportionality

37. Once a minor is a ward, the court is ultimately responsible for all aspects of the child's care and welfare. As Denham J. (as she then was) observed in *Eastern Health Board v. MK* ('*MK*'):

> *The judge is placed in the position of a good parent who must decide prudently on issues relating to the welfare of the child. The kernel of the jurisdiction is the welfare of the child. This ancient jurisdiction places the court in a particular position of responsibility. It must conduct an inquiry as to what, in all the circumstances, is in the best interest of the child.*[20]

38. The child's fundamental rights subsist and must be protected, but the ultimate decision-maker in respect of those rights changes from the parents to the President of the High Court.
39. In John's case, once he became a ward, the question of whether or not any life-prolonging treatment should occur became a question for the Court, not for John's parents, along with every other question regarding his welfare.
40. It may be that in John's case, the issue of his medical treatment is the only question concerning his welfare that arises for decision, given his particular and tragic circumstances. However, that will not be the case with all minor wards and so a degree of caution is necessary regarding the proporitionality of using wardship in Article 42A.2.1° cases.
41. The four-part *Heaney* proportionality test is well established.[21] It requires that a right be limited only in pursuit of a legitimate objective; that the limitation be rationally connected to the objective; that the right be impaired as little as possible; and that the effects be proportionate to the objective.
42. It is questionable whether admission to wardship was in fact the least intrusive means of achieving the objective. Relevant to this is the order that was actually made as a consequence of wardship: a general, permissive order. The Hospital's primary objective in bringing the proceedings appears to have been clarity in

[20] *Eastern Health Board v MK* [1999] 2 IR 99, at p.110.
[21] *Heaney v. Ireland* [1994] 3 IR 593, at p.607; [1996] 1 IR 580.

respect of what was lawful as regards medical treatment, particularly in light of the constitutional rights of John and his parents. There is no doubt but that the High Court has the jurisdiction to grant declaratory orders where necessary to protect constitutional rights.[22]. Where there is a lacuna in the statutory scheme, the court has an inherent jurisdiction to make positive orders to vindicate constitutional rights.[23] That inherent jurisdiction only arises in exceptional cases, but this poses no constitutional obstacle, since any order by which the State supplies the place of the parents will need to be an exceptional case to fall within the opening words of Article 42A.2.1° in any event.[24]

43. There seems no reason why the permissive order that has been made by the High Court could not have been made by way of a declaratory order in plenary proceedings. Such an order would not have placed all aspects of John's care under the supervision of the court. If there is no mechanism by which to obtain an order that does not unnecessarily intrude on John's parents' rights (and John's right that they continue to have responsibility for his welfare as far as practicable), then there is a lacuna in the law.
44. The requirement that the means of supplying the place of the parents be proportionate is not limited to the form of proceedings. The orders themselves must also be proportionate within the meaning of Art.42A.2.1°.
45. The order made by the Learned Trial Judge in John's case states (at para.2) *inter alia*:

> *that the Clinical Director of* [the Hospital] *and the medical and nursing staff of* [the Hospital] *be permitted to carry out such medical and nursing and ancillary treatment of the Minor as they consider in the exercise of their clinical judgment to be appropriate and in the best welfare and health interest of the Minor, including <u>but not limited to</u> ...*" (emphasis added)

46. Rather than making a decision on John's behalf as to what particular treatment should be administered or withheld, the court granted a permissive order in the widest of terms. It is difficult to see how its ambit impairs the decision-making rights of John's parents "as little as possible". Nor does it appear to impose a high

[22] *Sinnott v. Minister for Education* [2001] 2 IR 545, p.656.
[23] *AM v. HSE* [2019] IESC 3.
[24] *AM v. HSE* [2019] IESC 3, para. 89.

level of continuing scrutiny going forward, something that might be expected where John's parents' decision-making right has been entirely displaced.

"as provided by law"

47. Wardship, including minor wardship, is vested by statute in s.9 of the Courts (Supplemental Provisions) Act 1961.[25] As such, wardship does technically meet the requirement of being provided by law. But issues arise as to whether the law is sufficiently clear. By analogy, in the *Sunday Times v. United Kingdom*,[26] the ECtHR considered the meaning of the requirement under Article 10 (the right to freedom of expression) that any interference with the right be 'prescribed by law'. It stated:

> *49. In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct …*

48. In *H.L. v. United Kingdom*,[27] the European Court of Human Rights ("ECtHR") examined the Convention compliance of the detention of a man with a mental disorder. It referred to the *Sunday Times* case[28] and then to the need for clear rules in order to avoid arbitrariness, and stated: "*the Court finds striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted. The contrast between this dearth of regulation and the extensive network of safeguards applicable to psychiatric committals covered by the 1983 Act (…) is, in the Court's view, significant*."[29]
49. The Learned Trial judge conducted an inquiry into best interests within the wardship jurisdiction and did so with careful attention to issues of constitutional rights. However, there is a distinction to be drawn between the approach to be taken to care decisions for a ward of court and *the decision to make the child a*

[25] *Re D* [1987] IR 449 *Re FD (No 2)* [2015] IESC 83; [2015] 1 IR 741.
[26] (1979) 2 EHRR 245.
[27] Application no. 45508/99.
[28] para.119.
[29] para.120.

ward in the first place, a distinction referred to by this Court in *AC v. Cork University Hospital*.[30]

50. Although the wardship jurisdiction is vested by s.9 of the 1961 Act, the parameters of when that jurisdiction is to be invoked for minors is not set out in the 1961 Act. Nor is it set out in Order 65 of the Rules of the Superior Courts 1986 to 2020. This can be contrasted with s.18 of the Child Care Acts 1991 to 2015, which set out a clear statutory threshold for taking a child into care.

51. It appears that the test for admission of a minor to wardship is governed by case law and that no definitive test has been stated. In *MK*, Denham J. considered the test that should have been applied in the case (which concerned the admissibility of hearsay evidence in an application to make children wards of court). She held:

> *In a case such as this was originally, in exercising its wardship jurisdiction, the issue for the court was whether the children were at serious risk and should be brought into wardship. The issue now in considering the welfare of the children, in light of the delay and changed circumstances, is whether the children in all the circumstances, should be in wardship.*[31]

52. This indicates that wardship may be justified where there is a serious risk requiring a child to be brought into the court's care.

53. In practical terms there may be cases in which the application to take a child into wardship is not contested. In *AC (A Minor Ward)*, a disagreement between parents as to a course of treatment resulted in the minor coming into wardship so that the court could decide the dispute as between the parents.[32] In that case the hospital had indicated that it would follow a course of either curative intent or palliative intent treatment if the parents were agreed, but that agreement was not forthcoming. There does not appear to have been any objection raised by the parents to the child being placed in wardship. By contrast, John's parents objected to the child being made a ward of court. A clear legal test, and the application of fair procedures, were minimum requirements in any determination of what was the most appropriate course of action.

54. In *Lambert v. France*, the ECtHR found no violation of the European Convention on Human Rights ('ECHR') in respect of a decision to withdraw life sustaining

[30] *AC v. Cork University Hospital* [2019] IESC 73 para.364 *per* O'Malley J.
[31] *Eastern Health Board v. MK* [1999] 2 IR 99, p.115.
[32] *AC (A Minor Ward)* [2019] IEHC 691, paras. 28 – 29.

treatment which was made under French law.[33] In so finding, the court noted in particular the positive obligation under Article 2 of the ECHR (the right to life), which required '*States to make regulations compelling hospitals, whether private or public to adopt appropriate measures for the protection of patients' lives*.'[34] The Court's analysis focused also on the Article 8 (the right to respect for private life).[35] Whilst the facts in *Lambert* were different in that it concerned a decision being made to end life sustaining treatment, the ECtHR's requirement of a transparent process is instructive. If the mechanism in Ireland for decisions on medical treatment in cases of John's gravity is to be by way of admission to wardship, clarity is required as to how a child is admitted to wardship over parental objection.

55. Order 67 of the Rules of the Superior Courts provides a mechanism for a proposed adult ward to object to wardship, but no equivalent mechanism is provided for in Order 65 which deals with minor wards. Pleadings do not appear to be required beyond the minor summons filed by the moving party.
56. It may be that Article 42A.2.1° provides assistance in setting out the parameters for the appropriate legal test where the State is to supply the place of the parents, particularly as it has been stated repeatedly that the wardship jurisdiction must vindicate constitutional rights.[36]
57. Fair procedures must be applied in a decision on whether or not to admit a person to wardship. In *MK*:

    > *Wardship proceedings must be fair and in accordance with constitutional justice. 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.*[37]

58. Affording the parents fair procedures in the hearing on what orders should be made *after* the child had already been admitted to wardship does not necessarily cure the lack of fair procedures on the decision *to admit* the child to wardship. In *AC v.*

[33] *Lambert v. France* (Judgment of the Grand Chamber Application No 46043/14).
[34] *Lambert v. France* (Judgment of the Grand Chamber Application No 46043/14), at para 140.
[35] *Lambert v. France* (Judgment of the Grand Chamber Application No 46043/14), paras.136-143.
[36] *Re D* [1987] IR 449, at p.457.
[37] *Eastern Health Board v MK* [1999] 2 IR 99, at p.111.

Cork University Hospital, O'Malley J. expressed concern that the admission of the adult in that case to wardship '*lacked certain fundamental safeguards for the interests of the proposed ward.*'[38]

59. In *SMcG v. CFA*, Baker J. (whose order was upheld by the Supreme Court), held that recognising and respecting the interests and rights of children who are the subject of care proceedings requires the full recognition and respect of the procedural and substantive rights of the children's mother (albeit her analysis was in a case without a guardian *ad litem*).[39]
60. The child has a right to have decisions concerning his care made by his parents. If the parents are not afforded fair procedures in the process by which he is admitted to wardship, then his rights are undermined.

Best interests

61. Article 42A.4.1° provides:

1° Provision shall be made by law that in the resolution of all proceedings—

i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration

62. The paramountcy of best interests will apply to any decision made in respect of John by a court, whether in wardship or by way of declaratory relief/inherent jurisdiction orders under the Constitution. If a decision is to be made by way of a wardship application, then best interests will apply: best interests is already the test in Minor Wardship which has been acknowleged to be in keeping with Article 42A.4.1°.[40] If a decision is made by way of a declaratory order or inherent jurisdiction order under the Constitution then the issue of the best interests test being 'provided for by law' does not arise as it is not proceeding by way of a statutory mechanism. Article 42A.4 applies to decisions made by a court under the

[38] *AC v. Cork University Hospital* [2019] IESC 73, at para 366.
[39] *SMcG v. CFA* [2015] IEHC 733, at para. 40 – 43.
[40] Which also 'chimes' with Art.42A.4 *Re AC (A Minor Ward)* [2019] IEHC 691, para.44-49.

Constitution without necessity of 'provision shall be made by law'. This was acknowledged by Charleton J. in *SMcG v CFA* in respect of an application under Art.40.4.2° of the Constitution. Charleton J. held that the '*Constitution executes itself*'.[41]

Objective test

63. Best interests were examined subjectively by the Learned Trial Judge, with reference to *SR A Ward of Court*.[42] It is questionable whether this subjective approach has survived the adoption of Article 42A. The approach taken by the Learned Trial Judge, relying on previous jurisprudence concerning a child, and post-Article 42A jurisprudence concerning adults (which in turn relied on jurisprudence from England and Wales, which has no equivalent of Article 42A) did not base the analysis on the rights of the child.
64. The right to have decisions made with the child's best interests as the paramount concern constitutes a constitutional and human right of children in and of itself.[43] The UNCRC Committee has described it as being a 'threefold concept: (a) a substantive right; (b) a fundamental, interpretive legal principle, and (c) a rule of procedure.[44]
65. Children have multiple constitutional rights which must be evaluated and balanced carefully in difficult cases. An objective test is more appropriate for such an analysis. As the Law Reform Commission has observed, an objective approach is preferable in the context of medical treatment decisions:

> *The best interests test has sometimes been criticised as amounting to no more than a simple paternalistic test of "parents know best" or, in the context of this Report, "doctor knows best". When the best interests test is seen, however, in the light of a rights-based approach, it is clear that it is not paternalistic in nature but has an objective aspect that ensures an appropriate level of protection against outcomes that would be inconsistent with the rights of*

[41] *SMcG v Child and Family Agency* [2017] 1 IR 1. Charleton J (para.73).
[42] [2012] 1 IR 305, see paras.152-154 of the Learned Trial Judge's judgement.
[43] See Art.3 UNCRC.
[44] UNCRC Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (CRC/C/GC/14) para.6.

children. … It is notable that the best interests test has also been incorporated into international rights-based instruments on children, including the 1989 UN Convention on the Rights of the Child. This objective best interests test ensures, therefore, that the health care outcome in an individual case is not to be equated with the particular preferences of the person under 18, his or her parents or guardians (subject to the presumption that their views should be given priority under Article 41), still less of any person acting in the place of parents or guardians (such as the Health Service Executive exercising powers under the Child Care Act 1991).[45] (emphasis added)

66. Furthermore, an objective approach to best interests is inherent in the structure of Article 42A.4 itself, providing for best interests to be paramount (42A.4.1°), and for the ascertaining and giving of due weight to the views of the child (42A.4.2°). That ensures that a subjective element is available to the court in respect of the wishes of the child. To determine best interests solely by reference to the subjective position of the child would risk collapsing Article 42A.4.1° into Article 42A.4.2°. This is more obviously so with a child who is conscious and in a position to express his or her views, but the point holds: the court's assumptions about what an eleven year old child may want are of less assistance and relevance to a detailed assessment of each of the constitutional rights of the child and a consideration of how they are to be balanced against each other. As the UNCRC Committee has observed in relation to Article 3 of the UNCRC:

> *The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.*[46]

67. As was set out above, there are multiple constitutional rights of the child engaged in this case in addition to the parents' rights. First, and most obviously, there is the right to life. Second, there is the right to protection of the person, which is informed by the value of dignity and includes protection of bodily integrity and protection from inhuman treatment. These rights are protected by the Constitution for persons

[45] Law Reform Commission *Report on Children and the Law: Medical Treatment* (LRC 103-2011) p.23.
[46] UNCRC Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (CRC/C/GC/14) para.5.

generally, but are also given added constitutional protection by Article 42A.1 in the specific context of a child. A child's right to life is qualitatively different to an adult's right to life as a child has not yet fully developed and taken their place as an autonomous member of society. Dignity in the context of a child's development operates differently than in respect of an autonomous adult; children require care and protection; their dignity entails an element of dependence that is distinct from the experience of an adult. The role of the parent, and the parents' right to carry out that role, also have to be weighed. The minor wardship jurisprudence acknowledges, both before and after the entry into force of Article 42A, that there is a strong presumption in favour of preserving life.[47] Pain and suffering clearly engage the constitutional right to protection of the person.

Balancing of rights

68. A balancing of the constitutional rights of one rights-holder (as different to that of a person asserting rights against the actions of a state body) where those rights cannot be harmonised is already well established as an approach in Irish constitutional law (see *DG v Eastern Health Board*[48]). An illustration of a careful balancing exercise of this type is that of McDermott J. in *Health Service Executive v. VF*[49], in which he made an order under the court's inherent jurisdiction directing the detention of a woman lacking capacity and suffering from an alcohol-related amnesiac syndrome (a situation which fell outside the Mental Health Act 2001). This required the court to balance the woman's right to liberty against her other constitutional rights in assessing what care was appropriate. McDermott J applied the four-part *Heaney* proportionality test:

> *The object of the detention is to provide that care and thereby protect her life, and bodily integrity in accordance with the obligation imposed on the State under Article 40.3.2°. The court must strike a balance between the applicant's right to personal liberty and the danger posed by her condition to her right to life and personal safety, and the personal safety of others. The latter would be*

[47] (*Re AC (A Minor Ward)* [2019] IEHC 691, para.60; *Re SR A Ward of Court* [2012] 1 IR 305.
[48] [1997] 3 IR 511.
[49] [2014] IEHC 628; [2014] 3 IR 305.

preserved and vindicated by the restriction of the former. The court considers the deprivation of liberty in those circumstances to be rationally connected to the pressing and substantial need to ensure her life, health and safety. It considers that detention in a secure unit is the least restrictive way of ensuring her wellbeing, care and safety and that the order sought is proportionate to that objective. It is also an order that has due regard to the nature and hierarchy of the rights in issue, and the paramount importance of her right to life.[50]

69. This type of rights-based balancing exercise is entirely in keeping with the text of Article 42A. Its primary focus must be the rights of the child, which the court is obliged to vindicate. Any intervention that overrides the parents' decision-making capacity, so affecting their and the child's rights, must be justified in terms of an identified, and prevailing, constitutional right of the child.

Conclusion

70. The Commission does not take a view on what treatment John should or should not receive. The Commission does take the view that the decision of the court in respect of John's treatment must be made in a manner that places John's constitutional rights and those of his parents at the centre of the analysis. In accordance with Article 42A, that analysis must apply a nuanced assessement of the specific constitutional rights involved and ensure that the proportionality standard in Article 42A.2.1° is complied with.

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[50] para. 39.