APPROVED

THE HIGH COURT

[2023 No. 2193 P.]

[2023] IEHC 361

BETWEEN

GOVERNOR OF A PRISON

PLAINTIFF

AND

X.Y.

DEFENDANT

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 22nd June, 2023

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NO REDACTION NEEDED

1. Introduction

1. This judgment concerns an issue which has come before the courts on a number of previous occasions. The issue is: what are the prison authorities supposed to do when a prisoner, with full capacity, decides to cease taking food and fluids in the full knowledge that, if the prisoner persists in that decision, he or she will inevitably die. Such a choice by a prisoner presents the prison authorities, and those responsible for the treatment and care of the prisoner, with a difficult dilemma. Their natural instinct is, understandably, to seek to intervene to try and keep the prisoner alive. However, what if the prisoner has made clear that he or she does not want any such intervention and does not consent to it?

2. These issues arise in the present case and have been considered before the Irish Courts. However, another issue which presents itself in the case has not been previously considered. What happens if the prisoner, acting with full capacity, has made an advance healthcare directive, thereby bringing into play the provisions of Part 8 of the Assisted Decision-Making (Capacity) Act 2015 (as amended) (the "2015 Act")? Those provisions came into operation on 26th April 2023, a couple of weeks before these proceedings were commenced on 15th May 2023. No court has had, as of yet, the opportunity to consider the relevant provisions of Part 8 of the 2015 Act and that is what is new and different about this case.

2. Brief Overview of Proceedings and Decision

3. The case concerns a prisoner in a prison outside Dublin. The prisoner is serving a custodial sentence following a conviction in 2022. In early May 2023, the prisoner began to refuse to consume food or fluids. The prisoner had similarly refused food and fluids for brief periods on four or five previous occasions between December

2022 and April 2023. From 5th May 2023 onwards, the prisoner made numerous statements to the prison authorities that he or she (the gender of the prisoner is not disclosed in this judgment for reasons explained below) did not wish to consume any food or fluids. This time, apart from a few occasions on which the prisoner took some fluids, the prisoner maintained his or her refusal to consume food or fluids up to the date of the hearing of the proceedings on 18th May 2023. The stated intention of the prisoner was to end his or her life.

4. During the course of an assessment of the prisoner on 7th May 2023, the prisoner dictated a note stating that he or she intended to end his or her life by refusing food and fluids.

5. The prisoner executed two advance healthcare directives. The first was executed on 12th May 2023 and the second on 13th May, 2023. The applicable directive is the latter one which I will refer to in this judgment as the "AHD". In the AHD, the prisoner made clear:

(i) his or her wishes:

(a) not to receive any medical intervention and medication, and

(b) if actively dying, a preference to do so in a clinical setting, such as a hospital or hospice.

(ii) That those wishes were to be respected, should the prisoner become incapacitated or unconscious; and

(iii) That the AHD was to apply to life sustaining treatment and even if the prisoner's life was at risk.

6. At the time of the making of the AHD, and at the time of the hearing, the prisoner had and continues to have full capacity. That has been confirmed in evidence by the prison's Chief Medical Office (the "CMO"), by the National Nurse Manager of the

Irish Prison Service (the "NNM") and by an independent consultant psychiatrist who examined the prisoner and gave evidence to the court at the hearing on 18th May 2023.

7. The Governor of the prison commenced these proceedings on 15th May 2023, seeking orders essentially to give effect to the prisoner's wishes and permitting the Governor not to feed or provide fluid to the prisoner against his or her wishes, not to force-feed the prisoner or to provide any medical intervention to the prisoner against his or her wishes and to give effect to the prisoner's AHD in accordance with the provisions of Part 8 of the 2015 Act. A range of different orders were sought by the Governor in the proceedings.

8. An *ex parte* application was made to me on behalf of the Governor on 15th May 2023, seeking the court's consent to the making of the application for orders under Part 8 of the 2015 Act and for directions as to the service of the proceedings on the prisoner's solicitors, as well as various other directions.

9. At the commencement of that application, the Governor made an application for the proceedings to be heard *in camera*, pursuant to s. 92(7) of the 2015 Act and pursuant to the inherent jurisdiction of the court (as described by the Supreme Court in *Gilchrist v Sunday Newspapers Ltd* [2017] IESC 18, [2017] 2 I.R. 284). I ruled that the application for the proceedings to be heard *in camera* should itself be heard *in camera* and that if I decided that the proceedings should be heard *in camera*, I would give my ruling on the application in open court.

10. Having heard the application, I ruled that the proceedings should be heard *in camera*. I gave my ruling on that application in open court, setting out the reasons for my decision. Briefly stated, the main reason why I concluded that the proceedings should

be heard *in camera* was because, in the proceedings, the Governor seeks various orders under Part 8 of the 2015 Act in order to give effect to the prisoner's AHD. S. 92(7) of the 2015 Act provides:

> *"(7) Hearings of applications under this Part shall –*
>
> *(a) ...*
>
> *(b) be heard and determined otherwise than in public."*

11. Therefore, insofar as the proceedings involved an application by the Governor under Part 8 of the 2015 Act, the court was required to hear and determine the application otherwise than in public. While the Governor sought other orders in the proceedings, such as declarations and orders under the inherent jurisdiction of the court it was not possible to separate out those reliefs and to hear them in public. The orders sought under the inherent jurisdiction of the court were to the effect that the prisoner had capacity to make the decision to refuse food and fluids and to refuse all forms of medical intervention, should such be necessary and that the Governor's decision not to feed the prisoner against his or her wishes or to force-feed the prisoner or to provide any medical intervention to the prisoner so long as the prisoner had capacity was lawful. These other reliefs were so intwined and interconnected with the application for orders under Part 8 of the 2015 Act as to make it impossible to separate them from that application. For these reasons, I decided that the proceedings in their entirety should be heard *in camera*.

12. I did, however, indicate in my ruling that I would give consideration to make the ultimate decision or judgment in the case public, with appropriate redactions to protect the identity of the prisoner concerned and the prison. I proceeded to hear the Governor's application that day and all further applications in the course of the proceedings *in camera*. At the conclusion of the case on 18th May 2023, having given

my decision, I indicated that I would provide a written judgment setting out in full my reasons for the decision which I would make public with appropriate redactions.

13. The Governor's *ex parte* application on 15th May 2023, was grounded on affidavits sworn by the Governor and the NNM. I will summarise the evidence contained in those affidavits later in this judgment. Having considered the affidavit evidence before the court and the submissions made on behalf of the Governor, I was satisfied that it was appropriate to give consent to the making of the application for orders under Part 8 of the 2015 Act. S. 92(2) of the 2015 Act provides that an application to the court under Part 8 of the 2015 Act *"shall not be made unless the person making the application has received the consent of the court to the making of the application, which consent may be sought by way of an ex parte application"*. Having given the Governor consent to bring the application, I then gave liberty to the Governor to issue a motion seeking the reliefs in the proceedings which I made returnable for 2pm on 18th May 2023. I made further directions providing for the service of the proceedings on the prisoner's solicitors by email as well as various consequential directions. I gave liberty to the prisoner to file an affidavit in the interim period should he or she wish to do so.

14. At very short notice, on 16th May 2023, I agreed to sit to hear oral evidence from the CMO as there was a concern that the prisoner's medical condition, which had been stable as of 15th May, 2023, had deteriorated overnight. Counsel for the prisoner appeared at short notice that afternoon (senior counsel appeared in person and junior counsel remotely) instructed by the prisoner's solicitors who attended remotely for the hearing. The CMO gave evidence, which I will summarise later in this judgment but suffice to say, on the basis of that evidence, I was persuaded that it was appropriate to

make certain interlocutory orders. I gave a ruling explaining the reasons for my decision to do so.

15. I made interlocutory declarations and orders making clear that, as of that date, the prisoner had full capacity to decide to refuse food and fluids and to decline medical intervention, that the Governor's decision not to feed or provide fluids to the prisoner against his or her wishes and not to force-feed him or her was lawful as of that point and that the Governor was entitled to give effect to the prisoner's wishes not to be fed or to receive fluids and not to receive any medical intervention against his or her wishes. Those orders were expressly stated to last until the hearing of the proceedings, which was scheduled for 2pm on 18th May 2023.

16. I was also persuaded to make certain interlocutory orders with respect to the prisoner's AHD, namely, orders on an interlocutory basis as follows:

(a) Pursuant to s. 89(2) of the 2015 Act, that the AHD made by the prisoner on 13th May 2023 was valid on the basis of the evidence before the court and likely to be applicable in the event that the prisoner was subsequently to lose capacity.

(b) Pursuant to the inherent jurisdiction of the court,

(i) that the prisoner's decision to refuse food and fluids and to refuse medical intervention in the event that the prisoner were to lose capacity or to become unconscious, as expressed in the prisoner's AHD, should remain operative in the event that the prisoner was to become incapable of making a decision to accept food or fluids or medical intervention; and

(ii) that the Governor's decision not to feed the prisoner against his or her wishes, namely, not to force-feed or to provide any medical

intervention, in the event that the prisoner was to become incapacitated or unconscious, was lawful; and

(c) that the prisoner may be transferred to a hospital or other clinical facility if that is required for end-of-life treatment, while continuing to adhere to the AHD and the wishes of the prisoner regarding food and fluids refusal and medical intervention.

Those orders were expressly stated to last until 2pm on 18th May 2023.

17. There was no opposition from the prisoner's legal team to the making of those orders. While counsel for the prisoner indicated that neither counsel nor their solicitors had instructions from the prisoner on the particular application before the court that day, they were aware, from recent engagement with the prisoner for the purposes of other criminal proceedings, that nothing of which they were aware conflicted with the position put before the court on behalf of the Governor, that it seemed that the prisoner's wishes were clear and that the information which they had obtained for the purposes of the criminal proceedings pointed very much towards the prisoner having capacity.

18. The proceedings then came on for hearing at 2pm on 18th May 2023. Counsel for the prisoner indicated that the prisoner was supporting the orders being sought by the Governor. It was agreed that the proceedings would be heard that afternoon on the basis of the affidavit evidence, as supplemented by further oral evidence to be given. Oral evidence was given that afternoon by the independent consultant psychiatrist who had examined and assessed the prisoner on 15th May 2023, by the CMO and by the prisoner's solicitor. While I will refer to that evidence in greater detail shortly, at this stage it is sufficient to note that all of the witnesses remained firmly of the view that the prisoner continued to have full capacity and was clear and consistent in his or

her decision to refuse food and fluids (although the prisoner had consumed a small amount of water and Lucozade on 16th May, and a small amount of water on 17th May, the prisoner was refusing to take any fluids on 18th May) and to refuse medical intervention.

19. I then heard submissions from counsel for the Governor and counsel for the prisoner. Because of the urgency with which a decision of the court was required, I gave my decision immediately after the hearing.

20. For reasons which I outlined at the time and which I agreed to elaborate upon in a subsequent written judgment, I decided to grant several of the reliefs sought by the Governor in the proceedings.

21. I made a number of declarations which can be summarised as follows:

(i) A declaration pursuant to the inherent jurisdiction of the court that the prisoner had capacity to make a decision to refuse food and fluids and further that the prisoner had the capacity to refuse all forms of medical intervention should the necessity for such intervention arise.

(ii) A declaration pursuant to the inherent jurisdiction of the court that the Governor's decision not to feed the prisoner against his or her wishes, namely, not to force-feed the prisoner or to provide any medical intervention, for so long as the prisoner has capacity, is lawful.

(iii) A declaration pursuant to the inherent jurisdiction of the court that for so long as the prisoner has capacity, the Governor is entitled to give effect to the prisoner's wishes not to be fed or to receive fluids or to receive any medical intervention against his or her wishes.

(iv) A declaration that pursuant to s. 89(2) of the 2015 Act, the prisoner's AHD is valid.

(v) A declaration pursuant to the inherent jurisdiction of the court that the Governor is entitled to give effect to the prisoner's AHD insofar as same is applicable to the matter set out in that directive.

(vi) A declaration pursuant to the inherent jurisdiction of the court that the prisoner's decision to refuse food and fluids and to refuse medical intervention in the event that the prisoner loses capacity or becomes unconscious, as expressed in the prisoner's AHD should remain operative in the event that the prisoner becomes incapable of making a decision to accept food or fluids or medical treatment; and

(vii) A declaration pursuant to the inherent jurisdiction of the court that the Governor's decision not to feed the prisoner against his or her wishes, namely, not to force-feed the prisoner or to provide any medical intervention, in the event that the prisoner becomes incapacitated or unconscious, is lawful.

22. In addition, I made an order that the prisoner could be transferred to a hospital or other clinical facility if that was required for end of life of treatment, while continuing to adhere to the prisoner's AHD and the wishes of the prisoner regarding food and fluids refusal and medical intervention. I gave liberty to apply at short notice in the event that there was any issue about the transfer of the prisoner to a hospital or other clinical facility in accordance with the wishes expressed by the prisoner in the AHD. I also made an order on consent that the Governor pay the prisoner's costs of the proceedings and gave liberty to apply.

3. <u>The Evidence</u>

23. I heard evidence, either on affidavit or by oral testimony, over a number of days, 15th May 16th May and 18th May, 2023, in support of the Governor's application from the

following witnesses: the Governor himself, the NNM, the CMO of the prison, and an independent consultant forensic psychiatrist. The prisoner did not give evidence. However, the prisoner's solicitor did give brief evidence to confirm the prisoner's instructions and her view that the prisoner had and continued to have full capacity to give those instructions which were not to oppose the Governor's application.

(a) <u>The Governor's Evidence</u>

24. The Governor gave evidence by way of affidavit. He outlined the prisoner's particular circumstances. The prisoner was serving a custodial sentence of two years imprisonment and had been in the prison since March 2023, having been transferred there from another prison. The prisoner was also the subject of further ongoing criminal proceedings which the prisoner would be attending remotely by video link later in the week of the hearing. The Governor then explained the approach of the Irish Prison Service (the "IPS") to persons who refused food.

25. The IPS has developed a protocol entitled *"Food Refusal within Prison – Management Protocol"* which was issued by its Healthcare Directorate in April 2004 and a further undated protocol entitled *"Food Refusal within Prison – Nursing Management Protocol"* (I will refer to both documents together as "the protocol"). The protocol prohibits the force-feeding of prisoners with full capacity who refuse food. The policy of the IPS is not to force-feed a prisoner who refuses food. Where the refusal is based on a psychiatric illness, a full psychiatric assessment is required to be carried out and the underlying illness treated without delay. Where there is no evidence of psychiatric illness, the protocol requires that the wishes of the prisoner in refusing food should be respected and that *"force-feeding is not an option"*. The protocol requires extensive monitoring of the prisoner on a daily basis and also that

the prisoner should continue to be offered meals at the appropriate times and a note made of the prisoner's refusal. The prisoner is required to be asked at an early stage to nominate a legal advisor or family member to act on the prisoner's behalf in relation to resuscitation in the event that unconsciousness or incoherence occurs. The prisoner is required to be given the opportunity at an early stage to instruct the legal advisor or family member nominated regarding the prisoner's wishes. The prisoner is required to be assessed by a psychiatrist, at least twice weekly, to establish the prisoner's capacity. Medical supervision and advice, together with appropriate food and fluids should continue to be made available to the prisoner. The overall objective of the protocol is to ensure that there is a procedure in place that is systematically applied to ensure that a prisoner refusing food is managed from a healthcare perspective, with a view to achieving the best possible outcome for the prisoner while respecting the prisoner's right to refuse food. The protocol also provides that if the prisoner consistently refuses fluids, the prisoner should be admitted to hospital.

26. It is the case, therefore, that it is against IPS policy to force-feed a prisoner. It is also the view of the IPS and of the Governor in this case that a prisoner's right to refuse nourishment and medical treatment should be respected. That view applies to the prisoner the subject of this case. It is not suggested that respecting those wishes would, in any way, undermine prison order or the authority of the Governor.

27. The Governor also explained that the IPS is cognisant of the provisions of the 2015 Act and the facility available under the 2015 Act for a person to make an advance healthcare directive. He explained that where such a directive is made by a prisoner who has communicated a decision to refuse food or fluids or other nourishment, the IPS would, where appropriate and necessary, seek the directions of the court to ensure that there is clarity about the applicability and validity of the directive and to ensure

that the Governor of the relevant prison acts in a lawful manner. The Governor also explained that where a prisoner communicates an intention to refuse food or fluids, the relevant prison staff will always seek to engage with the prisoner and inform the prisoner that he or she can, and will, be afforded food and fluids at any time at their request. The Governor indicated that the same position applies where a prisoner communicates a refusal of medical intervention. Therefore, if there is a change of position by the prisoner, the prisoner will be given access to medical treatment without delay if this is requested.

28. The Governor then set out the particular circumstances of the prisoner's case. The prisoner has refused food and fluids on at least five previous occasions while in the custody and care of the IPS. Some of those previous refusals were short lived. However, since early May 2023, the prisoner took a more determined approach to the refusal of food and fluids. The Governor explained that the prisoner made an AHD on 13th May 2023, as well as making previous directives earlier that month. As of the time of the Governor's application to the court, the prisoner was undergoing constant medical supervision from medical staff of the IPS. The prisoner was being accommodated in a safety observation cell in the prison for his or her own wellbeing and to allow constant monitoring, assessment, and supervision. Staff under the Governor's direction and control, including the relevant medical staff in the prison, were liaising with, and monitoring the prisoner on an ongoing basis.

29. The prisoner began refusing to consume food and fluids from 3rd May 2023. That refusal was verbally indicated to the prison authorities on 5th May 2023 and was recorded in a written note dictated by the prisoner to the NNM of the IPS on 7th May 2023. The prisoner made three further written statements in respect of his or her wishes on 9th May 2023. The prisoner's stated intention in refusing to consume food

and fluid was to end his or her life. The prisoner continued refusing food and fluids until 10th May 2023, after which he or she began briefly to consume fluids again. He or she was transferred to a local hospital for treatment and care on 10th May 2023 and was discharged back into the care of the Governor later that evening.

30. On the night of 10th May 2023, or the morning of 11th May 2023, the prisoner indicated that he or she would again start refusing food and fluids with effect from 2pm on 11th May 2023, unless certain demands were met and that this was by way of protest against certain prison conditions. However, on 12th May 2023, the prisoner informed the NNM that his or her refusal to accept food and fluids was not a protest but was intended solely to end his or her life.

31. The prisoner made two advance healthcare directives, one on 12th May 2023 and other on 13th May, 2023. The reason why the AHD was made on 13th May 2023 was the first one did not contain the prisoner's date of birth and did not state that it applied to life-sustaining treatment, even if the prisoner's life was at risk. That led to the AHD being made by the prisoner on 13th May 2023. That AHD was typed up to ensure that the prisoner's date of birth was included, and it clarified that the prisoner's decision applied to life-sustaining treatment, even if the prisoner's life was at risk. It was considered appropriate by the IPS to obtain clarity on that issue from the prisoner before considering bringing an application to court. The circumstances surrounding the making of the AHD by the prisoner were outlined in more detail in the NNM's affidavit.

32. The Governor also explained in his affidavit that the prisoner had undergone various medical assessments and continued to be subject to medical supervision by the staff of the IPS. The prisoner was also due to be evaluated by an independent consultant forensic psychiatrist on Monday, 15th May 2023. The prisoner was assessed by a

consultant forensic psychiatrist that day, and her report was provided to the court. The psychiatrist gave oral evidence to the court on 18th May 2023.

33. The Governor explained that the purpose of the proceedings was to seek declarations from the court to the effect that the Governor's decision to respect the wishes of the prisoner was valid and lawful. The Governor wished to ensure that there was clarity and certainty in the administration of treatment and care to the prisoner while he or she continues to have capacity. In addition to that, the Governor also felt it appropriate to apply to the court under s. 92 of the 2015 Act to obtain clarity as to what might be required in terms of the administration of treatment and care to the prisoner should he or she become incapacitated or unconscious. The Governor wished to ensure that there was a declaration by the court as to whether the AHD of 13th May 2023 is valid and applicable in circumstances where the prisoner in the custody of the IPS, and to ensure that the Governor's duties and obligations are clear in the circumstances. Understandably, the Governor required guidance and directions from the court as to how to manage the prisoner's situation in the event that the prisoner was to lose capacity or to become unconscious. The Governor, therefore, required clarity and certainty in the administration of treatment and care to the prisoner in the event of such incapacity or unconsciousness. The Governor also felt it necessary to seek directions from the court to ensure that the prisoner could be transferred to an appropriate clinical facility for end-of-life treatment, if that were to arise, while respecting the terms of the AHD made by the prisoner.

(b) The NNM's Evidence

34. The NNM of the IPS also gave evidence by affidavit. He referred to the prisoner's medical records. He noted that the prisoner had previously indicated that he or she

suffered from coeliac disease and asthma and had experienced post-traumatic stress disorder as a result of childhood trauma. He indicated that the prisoner had threatened or occasioned self-harm on several occasions while in the custody and care of the Governor and previously while in the care of the Governor of another prison. The NNM outlined those previous instances. He noted that the prisoner does not have any formal mental health diagnosis and has not been prescribed any psychiatric medication while in custody. He also explained that the prisoner had refused food and fluids on a number of previous occasions while in the custody of the IPS. However, on 3rd May 2023, the prisoner started refusing to take food and fluids again. After that, the prisoner's health began to deteriorate, and the prisoner refused to allow anyone to monitor his or her physical health. On 5th May 2023, the prisoner verbally indicated to the prison authorities that the prisoner intended to refuse to accept food and fluids. The NNM attended the prison on evening of Sunday, 7th May 2023, in order to assess the prisoner. He discussed the position with members of the nursing staff and referred to various documents published by the Decision Support Service (the "DSS") in relation to the 2015 Act and, in particular, those provisions concerning advance healthcare directives. The NNM drew particular attention to para. 2.7.3 of the Code of Practice on Advance Healthcare Directives for Health Professionals published by the DSS which states that:

> *"…if there is an issue with regard to life-sustaining treatment a court application must be made to the High Court."*

35. The NNM carried out a functional capacity assessment of the prisoner on the evening of 7th May 2023. During the course of the assessment, he explained in detail to the prisoner the likely trajectory of continued food and fluid refusal on the prisoner's health and informed the prisoner that it would likely lead to his or her inevitable

death. The prisoner clarified that he or she understood that he or she may experience significant discomfort and pain. Despite this, the prisoner remained resolute in his or her commitment to the current course of action. The NNM explained that having carried out a functional capacity assessment, he considered that the prisoner had full capacity. The NNM produced a report of his assessment of the prisoner. He concluded that it was clear from the assessment that the prisoner:

"1. *Understood all the information regarding* [the prisoner's] *current course of food and fluid refusal, including possible medical sequalae up to and including death.*

2. [The prisoner] *had no issue in retaining information and there was no impediment to* [the prisoner] *retaining this in perpetuity.*

3. [The prisoner's] *ability to assess and weigh up the information appeared to be grossly intact and* [the prisoner] *was able to verbalise* [the prisoner's] *rational coherently*.

4. [The prisoner] *had no issue in communicating* [the prisoner's] *decision and the rationale* [the prisoner's] *decision."*

36. During the course of the assessment of the prisoner by the NNM, the prisoner dictated a note to the NNM indicating that the prisoner intended to end his or her life by refusing food and fluids. In that note, the prisoner stated that he or she was:

> *"…making the decision with full mental capacity to end my life by refusing fluids and food. I have considered my options incredibly carefully and upon reflection have decided this is the best course of action for me. This is not a decision I take lightly. I have been and am in a deep state of trauma and feel to continue my life is not a feasible option. I regretfully respect that my decision may not suit everybody but until a person stands in my shoes and*

carries my weight and my baggage, they will never understand. I have not been coerced or controlled into make any unlikely decision, however, it is a decision I stand firmly for. I take the time to thank you for reading this."

37. The prisoner signed that note and it was witnessed by the NNM and a nurse officer from the IPS.

38. On 9th May 2023, the prisoner further expressed his or her intentions in answer to certain queries put to him or her by the prison healthcare staff and prison officers. The prisoner's responses were signed and witnessed. The three questions and the prisoner's responses were as follows:

"Q1. Is there any direction on whether you want to receive any health inputs/life sustaining treatment should you become incapacitated/lose capacity?

A1. I am willing to accept CPR and surgical intervention. I want the foremost to have my decision to die recognised without feeling under pressure.

Q2. What medical interventions or care are you willing to accept?

A2. I am willing to accept all treatment from a physical point of view e.g., ER/any surgical intervention.

Q3. What intervention or care do you not consent to even if you lose capacity?

A3. I don't accept if I lose capacity any mental health assessment or psychiatrist evaluation."

39. The prisoner continued to remain under constant medical supervision and was continually monitored, including by the CMO of the prison. The CMO examined the prisoner on 9th May 2023. A copy of his report was provided to the court. In that report, the CMO outlined that the prisoner had been refusing food and fluids, despite advice and clinical intervention. The CMO explained that the prisoner was *"very guarded"* with him and did not communicate with him for the purposes of his

evaluation. On inspection, however, he explained that the prisoner looked alert and well perfused. He noted that the prisoner had lost 8kg since early March 2023. He also noted that the prisoner was stable in a number of vital respects.

40. The prisoner continued to refuse food and fluids until 10th May 2023. The prisoner commenced consuming fluids again early that evening. The prisoner was transferred to a local hospital for care and treatment that evening but was discharged later that night and returned to the prison. The prisoner was advised to start slowly with a low volume liquid diet. However, following the prisoner's return to the prison later that night (early in the morning of 11th May 2023), the prisoner indicated to one of the nurse officers that the prisoner intended to start refusing food and fluids again from 2pm that day. The prisoner indicated that the refusal of food and fluids was a form of protest. The prisoner set out a series of demands which the prisoner required to be met. Those demands included being accommodated with a particular prisoner, better treatment from prison staff, including psychological services, and access to certain educational courses. The prisoner indicated that he or she would refuse to engage with any person until those demands were met. Later, on 11th May 2023, the prisoner spoke with medical staff and incited that prisoner would communicate and engage with limited persons thereafter. The prisoner further indicated that he or she wished to engage with a chaplain to discuss end-of-life entitlements and that he or she wished to die in a peaceful manner.

41. Having been informed of these developments, the NNM decided to visit the prison again to meet with the prisoner. He met with the prisoner on 12th May 2023, without objection from the prisoner. In response to questioning from the NNM the prisoner indicated that he or she was refusing to consume food and fluids in order to end his or her own life and that it was not a protest. The prisoner indicated that the demands

previously made on 11th May 2023, were made in haste and should not have been made. The prisoner indicated he or she would resort to taking his or her own life by other means or methods if necessary.

42. The NNM offered the prisoner the opportunity to make an advance healthcare directive. It was explained to the prisoner that such a directive would only come into consideration if or when the prisoner was to lose capacity or become unconscious and unable to verbalise or otherwise communicate his or her wishes. It was also explained and reinforced to the prisoner that he or she could cease refusing to take food and fluids and could similarly seek medical intervention at any time. He discussed the issue of life-sustaining treatment with the prisoner. Following that discussion, the prisoner informed the NNM that he or she wanted to dictate an advance healthcare directive. This was then done, was signed by the prisoner, and witnessed by the NNM and a nurse officer on 12th May 2023. A further version of the directive was prepared as the first version did not include the prisoner's date of birth and did not specify whether the directive was to apply to life-sustaining treatment, even if the prisoner's life were at risk. A typed-up version including these two matters was prepared and furnished to the prisoner on 13th May 2023. The prisoner read through the document and signed the AHD on 13th May 2023. In accordance with the prisoner's wishes, a copy of both directives was provided by the Chief State Solicitors' Office and to the prisoner's solicitors on 13th May 2023. A solicitor in the Chief State Solicitors' Office spoke with the prisoner's solicitor who confirmed that he or she had spoken to the prisoner on 12th May 2023.

43. The AHD signed by the prisoner on 13th May 2023 made clear that it was intended to *"supersede all previous instruction to the Irish Prison Service"*. It then provided as follows:

"I am making this Advance Healthcare Directive in relation to my current food and fluid refusal in [the prison].

This directive applies to life-sustaining treatment even if my life is at risk. These wishes are to be respected should I become incapacitated or unconscious.

My wishes are as follows:

(1) That I do not receive any medical intervention e.g., CPR, drip (IV fluids), medication;

(2) If I am actively dying, I would prefer to die in a clinical setting e.g. hospital/hospice.

This statement has been made of my own free will and without coercion or control."

The document was signed by the prisoner and witnessed by two prison officials.

44. The NNM also referred to and exhibited to his affidavit an updated medical report of the CMO dated 14th May 2023. In that report, the CMO confirmed that the prisoner had full capacity. He stated that in all his reviews of, and consultations with, the prisoner, he had found the prisoner to be *"very articulate, compos mentis, with a clear mind"* and that the prisoner was *"always alert, bright with orientation, intact to time space and person"*.

(c) The CMO's Evidence

45. The CMO of the prison gave evidence remotely on 16th May 2023 and 18th May 2023. In his evidence on 16th May 2023, the CMO confirmed the contents of his report of 14th May, 2023 (referred to earlier). He also gave evidence as to his reviews of the prisoner on 15th May 2023 and 16th May 2023.

46. As of 15th May 2023, he said that the prisoner was *"very alert"*. He or she was well perfused and not compromised from a haemodynamic point of view. The prisoner's vital signs were stable. He confirmed the prisoner's decision not to accept food and fluids. The CMO saw the prisoner again on the morning of 16th May 2023. The prisoner was slightly weak but his or her vital signs were normal, including blood pressure, pulse, and temperature. The prisoner was well perfused and his or her colour was good. There was no evidence of imminent danger at that stage. While the prisoner was complaining of being *"a bit weak"*, the CMO felt that that was consistent with the prisoner not taking in any sugar. The prisoner declined food. However, in his evidence on 16th May 2023, the CMO explained the prisoner had requested some water and Lucozade. The prisoner drank 100ml of water and some Lucozade that day.

47. The CMO confirmed in his evidence that, in his view, the prisoner was of full capacity. Notwithstanding his view that the prisoner was not in imminent danger, the CMO explained that, given the fact that the prisoner was abstaining from food and fluids, he or she would likely become severely dehydrated, giving rise to a risk of cardiovascular compromise which would initially come in the form of a faint or a collapse. He explained that the prisoner could sustain organ failure, particularly of the renal system which could initially become compromised in the form of renal impairment and that the prisoner could accumulate toxins in his or her body which could impact on the brain, kidneys and on other organs. However, he did not see at that point any *"red flags"* which would likely be a precursor to cardiac failure. The nursing notes disclosed that the prisoner also drank another 100mls of water in the evening of 17th May 2023.

48. The CMO gave evidence again on 18th May 2023. He explained that he saw the prisoner at approximately 10am that morning. The prisoner looked *"well, not distressed, alert, bright"*. The prisoner informed the CMO that, while he or she had taken fluids the previous day (17th May 2023), the prisoner indicated that he or she would not take any more fluids starting from that morning. The nursing notes made available to the court disclosed that the prisoner requested water the previous day, drank a full cup of water and requested more. The CMO further assessed the prisoner just before midday on 18th May 2023. The nursing staff had reported that the prisoner had a fall while taking a shower. The CMO explained that the fall was likely to have been caused by the prisoner's abstinence from food and fluid resulting in low blood pressure which was exacerbated by a hot shower. He explained that the prisoner was *"very alert"* when he assessed the prisoner at that stage. The prisoner refused any medication or medical intervention. He explained that he continued to be very satisfied that the prisoner continued to have capacity.

(d) The Consultant Psychiatrist's Evidence

49. The consultant forensic psychiatrist also gave evidence remotely on 18th May 2023. She had produced a very detailed report in advance of the hearing following her assessment of the prisoner on 15th May 2023. The psychiatrist's findings can be summarised as follows:

(i) The prisoner was not suffering from a severe and enduring mental illness. The prisoner's overall presentation could be explained in the context of a primary diagnosis of emotionally unstable personality disorder which was complicated by the presence of complex trauma and an adjustment disorder which was due to a number of life events.

(ii) The prisoner was not suffering from a mental illness or mental disorder that impaired his or her decision-making capacity to refuse food and fluids at the time of his or her assessment on 15th May, 2023.

50. The psychiatrist concluded her report by stating that she was of the view that the prisoner had full capacity to refuse food and fluids and to make a valid advance healthcare directive as of 15th May 2023.

51. The psychiatrist confirmed her report at the outset of her evidence on 18th May 2023. In evidence, the psychiatrist confirmed that she had assessed the prisoner's capacity by reference to the functional capacity test contained in s. 3 of the 2015 Act. She was satisfied that the prisoner had capacity to make a decision as to whether to accept or refuse food and fluids and to enter into an advance healthcare directive by reference to that test. She confirmed that, in her view, the prisoner had an emotionally unstable personality disorder and an adjustment disorder which did not affect the prisoner's capacity to make those decisions. She was also satisfied that the prisoner had made the AHD on 13th May 2023 voluntarily and of his or her own free will and that the prisoner fully understood the consequences of the decisions made. The psychiatrist confirmed that she had absolutely no doubt whatsoever about the prisoner's capacity to make those decisions. She confirmed that the prisoner is *"highly intelligent"*, has a number of degrees, is *"very articulate"* and at the time of her assessment of the prisoner, the prisoner was *"still fully lucid and…very compos mentis, very articulate"*. The prisoner was very clear as to what he or she wanted and informed the psychiatrist that the prisoner felt that his or her wishes should be respected. The prisoner clearly understood that if he or she continued to refuse food and fluids and there was no medical intervention, the prisoner would lapse into unconsciousness and, if there was no life-saving intervention at that point, the end result would be the prisoner's death.

(e) Other Evidence

52. In addition to that evidence on 18th May 2023, the Governor also relied on an affidavit sworn by Peter Clifford, a solicitor in the Chief States Solicitor's Office, on 18th May 2023. That affidavit exhibited the report of the consultant forensic psychiatrist and also the relevant nursing and doctors' notes.

53. The prisoner did not give evidence. However, the prisoner's solicitor was called to give evidence by the prisoners' counsel. She confirmed that she had received express instructions from the prisoner not to defend the proceedings and that those instructions were *"very clear and consistent"*. She outlined that she had spoken with the prisoner on a number of occasions, including in relation to the AHD. The solicitor spoke with the prisoner on 16th May 2023 and went through the AHD of 13th May, 2023. The prisoner confirmed to the solicitor that the AHD was in accordance with the prisoner's wishes and that he or she had signed it voluntarily. The solicitor had spoken with the prisoner about the AHD, also on 13th May 2023. The solicitor confirmed that she had spoken to the prisoner with respect to the ongoing criminal proceedings which were before another court on 17th May 2023. The solicitor explained that the prisoner had asked *"quite pertinent questions about the proceedings"*. She was satisfied that the prisoner fully understood what was at issue in those proceedings. The prisoner confirmed to the solicitor shortly before the court sat on 18th May 2023 that the prisoner's instructions remained the same, that the prisoner would like his or her wish to be granted and that the prisoner wanted finality to the proceedings that day. The solicitor had no concerns whatsoever about the prisoner's ability to give those instructions. The solicitor confirmed that she had no doubt as to the prisoner's capacity to give the instructions.

4. Findings and Assessment of Evidence

54. It is clear from the evidence that, as of the date on which I gave my decision in these proceedings, 18th May 2023, the prisoner had full capacity to make a decision as to whether or not to accept or to refuse food and fluids. The prisoner also had full capacity at the time the prisoner made the AHD on 13th May 2023. The prisoner continued to have full capacity right up to the time at which I gave my decision on 18th May 2023. It was the prisoner's stated position that he or she did not wish to take food and fluids, although, as noted earlier, the prisoner had taken water and some Lucozade in the morning and on the evening of 16th May 2023 some water on the following date. In light of the evidence, I must proceed on the basis that the prisoner is and was at all material times a person with full capacity to decide whether or not to accept or refuse food and fluids as well as any form of medical intervention or treatment.

55. It is against that background and in the context of those findings that I must now address the relevant legal principles.

5. Application of Relevant Legal Principles and Statutory Provisions

56. In considering the relevant statutory provisions and legal principles in this section of my judgment, I will first make reference to, and consider, the Prison Rules 2007 (SI 252/2007) (as amended) (the "Prison Rules"). I will then consider the relevant case law on the court's inherent jurisdiction to make orders in circumstances such as those which have arisen in this case. The law is now well settled in the area. Finally, I will consider the relevant provisions of the Assisted Decision-Making (Capacity) Act 2015 (as amended) as this application has required consideration for the first time of the

provisions of Part 8 of the 2015 Act, since those provisions came into force on 26th April 2023.

(a) The Prison Rules

57. Rules 33 and 100 of the Prison Rules are relevant to the issues which arise in this case. Both were referred to in one of the leading judgments: *The Governor of a Prison v. GDC* [2020] IEHC 354 (T. Burns J.) ("*GDC*"). Rule 75(8) is also relevant.

58. Rule 33(1) states that:

"Each prisoner shall be entitled, while in prison, to the provision of healthcare of a diagnostic, preventative, curative and rehabilitative nature (in these Rules referred to as "primary healthcare") that is, at least, of the same or a similar standard as that available to persons outside of prison who are holders of a medical card."

59. Rule 75(8) requires the Governor of a prison to *"ensure the efficient and appropriate delivery of healthcare services"* within a prison.

60. Rule 100(1) deals with the performance of functions by healthcare professionals in prisons. A number of paragraphs of Rule 100(1) are relevant in this case. First, Rule 100(1)(c) provides that a healthcare professional in the performance of his or her functions shall *"treat prisoners with the same dignity and respect as would be afforded to any patient who is not a prisoner"*. Second, under Rule 100(1)(e) such a healthcare professional is required *"as far as possible* [to] *involve the prisoner in making decisions in relation to his or her own healthcare and encourage him or her take a responsible attitude towards his or her health while in prison and upon his or her release from prison"*. Third, under Rule 100(1)(f), a healthcare professional must *"provide prisoners with such information as will enable them to make free and informed decisions regarding their own healthcare"*. Finally, under Rule 100(1)(g), a

healthcare professional is required to *"only administer treatment to a prisoner or conduct any tests on a prisoner with the consent of that prisoner except in the case of treatment or a test required by or under these Rules, any statute, or by order of a court".*

61. The protocol to which I referred earlier are said to be in compliance with these provisions of the Prison Rules. I agree that they are. I accept the submission made on behalf of the Governor that adhering to the prisoner's stated wishes to refuse food and fluids and to decline medical intervention on the terms set out in the AHD is consistent with these provisions of the Prison Rules which are, of course, applicable to the prisoner's detention in the prison.

(b) The Inherent Jurisdiction of the Court

62. The court does have an inherent jurisdiction to hear and determine an application such as this by the prison authorities in circumstances where a prisoner, with full capacity, decides to refuse to consume food and fluids. In the exercise of that inherent jurisdiction, the court can make orders and declarations confirming that the prison authorities must respect the prisoner's wishes and are not required to intervene to force-feed or otherwise compel the prisoner to consume food and fluids. That is so even where the consequences of the prisoner's decision could, and, if seen through to its ultimate end — will likely, lead to the loss of life of the prisoner. I was satisfied that it was appropriate for me to exercise that inherent jurisdiction in this case to make the orders sought by the Governor.

63. There are a number of previous judgments of the High Court which have considered this issue. Most of those judgments have confirmed the right of a prisoner with full

capacity to refuse to consume food and fluids and the obligation of the prison authorities to respect that decision. While acknowledging the very careful and considered judgment to the contrary (which I discuss below), I tend to agree that that judgment can be distinguished from many of the other judgments in that it did not involve a prisoner with capacity who was declining food and fluids, and the judge's consideration of that issue may be considered to be *obiter dicta*. Further, that case did not involve a consideration of the particular issues arising under Part 8 of the 2015 Act in relation to advance healthcare directives which arise in this case.

64. The first relevant judgment is that of Baker J. in the High Court in *Governor of X Prison v. P McD* [2015] IEHC 259, [2016] 1 ILRM 116 ("*P. McD.")*. That case was similar to the present case, in that a prisoner with full capacity commenced a hunger strike. The prisoner did so for personal reasons relating to the conditions of his detention. The governor brought an application seeking declaratory reliefs pursuant to the inherent jurisdiction of the court. Those reliefs included a declaration as to the prisoner's capacity to make a decision to refuse all forms of medical assistance should the necessity for such assistance arise, a declaration that the prisoner's decision to refuse medical assistance was valid and should remain operative in the event that the prisoner became incapable of making a decision on whether to accept such treatment, a declaration that the governor's decision not to feed the prisoner contrary to his wishes was lawful, a declaration that the governor was entitled to give effect to the prisoner's wishes not to receive medical assistance or, in the alternative, direction pursuant to the inherent jurisdiction of the court as to the appropriate course of action for the governor to take in the event that emergency care for the prisoner was required.

65. In the course of her careful and considered judgment, Baker J. confirmed that the High Court has an inherent jurisdiction to protect and vindicate the prisoner's constitutional and common law rights and those under international law, as well as those arising under the European Convention on Human Rights. That inherent jurisdiction arises under Article 34.3.1 of the Constitution and also by reason of the imperative on the court to protect the rights of all citizens, whether those citizens are to a greater or lesser extent vulnerable, either as a result of passing circumstances arising from their inherent characteristics, or from conditions imposed on them.

66. An issue had been raised in that case as to whether the prisoner did, in fact, have capacity to make the decision which he had made and which he was continuing to stick with, namely, to refuse to treatment food and fluids. Baker J. carried out an inquiry into the prisoner's capacity and concluded that he had the capacity to make the relevant decision and that the decision was made in the full understanding of its consequences and of the alternatives. The court held the prisoner had fully and freely chosen his path of hunger strike and that his decision had been fully informed.

67. Baker J. held that a competent adult is free to decline medical treatment and that that is a necessary corollary of the right of an adult person with full capacity to accept medical treatment. Giving medical treatment without consent may be a trespass against the person in civil law, a battery in criminal law and a breach of that person's constitutional rights. There could, however, be exceptions to those rights in an individual case, such as a medical emergency or in other circumstances. The rights of a person could, in some instances, also be tempered by the rights of others.

68. Baker J. held that the right to life is the pre-eminent personal right guaranteed by Article 40.3 of the Constitution. The right to life is a right which the State and its various organs are obliged to act positively to protect. However, the autonomy to

choose medical treatment is one which derives from the right to life. Baker J. held that the State's duty to protect that right to life also includes a duty to respect decisions autonomously made. She further states that the sentence of imprisonment lawfully imposed on the prisoner in that case deprived him of the right to personal liberty but stated that he had not lost all of his constitutional rights including the right of personal autonomy and the right of bodily integrity. In this regard, Baker J. relied on dicta of Edwards J. in the High Court in *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288, and of Fennelly J. in the Supreme Court in *Creighton v. Ireland* [2010] IESC 50 ("*Creighton*"). She stated that, under the Constitution, a person has fundamental rights including the right to life, the right to personal autonomy, the right to bodily integrity, the right to self-determination and the right to live ones life as one wishes, provided those wishes do not impact upon or harm others and provided no conflict arises between those rights of the individual and the interests of society. Further, Baker J. held that while the court has an obligation to protect the sanctity of life, as the Supreme Court held in *Fleming v. Ireland* [2013] IESC 19, [2013] 2 I.R. 417, the obligation of the court to protect life is not an absolute obligation to protect life and may, in certain circumstances, have to give way to a freely expressed decision of an adult competent to make a choice to renounce that right: see also *In Re A Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79 and the recent discussion of that case in *In the matter of C.F.* [2023] IEHC 321 (at para. 151 onwards).

69. At para. 106 of her judgment, Baker J. referred to the *"already established jurisprudence"* to the effect that:

> *"…an adult person with full cognitive capacity is entitled to refuse medical treatment, even if that refusal is likely to inevitably lead to that person's death."*

She continued:

> *"Thus it seems to me that while it could not be said that a person has a right to commit suicide, it can be said that he has a right to freely elect to refuse food, provided his choice is full, free and informed and he does not require assistance to achieve that end, and it is rather the case that he has refused such assistance. The distinction is between a positive right to directly end one's life, and to make choices which have the indirect effect that death follows. The latter right is constitutionally recognised as flowing from the autonomy of the self."*

70. Baker J. considered and adopted the principles stated in two English cases, *Secretary of State for the Home Department v. Robb* [1995] 2 WLR 722 (Thorpe J.) ("*Robb*") and *Nottinghamshire Healthcare NHS Trust v. R.C.* [2014] EWCOP 1317 (Mostyn J.). Having done so, Baker J., in a passage cited and approved in a number of the subsequent judgments, then stated the following at para. 115:

> *"I conclude that the right of self-determination may prevail over the duty of the State to preserve the right to life. The duty of the State imposed upon it by the Constitution reflects the social order and the fact that the citizen is part of a community, and that the social contract requires that the State protect that citizen from an attack on his or her life and person. While the duty on the State may be stated in the affirmative and is not merely a reactive obligation, or an obligation to react or defend a right that is actively under attack, that duty, if it is to fully protect the citizen, must in an appropriate case give way to the*

> *express free choices of the individual. To consider otherwise would be in my view to give the State power to overbear the right of the individual not envisaged by the Constitution, and would fail to recognise the right of autonomy and individual self-determination that it promotes."* (at p. 148)

71. Baker J. concluded that there was no reason arising from considerations under the Constitution, or in human rights law, that would mandate the court or the governor of the prison to ignore the prisoner's expressed wishes. She held that the *"constitutional imperative goes the other way, and requires that the* [governor] *abide by his wishes"* (para. 116 at 148).

72. The prisoner in that case had made an advance care directive (although the case long predated the commencement of the 2015 Act). Baker J. felt that as a matter of law a person could make a *"freely stated wish in regard to their future care and that this ought to be, and can in an appropriate case be, respected by those with care of that person"* (para. 126).

73. The following year, a similar issue arose before the High Court (Humphreys J.) in the case of *A.B. v. C.D.* [2016] IEHC 541, [2016] 3 I.R. 598 ("*A.B.*"). In that case, the plaintiff was the CEO was a hospital to which the defendant, a prisoner serving a custodial sentence, was admitted for medical treatment for a self-inflicted injury. The hospital was of the view that the prisoner required urgent treatment in the form of intravenous antibiotic administration to reduce the immediate possibility of sepsis. There was a medical report to the effect that the prisoner lacked capacity. The hospital sought a declaration from the High Court authorising it to administer all necessary medical and surgical treatment in the interests of the prisoner's medical welfare. That application was granted by Humphreys J. in the High Court. His judgment contains an extensive and interesting consideration of case law of the

European Court of Human Rights and of various Federal and State Courts in the United States. In the course of it, Humphreys J. observed that:

> *"ordering medical treatment and especially surgical treatment contrary to the wishes of an adult patient impinges upon the bodily integrity of the individual, so in the case of a patient of full age and capacity, leaving aside for a moment the position of prisoners or any other special cases, it normally needs to be clear that the person does indeed lack such capacity…."* (para. 9, at 603)

74. Humphreys J. did conclude on the basis of his examination of the European Court of Human Rights and United States Federal and State case law that different considerations arose in the case of a prisoner. He did not find the reasoning contained in *P. McD.* or in the English case of *Robb* to be persuasive. In his view, insufficient weight was attached in those cases to the effect of a decision such as that made by the prisoner in that case which was, in the judge's view, to evade justice. He said:

> *"The question to my mind is whether the court wants to stand by and watch justice be evaded? That question needs only to be posed in order to be answered in the negative. There is no right to evade the implementation of the criminal justice system, either before, during or after trial, and whether directly or indirectly. In addition, the state interest in preventing prisoners killing themselves either directly or indirectly also supports the maintenance of order in prisons for a series of reasons spelled out in the U.S. caselaw."* (para. 49 at 615)

75. Humphreys J. found that the outcome in *P. McD* was not *"hugely problematic to the extent that the judge granted a declaration that the prison Governor was entitled to give effect to the prisoner's wishes not to be fed or treated"*. He continued:

> *"If a prisoner wants to starve to death or die by medical neglect, it is a matter for executive discretion as to whether to allow them to do so in all the circumstances: it might be too prescriptive in the modern era to declare a positive duty to force-feed a person of full age and capacity in particular, at least in all cases (there might well be a duty to force-feed a minor or a person of impaired capacity, or perhaps in other particular circumstances)."* (para. 50 at 616)

76. Humphreys J. did, however, disagree with the declaration in *P. McD.* that the prisoner's decision was valid and should remain operative if the prisoner subsequently became incapable if that implied that such a valid and operative decision precluded the possibility of State action overriding it if the Executive so decided. He felt that a prisoner did not have such an entitlement and that such entitlement could not *"co-exist with the doing of justice"*. He stated:

> *"A prisoner simply does not have any legal entitlement to cheat justice, and the court should not co-operate in him or her attempting to do so."* (para. 50 at 616 – 617)

77. The issue arose again for consideration a few years later in the case of *GDC.* In that case, a prisoner commenced a hunger strike at protest at his conviction, his treatment by the criminal justice system and the treatment of his family by the State. He had been convicted and sentenced to a lengthy period of imprisonment for various serious offences. The governor brought proceedings seeking similar declarations to those sought in the present case in relation to the prisoner's decision to refuse food, nourishment, and medical assistance. T. Burns J. held that on the evidence the prisoner had full capacity to decide to refuse food and medical treatment and that he fully understood the ultimate consequences of his decision. She referred to some of

the provisions of the Prison Rules which I referred to earlier and also to the protocol. She referred to evidence given on behalf of the prison authorities to the effect that, in their view, respecting a prisoner's rights is of *"paramount importance"* to the prison authorities, that it would *"go against every policy of the Prison Service to force-feed a prisoner"* and that *"affording the* [prisoner] *a dignified death was the Governor's priority"*. The governor of the prison said on affidavit that his view and that of the IPS was that the prisoner's *"right to refuse nourishment and medical treatment should be respected"*. The judge then reviewed the case law and cited with approval and applied the judgment of Baker J. in *P. McD.* She referred to the judgment of Humphreys J. in the *A.B.* case discussed above. She identified a number of significant factual differences between that case and the present case (at para. 34 of her judgment). She felt that based on those factual differences, the *A.B.* case could be distinguished from the *P. McD.* case and the case before her. She also felt there were significant distinctions between the case before her and another case, that decided by Kearns P. in *Nash v. Chief Executive of the Irish Prison Service* [2015] IEHC 504 ("*Nash*"). Those differences were set out at para. 38 of her judgment. She felt that *Nash* could also be distinguished from *P McD.* and the case before her. She then referred to a significant issue of distinction between the case before her and the *A.B.* and *Nash* cases and that was the evidence from the Governor and the prison authorities to the effect that it was of paramount importance to the prison authorities that a prisoner's wishes be respected in relation to any decision to refuse food and medical treatment in circumstances where the prisoner had capacity. The judge held that, on the basis of that evidence, it was difficult to see any evidential basis for an assertion that a prison order would not be maintained if prisoners were permitted to end their lives. That was an important factor in the *A.B.* and *Nash* cases. T. Burns J.

held, therefore, that the *A.B.* and *Nash* cases could be distinguished from *P. McD.* and the case before her.

78. Apart from that, the judge disagreed with the analysis set out in the *A.B.* and *Nash* cases. She preferred to rely on other authorities which recognised that, while a prisoner may lose many of his or her constitutional rights as a result of conviction and imprisonment, *"as a human being* [the prisoner] *retains the constitutional right to his personal autonomy and bodily integrity"* (para. 42). The judge referred to the dicta of Fennelly J. in *Creighton* (to which Baker J. in *P. McD.* had also referred) and of MacMenamin J. and O'Donnell J. in *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81 (see paras. 44 – 46 of her judgment). She then cited with approval dicta of Hogan J in *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 344, in relation to the continuing constitutional rights of prisoners notwithstanding their imprisonment. Having done so, T. Burns J. stated:

> *"I fail to see how the public interest in ensuring compliance with a court order imposing a prison sentence is of greater importance that a prisoner's right to bodily integrity and autonomy when to effect same would involve force-feeding the Defendant."* (para. 48)

79. She concluded that, in light of the prisoner's right to bodily integrity, including integrity of mind and personality, and his right to autonomy, it was not appropriate that the prisoner's will would be *"overwhelmed so as to force-feed him"*. She continued:

> *"Although he is a prisoner on whom a substantial term of imprisonment has been imposed having been found guilty of the most vile crimes, his core and basic rights as a human being would be completely violated by such action. It would turn him into a lesser being and turn society into the captors of lesser*

> *beings. This is not what is envisaged by our noble Constitution. While the enforcement of court orders in the criminal justice system is of major significance, it does not trump the core rights of the person to autonomy and self-determination."* (para. 50)

80. I respectfully agree with those conclusions. While recognising and respecting the conclusions reached in some of the other cases such as *A.B.* and *Nash*, I would prefer to adopt the approach taken in *P. McD.* and *GDC*. In my view, they best provide for the respect which the prison authorities and the court must have for the core constitutional rights of prisoners with full capacity, including their rights to bodily integrity, personal autonomy, and self-determination.

81. It seems to me also that there is a fundamental point of distinction between the present case (and that of *P. McD.* and *GDC*) and *A.B.* In this case and in *P. McD.* and *GDC*, the prison authorities who brought the relevant applications to the court gave clear and unequivocal evidence as to their strong desire to respect the wishes and decisions of the prisoner in this context. Neither in this case nor in *P. McD.* or *GDC* was there any evidence that respect for the wishes and decisions of the prisoner would in any way undermine order in the particular prison. On the contrary, the clear evidence in this case and in the other two cases, as well in the further case referred to below, is and was that it would not. Humphreys J. did not have such evidence available to him in *A.B.* That may well have been because it was the hospital and not the prison authorities who commenced the proceedings and brought the application in that case. Furthermore, the actual outcome of *P. McD* and *GDC* and this case is consistent with the sort of executive discretion to which Humphreys J. referred in *A.B.* In this case and in *P. McD.* and *GDC*, the prison authorities have taken such an executive decision that the wishes and decisions of a prisoner with capacity to make the decisions to

refuse food and fluids and medical treatment should be respected. This was done in a general sense by adopting the protocol and by the particular decision taken by the relevant governor in each case to respect the prisoner's decision.

82. A similar approach was taken by P. Burns J. in *Governor of a Prison v. B.K.* (Unreported, High Court, 9th January 2023). That was another case which involved a prisoner with capacity who decided to refuse food, nourishment and medical treatment, apparently by way of protest arising from his concern that he would not receive a fair trial and for various other reasons. A similar application to that made by the Governor in the present case was made in that case. The court was satisfied on the evidence that the prisoner had sufficient capacity to refuse food and medical treatment and that he fully understood the ultimate consequences of his decision. The court accepted that should the prisoner continue to refuse to accept food, nourishment, medication, and medical treatment, there was a risk that he would lapse into unconsciousness and, ultimately, die. The governor of the prison did not wish to act contrary to the prisoner's expressed wishes by feeding or force-feeding the prisoner or by providing or facilitating the provision of medical treatment, should the need for such treatment arise. Evidence was given by the governor of the longstanding prison policy to respect the wishes and right to self-determination of a prisoner who refuses food and medication, provided the prisoner has capacity to make such decisions. Reference was also made in that case to the protocol (to which I referred earlier in this judgment). P. Burns J. then referred to the *P. McD.* and *GDC* cases as well as *Creighton, Simpson,* and *Connolly.* Having concluded that the prisoner had capacity, P. Burns J. continued:

> *"In light of his constitutional rights to bodily integrity, including integrity of mind and personality, and his right to autonomy, it is not appropriate that his*

will should be overwhelmed so as to force-feed him or medicate him contrary to his express wishes. Although he is a prisoner on whom a substantial term of imprisonment has been imposed, having been found guilty of serious offences, his core and basic rights as a human being would be violated by such action." (para. 29).

83. I agree with the approach taken in that case and in the *P. McD.* and *GDC* cases. That is the approach which I have taken in the present case. In my view, it best reflects the obligation on the prison authorities and on the court to respect and vindicate the various constitutional rights of the prisoner in the case of a prisoner with full capacity. As I have outlined earlier, all of the evidence in this case confirms that the prisoner has, and had, at the time this application was determined, capacity to decide whether or not to accept or refuse food and fluids and medical treatment.

84. I am satisfied that in light of the evidence which I have summarised and the findings I have made on that evidence earlier in this judgment, it is appropriate that I would make the various declarations and orders confirming the prisoner's capacity to decide to refuse food and fluids and medical intervention and the lawfulness of the Governor's decision not to feed the prisoner against his or her wishes or to provide medical intervention, for so long as the prisoner has capacity. I am also satisfied that it is appropriate, in light of that evidence in the exercise of the inherent jurisdiction of the court, for so long as the prisoner has capacity, for the Governor to give effect to the prisoner's wishes not to be fed or to receive fluids against the prisoner's wishes and not to receive medical intervention against the prisoner's wishes and not to receive medical intervention against the prisoner's wishes. Further, I am also satisfied that I should make a declaration pursuant to the inherent jurisdiction of the court that the Governor's decision not to feed the prisoner against his or her wishes, namely, not

to force-feed the prisoner or to provide any medical intervention to the prisoner, in the event that the prisoner becomes incapacitated or unconscious is also a lawful decision.

85. Having considered and addressed the issues which fall for consideration under the court's inherent jurisdiction, I now turn to those which arise under Part 8 of the Assisted Decision-Making Capacity Act 2015 (as amended).

(c) Assisted Decision-Making (Capacity) Act 2015

86. Among the reliefs sought by the Governor are various orders and declarations giving effect to and respecting the prisoner's ADH, the terms of which have been outlined earlier. Essentially, the Governor asked the court to find that the ADH was valid, that he was entitled to give effect to it and that the prisoner's wishes as set out in the ADH should be respected and remain operative in the event that the prisoner was to lose capacity or become unconscious or otherwise incapable of making a decision to accept food, fluids, and medical intervention. I was satisfied that I could and should grant those reliefs. I was of the view that the prisoner's ADH was valid and complied with the provisions of Part 8 of the 2015 Act. Since this is the first case in which the court has had to consider the provisions of Part 8 of the 2015 Act, I should say a little more about why I came to that conclusion.

87. The term *"advance healthcare directive"* is defined in s. 82 of the 2015 Act. The relevant definition is contained in s. 82(a) of the 2015 Act, where the term is defined, in relation to a person who has capacity, as meaning *"an advance expression made by the person, in accordance with section 84, of his or her will and preferences concerning treatment decisions that may arise in respect of him or her if he or she subsequently lacks capacity…"*.

88. The term *"treatment"* is defined in s. 2 of the 2015 Act, as meaning, in relation to a person, *"an intervention that is or may be done for a therapeutic, preventative, diagnostic, palliative or other purpose related to the physical or mental health of the person and includes life-sustaining treatment"*. The term is wide enough to include the provision of food and fluids and, of course, medical intervention.

89. The purpose of Part 8 of the 2015 Act is stated in s. 83(1) to be to:

"(a) enable persons to be treated according to their will and preferences, and

(b) provide healthcare professionals with information about persons in relation to their treatment choices."

90. S. 83(2) of the 2015 Act provides:

"A relevant person who has attained the age of 18 years and who has capacity is entitled to refuse treatment for any reason (including a reason based on his or her religious beliefs) notwithstanding that the refusal—

(a) appears to be an unwise decision,

(b) appears not to be based on sound medical principles, or

(c) may result in his or her death."

91. The term *"relevant person"* is defined in s. 2 as including "*a person whose capacity is in question or may shortly be in question in relation to one or more than one matter*."

92. The circumstances in which a person may make an advance healthcare directive and the formal requirements for such a directive are set out in s. 84. S. 84(1) provides that "*a person who has reached the age of 18 and who has capacity may make an advance healthcare directive*". S. 84(2) sets out the circumstances in which such a directive must be complied with. It states:

"A refusal of treatment set out in an advance healthcare directive shall be complied with if the following 3 conditions are met:

(a) at the time in question the directive-maker lacks capacity to give consent to the treatment;

(b) the treatment to be refused is clearly identified in the directive;

(c) the circumstances in which the refusal of treatment is intended to apply are clearly identified in the directive."

93. Formal requirements in relation to advance healthcare directives are contained in ss. 84(4) – (6). An advance healthcare directive must be in writing (s. 84(4)). It must contain certain details including the name, date of birth and contact details of the person making the directive, the signature of the person and the date on which the person signed the directive (unless the person is unable to sign the directive or directs that it be signed by someone on his or her behalf) and the signatures of two witnesses (s. 84(5)). The requirements in relation to signing and the requirement for witnesses are set out in s. 84(6).

94. There is no doubt on the evidence that the AHD made by the prisoner on 13th May 2023 complies with the formal requirements for an advance healthcare directive contained in Part 8 of the 2015 Act. The document is in writing. It contains the name, date of birth and contact details of the prisoner. It is signed by the prisoner and by the prisoner and by two witnesses. It set out clearly the prisoner's will and preferences in terms of treatment. The evidence also clearly established that the prisoner was more than 18 years and had capacity at the time the AHD was made on 13th May 2023.

95. S. 85 of the 2015 Act contains the provisions in relation to the validity and the applicability of an advance healthcare directive. S. 85(1) deals with validity, not by

stating when such a directive is valid but rather by setting out the circumstances in which a directive is not valid. It says that a directive is not valid if the directive maker:

"(a) did not make the directive voluntarily, or

(b) while he or she had capacity to do so, has done anything clearly inconsistent with the relevant decisions outlined in the directive."

96. The evidence established that the prisoner did make the AHD on 13th May 2023, voluntarily. Further, the prisoner did not do anything which was *"clearly inconsistent"* with any of the relevant decisions outlined in the directive at a time when he or she had capacity to do so. I accept the submission made on behalf of the Governor that the prisoner's consumption of water and a soft drink on 16th May, and his or her consumption of water on 17th May 2023, were not *"clearly inconsistent"* with the decisions or wishes of the prisoner set out in the AHD. Those wishes were that the prisoner would not receive *"any medical intervention"* such as *"CPR, drip (IV fluids) medication"* and that if the prisoner was actively dying, the prisoner's preference was to *"die in a clinical setting"* such as a hospital or hospice. The consumption of a small amount of water and soft drink on 16th May 2023 and a small amount of water on the following day, is not *"clearly inconsistent"* with those wishes. Therefore, neither of the disapplying factors in s. 85(1) applies.

97. Since the formal requirements for an advance healthcare directive contained in Part 8 of the 2015 Act have been complied with and since neither of the factors which might deprive the directive of validity applies, I have concluded that the AHD made by the prisoner on 13th May 2023 is valid.

98. S. 85(2) outlines the circumstances in which a directive would not be *"applicable"*. That subsection provides that an advance healthcare directive is "*not applicable"* if:

"(a) at the time in question the directive-maker still has capacity to give or refuse consent to the treatment in question,

(b) the treatment in question is not materially the same as the specific treatment set out in the directive that is requested or refused, or

(c) at the time in question the circumstances set out in the directive as to when the specific treatment is to be requested or refused, as the case may be, are absent or not materially the same."

99. Since the prisoner had and continues to have capacity to give or refuse consent to the treatment outlined in the AHD, up to and including the date I gave my decision in this case, the AHD was *"not applicable"* having regard to the terms of s. 85(2) at law. The applicability of the AHD would only arise if the prisoner were to lose capacity to give or refuse consent to the treatment outlined in the AHD. Since that has not occurred in this case, the AHD is "*not applicable"*. It might, however, become applicable were the prisoner to lose capacity and provided that the other disapplying factors contained in subparas. (b) and (c) do not apply.

100. For these reasons, therefore, I was satisfied that the AHD made by the prisoner on 13th May 2023, was valid under s. 85(1) but had not become *"applicable"* under s. 85(2) since the prisoner still had capacity to give or refuse consent to the treatment outlined in the directive.

101. The next provision which requires consideration is s. 85(3) of the 2015 Act. It provides that an advance healthcare directive *"is not applicable to life sustaining treatment unless this is substantiated by statement in the directive by the directive-maker to the effect that the directive is to apply to that treatment even if his or her life is at risk"*. The AHD signed by the prisoner on 13th May 2023, contains an express statement that it is to apply *"to life-sustaining treatment even if* [the prisoner's] *life is*

at risk". The AHD is, therefore, applicable to life sustaining treatment in the case of the prisoner.

102. An interesting debate took place at the hearing in relation to the provisions of s. 85(4). This subsection deals with the provision of *"basic care"* to the decision maker. S. 85(4) provides:

> *"(a) An advance healthcare directive is not applicable to the administration of basic care to the directive-maker.*
>
> *(b) In paragraph (a) 'basic care' includes (but is not limited to) warmth, shelter, oral nutrition, oral hydration and hygiene measures but does not include artificial nutrition or artificial hydration."*

103. It was confirmed on behalf of the Governor that the prison authorities would continue to provide warmth, shelter, and hygiene measures to the prisoner while the prisoner continues to have capacity and in the event that the prisoner were to lose capacity. An interesting issue did, however, arise as to whether in light of the clearly expressed decision and wish of the prisoner not to accept food and fluids, there would be any obligation on the prison authorities to provide *"oral nutrition"* or *"oral hydration"*, against the wishes of the prisoner. It was submitted on behalf of the Governor that in the circumstances no such obligation arises. I agree. The prisoner made it very clear that he or she did not wish to take food or fluids. The provision of food or fluids against the prisoner's clearly expressed decision and wishes would be fundamentally inconsistent with the entire objective of Part 8 of the 2015 Act as set out in ss. 83(1) and (2). However, the issue does not really arise in this case as, while the prisoner stated in the AHD that the directive was being made in relation to the prisoner's *"current food and fluid refusal"* in the prison, the directive itself did not expressly contain a directive as to the provision of food and fluid. The AHD contained the

prisoner's wishes with respect to medical intervention and a desire to die in a clinical setting. On the face of it, therefore, the AHD would not apply to the provision of oral nutrition or oral hydration. However, the provision of such, contrary to the express wishes of the prisoner would, in my view, breach the prisoner's constitutional rights for the reasons outlined earlier in the section of this judgment concerning the court's inherent jurisdiction to make orders supporting the lawfulness of the prison authorities' decision to give effect to the prisoner's clearly stated wishes not to accept food and fluids.

104. While it is unnecessary to express a concluded view on the issue here, I would tend to the view that force-feeding or forcibly providing hydration to a person would probably amount to *"artificial nutrition"* or *"artificial hydration"* as those terms are used in s. 85(4)(b). A definitive decision on that point should await a case on which the issue directly arises.

105. In short, in my view there is nothing in s. 85(4) which would impose any obligation on the prison authorities in this case to force-feed or forcefully provide hydration to the prisoner.

106. There are one or two further provisions of Part 8 to which I should now refer before concluding, as they were raised in the submissions. S. 86 is an important provision as it sets out the effect of an advance healthcare directive. S. 86(1) states:

> *"A specific refusal of treatment set out in an advance healthcare directive is as effective as if made contemporaneously by the directive-maker when he or she had capacity to make that decision."*

This means that if the AHD were to become applicable in the event that the prisoner were to lose capacity, the prisoner's expressly stated wishes in the AHD would have

to be given effect to as if the prisoner was at the point in time at which the treatment was being considered had capacity to refuse the relevant treatment.

107. S. 86(2) was also mentioned in submissions although it does not directly arise on the facts of this case. S. 86(2) provides that nothing in Part 8 shall be construed as imposing any civil or criminal liability on a healthcare professional who complies with a refusal of treatment set out in an advance healthcare directive and who, at the time in question, had reasonable grounds to believe and did believe that the directive was valid and applicable (s. 86(2)(a)). It also provides that nothing in Part 8 should be construed as imposing any civil or criminal liability on such a professional who has not complied with a refusal of treatment set out in such a directive and, who at the time in question had reasonable grounds to believe and did believe, that the directive was not valid or applicable or both (s. 86(2)(b)). In the present case, on the evidence, it is clear that the healthcare professionals involved in the treatment and care of the prisoner are seeking to comply with the refusal of treatment set out in the AHD and had and have reasonable grounds to believe, and did believe, that the AHD was valid and, were the prisoner to lose capacity, would be applicable. There is, therefore, no question of any civil or criminal liability being imposed on those healthcare professionals by reason of any provision contained in Part 8 of the 2015 Act.

108. The declarations and orders sought by the Governor in respect of the prisoner's AHD are provided for in s. 89 of the 2015 Act. S. 89(2) is the relevant provision. It states:

> *"On an application (being an application that involves considerations relating to life-sustaining treatment) made to it by any interested party, the High Court may make a declaration as to whether—*
>
> *(a) an advance healthcare directive is valid,*
>
> *(b) an advance healthcare directive is applicable, or*

(c) ..."

109. For all of the reasons which I have set out, I am satisfied that the AHD made by the prisoner on 13th May, 2023 is valid. It had not yet become applicable as of the date of my decision, since, as of that date, the prisoner continued to have capacity to consent or to refuse to the treatment referred to in the directive. I was also satisfied that it was appropriate to make declarations under the court's inherent jurisdiction that the Governor was entitled to give effect to the AHD in relation to the matters set out in the directive, to give effect to the prisoner's decision and wishes set out in the directive in the event that the prisoner were to lose capacity or become unconscious or otherwise incapable of making a decision to accept food or fluids or medical intervention, and that the AHD should remain operative in such circumstances.

6. Conclusions

110. In this written judgment, I have set out in detail the evidence in the case and the reasons for the decision which I gave on 18th May, 2023, to make orders and to grant declarations sought by the Governor of the prison supporting the lawfulness of the prison authorities' desire to give effect to the wishes and decision of the prisoner not to accept food or fluids or medical intervention and to give effect to the advance healthcare directive made by the prisoner on 13th May, 2023.

111. I was satisfied, for the reasons set out briefly in my decision at the time and expanded upon in this judgment that the prisoner had and continued to have capacity to make the relevant decisions to refuse food and fluid and medical intervention and that the prison authorities' decision not to force-feed the prisoner or to forcefully provide medical intervention to the prisoner was lawful. I was also satisfied that the advance healthcare directive made by the prisoner on 13th May 2023, was valid and that the

Governor was entitled to give effect to that directive in relation to the matters set out in it and that the directive should remain operative in the event that the prisoner was to lose capacity or become unconscious or incapable of making a decision to accept food or fluids or medical intervention.

112. In those circumstances, for the reasons set out in my decision at the time and expanded upon in this judgment, I was satisfied that the Governor's decision not to force-feed the prisoner or to provide medical intervention against the prisoner's wishes in the event that the prisoner was to lose capacity or to become unconscious was lawful.

113. For these reasons, I was satisfied to make the various declarations and reliefs referred to earlier on 18th May 2023.