UNAPPROVED

THE COURT OF APPEAL

Court of Appeal Record Numbers: 2024/80
2024/105
2024/123
Neutral Citation: [2024] IECA 246

Noonan J.
Faherty J.
Burns J.

BETWEEN/

THE CHILD AND FAMILY AGENCY

FIRST RESPONDENT

- AND -

M.H.

SECOND RESPONDENT

- AND -

E. (A CHILD)

APPELLANT

- AND -

C.S. (GUARDIAN AD LITEM)

THIRD RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 18th day of October 2024

1. The appellant in these three appeals is a 16-year-old child in the care of the Child and Family Agency (*"CFA"*). The appeals concern the granting by the High Court of two

special care orders on 22 February 2024 and 16 May 2024, respectively, and that Court's refusal on 18 April 2024 to discharge the 22 February 2024 special care order. The appeals were heard by this Court on 10 July 2024 and dismissed by way of *ex tempore* ruling on 12 July 2024. On that date, the Court advised that the reasons for the dismissal would be given at a later stage. This judgment now sets out the background to the appeals and the reasons for their dismissal.

Background

2. The appellant is the subject of a special care order directing the CFA to detain him in a special care unit pursuant to Part IV A of the Childcare Act, 1991 (as Amended) (*"the 1991 Act"*) since 22 February 2024. At the time of the hearing of these appeals the appellant was not yet placed in special care by the CFA and was in the jurisdiction of England and Wales, having absconded from care in the State on or about 24 December 2023. At the time of his absconding, the appellant was on bail in respect of criminal charges, the High Court having granted him bail with conditions on 8 November 2023. Prior to being bailed, the appellant was on remand in Oberstown.

3. The CFA is the first respondent in the within appeal. The appellant's mother (*"the Mother"*) is the second respondent. The third respondent (*"the guardian ad litem"*) has acted as the appellant's guardian ad litem in the District Court since 2020 and was appointed to this role pursuant to s. 26 of the 1991 Act in both the District Court care proceedings and the High Court special care proceedings.

4. The appellant has been in the full-time care of the CFA since 2013. He has been diagnosed with Oppositional Defiant Disorder, Reactive Attachment Disorder and ADHD (hyperactive type). He was initially placed in foster care but after placement breakdowns, he was placed in residential care in June 2021. After various residential care placements

broke down, he was accommodated in Special Emergency Arrangements (*"SEA"*) between June and December 2023. The appellant has alleged that during this time in care, he was subject to a sexual assault by an unknown male.

5. On 24 December 2023, the appellant absconded from his SEA. He was not located until 19 January 2024 when he was found living in a house with an unknown woman and her two children in Lincolnshire in England. The appellant's social work team believe that he was assisted in absconding from the jurisdiction by a member of an online "anti-Tusla" group.

6. The appellant was removed from the house in Lincolnshire and taken into the care of Lincolnshire County Council's social work staff. A Police Protection Order was then invoked. This expired on 22 January 2024. On the same date, Lincolnshire County Council sought and were granted an Emergency Protection Order (*"EPO"*) by Mr. Justice Hayden in the High Court of England and Wales. The order on its face was made pursuant to Article 11 of the Hague Convention 1996 as a protective measure pending the steps to be taken by the CFA to secure the return of the appellant to Ireland. The appellant was not present, nor legally represented at this hearing, but provision was made for him to participate on the following day by video link. The appellant was initially placed in accommodation in Telford. (At the time of the within appeal hearing he was in accommodation in Gainsborough).

7. When the matter returned before Mr. Justice Hayden on 23 January 2024, the appellant engaged informally with the court by video link and expressed his strong desire to remain in the UK, indicating his strong belief that his safety could not be assured on a return to Ireland. Provision was duly made by the court for the appellant to secure legal representation and for the matter to return to the court on 29 January 2024. Also on the 23

January 2024, the CFA applied to the High Court of England and Wales (Family Division) for the recognition and enforcement of the care order made at Cork District Court on 9 June 2023 in respect of the appellant, and also applied under the court's inherent jurisdiction to seek measures pursuant to Article 11 of the 1996 Hague Convention for the return of the appellant to Ireland.

8. On 29 January 2024 the Royal Courts of Justice confirmed that the Irish care order had been recognised and made enforceable by a District Judge (Judge Jenkins) sitting in the Principal Registry.

9. At a further hearing before Mr. Justice Hayden in the High Court of England and Wales on 29 January 2024, Lincolnshire County Council sought and were granted an extension of the EPO until 6 February 2024. A CAFFCASS (Children and Family Court Advisory and Support Service) guardian (Ms. Sarah Williamson) was appointed as the appellant's guardian within the EPO proceedings.

10. At a hearing before Mr. Justice Hayden on 6 February 2024, Lincolnshire County Council agreed to accommodate the appellant pursuant to s.20 of the Children's Act 2024, following the expiry of the EPO. The court declared that the CFA, as the holder of an Irish care order which had been recognised and made enforceable, was able to provide consent to the appellant's accommodation by Lincolnshire County Council. The CFA funded the appellant's placement.

11. At the hearing on 6 February 2024, the appellant sought separate legal representation on the basis that his guardian (Ms. Williamson) supported the CFA's application to return him to Ireland. The court ordered that the appellant be separately represented for the purpose of the CFA's return application, and appointed Ms. Williamson as guardian for the appellant in that context.

12. The CFA also indicated to the UK High Court of England and Wales on 6 February 2024 that it intended to apply to the Irish High Court for a special care order pursuant to s.23H of the 1991 Act and for an order to search for and deliver the appellant to Ireland. It indicated that if these orders were granted it would seek to register and enforce same in England and Wales pursuant to Chapter IV of the 1996 Hague Convention. On foot of this, Mr. Justice Hayden directed that the proceedings, including the CFA's application for relief under Article 11, be adjourned pending the outcome of the Irish special care proceedings.

13. On 15 February 2024, the CFA sought *an ex parte* special care order in respect of the appellant before the High Court (Jordan J.). The appellant was joined as a party to those proceedings pursuant to s. 25 of the 1991 Act and solicitor and counsel (including senior counsel) were duly appointed to act directly for the appellant.

14. The CFA's application for a special care order was heard on an *inter partes* basis before the High Court (Jordan J.) on 22 February 2024 when the CFA sought a special care order pursuant to s. 23H(1) of the 1991 Act. The Originating Notice of Motion also sought an order pursuant to s. 23(H)2 and/or s. 23H(3) that custody of the appellant be delivered to the CFA and, if necessary, pursuant to s. 23H(3)(c), a warrant for An Garda Síochána (*"AGS"*) to search for and deliver the appellant into the custody of the CFA. The application was moved on the clear understanding that there was no special care bed available for the appellant at the time of the application.

15. The appellant opposed the application on the express grounds that having allegedly been sexually assaulted while in an SEA, he would not feel safe in any CFA placement, and also on the basis that he was well placed in England and Wales and the CFA had not put sufficient specifics before the High Court in respect of the sort of placement in which

he would be accommodated if returned to Ireland. Essentially, the case put forward on the appellant's behalf was that in the absence of any special care bed and/or any appropriate placement in Ireland, it would not be in his best interests to be returned to the State.

16. Albeit supportive of the special care application (and indeed having called on the CFA to make it) and while agreeing that a special care order should be made, the guardian ad litem opposed the CFA'a application for an order or warrant either pursuant to s.23H(3)(a) or (c) of the 1991 Act on the basis that the appellant should not be returned if there was no special care place available for him upon his return. In light of other submissions made by the guardian ad litem, the CFA accepted that the relief it was seeking pursuant to s.23H(3)(c) was not appropriate, having regard to the wording of that provision, in circumstances where the CFA was not in a position to identify a special care unit for the appellant. It submitted, however, that the Court could make an order pursuant to s.23(H)(3)(a) providing for the delivery of the appellant to the custody of the CFA.

17. Jordan J. (hereinafter "the Judge") was satisfied that the statutory proofs set out in s. 23H(1)(a) – (h) had been met. As he stated, the appellant was someone who required special care, about which there was not *"significant dispute*". The appellant presented with *"an exceptionally challenging profile of need"*. The Judge went on to list the various challenges and risks which, he found, merited the special care order. As the Judge noted, however, the matter did not end there. The appellant was in the UK where he wished to remain. He noted that the appellant's view was something that he had to have regard to and that the appellant was of an age where he was entitled to *"some autonomy in terms of his situation in life".* The Judge, however, could not allow the appellant's views to be determinative. It seemed to the Judge that the appellant "*is not a good judge of what is best for him".*

18. In circumstances where no special care bed was available for the appellant in the context of the special care order being applied for, the Judge opined there was *"an extraordinary disconnect in the position of [the CFA]"* caused by the *"current crisis in …providing places in special care units".* As the Judge put it, *"this is a terrible indictment of the system".* However, this was not a matter for the High Court, the Judge stating: *"If I'm satisfied that the requirements are met as set out in [s.23H(1)(a)-(h)]…then it seems to me that I ought to make a special care order."* He opined that the *"disconnect"* that presented in the CFA's position was a matter for the CFA albeit that the *"disconnect"* was an issue *"of huge concern"* which had caused him to consider not granting the special care order. However, not to grant the special care order would not be in the interests of the welfare of the appellant.

19. The Judge duly made a special care order pursuant to s.23H(1) of the 1991 Act, together with, *inter alia,* an order pursuant to s.23H(3)(a) that Lincolnshire County Council deliver the appellant to the CFA, and directed pursuant to s. 23H(3), that AGS search for and deliver the appellant to the custody of the CFA. It is accepted from the transcript of the oral submissions at the High Court hearing on 22 February 2024 that the latter direction was also pursuant to s. 23H(3)(a).

20. On 5 March 2024, the appellant sought a stay on the special care order pending the resolution of his appeal of the 22 February 2024 order, which was refused by the Judge (and subsequently by this Court). One of the issues which arose in respect of the stay application was the appellant's reliance on information contained in an email from a Sergeant Shane Thornton of 15 February 2022 (which had not been made available to the High Court at the time of the making of the special care order on 22 February 2024). Sergeant Thornton had emailed Ms. Caroline Walsh, CFA social work team leader, outlining that formal directions were awaited from the Director of Public Prosecutions and

if those were received, a Trade and Cooperation Agreement (*"TCA"*) warrant (the successor to the European Arrest Warrant post-Brexit) could be applied for in respect of the appellant. Sergeant Thornton outlined that there was a *"strong case"* for such a warrant. This email was only available to the parties after being exhibited in the affidavit of Mark Yalloway filed on behalf of the CFA on 11 March 2024 in opposition to the appellant's stay application.

21. In light of the contents of this email, the appellant brought an application to discharge his special care order pursuant to s. 23NE(3) of the 1991 Act.

22. The discharge application was heard by the High Court on 18 April 2024. The CFA opposed the discharge application on the basis that the appellant did not have standing to make such application and that s. 23NE (3) allowed only for the discharge of an order of the High Court's own motion or on the application of the CFA or a parent or guardian. Albeit also opposing the discharge application, the guardian ad litem's position was that a constitutionally sound interpretation of s. 23NE required that the High Court would hear an application for discharge from a child who was joined as a party to the proceedings and deal with it as though it was of the Court's own motion. On the other hand, the Mother's written submissions argued that the appellant did not have standing to bring an application to discharge.

23. The Judge duly refused the discharge application on the basis *inter alia* that the appellant lacked standing. I will return to what the Judge said later in the judgment.

24. To return briefly to the UK proceedings: following the making of the 22 February 2024 special care order in this jurisdiction and its subsequent recognition by the High Court of England and Wales on 6 March 2024 and the permission given for its enforcement on 26 March 2024, the CFA's UK proceedings came back before Mr. Justice Hayden on 29 April 2024. On that occasion, the appellant expressed his intention to appeal

the recognition and enforcement orders made by the High Court of England and Wales. On that basis, Mr. Justice Hayden stayed the enforcement order dated 26 March 2024 pending the conclusion of the appellant's appeal.

25. At the hearing of 29 April 2024 before Mr. Justice Hayden, it was conceded on the part of the appellant that his appeal against the 26 March 2024 enforcement order would not have to be abandoned and a fresh process commenced if the appeal was not completed by the time the special care order on 22 February 2024 expired on 21 May 2024, so long as the 22 February order was replaced by a fresh order in the same or similar terms.

26. It should be noted, at this juncture, that on 10 July 2024, the date of the hearing of the within three appeals, the Court was informed that the appellant was unsuccessful in his UK appeal and that Friday 12 July 2024 was the date scheduled by the UK Court of Protection to give effect to the High Court orders of 22 February 2024, 18 April 2024 and 16 May 2024, subject only to the outcome of the appeal of those orders to this Court.

27. Turning again to the special care proceedings in this jurisdiction: on 16 May 2024, shortly before the expiry of the 22 February 2024 order, the CFA applied to the High Court for a fresh special care order pursuant to s. 23H of the 1991 Act. It did not seek to extend the order made on 22 February 2024 as the statutory proofs for an extension (see in particular s. 23J(1)(a) and (c) of the 1991 Act) pre-suppose that a child is actually in a special care unit at the time of the application for an extension, which was not the case here. At this hearing, the appellant was granted all the rights of a party pursuant to s. 25 of the 1991 Act but was not joined as a party.

28. The CFA's application for a special care order was opposed by the appellant on similar grounds to those he had already raised earlier, specifically:

(i) Section 23H(1)(d) of the 1991 Act was not made out as there was no evidence that there was any prospect of the appellant being provided with special care during the currency of the order.

(ii) Section 23H(1)(h) was not made out as it was not in the appellant's best interests to be returned to the State without the security of a special care bed having been identified.

(iii) Section 23H was being used as an alternative to the TCA warrant system and as such, the appellant was being deprived of the protections of the criminal justice system in the manner of his return, most notably the entitlement to raise arguments under Article 601 of the Withdrawal Agreement and/or raise an argument that extradition would be disproportionate under Article 597.

(iv) Section 23H(3)(a)-(c) only allows the making of custodial warrants for the purposes of executing a special care order. In circumstances where any special care order made in respect of the appellant could not be executed without a special care bed, the High Court lacked the jurisdiction to make any warrant under s. 23H(3).

29. The appellant also opposed the appointment on 16 May 2024 of the third respondent as guardian ad litem pursuant to s. 26 of the 1991 Act, on the basis that ss. 25 and 26 of the 1991 Act were mutually exclusive and, hence, the High Court did not have jurisdiction to appoint a guardian ad litem pursuant to s. 26 of the 1991 Act in circumstances where the appellant had already been given the rights of a party pursuant to s.25 of the Act.

30. Notwithstanding the arguments raised by the appellant's counsel on this issue, the third respondent was appointed as guardian ad litem. I will return to the Judge's reasoning in due course.

31. Much as he had in respect of the earlier special care order, the Judge noted the appellant's vulnerability and that he had been exploited. Albeit the appellant was again resisting his return from the UK, in the view of the Judge it was *"clear from the evidence that the threats to his welfare are as great in the United Kingdom as they are in Ireland or at the very least they are currently very significant and worrying".* There were threats to him *"if he is not in the care of [the CFA] and if there is not a special care order made in respect of him".*

32. The Judge noted the appellant's multiple placement breakdowns, the pattern of residing in emergency accommodation or SPAs, episodes of missing in care and the appellant's engagement with a group opposed to the CFA. He noted the appellant's allegation that he was the subject of a sexual assault whilst in the care of the CFA. As appeared to the Judge, the appellant was somebody *"who is at the risk of exploitation and appears to have been exploited".* Moreover, his engagement in criminal behaviour was *"not insignificant criminalised behaviour"*. On the other hand, the appellant when he spoke with the Judge *"came across as an intelligent, insightful and articulate young man"*. That, however, belied the fact that the appellant was *"at a very high risk at the moment in the United Kingdom and there are significant threats to his welfare".*

33. The Judge outlined in further detail the concerns set out in the affidavit evidence adduced by the CFA. On the basis of the evidence before him and having had regard to the requirements of s.23H(1) of the 1991 Act and the submissions of the appellant, the Mother and the guardian ad litem, the Judge was satisfied to grant the special care order. However, it seemed to the Judge that once again, there was *"a notable inconsistency"* in the position

of the CFA in applying for a special care order *"and in the same breath advising the court that they're not in a position to provide a bed and special care to [the appellant]".* He went on to state:

> *"I have concerns in relation to the situation by reason of no bed being available and no indication of when one might become available. I also have concerns by reason of the fact that the position of [the CFA] is that [the appellant] will be placed in a residential placement, not a special care unit, when and if he is returned from the United Kingdom to the custody of [the CFA].*
>
> *However, it seems to me that I'm obliged to approach this situation on the basis that the special care order which I am granting will have effect. [I]t should have effect and it should have effect from the time it is made today and the result of it should be that [the appellant] should be returned to the care of [the CFA] once the legal proceedings in the United Kingdom have taken their course and should be admitted on foot of the special care order to a special care unit for treatment and interventions and care which are necessary to protect his life, health, safety, development and welfare."*

34. Having, however, satisfied himself that the requirements of s.23H(1) were met, and being alert to the appellant's opposition to the application and what he had to say, and the submissions made on his behalf (which the Judge was not discounting albeit he considered that the appellant was a poor judge of what was in his best interests), ultimately, the Judge considered it *"appropriate and indeed necessary"* to grant the special care order.

35. On 16 May 2024, therefore, the High Court made a special care order pursuant to s.23H(1) of the 1991 Act together with an order pursuant to s.23H(3)(a) that Lincolnshire County Council deliver the appellant to the custody of the CFA. The order further directed

that pursuant to s.23H(2), AGS search for and deliver the appellant to the custody of the CFA.

36. It is perhaps worth repeating, at this juncture, that all parties save the appellant himself were supportive of the making of the special care orders in issue here.

37. By operation of s. 23NJ(2) of the 1991 Act, the 22 February 2024 special care order ceased to have effect immediately upon the making of the 16 May 2024 special care order. It is acknowledged by all concerned that this rendered both the reasons for the making of the 22 February 2024 order and the issue of standing in respect of the discharge application made on 18 April 2024 moot. However, when the matter came before this Court for directions on 26 April 2024, the Court (Costello J., as she then was) directed that no mootness issue would be raised at the substantive appeal hearing, it being accepted that the facts of the appellant's case come within the test outlined by Denham C.J. at para. 82(vii) of *Lofinmakin v Minister for Justice* [2013] 4 IR 274.

38. Accordingly, as I have already said, the appellant appeals both special care orders and the decision that he lacked standing to bring an application for a discharge of the 22 February 2024 special care order.

39. The three appeals were fully opposed by the CFA. The CFA's position on all appeals had the support of the Mother and the guardian ad litem.

The issues in the appeal

40. The issues in the appeal may be summarised as follows:

(I) Whether the statutory proofs for a special care order are in fact made out in a case where a child is to be returned under a special care order but there is no special care bed for them.

(II) Whether it was an unlawful use of the special care system to return a child to the State in circumstances where, as the appellant asserted, the child can be reasonably expected to then go directly into the criminal justice system.

(III) Whether an interpretation of s. 23NE of the 1991 Act which excludes a child joined to their own special care proceedings from applying to discharge the special care order is consistent with the Constitution and/or the European Convention on Human Rights (*"ECHR*").

(IV) Whether the High Court acted within jurisdiction in granting an order pursuant to s. 23H(3)(a) that Lincolnshire County Council, their servants and/or agents, be requested to deliver the appellant to the custody of the CFA in circumstances where it is a statutory prerequisite to the making of an order pursuant to s. 23H(3) that the order is made for the purpose of executing a special care order and no bed in special care is available for the appellant.

(V) Whether the High Court acted within jurisdiction in appointing a guardian ad litem pursuant to s. 26 of the 1991 Act whilst also granting the appellant all the rights of a party pursuant to s. 25 of the 1991 Act.

Issue I - Physical return where no special care placement is available

41. The primary issue in these appeals is whether the Judge erred in law in holding that the statutory criteria for the making of a special care order, in particular the criteria at sections s. 23H(1)(d) and (h) of the 1991 Act, were met in circumstances where no special care bed was available for the appellant.

42. Before considering the parties' respective arguments, it is perhaps of assistance to advert to the statutory criteria for making a special care order. Section 23F(7) of the 1991 Act requires the CFA to make a determination as to whether a child requires special care,

where it is satisfied that there is reasonable cause to believe that the child requires special care. This is a mandatory obligation which cannot be deferred by the CFA due to a lack of available beds in special care (see *AF v CFA*; C*K v CFA* (Unreported, Faherty J., 28 January 2019) and *Re M McD* [2024] IESC 6).

43. In practice, the CFA operates a procedure whereby the National Special Care Referrals Committee, a body within the CFA, makes a decision on whether a child requires special care prior to a formal determination being made. In the instant case, prior to the making of a determination, the guardian ad litem urged the CFA to make such a determination. The CFA duly made a determination for the purposes of s. 23F(7), which the appellant did not challenge.

44. Section 23F(8) then requires the CFA to apply to the High Court for a special care order where it determines that there is reasonable cause to believe that for the purposes of protecting the life, health, safety, development or welfare of the child, the child requires special care. As set out in *AF v CFA (No. 2)* [2019] IEHC 345 and *Re M McD* [2024] IESC 6, this is a mandatory obligation which cannot be deferred due to a lack of availability in special care. The appellant accepts that the CFA was obliged to apply for a special care order in this case.

45. Once the matter comes before the Court, the test for the granting of a special care order is set out in s. 23H of the 1991 Act as follows:

> *"23H.—(1) Where the High Court is satisfied that—*
>
> *(a) the child has attained the age of 11 years,*
>
> *(b) the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare,*
>
> *(c) having regard to that behaviour and risk of harm and the care requirements of the child—*

(i) the provision, or the continuation of the provision, by the Child and Family Agency to that child of care, other than special care, and

(ii) treatment and mental health services under, and within the meaning of, the Mental Health Act 2001, will not adequately address that behaviour and risk of harm and those care requirements,

(d) having regard to paragraph (c), the child requires special care to adequately address—

(i) that behaviour and risk of harm, and

(ii) those care requirements, which the Child and Family Agency cannot provide to the child unless a special care order is made in respect of that child,

(e) the Child and Family Agency has carried out the consultation referred to in section 23F(3) or, where the Child and Family Agency has not carried out that consultation, the High Court is satisfied that it is in the best interests of the child not to have carried out that consultation having regard to the grounds provided in accordance with section 23F(9),

(f) in respect of the family welfare conference referred to in section 23F(5)—

(i) the Child and Family Agency has convened the family welfare conference and the Child and Family Agency has had regard to the recommendations notified in accordance with section 12 of the Act of 2001, or

(ii) it is in the best interests of the child that the family welfare conference was not convened having regard to the information and

grounds provided in accordance with section 23F(10), 33[1991.]

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(g) for the purposes of protecting the life, health, safety, development or welfare of the child, the child requires special care, and

(h) having regard to paragraphs (a) to (g), the detention of the child in a special care unit, as it is required for the purpose of providing special care to him or her, is in the best interests of the child, the High Court may make a special care order in respect of that child."

46. Both on 22 February 2024 and 16 May 2024, the High Court had extensive evidence of serious risks to the appellant's life, health, safety, development or welfare in the community.

47. As already mentioned, the CFA's application to have the appellant returned from the UK on foot of the special care orders was the key issue before this Court in circumstances where the CFA itself openly acknowledged, both in the High Court and this Court, that there was presently no bed available in special care for the appellant, and where in the weeks preceding the hearing of the appeals, there were five children on the CFA's *"Bed Prioritisation List"*. The question for the Court was whether the immediate absence of a bed in a special care unit meant that the special care order should not be executed, or indeed (as the appellant contended) that the High Court should not in fact have made the findings it did and which led to the two special care orders in issue here.

48. Thus, Issue I arises because of the current situation in which the CFA finds itself, namely that there are not enough special care beds because of difficulties in recruiting staff. More staff are leaving than are being recruited. It is acknowledged by counsel for the CFA that bed capacity in special care is half of what it should be. This issue is one that is exercising the High Court in another case. The situation in which the CFA finds itself

has now resulted in effectively a subsection of the High Court special care List, namely the *"No Beds List"*.

49. Albeit accepting that once the CFA had made a determination in respect of the appellant it was under a statutory obligation to seek a special care order, the appellant's primary argument on appeal was that the CFA was under no equivalent legal obligation with respect to seeking the physical return of the appellant from England and Wales in circumstances where, it was said, the appellant was currently in safe accommodation in the UK and where the CFA was not in a position to fulfil the terms of the special care order. It was submitted that the making of a special care order did not, in and of itself, establish that returning the appellant to this jurisdiction was in his best interests. Counsel argued that the particular facts of the appellant's circumstances (*i.e.*, where he was out of the State and where there was no special care bed available) went so far as to undermine the statutory proofs required for the making of a special care order. Counsel laid emphasis on s. 23H(1)(d) of the 1991 Act. She submitted that a special care order is made so that the child can be brought into special care: in other words, special care is warranted because the child cannot otherwise be cared for safely. Thus, it was said, the CFA should not seek to use the mechanism of a special care order for the purposes of accommodating the child in question in a placement which is not a secure unit.

50. In this regard counsel referred to the observation of Hogan J. in *Child and Family Agency v. M McD* [2024] IESC 6, at para. 108:

> *"After all, s. 23H(1)(c) provides that a Special Care Order should only be made where the behaviour and risk of harm posed by the child's conduct was such that continued care by the CFA 'other than special care' will not 'adequately address that behaviour and risk of harm and those care requirements.*

The High Court could not be asked to make a Special Care Order in circumstances where the ordinary care offered by the CFA to a troubled child would be insufficient for that child's needs and yet simultaneously request the Court to release the child back into that ordinary care because no suitable bed was available in a Special Care Unit."

51. I should say that the decision in *M McD* was handed down some four days after the High Court's order of 22 February 2024. I will revert shortly to other aspects of this decision.

52. One of the arguments advanced on behalf of the appellant was that the words *"which the Child and Family Agency cannot provide to the child unless a Special Care Order is made"* as appear in s. 23H (1)(d) presuppose, on their face, that special care is in fact going to be provided. The contention put was that special care was not going to occur in the appellant's case for two reasons. First, in common with all of the children currently subject to special care orders with no bed – there was no indication of when a bed in a special care unit would become available for the appellant. Thus, even if he was returned, there was no guarantee that the appellant would be given a special care bed (albeit it was accepted that once the appellant is returned to the jurisdiction, he would be put on the CFA's Bed Prioritisation List). Secondly, the appellant was in breach of High Court bail conditions and warrants have issued for his arrest. It was submitted that upon his return he would likely be taken into custody by the Gardaí. If he was refused bail and/or received a custodial sentence, the CFA must apply to discharge the special care order (see ss. 23D(6)(b) and 23(9) of the 1991 Act).

53. Counsel contended that the cumulative effect of the facts of the appellant's case was that he was being made the subject of a special care order not just where there was no special care bed available for him but also in circumstances in which, on the balance of

probabilities, he was unlikely to be admitted to a special care unit at any point during the currency of the order. It was thus submitted that the evidence in this case did not sustain a finding that the criterion in s. 23H(1)(d) had been met.

54. The appellant also claimed that a further deficiency arose in the proofs necessary for a special care order. This relates to s. 23H(1)(j) and the *"best interests"* test. This test whilst based in statute is the subject of a constitutional mandate in Article 42A.4.1 of the Constitution which requires best interests to be the paramount consideration. What had been proposed for the appellant, it was said, was that he be the subject of a special care order and that the special care order be used as a basis for his forcible return to the jurisdiction in circumstances where no special care bed is available. With regard to the CFA's plan to accommodate the appellant in a further SEA arrangement upon his return, counsel submitted that, manifestly, the designated place which the CFA had in mind was a highly inappropriate setting for a profoundly vulnerable child with complex needs in circumstances where the intended placement was by no means secure. Given the appellant's previous history of absconding, and his relationships with individuals online who have sought to assist him in making those escapes, returning the appellant to a non-secure setting would place him at acute risk and leave him at extremely high risk of exploitation and abuse.

55. The case made on behalf of the appellant was that in all of those circumstances, and in light of the terms of Article 42A.4.1, it was not in his best interests that he be taken from a secure setting in England and Wales, where he feels safe, and removed to an unsecure setting in this jurisdiction. It was argued that the particular facts of the case went so far as to undermine the requisite statutory proofs for a special care order.

56. Ultimately, the sum of the appellant's position was that whilst the CFA had to apply for a special care order once a determination had been made, it may not apply for the

execution of that special care order (in this case for the return of the appellant to the jurisdiction) until a bed in special care is available.

57. The CFA opposed the appellant's proposition that a distinction could be drawn between the making of a special care order and giving effect to that order. According to the CFA, the appellant's argument came down to the submission that the Judge should not allow for the execution of the special care order because of the absence of a special care bed, a proposition, for which, counsel contended, that there was no legal authority. It was submitted that, here, the imperative for the special care order to be executed was great particularly since execution of the order meant that upon his return to the jurisdiction, the appellant would be immediately put on the Bed Prioritisation List.

58. The first thing to be noted, in my view, is that the question of whether the unavailability of a bed in special care rendered it imperative that the High Court refuse to make a special care order was answered conclusively by the Supreme Court in *M McD.* At para. 105, under the heading *"Whether the High Court should have declined to make the Special Care Order under s. 23H(1) by reason of the lack of resources"* Hogan J. stated as follows:

> *"As I have just indicated, the appeal against the order of Jordan J. raises the troublesome issue of whether the High Court can decline to make an order which it would otherwise have made pursuant to a statutory requirement by reason of the impossibility of complying with that order".*

59. At para. 113, Hogan J. went on to answer the question posed:

> *"Yet if the Courts were to allow statutory obligations to fall fallow on this ground, it would immediately raise separation of powers and rule of law issues. It would mean, in effect, that the judicial branch of government was failing to give effect to a legislative command or acquiescing in such a failure by the Executive, often in*

circumstances where the executive branch itself had either failed to allocate sufficient resources for this purpose or had not made appropriate arrangements so that the necessary staff could either be sourced or retained."

60. It follows from the above *dictum* that the risk of non-compliance does not provide a legal basis to refuse to make a special care order. Nor, to my mind, does the failure to provide a special care bed provide a legal basis to discharge a special care order.

61. The learned Hogan J. went on to conclude at paras. 126 – 127:

"I would apply these principles to any construction of s. 23H(1). All of the eight enumerated conditions contained in the sub-section relate to the child's needs and best interests. There is nothing at all in the sub-section to suggest that the performance of these statutory obligations is – or was ever intended to be – dependent upon resources. As s. 5(5) of the Disability Act, 2005 in particular shows, the Oireachtas is perfectly capable of legislating for the provision of services while indicating at the same time that the provision of such services is itself resource dependent.

127. In these circumstances, I consider that Jordan J. was correct in making the requisite orders providing in each case for the making of Special Care Orders under s. 23H(1)."

62. In my judgement, therefore, the bulk of the appellant's arguments as regards Issue I have been overtaken by the decision of the Supreme Court in *M McD*, in particular the question of whether the availability of a bed in special care affects the statutory proofs under s. 23H being met. I would go so far as to say that the decision in *M McD* fundamentally undermines the appellant's principal argument in this appeal. Nevertheless, it is necessary to consider whether the particular arguments canvassed on behalf of the appellant are such as to distinguish the present case from *M McD.*

63. I turn firstly to the submission that the factors at play in the present case call into question whether the requirements of s.23H(1)(d) were met in this case. Insofar as the appellant submits that the criteria at s. 23H(1)(d) of the 1991 Act presuppose that special care is in fact going to be provided, it is important to note that what s.23H(1)(d) actually requires is that the CFA cannot provide the care that the child requires without a special care order. The overwhelming evidence in this case was that the appellant required special care. What s. 23H(1)(d) does not require is that the CFA are in an immediate position to provide the care the child requires if a special care order is made.

64. Hence, the absence of a bed for the appellant in special care in no way affects the statutory proofs being met. The Court's jurisdiction to make a special care order is not resource dependent in that the Judge does not have to be satisfied that a placement is available in special care in order to make the order. More accurately, a judge should not exercise his or her discretion to refuse to make a special care order simply by reason of the fact that no placement is available. This has been confirmed by the Supreme Court in *M McD* (*per* Hogan J. at para. 126 and 127).

65. The High Court must operate on the assumption that the special care order will be complied with. It would be extraordinary if, as the appellant appeared to suggest, the CFA could come to the High Court and apply for a special care order but then not seek to execute it. The legal position is that once the threshold for a special care order is met (after the requisite balancing exercise), such order must be made. The making of such order involves very serious protective duties on the State (*via* the CFA). The fact that a special care bed may not be immediately available could not give rise to a situation where the CFA would abdicate its duty as set out in the 1991 Act.

66. The fact, therefore, that there was no bed available to the appellant at the time when the special care orders were made did not mean that s. 23H(1)(d) was not met. As I have

already alluded to, there was overwhelming and uncontradicted evidence before the High Court that the CFA was unable to provide the appellant with the care he required without a special care order and in light of this evidence, the Judge was entirely correct to find that this criterion was met.

67. The statutory requirement on the CFA to make the application for special care also existed regardless of the appellant's whereabouts. Specifically, the Court's jurisdiction to make a special care order was not dependent on the appellant (or any child) being present in the jurisdiction.

68. Thus, the High Court appropriately exercised its discretion in granting the order sought notwithstanding the fact that the appellant had absconded to a different jurisdiction at the time the application was made. The fact that the making of a special care order entails the return of the appellant to Ireland is a consequence of his decision to abscond to the UK and not a consequence of the special care application or order.

69. I also find no merit in the contention that the appellant *"is unlikely to be admitted to special care at any point during the period of the Order"* and, thus, the special care order would not be complied with. There was no evidence before the High Court to support the contention. Whilst it was unclear, both on 16 May 2024 and at the time of the hearing of the within appeals, when exactly the appellant might be placed in a special care unit upon his return, the CFA's position was that the availability of beds and the allocation of same to the child most at risk at the time each bed becomes available was a fluctuating scenario dependant on many, albeit undefined, factors. As the CFA itself acknowledged, and indeed as the Judge observed, this is a deeply unsatisfactory and regrettable state of affairs considering the CFA's statutory obligation to protect the appellant. Nevertheless, I am satisfied that this did not alter the statutory criteria applicable to the making of a special

care order, or the fact that on the basis of the evidence before the Judge, those criteria were met in this case.

70. Counsel for the CFA confirmed that albeit that the appellant upon his return to the jurisdiction will not be placed in a special care unit, his name would immediately be put on the Bed Prioritisation List and he would then be assessed and ranked according to need when decisions are being made in respect of that List.

71. The reality is that beds in special care units become available from time to time and those placed at the top of the priority list receive the bed. The position on the priority list can change daily, based upon improvement or deterioration in a child's presentation. As such, any definitive statement on whether the appellant will get a bed was mere speculation on behalf of the appellant.

72. For the foregoing reasons, I reject the argument that whilst the CFA was subject to a legal obligation to apply for a special care order it was under no equivalent legal obligation with respect to seeking the physical return of the appellant from England. Once a special care order is made it has immediate effect. From that point on, the CFA was required to take all necessary steps to comply with the order. Executing the High Court order is the legal obligation that is on the CFA. In this case, the first step in terms of executing the order was the return of the appellant to this jurisdiction. In seeking to do so, the CFA was not exercising a discretion but rather complying with a mandatory legal requirement. Whilst it is entirely unfortunate that the likelihood is that the special care order will not be fully executed straight away in terms of an available bed in a special care unit for the appellant upon his return to the jurisdiction, that does not prevent the CFA from carrying out all the steps that it can at any given moment in time in order to comply with the special care order. That approach entails, as an obvious first step in the execution process, the return of the appellant to this jurisdiction.

73. There is also no merit to the suggestion that the CFA was seeking to use the mechanism of special care for the purpose of accommodating the appellant in a non-secure unit. The appellant's assertion in this regard was not borne out by the evidence. The fact of the matter is that until the CFA is in a position to fully execute the special care order, the appellant will be placed in a non-secure setting. Unacceptable and all as this state of affairs is, the same will apply to any other child who is the subject of a special care order where no special care placement is immediately available. The intended placement of the appellant in a non-secure unit is wholly unrelated to the special care order itself. Rather, such placement is necessitated by the fact that the CFA may not be able to immediately accommodate the appellant a bed in a special care unit upon his return to this jurisdiction.

74. What was clear from the evidence, and reflected in the findings of the High Court, is that the appellant requires special care to adequately address his care requirements, his behaviour and the risk of harm his behaviour is causing him. What was also clear is that the CFA cannot provide such care to the appellant without a special care order. The fact that the best available alternative is the placement of the child (temporarily) in a non-secure unit pending a place in special care does not mean that a non-secure placement is suitable to meet the appellant's care requirements. It is accepted that a non-secure placement does not meet the appellant's requirements and indeed that is borne out by the evidence in the case.

75. In short, the fact that there is no bed immediately available in special care, or that the appellant will return in the first instance to non-secure accommodation, has no bearing on the fact that the statutory requirement that care by the CFA *"other than special care"* will not *"adequately address that behaviour and risk of harm and those care requirements"* is met in the circumstances of this case. There was no evidence to suggest otherwise before the High Court. Indeed, the recent breakdown in the appellant's placement in the UK is

further confirmation of this. The fact that the CFA are not immediately able to provide the appellant with the special care he requires does not change the fact that he requires it.

76. It was accepted by the CFA that the appellant may abscond again once returned to the care of the CFA. The CFA have taken measures to forestall this. The private unit into which the appellant will be placed upon his return has a staffing ratio 3:1.

77. Another argument canvassed on behalf of the appellant was that *"upon his return to the State he will likely be taken into custody by the gardaí"*. Whilst there is undoubtedly a possibility (perhaps even a probability) that upon the appellant's return to the jurisdiction AGS may take steps open to them under the criminal process and, thus, the appellant's suggested outcome might come to pass, I agree with the CFA that in its current iteration, this argument is wholly immaterial in term of its effect on the present legal state of affairs (which is that all the criteria for a special care order were met in this case). Furthermore, no evidence of what steps AGS intend to take upon the appellant's return to the jurisdiction was adduced before the High Court. No remand or sentence has been given in the appellant's case. The issue of a warrant and/or the likelihood of a custodial sentence being imposed on the appellant at some future point has no bearing on the legality of the special care order. Absent the provisions of s.23D (6) and 23E(9) of the 1991 Act having been brought into play, any intentions AGS might entertain as regards the appellant have no bearing on the High Court's jurisdiction to make a special care order or ancillary orders aiding the execution of that order.

78. The fact that the appellant may be subject to criminal sanctions upon his return to the jurisdiction results from his breaching his bail conditions: it is not the result of his having met the criteria for special care or having been the subject of an application for special care. Nor is it the result of the making of a special care order by the Judge, who was fully satisfied when making that order that the statutory criteria were met for such order.

79. In essence, the possibility that the appellant's placement in special care might be frustrated by the criminal process does not negate the fulfilment of the statutory criteria for a special care order.

80. Upon his return to the jurisdiction, the appellant may come before the criminal courts at some stage and the court overseeing the bail process may well form the view that it would be more beneficial to release him into the care of the CFA rather than remanding him in custody, particularly when a special care order is in place requiring the CFA to detain him in a special care unit. In the event, however, that the appellant is remanded in custody or otherwise is the recipient of a custodial sentence, the provisions of the 1991 Act are expressly designed to ensure that the making of a special care order does not interfere with the criminal process. As provided for by s. 23D(6) and s. 23E(9), the criminal justice process would supersede the special care order once the appellant is remanded in custody.

81. In summary therefore, whilst the outcome of the criminal process cannot be predicted, the possibility that the criminal process could thwart the CFA's attempts to provide the appellant with the care he requires is not a basis for refusing to make a special care order or indeed orders aiding its speedy execution.

82. I turn now to the appellant's "best interests" argument.

83. Although it was conceded that the Court was bound by *M McD,* counsel nevertheless argued that by virtue of the appellant's circumstances, a distinction could be drawn between the making of a special care order and executing such order by seeking the return of the child. Whilst ultimately it was not disputed that the Judge could (and was required to) make the special care order, it was submitted that the Judge erred in permitting the CFA to seek to execute that order in circumstances where it was palpably not in the appellant's best interests to be returned to the jurisdiction when in fact no special care bed was available for the appellant. Counsel highlighted the purpose of a special care order, which

is to meet specific severe circumstances such as the risk to the life and safety of a child – in those circumstances, it was said, there should be a bed available in special care for the purposes of executing a special care order. This was all the more so given the short life span of a special care order (three months) – which raises the inference that a special care order as envisaged by the 1991 Act must be implemented as soon as possible.

84. It was thus submitted that in circumstances where the appellant strenuously opposes his return to the State, where he is settled in England and where no special care bed is available in this jurisdiction, no execution of the special care order should take place, in the appellant's best interests. Whilst it was for the Court to decide the weight to be given to the appellant's views, counsel emphasised the appellant's opposition to his being returned to the State in circumstances where no beds are available in special care.

85. I note that the High Court did not make any finding that returning the appellant to non-secure accommodation was in his best interests. Rather, on the basis of the evidence before it, the High Court made lawful findings, as recorded on the face of the special care orders in issue here, that a special care order (and a return to this jurisdiction) was in the appellant's best interests.

86. As I have previously alluded to, here, the High Court was informed by the CFA that no bed was available for the appellant should a special care order be made. In making the special care order it was not the case that the Judge endorsed the interim residence placement being planned by the CFA for the appellant until a special care bed became available. Rather, the Judge made it clear that he was entitled to proceed on the basis that the Court's orders would be complied with. Whilst compliance with the special care order would require the CFA to detain the appellant in a special care unit, even if there cannot be immediate compliance this regard, in my view, the High Court was nevertheless entitled to find on the evidence that care other than special care could not meet the appellant's needs,

and to make a special care order accordingly, having regard to the appellant's best interests. The Supreme Court says as much in *M McD*.

87. For the purposes of placing the appellant in special care, it is necessary that he be returned to Ireland. Pragmatically (whether or not lawfully), the CFA made clear in the court below that the appellant would not be considered for a place in special care when one becomes available until he is in the jurisdiction. In order, therefore, to give effect to the High Court's determination as to the type of care that is in the appellant's best interests, it is necessary that he be returned to the State.

88. Insofar as it was argued that it is not in the appellant's best interests to be taken from a secure setting in England, I am not convinced that the description the appellant put on his placement is an accurate depiction of his situation in the UK. Throughout the proceedings, his placement in accommodation in England has been extremely tenuous, culminating in a breakdown of his placement in Telford in June 2024 and his having to be moved elsewhere. Furthermore, insofar as the appellant complained that upon his return he is to be accommodated in a further SEA and not in a special care unit, at its height, this argument is a basis for criticising non-compliance with a special care order rather than the making of the special care order itself.

89. At the end of the day, all of the evidence before the High Court was that it was in the appellant's best interest to be detained in a special care unit. Accordingly, the Judge did not err in making a special care order based on that evidence.

90. In summary, therefore, insofar as it was contended that the criterion in s. 23H(1)(h) was not met, I am satisfied there was overwhelming and uncontradicted evidence before the High Court to show that it was in the appellant's best interest to be detained in special care. There was also clear and irrefutable evidence before the High Court at the time both special care orders were made that it was in the appellant's best interests to be returned to

the State. This evidence is set out in the affidavits grounding the special care applications and can be summarised as follows:

(a) Ireland is the appellant's country of origin and has been his home for his entire life. The appellant has no connection to the UK and his entire family are in this jurisdiction.

(b) Remaining in the UK where the appellant will be isolated will only further increase his vulnerability to exploitation.

(c) In light of his behaviour, there is a high risk that the appellant will engage in criminal activity in the UK and there could be repercussions which could result in him being detained in the UK again.

(d) Information from UK authorities suggest that members of the "anti-Tusla" group pose a real danger to the appellant's physical, psychological, sexual health and wellbeing.

(e) The appellant is the subject of a temporary placement in the UK.

(f) There is no long-term plan in place for the appellant in the UK.

(g) Returning the appellant to this jurisdiction and providing him with a residential placement and additional supports while he awaits a placement in special care is the best opportunity that the appellant has to get the vital therapeutic help he requires to break the cycle of high risk and dangerous behaviour he is engaging in.

91. In short, the making of a special care order which had the natural consequence of returning the appellant to the jurisdiction could only have been lawfully made where the Judge was satisfied that such a return was in his best interests, as was indeed the case here. As s. 23H of the 1991 Act shows, the determination of the child's best interests is entrusted to the Court, as indeed noted by the Judge.

92. For all the reasons set out above, Issue I is not made out.

Issue II: The making of a special care order to return the appellant to the State to face criminal charges.

93. In her oral submissions, counsel for the appellant confirmed to the Court that she was not pursuing the suggestion (in her written submissions) that in seeking the return of the appellant, the CFA was somehow "in cahoots" with the criminal justice system. However, an argument that was advanced on behalf of the appellant was that the actions of the CFA in allowing the special care order to be used to return the appellant to this jurisdiction in circumstances where there was no bed available for him in special care, and where there were outstanding warrants against him for breaching bail, would ultimately result in the appellant being subjected to the criminal justice system. It was said this was in fact the *"primary and dominant"* purpose of the special care orders. As can be seen, this was also an aspect of the appellant's arguments in relation to Issue 1.

94. The appellant's submission was that a special care order should not be used to supplant the criminal process. Counsel argued that in allowing the special care orders to be usurped for the benefit of the criminal justice process undermined a vital safeguard with respect to the appellant's right to liberty in circumstances where, as *per* Whelan J. in *Child and Family Agency v. M.L.* [2019] IECA 109, *"…the rationale of any [special care order] must be educational or therapeutic and with no punitive element in order to vindicate the convention rights of the minor"*. Counsel further pointed out that the issuing of a special care order is required to be determined purely on the basis of a "*best interests"* test and that it has long been established that such a process cannot be used for purely punitive purposes, as held by the European Court of Human Rights in *D.G. v. Ireland* [2002] 35 EHRR 1153.

95. What was posited to the Court on the appellant's behalf was that if the State wished to return the appellant to the jurisdiction for the purpose of subjecting him to criminal charges, whilst the State was entitled to do so it was nevertheless inappropriate for the CFA to avail of the special care order process to achieve this purpose. This, it was argued, was in circumstances where there is a formal mechanism (the TCA process) prescribed for the return an individual to the State from the UK for the purposes of subjecting them to criminal charges outstanding against them.

96. Counsel argued that if the appellant were to be the subject of a TCA arrest warrant, he would have the benefit of vital procedural safeguards as part of that criminal justice process. It was submitted that returning the appellant to the jurisdiction on foot of a special care order deprived him of the benefits of the TCA process (including the proportionality requirement). This, counsel argued, is incompatible with the appellant's rights under Article 38.1 of the Constitution, as well as his personal rights under Article 40.3.1 and Article 42A.4.1.

97. Counsel also pointed to the fact that in making its special care order of 22 February 2024, the High Court did not have sight of the highly relevant email sent by Sergeant Thornton to the CFA on 15 February 2024, and that no satisfactory reason has been provided as to why that email was not before the High Court. Had it had sight of that email, the High Court could not have considered that the criteria in s. 23H(1)(a) - (h) were satisfied. Rather, it was said, the Judge would have been obliged to refuse the application for a special care order since a clearly referenced and entirely separate process (the TCA surrender warrant) was being considered as the legal basis for the appellant's return.

98. The first thing to be noted is that the appellant's assertion that the CFA applied for a special care order for the purpose, or with the intended effect, of securing the appellant's return to face criminal charges is a significant allegation. In my view, the allegation is

inconsistent with the appellant's acceptance that the CFA was required by s.23F(8) of the 1991 Act to make the application for a special care order once it had made a determination that the appellant required special care. As I have said, that determination was not challenged by the appellant. To my mind, it is not now open to the appellant to question the CFA's motives in applying for a special care order when it is accepted that the CFA was obliged by statute to do so. Secondly, there was no evidence before the High Court (or this Court) that a *"a primary or dominant"* purpose of the special care orders in issue here was to ultimately subject the appellant to the criminal justice system.

99. Insofar as the appellant asserted that it is an unlawful use of the special care system to return him to the State because he can reasonably expect to be taken directly into the criminal justice system, this ground of appeal also is not sustained on the evidence. I have already observed that the appellant has not adduced any evidence to support his assertions. At best, there is on the part of the appellant an assumption in respect of matters which lie entirely outside his competence. The assumption appears to be premised upon the fact that because the appellant is the subject of an arrest warrant a custodial sentence will follow and it ignores the basic fact that the judge executing the warrants has a full jurisdiction and discretion whether to remand in custody or impose a custodial sentence. Without in any way wishing to trespass on the jurisdiction of the criminal courts, when one considers the plethora of mitigating circumstances that will no doubt be advanced by the appellant's legal representatives at any future bail hearing (if same comes to pass), it is reasonable to conclude that a judge would take into account the fact that the appellant has been placed in special care.

100. The question here is whether the Judge erred in making the special care orders notwithstanding the risk that the appellant might ultimately be remanded in custody and therefore be unfit to benefit from special care. Sections 23D and 23E of the 1991 Act deal

with the interactions between the criminal justice system and special care. Section 23D explicitly allows the High Court to make a special care order notwithstanding that the subject child has outstanding criminal charges. Accordingly, the Judge did not err in making the special care orders.

101. The High Court's protective/welfare jurisdiction under the 1991 Act and the criminal law jurisdiction are two separate free-standing jurisdictions, with different purposes and aims. Insofar as the appellant maintains that execution of the special care order will subject him to the criminal justice system, and that in allowing the special care order to be usurped for such purpose undermines his right to liberty, as I have already observed, he has not adduced any evidence to support his claims in this regard.

102. The 1991 Act expressly provides for the parallel operation of the special care system and the criminal justice system up to a certain point where the criminal justice process then takes precedence. As already alluded to, the point at which the criminal process takes precedence is where a custodial sentence is imposed on a child and is to take effect immediately (as opposed to being suspended or deferred). That has not occurred in this case.

103. As to what might happen in the future, neither the CFA in initiating the special care process, nor the High Court in making the special care order, have any control over if or when the criminal process will be initiated. In short, neither the CFA nor the High Court has a say on the steps that may or may not be taken by separate legal authorities within their own remit. Here, in any event, the point at which the criminal process takes precedence has not been reached and it is only at the point that it has been reached that the CFA must apply to discharge a special care order if it has already been made or withdraw any application that is in the process before the Court. As far as the criminal process is

concerned, the fact of the matter is that at the time of the making of the special care order it was not known what would happen upon the appellant's return to this jurisdiction.

104. I turn now to the appellant's contention that returning him to the jurisdiction on the basis of a special care order will deprive him of the benefit of the TCA. The first observation to be made is that the appellant is not the subject of a TCA warrant. Hence, he is asking the Court to opine about something that has not happened and, therefore, his argument cannot be entertained. The fact that it might be possible to secure the appellant's presence in Ireland using both jurisdictions does not mandate that the criminal law jurisdiction must be used.

105. In essence, the appellant has not established any hierarchical deference in favour of the TCA process, nor has he cited any authority for the proposition that the CFA ought to have deferred to the TCA process. There was no legal basis put forward by the appellant to assert that any *"contemplated"* TCA process should have been allowed to take precedence over the special care process. That is simply not the law. In any event, it would not have been permissible for the CFA to decline or apply for a special care order on the basis that a TCA arrest warrant might be applied for: once it had made a determination that the appellant required special care, the CFA was required to apply for a special care order.

106. Insofar as the appellant says that the TCA process expressly permits arguments to be made relating to proportionality and that the appellant is therefore being denied those procedural rights, once again, the appellant has again strayed into the hypothetical given that no application for a TCA warrant had been made in his case at the time of the making of the special care order.

107. Moreover, the appellant's argument on this issue entirely skirts the fact that special care orders themselves are only made where they are necessary and proportionate (see in this regard Whelan J. in *CFA v. M.L. (G)* at para. 149). Here, there is no suggestion that the

Judge when making the special care orders in issue did not have regard to the principles of proportionality.

108. The appellant also relies on the fact that the High Court did not have sight of Sergeant Thornton's email dated 15 February 2024 when considering the application for a special care order on 22 February 2024. It is the case that due to an oversight the email was not put before the High Court in February 2024. While that is regrettable, the fact of the matter is that almost immediately in the course of the application for the special care order, the Judge was aware, both from the affidavit of Mr. Rogan (social worker) sworn 13 February 2024 and through the oral submissions by counsel for the CFA, that the appellant was in breach of High Court bail conditions and that a High Court arrest warrant had been issued for breach of bail. Albeit he was on notice of those matters, for the reasons already alluded to, the Judge was nonetheless entitled to find that the statutory criteria for a special care order were met and to make the special care order.

109. The fact that a TCA application was in contemplation at the time the special care order was made and/or that Sergeant Thornton was of the view that the appellant's breach of bail conditions might lead to a remand in custody did not present a legal impediment to the making of a special care order.

110. Whilst I accept that Sergeant Thornton's email suggests that the State could seek the appellant's return to the jurisdiction by way of a TCA arrest warrant, there is no evidence that the CFA sought to use the enforcement and execution of a special care order to circumvent that process. As a matter of fact, the special care proceedings were already in train prior to receipt of that email, the CFA having applied on the same date as the email (15 February 2024) for orders appointing the guardian ad litem, joining the appellant as a party to the proceedings, and granting the CFA liberty to issue a motion for a special care order returnable to 22 February 2024.

111. In short, there are simply no factual or legal grounds identified by the appellant beyond a mere assertion to say that the contents of Sergeant Thornton's email were capable of undermining or otherwise displacing the findings made by the Judge. As I have already said, whilst, because of an oversight, the email itself was not before the High Court, when one looks at the pleadings and the evidence that was before the High Court on 22 February 2024, there can be no argument but that the Judge was aware that the appellant had breached his bail conditions and that a warrant had issued.

112. Issue II is not made out.

Issue III: The appellant's standing to apply for discharge of the special care order

113. As provided by s.23NE(3) of the 1991 Act, the High Court may discharge a special care order (a) of its own motion, (b) on the application of a parent of the child, a guardian of the child or a person *in loco parentis* or (c) on the application of the CFA.

114. Section 23NE(3) does not permit a discharge application to be brought by a guardian ad litem. The reference to *"guardian"* in the section is not to a guardian ad litem. A *"guardian"* in s. 23NE pertains only to a person who is a guardian of a child pursuant to the Guardian of Infants Act 1964 or is appointed to be a guardian of the child by Will or order of the Court in the State and who has not been removed from office**.** Nor, notwithstanding s. 25 of the 1991 Act (which contemplates a child being joined as a party to special care proceedings), does s. 23NE include a child among the categories of persons entitled to bring an application to discharge.

115. It will be recalled, however, that on 18 April 2024, the appellant applied by notice of motion to have the special care order of 22 February 2024 discharged. The application was grounded on an affidavit sworn by the appellant's solicitor.

116. The Judge refused the application on the following grounds:

1. It was not appropriate to embark on a discharge application in relation to an order while the special care order itself was under appeal.
2. The legislation does not afford the child a right to apply to have the special care order discharged. As such, the matter was not properly before the Court.
3. Because of the wording of the legislation (s.23NE(3)(a)), the application was relying on the High Court's power to discharge the order of its own motion. The High Court, however, was not moving to do anything of its own motion.
4. Even if the matter was properly before the High Court or the application brought by the appellant permitted, there was no evidence that it was in the appellant's best interests to discharge the special care order. Pursuant to s.23NE(5), the High Court would need to satisfy itself that the discharge of the special care order was in the best interests of the appellant having regard to his behaviour and risk of harm to life, health, safety, development and welfare. There was no possible basis on which the Court could be satisfied of that having regard to the evidence before the Court.

117. Albeit it was accepted that s. 23NE(b) and (c) of the 1991 Act preclude an application for the discharge of a special care order by either a guardian ad litem or a child who has been joined as a party under s. 25 of the 1991 Act, the argument the appellant advanced on appeal was that s. 23NE(a) affords the High Court a discretion to hear an application by a child for discharge where it is satisfied that the circumstances warrant such application. It was said that the appellant's circumstances warranted the application brought - his right to liberty was clearly engaged in circumstances where he is a minor who is subject to a special care order (albeit one that had not been executed) and where there

was a warrant directing his forceable return to the State. Citing Davitt P. in *State (Quinn) v. Ryan* [1965] IR 70 counsel pointed to the long-established obligation on the High Court to vindicate constitutional rights.

118. Counsel also argued that the Judge's ruling on the appellant's lack of standing to make an application to discharge the special care order was based on a narrow interpretation of s.23NE(3)(a). She submitted that albeit not expressly provided for, the Oireachtas must be held to have provided for a residual set of circumstances to those set out in the section in which a court may wish to exercise its discretion to discharge a special care order. It was said that reading the section as permitting the Court to hear a discharge application initiated by either a guardian ad litem, or a child who has been joined to the proceedings, would allow for the child to be heard (either directly or through their guardian ad litem) on whether a discharge is required. On the other hand, a reading which did not allow for this would give the child no means of triggering an application to discharge a detention order that affects them. Such a reading, it was said, would be particularly egregious given that the entire constitutional basis for the form of civil detention provided for in Part IVA of the 1991 Act is to vindicate the child's rights.

119. Thus, with reference to s.23NE(3)(a), the appellant's overarching contention was that there must be circumstances, where a child is directly represented, that allows for the making of representations by the child for the discharge of a special care order. Albeit acknowledging that the appellant does not have a right to apply to discharge the special care order, counsel was nevertheless asking the Court to decide whether the words *"of its own motion"* in s. 23NE were capable of capturing the discharge application brought by the appellant.

120. As the appellant's constitutional rights were in issue, counsel asked the Court to apply the double construction rule to the words *"of its own motion"* in s. 23NE(3)(a). In

aid of her argument, she cited *A, B, and C v. Minister for Foreign Affairs* [2023] IESC 10; [2023] I ILRM 335, where at para. 90, Murray J. observed:

> *"As counsel for the applicants put it in the course of his oral submissions, the double construction rule is central to their case. It operates where 'two or more constructions are reasonably open' (McDonald v. Bord na gCon (No.2) [1965] IR 217 at p. 239 per Walsh J.), requires that 'an interpretation favouring the validity of an Act should be given in cases of doubt' (East Donegal Co-operative Ltd v. The Attorney General [1970] IR 317 at p. 341 (again per Walsh J.)), or 'where there is an ambiguity or a choice between two constructions' (In re The Employment Equality Bill, 1996 [1997] IESC 6, [1997] 2 IR 321 at p. 369 per Hamilton C.J.)."*

121. Contrary to the arguments the appellant advanced, in my view, the Judge was correct to find that the appellant did not have standing under s.23NE to seek to have the special care order discharged. A notable exclusion from the categories of persons permitted to bring an application for discharge of a special care order includes the child and the guardian ad litem. In light of the specific provisions of s.23NE(3), the High Court cannot be put in a position of having to refuse or give a discharge of a special care order on foot of a formal motion by a child or his/ her guardian ad litem.

122. In the course of his judgment, the Judge touched upon the rationale and logic for the restricted remit of s. 23NE. As he observed, it is rare that any child who is the subject of a special care order is in agreement with same. It follows that an express provision which would permit a child to bring a discharge application would inevitably be the subject of abuse. This is because any child who is made the subject of such order would be likely to seek to discharge it immediately, or repeatedly attempt to do so throughout the currency of the order. This Court can take judicial notice of the fact that the number of applications for special care in which the relevant child enthusiastically agrees to being detained in special

care would be very few in number. Thus, had the Oireachtas enacted a mechanism for such children to apply as of right for the discharge of their special care orders, that entitlement could reasonably be expected to generate effectively an automatic application to discharge in any case in which the detained child was free to exercise that choice and, possibly, (having regard to the statutory scheme) multiple discharge applications during the currency of the special care order.

123. Whilst not directly addressed by the Judge, the rationale for the guardian ad litem also not being included in s. 23NE admits of a similar logic. The appointment of guardians ad litem in special care cases was specifically contemplated and provided for by the Oireachtas in s. 26 of the 1991 Act. The role of a guardian ad litem is twofold: (1) to ensure that the child's voice (including their wishes and feelings) is heard before the Court and (2) to make independent recommendations in the best interests of the child. If a guardian ad litem had the express power under the 1991 Act to bring a discharge motion on the basis of the wishes of a child (but refused to do so in their best interests), one could readily foresee that this could present an immediate conflict for a guardian ad litem and may result in undermining their relationship with the child they are endeavouring to assist.

124. Undoubtedly, the statutory withholding of standing from guardians ad litem to make an application under s. 23NE is to protect them from being placed in the impossible position of being (inevitably) asked by the children they represent to discharge their special care order.

125. As we see, the appellant's principal contention is that the High Court's ruling on his lack of standing is based on a narrow interpretation of s. 23NE(3)(a), and that this Court should read or interpret the section as including a discretion which allows the child, either directly or through their guardian ad litem, to be heard as to whether a discharge is required. If by this the appellant is saying that a child or a guardian ad litem should always

be entitled to bring a motion to discharge, I agree with counsel for the CFA that to read the 1991 Act as providing for this would be to violate the express provisions of the Act and would involve the re-writing of the section, which is not permissible.

126. Insofar as any restricted party (whether that be the guardian ad litem or the child) wishes to raise the question whether a special care order should be discharged, they may do this by putting appropriate evidence before the Court, in the hope that the Court of its own motion may raise the possibility of a discharge. It is clear that s.23NE(3)(a) is designed to take account of a situation where the court becomes aware of matters that may warrant the discharge of the special care order *"of its own motion".* What the child or guardian may not do - as occurred in the present case - is issue a motion to force the Court's hand in respect of the exercise of the Court's discretion.

127. Insofar as the appellant appears to contend that a reading of s. 23NE that gives a child no means of triggering an application to discharge a special care order would be particularly egregious, I am satisfied that the Judge did not go so far as to hold that there was no means by which the concerns of a child or a guardian ad litem could be addressed. It is important to note that the Judge never said that he could not reconsider the special care order made on 22 February 2024. Section 23NE(3)(a) of the 1991 Act provides for the possibility of the Court discharging a special care order *"of its own motion"*. The question for this Court is whether the appellant was entitled to initiate the application he made in April 2024, and whether the Judge was correct to find he had no standing to do so under the relevant section and that, in any event, there was nothing put before the High Court to warrant the Judge invoking the jurisdiction he himself had under s.23NE.

128. I accept that it is important that there would be a mechanism for the child to be able to raise issues before the High Court. Such a mechanism has been put in place by the manner in which the 1991 Act is structured. As this Court observed in exchanges with

counsel for the appellant, once a special care order is made there are regular statutory reviews conducted by the High Court during which reports by the CFA and the guardian ad litem regularly feature, as indeed they must, so that the High Court can remain updated as regards the child's progress. Through the mechanism of his or her reports, a guardian ad litem may raise matters with the High Court judge on behalf of a child that could, of the High Court's own motion, give rise to a discharge of the special care order. Equally, where a child is a party to the proceedings, there remains open to the child's legal advisors the option of making submissions on any issue of concern, that, again, could lead the High Court *"of its own motion"* to raise the issue of the discharge of the special care order.

129. What the Judge simply said here was that the appellant had no standing to bring the application he brought and that he (the Judge) was not bringing or entertaining an application of his own motion. Clearly, when declining to entertain an application *"of its own motion"*, the High Court was aware of all relevant matters pertaining to the appellant's then circumstances. On the merits, he found no basis upon which to embark on the discharge of the special care order of his own motion.

130. The Judge palpably did not say he (the Judge) could never entertain an application of the Court's own motion if there was appropriate evidence before the Court warranting such a motion. There was here simply no such evidence to warrant the intervention of the Judge. He was clearly not satisfied that the circumstances presented to him on behalf of the appellant warranted him entertaining the appellant's application by way of the High Court's own motion. In my view, that was an entirely proper approach to s. 23NE and one which appropriately protects the appellant's constitutional rights, while also protecting against a potential abuse of process in the assertion of those rights.

131. In summary therefore, on the evidence before him, the Judge was correct to refuse to entertain a motion to discharge brought directly on behalf of the appellant in circumstances

where the legislature has not permitted such an application to be brought. He was also correct in refusing to hear the application of the Court's own motion in circumstances where such an application was directly contrary to the valid and lawful findings already made by the Judge, and the updated evidence in relation to the appellant's best interests that was before the High Court on 18 April 2024.

132. I am satisfied that, in effect, the Judge acknowledged his jurisdiction under s. 23NE(3)(a). Furthermore, once it was brought to the Judge's attention that the appellant had no entitlement to bring an application to discharge, it then became a question of whether the Judge would of his own motion discharge the special care order. The Judge stated that he would not exercise his statutory entitlement under s.23NE(3)(a). He did so in light of the factual matrix before him.

133. In my view, no principle of statutory interpretation can be invoked by the appellant such as would have allowed the High Court to interpret and apply the section in the way contended for. The interpretation the appellant gives to the decision of the Supreme Court in *A, B, and C v. Minister for Foreign Affairs* does not stand up. In that decision, the Supreme Court specifically cautioned against the use of the *"double construction"* test to give new meaning or construction to legislation beyond which the words reasonably bear. That is what the appellant is attempting to do in this case.

134. As Murray J. makes clear in *A, B, and C v. Minister for Foreign Affairs*, the double construction rule may only be availed of where "*two or more constructions are reasonably open"* (para. 90). That is not the case here. What is being sought here amounts to an attempt, in the words of Murray J., *"to fundamentally re-orientate the structure and direction of a legislative scheme by changing the essential features of that regime"*, which is not permissible. Moreover, in his judgment in *A, B, and C v. Minister for Foreign*

Affairs, Hogan J. cautioned forcibly against the use of the double construction rule to rewrite statute:

> *"The courts cannot, however, use the double construction test to forge a new meaning or construction of the legislation beyond which the words of the legislation may reasonably bear. The double construction test cannot be so expanded that it operates as a form of substitute finding of unconstitutionality beyond any construction of the legislation which is reasonably open in the circumstances."* (at para. 8)

135. For the reasons set out, the Judge was entirely correct in the finding he made and in refusing to discharge the special care order.

136. Issue III is not made out.

Issue IV: The order to deliver the appellant to the CFA

137. The question that arises under Issue IV is whether the High Court had jurisdiction to make an Order under s. 23H(3)(a) requesting the English local authority with custody of the appellant to deliver him to the custody of the CFA in circumstances where there was no special care bed for the child.

138. The High Court's power to issue an order directing that the appellant be handed up to the CFA arises under s. 23H(3) which provides:

> *"(3) For the purposes of executing a special care order the High Court may—*
>
> *(a) make an order directing a person who has actual custody of the child to deliver that child to the custody of the Child and Family Agency,*
>
> *(b) make an order directing the Garda Síochána to search for and find the child and to deliver the child to the custody of the Child and Family Agency, at a special care unit specified by the Child and Family Agency, and*

(c) issue a warrant authorising a member of the Garda Síochána, accompanied by such other members of the Garda Síochána or such other persons as may be necessary, to enter, if need be by force, any house or other place specified in the warrant, including any building or part of a building, tent, caravan, or other temporary or moveable structure, vehicle, vessel, or aircraft where the child is, or where there are reasonable grounds for believing that he or she is, and to deliver the child into the custody of the Child and Family Agency at the special care unit in which the child is to be detained, and the High Court may, in respect of such order or warrant, give directions as, having regard to all the circumstances of the child, it considers necessary and in the best interests of the child."

139. When applying on 22 February 2024 for a special care order, counsel for the CFA ultimately confirmed that the order should not be made under s. 23H(3)(b) or (c) since those provisions require the child to be delivered to a specific special care unit. Accordingly, those provisions could not be used in the appellant's case as no specific special care unit had been identified. As already referred to, orders were duly made on 22 February 2024 pursuant to s.23H(3)(a).

140. At the hearing on 16 May 2024, in light of objections raised on behalf of the appellant to the making of warrants under s. 23H(3) the Judge made an order pursuant to s. 23H(3)(a) requesting Lincolnshire County Council to deliver the appellant to the custody of the CFA and, pursuant to s. 23H(2), directed AGS to search for and find the appellant and deliver him into the custody of the CFA.

141. The appellant appeals against the orders made pursuant to s. 23H(3)(a). He asserts that the Judge erred in making such orders in circumstances where there was no special

care bed available. In the absence of a bed in a special care unit, the order made, it was argued, cannot be said to be for the purpose intended by the statutory provision.

142. The appellant's contention is that the availability of a s. 23H(3)(a) order is dependent on the initial words, namely *"for the purposes of executing a Special Care Order"*, in 23(H)(3) being met in any given case. It was submitted that there was no evidence before the High Court that the special care orders in issue here were going to be executed any time soon. In this regard, counsel pointed to the minutes of the CFA's Special Care Prioritisation Meeting for Special Care on 8 April 2024 which indicated that the CFA was not considering the appellant for prioritisation for a bed in special care at that time as there was no confirmed date of return of the child to this jurisdiction. As such, the appellant argued that the condition precedent to the exercise of the High Court's power to make an order under s. 23H(3)(a) was not met. This, it was said, follows from a literal reading of s. 23H(3), and accords with s. 5 of the Interpretation Act, 2005, counsel quoting, in this regard, from Dodd in *Statutory Interpretation in Ireland* (Bloomsbury 2008) at para. 5.25 *"that effect must be given, if possible, to all the words used"* in a statute.

143. It was submitted that the Oireachtas had expressly based the jurisdiction to make orders pursuant to s. 23H(3) on the execution of the special care order. Yet, on the facts of this case, execution was not possible as there was no bed available in special care for the appellant. Hence, it was argued, the condition precedent for the exercise of the s. 23H(3) jurisdiction was not met.

144. The CFA refuted the appellant's argument on the basis that same was a reprise of the arguments canvassed by the appellant in respect of Issue I. Counsel for the CFA contended that for all the reasons the CFA advanced in respect of Issue I, there was no merit in the appellant's argument.

145. Whilst there is no doubt but that the orders envisaged by s. 23H(3) are made expressly for the purposes of aiding the execution of a special care order, I am satisfied that when he made orders pursuant to s.23H(3)(a), the Judge was correctly not concerned with when the special care orders might be executed in circumstances where such orders take effect immediately. Upon their making, it is a matter for the CFA to comply with them. The manner and method of execution of a special care order is not prescribed by statute.

146. As I have alluded to earlier, the first step in the execution of the special care order was to return the appellant to this jurisdiction, regardless of when a placement in special care may become available. It follows, therefore, that when making the valid and lawful special care order that was made in respect of the appellant, in circumstances where the child the subject of that order was in another jurisdiction the Judge was entirely correct in making the additional order sought by the CFA pursuant to s.23H(3)(a), as an aid in the execution of the special care order.

147. In this regard, s. 23H(3)(a) permits the High Court to make an order directing a person who has actual custody of the child to deliver that child to the custody of the CFA for the purposes of executing a special care order. Unlike s. 23H(3)(c), the delivery provided for in subsection (a) of s.23H(3) is of the child to the CFA rather than to a special care unit. Thus, there is no obstacle to the UK authorities complying with the order made.

148. I agree with the CFA's submission that the appellant advances an interpretation of s. 23H(3)(a) which asks the Court to effectively insert the words *"imminent"* or *"immediate"* into the statutory language *"for the purposes of executing a Special Care Order …"*, an immediacy requirement which the subsection itself does not contain. There is no basis for such rewriting, in my view. The CFA had made clear to the High Court that a number of steps were required to be taken for the special care order to be executed. Amongst these,

was the return of the child to Ireland. That being the case, the order made under s. 23H(3)(a) was clearly made for the purpose of executing a special care order, and accordingly falls squarely within the contemplation of s.23H(3)(a).

149. Unlike subsections (b) and (c) of s. 23H(3), subsection (a) does not specify that the child must be delivered to a special care unit: it only requires the delivery of the child, for the purposes of executing the special care order, to the CFA. This is entirely permissible, even, as was the case here, where there were other steps in the special care process such as the placement of the appellant in a special care unit that could not be achieved immediately.

150. Accordingly, there was no error in the Judge's approach in granting the order pursuant to s. 23H(3)(a). The utilisation of s. 23H(3)(a) was entirely apt here for the purposes of executing the special care order since that subsection does not require the specification of a special care bed. What it provides for is that the child be delivered up to the custody of the CFA and not to a named place *per se*. Moreover, the order was granted in the context of a special care order having been made in the first instance.

151. The second order that was made was an Order pursuant to s. 23H(2), namely that AGS search for and find the appellant and deliver him into the custody of the CFA. Section 23H(2) of the 1991 Act enacts a broad power for the High Court making a special care order to *"make such other provision and give directions"* in the best interests of the child concerned. Even if the Judge was not entitled (although I am satisfied he was) to make the ancillary order requesting the assistance of the English local authority under s. 23H(3)(a), the statutory power in s. 23H(2) to *"make provision"* and *"give directions"* also provides a jurisdictional basis for the delivery of the appellant to the custody of the CFA. This subsection states that in making a special care order, *"the High Court may make such other*

provision and give directions, as it, having regard to all the circumstances of the child, considers necessary and in the best interests of the child".

152. Issue IV is not made out.

Issue V: The appointment of the guardian ad litem

153. Section 25(1) of the 1991 Act provides as follows:

> *"25.—(1) If in any proceedings under Part IV F200, IV A (as amended by the Child Care (Amendment) Act 2011)] or VI the child to whom the proceedings relate is not already a party, the court may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so, order that the child be joined as a party to, or shall have such of the rights of a party as may be specified by the court in, either the entirety of the proceedings or such issues in the proceedings as the court may direct. The making of any such order shall not "require the intervention of a next friend in respect of the child."*

154. Section 26 of the 1991 Act provides in relevant part:

> *"26.—(1) If in any proceedings under Part IV F205, IVA (as amended by the Child Care (Amendment) Act 2011)] or VI the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian ad litem for the child.*
>
> *…*
>
> *(4) Where a child in respect of whom an order has been made under subsection (1) becomes a party to the proceedings in question (whether by virtue of an order under section 25 (1) or otherwise) then that order shall cease to have effect."*

155. The appellant's contention is that on 16 May 2024 the Judge erred in law in appointing a guardian ad litem pursuant to s.26 of the 1991 Act in circumstances where the Court also made an order pursuant to s.25 that the appellant should have all the rights of a party in the proceedings. It was submitted that ss. 25 and 26 of the 1991 Act are mutually exclusive and the Court did not have the power to join a guardian *ad litem* for a child pursuant to s.26 whilst also making an order pursuant to s.25 that the child should have all the rights of a party in the proceedings.

156. In aid of her submissions, counsel for the appellant relied on *Shannon, Family and Child Law* (3rd Ed Thomson Reuters 2020) at para. 8-126:

> *"It seems that section 25 (allowing a child to be a party to the case) and section 26 (allowing the appointment of a guardian ad litem) are mutually exclusive. This is so even where a child is added as a party not fully, but only for certain purposes specified by the court."*

157. Albeit no authority is cited in the text, counsel submitted that the view expressed by learned author (now His Honour Judge Shannon of the Circuit Court) on the effect of and/or interaction between ss. 25 and 26 of the 1991 was subsequently confirmed by Baker J. in *AO'D v. O'Leary* [2016] IEHC 555 where she stated at para. 105:

> *"I consider that the Oireachtas intended the appointment of a guardian to be a means by which a child could engage in the litigation, and the appointment is an alternative to the appointment of a child as a party, or as a person with some of the rights of a party".*

158. The CFA's position was that s.25 and s.26 of the 1991 Act are mutually exclusive insofar as it is only permissible to appoint a guardian ad litem where a child is not a party to the proceedings**.** Here, however, the appellant was not joined as a party to the

proceedings but rather given only the rights of a party for the entirety of the proceedings until further order, as provided for by s.25 of the 1991 Act.

159. The CFA thus contended that in the circumstances that pertained here, where the appellant was not joined as a party to the proceedings, in accordance with the express provisions of ss. 25 and 26 of the 1991 Act it was entirely permissible for the Court to appoint a guardian ad litem for the purpose of the proceedings.

160. The question of the High Court's power to appoint the guardian ad litem was directly addressed by the Judge on 16 May 2024. The Judge agreed that if the appellant was a party to the proceedings, there could not be a guardian ad litem appointed for him. Hence, for the purposes of the 16 May 2024 special care application, the appellant was not joined by the Judge as a party to the proceedings but rather granted the rights of a party.

161. I am satisfied that the Judge acted *intra vires* in appointing a guardian ad litem for the appellant pursuant to s.26 of the 1991 Act albeit he did so in circumstances where he had already made an order pursuant to s.25 that the child should have all the rights of a party in the proceedings. In my view, the Judge was correct in holding that ss. 25 and 26 are not mutually exclusive where a child has rights of a party but is not himself or herself a party to proceedings. The plain and literal meaning of ss. 26(1) and 26(4) of the 1991 Act, when read together, allows for the appointment of a guardian ad litem in any case where the subject child is not a party to the proceedings.

162. The Oireachtas chose its language carefully in ss. 25 and 26, carving out, as it clearly did, from the statutory exclusion of guardians ad litem being appointed in s.26 where a child is a party, the situation where instead of being a party the child has *"the rights of a party"*. There is thus no merit in the appellant's argument. What the appellant aspires to is an interpretation of the relevant statutory provisions which is based more upon what the

appellant wishes had been written, rather than the policy decisions made by the Oireachtas in enacting the relevant statute.

163. Insofar as the appellant relies on the view expressed at para. 8-126 of *Shannon, Family and Child Law* that ss. 25 and 26 are mutually exclusive *"even where a child is added as a party not fully, but only for certain purposes specified by the Court",* on a close reading of s.25 and s.26, it is difficult to see how the learned author could be correct in what he says.

164. I note that para. 8-126 of *Shannon, Family and Child Law* was cited in oral submissions to the Judge at the hearing on 16 May 2024. In finding that he could appoint a guardian ad litem despite also giving the appellant the rights equivalent to those of a party, the Judge stated:

> *"It seems to me if I am articulating my view correctly, that the author's observation that sections 25 and 26 are mutually exclusive is an observation that is not supported by reading the two sections and adopting a literal interpretation in terms of their meaning."*

165. The Judge's observation is correct, in my view.

166. Insofar as the appellant relies on the comments of Baker J. in *AO'D v. O'Leary,* I note that the issue for determination in that case was very different to that which presents here. *AO'D v. O'Leary* concerned the right of a guardian ad litem to instruct a solicitor and counsel in District Court proceedings. No question of the joinder or participation of the child arose in that case, where the child in question was aged five years at the time. Accordingly, Baker J.'s comments in relation to the interaction between ss. 25 and 26 are, therefore, strictly *obiter*. Moreover, the interplay between s.25 and s.26 of the 1991 Act

was not argued in *AO'D v. O'Leary* but was argued before the High Court in the present case.

167. I note that one of the arguments canvassed by the guardian ad litem in her submissions in relation to Issue V was that any interpretation of the 1991 Act must aim to vindicate the rights of the child. She submitted that an interpretation of the relevant provisions which would allow a child to both participate directly in proceedings, having his voice directly heard, whilst also having an independent guardian ad litem advocating in his best interests, best achieves the vindication of the child's rights. As the plain and literal meaning of ss. 25 and 26, when read together, is that there is no impediment to the appointment of a guardian ad litem when a child only has the rights of a party as opposed to being a party in the proceedings, in my view, it is not necessary to embark on any further consideration of the guardian ad litem's submission.

168. Issue V is not made out.

Summary

169. For the reasons set out in this judgment, I would dismiss each of the appellant's three appeals.

170. The Court will schedule a short hearing on the issue of costs on a date to be advised.

171. As this judgment is being delivered electronically, Noonan J. and Burns J. have indicated their agreement therewith and with the orders I have proposed.