



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

[2024] IESC 6

**Supreme Court Appeal Numbers: S:AP:IE:2023/000132
S:AP:IE:2023/000133
S:AP:IE:2023/000134
S:AP:IE:2023/000135**

**O'Donnell C.J.
Woulfe J.
Hogan J.
Murray J.
Donnelly J.**

IN THE MATTER OF M McD, A CHILD

Between:

THE CHILD AND FAMILY AGENCY

Applicant/Appellant

AND

1 McD

First Respondent

AND

W McD

Second Respondent

AND

HELEN TULLY

Third Respondent,

Guardian Ad Litem

IN THE MATTER OF J B, A CHILD

Between:

THE CHILD AND FAMILY AGENCY

Applicant/Appellant

AND

D B

First Respondent

AND

R B

Second Respondent

AND

FRANCIS O'CALLAGHAN

**Third Respondent,
Guardian Ad Litem**

IN THE MATTER OF M McD, A CHILD

AND

IN THE MATTER OF ARTICLE 40.3 AND ARTICLE 42A OF THE

CONSTITUTION

AND

IN THE MATTER OF THE CHILDCARE ACT 1991 (AS AMENDED)

AND

THE INHERENT JURISDICTION OF THE HIGH COURT

Between:

THE CHILD AND FAMILY AGENCY

Applicant/Appellant

AND

M McD

(A MINOR SUING THROUGH HER GUARDIAN AD LITEM AND NEXT

FRIEND HELEN TULLY)

First Respondent

AND

P McD

First Notice Party

AND

W McD

Second Notice Party

IN THE MATTER OF J B, A CHILD

AND

IN THE MATTER OF ARTICLE 40.3 AND ARTICLE 42A OF THE

CONSTITUTION

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IN THE MATTER OF THE CHILDCARE ACT, 1991 (AS AMENDED)

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Between:

THE CHILD AND FAMILY AGENCY

Applicant/Appellant

AND

J B

(A MINOR SUING THROUGH HIS GUARDIAN AD LITEM AND NEXT

FRIEND FRANCIS O'CALLAGHAN)

First Respondent

AND

D B

First Notice Party

AND

R B

Second Notice Party

JUDGMENT of Mr. Justice Gerard Hogan delivered the 26th day of February 2024

Part I- Introduction

1. These appeals concern the fate of two acutely vulnerable teenage children whom I shall describe as M and B. There is no doubt whatever but that both of these children require a secure and safe environment in which their complex behavioural and educational needs can be attended to. It is likewise accepted by all the parties to these appeals that this care can best be provided by the civil detention of both teenagers for a limited period of time through the mechanism of a special care order. The care of these children is, however, a difficult and demanding one and the Child and Family Agency (“CFA”) has encountered considerable difficulties in retaining the appropriate staff for this purpose. It is not that the CFA cannot obtain staff simpliciter: it is rather that it cannot obtain staff at the current rates of pay presently sanctioned by the Minister for Public Enterprise and Reform.
2. It is these difficulties which have given rise to these two appeals. In essence, the issues which are now presented are whether, first, the CFA was justified in not making an application for a special care order in respect of these teenagers in the first instance under s. 23F of the Child Care Act 1991 (as amended) (“the 1991 Act”) and, second, having been ordered by the High Court to make that application, whether the High Court was justified in making an order providing for their special care under s. 23H of the 1991 Act even in circumstances where there was no immediate place available for either of these children due to staff shortages. This raises the wider question of whether the courts should refuse

to make orders commanding a statutory agency to perform its statutory functions in circumstances where the agency contends that by reason of the lack of resources (in this instance, staff) it encounters real difficulties in performing those functions.

3. The present regime in respect of special care orders is provided for in Part IVA of the 1991 Act, as inserted by s. 10 of the Child Care (Amendment) Act 2011. This provision was commenced on 31st December 2017: see Child Care (Amendment) Act 2011 (Commencement) Order 2017 (S.I. No. 637 of 2017).
4. These appeals accordingly concern appeals by the CFA against two separate orders of the High Court made pursuant to this statutory regime. In the first case, *M v. Child and Family Agency* [2023] IEHC 557, Heslin J. granted mandatory orders directing the CFA to make an application to the High Court for a special care order pursuant to s. 23H of the 1991 Act. The second case concerns the order made by Jordan J. on 25th October 2013, *Child and Family Agency v. M.* (2023, MCA 354) in which he granted the requisite special care order.
5. As it happens, since the High Court made orders to this effect, two beds have become available which would accommodate the two children for the purposes of a special care order. To that extent, the case is in one sense technically moot. Since, however, the issue raised is a systemic one affecting the general operation of the special care regime, it is appropriate that this Court should now determine the general issue of principle raised by this appeal: see, *e.g.*, *Odum v. Minister for Justice* [2023] IESC 3.

The case of M.

6. It is not, I think, necessary to outline in any great detail the sad facts underlying these two cases. The first of them concerns M., a teenager, whose mother is currently in prison. M and her siblings were placed with extended family members before she and her sister started living with her father for a period. Two years ago, M and her sister were found in the house of a known sex offender and the children were then taken into care.
7. At various stages in her life, M was subjected to physical, sexual and emotional abuse and neglect. It seems that while living with her adult sister for a period she witnessed horrific acts of domestic violence perpetrated by her sister's partner on her sister. M discontinued her education as of the second half of 2022 and has opted out from all therapeutic offers of treatment during her placement. Over the last two years she was experienced the loss of siblings and an aunt and uncle to whom she was close.
8. In the two years prior to May 2023, concerns were raised about M's behaviour with regards to threats and assault on staff members at the residential placement by M where she was living. This erratic behaviour included the stealing of money; damage to property and attempted arson; the consumption of alcohol and cannabis; suspected cocaine use; and multiple hospital admissions due to alcohol misuse. M.'s court appointed guardian *ad litem* ("GAL") suggested that serious consideration be given to a special care placement in November/December 2022. Throughout 2023 M's circumstances worsened, with a litany of instances of where she was missing from care. During this period, she was found to have had an inappropriate relationship

with an older male and was socialising with a peer group which engaged regularly in drug and alcohol misuse and anti-social behaviour.

- 9.** M's risk profile worsened throughout May and June 2023. M had begun a relationship with a new boyfriend, and she consumed cocaine and other illegal drugs. Suspicions were raised that M's boyfriend had harmed her in an instance of domestic violence. When that relationship broke up it appears that her boyfriend shared intimate images of them online.
- 10.** On 28th June 2023 a complex case meeting was held by the CFA. During the course of this meeting, concerns were raised regarding a series of missing in care incidents where M was said to have been physically threatened by males; that a man threatened to kill her and attempted to strangle her; and that a car she was riding in with two males was driven dangerously and crashed into another vehicle. Furthermore, concerns were raised that M had spent a night in an unknown male's house where she had allegedly used cocaine and cannabis and had been drinking alcohol. Upon her return, M was intoxicated and began using cocaine in her room. M then used an aerosol can and a lighter as a weapon against staff. As a result of this incident the Gardaí brought M to a Garda station.
- 11.** This, however, is just a summary of M's inappropriate conduct during this period. It is clear that she engaged in highly dangerous and inappropriate behaviour which was gravely prejudicial to her general welfare. Her liaisons with older males posed a real threat that she would be raped or even killed.
- 12.** As Heslin J. was later to state in his judgment, the CFA was clearly "satisfied, as of 28th June 2023 that there was, at that point, at least, reasonable cause to believe that the child requires special care." A family welfare conference was

convened on 14th July 2023 in the manner required by s. 23F(5) of the 1991 Act. The minutes of that conference record that M's family supported 'the decision of the CFA to make an application for a special care order in respect of M.

- 13.** On 8th August 2023 a meeting was convened by the CFA's Special Care Committee ("SCC"). Following that meeting the National Special Care Referrals Committee determined that M's case now "fulfils the criteria for Admission to Special Care." It was further noted that it was "essential" that a Special Care Order application preparation meeting be arranged without delay once the young person has been allocated a bed.
- 14.** In the meantime, M's condition was deteriorating further. M had been admitted to a hospital intensive care unit following the suspected ingestion of heroin which had been cut with fentanyl and benzodiazepines. Other incidents involved the serious threats of violence to M from older males. On yet another occasion M had visited the house of a known paedophile where there were significant quantities of illegal drugs present. In an affidavit M's GAL stated that the level of risk with which M presented with had escalated to such a perilous level that "all professionals involved with M have a significant worry around whether she can actually stay alive in the short to medium term ... Every day she is not in special care is causing her harm." On any view, therefore, M's condition was an extremely precarious one, and her behaviour presented an acute threat to her safety and well-being.

The case of B.

- 15.** The second child, B, is also in his late to-mid teens He has been diagnosed with oppositional defiant disorder, mild expressive language difficulties and moderate receptive language difficulties. B has also been found to meet the criteria for a diagnosis of autism spectrum disorder. B's general practitioner has indicated that B would benefit from a course of ADHD medication, yet this step has not been undertaken due to the unknown drugs B appears to be taking, He also has a heart murmur, but the relevant medical tests have not yet been carried out.
- 16.** On 26th April 2022 B presented to a Garda station stating that he did not want to go home to his mother. He admitted to suicidal thoughts and thoughts that he may harm others — specifically his mother — if he were to return home. Section 12 of the 1991 Act was invoked by the Gardaí in order to facilitate a review by a general practitioner, and B was discharged to his father the next day.
- 17.** On 18th January 2023, s. 12 of the 1991 Act was again invoked by Gardaí when B refused to return to his mother's home. An interim care order was granted with the expectation that B would transition from care to residing with his father, with support from the CFA.
- 18.** On 21st March 2023, s. 12 was again invoked after B ran away and refused to return to the homes of either his mother or his father. On 23rd March 2023, an emergency care order was granted by the District Court pursuant to s. 13 of the 1991 Act in respect of B, and he was placed in emergency foster care. S. 12 was again invoked on 29th March 2023 and on 30th March 2023 as a result of a lack of any suitable foster placement. B was sent first to a residential unit and then later a hospital as alternative places of safety.

- 19.** On 28th April 2023 a further emergency care order was granted after a voluntary care arrangement with B’s mother expired. B remained in the care of the CFA under a special emergency arrangement (“SEA”) awaiting a residential placement and he has since been the subject of a number of SEAs.
- 20.** On 3rd May 2023 the first interim care order was granted. On 22nd May 2023 a GAL was appointed in respect of B. On 7th June 2023 a 28-day extension was granted to the interim care order, and a full care order was granted on 5th July 2023 for a period of one year.
- 21.** On 5th July 2023, due to the level of concern and escalation of the risk to B, the District Court made an order under s. 47 of the 1991 Act that a placement would be sourced. The District Court judge directed that the CFA apply immediately for special care. The sorry facts are that since 26th April 2015, B’s placement history has included fifteen different placements, including short-term fostering placements, social admissions to a hospital, emergency out of hours placements and a number of SEAs, some of which took place in hotels.
- 22.** On 20th July 2023, a family welfare conference was held. As I have already noted, the obligation on the CFA to hold such a conference is triggered where “... it is satisfied that there is reasonable cause to believe that the child requires special care” under s. 23F(5) of the 1991 Act. The decision of the family welfare conference was that B “requires special care and protection as his behaviour poses a real and substantial risk of harm to his life, health and safety, development or welfare ...”. At that conference B’s GAL expressed his concerns, noting that B had been missing in care for significant periods, and that B had spent only one night out of seven weeks in placement. The GAL expressed further concerns regarding a significant deterioration in B’s behaviour and B’s frequent intoxication and drug-dealing. B.

had a limited understanding of the potential dangers he is exposed to and this was a consequence of his severe receptive language disorder and ADHD (for which he is not receiving treatment). B's mother and father also were recorded as having expressed their anxieties regarding B's behaviour.

23. The gravity of the situation was summarised by the CFA's social work department.

It took the view that B's "current behaviours are putting his life at immediate risk, and he would greatly benefit from a special care intervention to reduce the significant risk to his health, safety, development, welfare and indeed his life." It was further suggested that B's behaviour was deteriorating "by the day" and concerns were expressed that he was consistently using drugs and becoming more aggressive towards staff. The SCC recommended that an application be made to the CFA for a special care order.

24. Judged by an affidavit sworn by B's GAL, there is every reason to believe that B's behaviour deteriorated over the summer of 2023. That affidavit details numerous missing in care events; instances of alcohol misuse; alcohol and drug consumption in his SEA placement; property damage in the home, and incidents of alleged stealing. Furthermore, the affidavit details the injuries suffered by B following an altercation, which resulted in a broken jaw and loose teeth, which required jaw surgery, and which later became severely infected. B later showed staff a video of a man on a trolley in hospital with a stab wound in his leg, who, B contends, was stabbed by him in retribution for breaking his jaw. B also threatened further serious violence. Gardaí were called, but B absconded before their arrival. There is, regrettably, much more in the same vein detailed in this affidavit.

Part II – The Relevant Statutory Provisions

25. Section 23B of the 1991 Act provides that the CFA shall provide special care to a child in respect of whom a special care order, or an interim special care order has been made, and shall provide, maintain and administer special care units. Section 23B provides as follows:

“23B.—(1) The Child and Family Agency shall provide special care to a child in respect of whom a special care order or an interim special care order has been made for the period for which that special care order or interim special care order has effect.

(2) The Child and Family Agency shall not detain a child in a special care unit unless the detention is pursuant to, and in accordance with, a special care order or an interim special care order made in respect of that child or the High Court has otherwise ordered.

(3) The Child and Family Agency shall—

(a) provide special care units, and

(b) maintain and administer special care units provided by it under paragraph (a),

and shall comply with regulations, if any, made under the Act of 2007 in relation to special care units and standards, if any, set out under section 8(1)(b) of the Act of 2007.”

26. Section 23C deals with special care, and defines it thus:

23C.—In this Part "special care" means the provision, to a child, of—

(a) care which addresses—

(i) his or her behaviour and the risk of harm it poses to his or her life, health, safety, development or welfare, and

(ii) his or her care requirements, and includes medical and psychiatric assessment, examination and treatment, and

(b) educational supervision,

in a special care unit in which the child is detained and requires for its provision a special care order or an interim special care order directing the Child and Family Agency to detain the child in a special care unit, which the Child and Family Agency considers appropriate for the child, for the purpose of such provision and may, during the period for which the special care order or interim special care order has effect, include the release of the child from the special care unit—

(i) in accordance with section 23NF, and

(ii) where the release is required for the purposes of section 23D or 23E, in accordance with section 23NG.’

27. Section 23F states:

“23F.—(1) The Child and Family Agency shall not apply for a special care order in respect of a child unless it is satisfied that the child has attained the age of 11 years and it has made a determination, in accordance with this section, that the child requires special care.

(2) Where—

(a) the Child and Family Agency is satisfied that there is reasonable cause to believe that the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare,

(b) having regard to that behaviour and risk of harm, the Child and Family Agency has assessed the care requirements of the child, and is satisfied that there is reasonable cause to believe that—

(i) the provision, or the continuation of the provision, by the Child and Family Agency to the 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, and

(c) having regard to paragraph (b), the Child and Family Agency is satisfied that there is reasonable cause to believe that the child requires special care to adequately address—

(i) that behaviour and risk of harm, and

(ii) those care requirements, which it cannot provide to the child unless the High Court makes a special care order in respect of that child, the Child and Family Agency shall make arrangements to carry out the consultation referred to in subsection (3).”

28. Section 23F(5) and s. 23F(6) concern the convening of a family welfare conference if the Agency is satisfied that there is reasonable cause to believe that the child requires special care. Section 23F(7) is, however, a critical provision which prescribes the circumstances in which the CFA “shall” make a determination as to whether the child requires special care:

“(7) Where a family welfare conference—

(a) has been convened in accordance with subsection (5) and the Child and Family Agency has had regard to the recommendations, if any, notified under section 12 of the Act of 2001, or

(b) has not been convened in accordance with subsection (6), and the Child and Family Agency is satisfied that there is reasonable cause to believe that the child requires special care it shall make a determination as to whether the child requires special care.”

29. Section 23F(8) details the circumstances under which the CFA must apply to the High Court for a special care order:

“(8) Where the Child and Family Agency 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 the Child and Family Agency *shall* apply to the High Court for a special care order.” (Emphasis supplied)

30. Section 23G deals with the notice requirements of the application for special care or an interim special care order, but nothing turns on this so far as these appeals are concerned. Section 23H deals with special care orders and it is in the following terms:

“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),

(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...”

(Emphasis supplied).

31. Section 23H(2) that the special care order shall specify the period for which it has effect and *inter alia* provides that “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.”

32. One must finally refer in this context to the provisions of s. 23NF. Section 23NF(1) provides that: “Notwithstanding the detention of a child in a special care unit pursuant to a special care order or an interim special care order, the Child and Family Agency may apply to the High Court to vary that special care order or interim special care order to authorise the release of the child from the special care unit for all or any of the purposes referred to in sub-section (2).”

33. Section 23NF(2) permits the High Court:

“(a) to place the child in a children’s residential setting or to permit the child to reside with a parent or relative, including a parent or relative who resides outside the State, for a specified period as the Child and Family Agency considers appropriate having regard to the care requirements of the child;

(b) the provision to the child of medical or psychiatric examination, treatment or assessment;

(c) the provision to the child, outside the State, of medical or psychiatric examination, treatment or assessment;

(d) release on compassionate grounds;

(e) educational and recreational outings from the special care unit;

(f) to promote the welfare of the child, having regard to his or her care requirements and to adequately address his or her behaviour and the risk of harm it poses to his or her life, health, safety, development or welfare.”

Constitutional Provisions

34. The relevant constitutional provisions at issue are Articles 40.3 and Article 42A.

Article 42A.1 states:

“1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.”

35. Article 42A.4.1^o places “the best interests of the child” as the paramount consideration and is as follows:

“4.1° Provision shall be made by law that in the resolution of all proceedings—

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

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

the best interests of the child shall be the paramount consideration.”

36. Article 40.3 concerns the personal right of the citizens:

“1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

Part III – The two High Court judgments

37. One critical feature of this case was that no determination under s. 23F(7) of the 1991 Act was made by the CFA as to whether M or B required special care, and as a result, no application for special care under s. 23F(8) was made to the High Court in respect of either child. Judicial review proceedings were accordingly initiated seeking to compel the CFA to discharge its statutory duties and the matter came before Heslin J. in the High Court.

38. In those proceedings the CFA acknowledged that it was in breach of its statutory obligations under the 1991 Act. It accepted that it was obliged to make a “determination” pursuant to s. 23F(7) of the 1991 Act and that it was in breach of

its obligations pursuant to s. 23F(8) given its failure to apply to the High Court for a special care order. The CFA contended, however, that the appropriate response by the High Court was to make declaratory orders reflecting these acknowledged breaches of statutory duties. It was nonetheless strongly opposed to the granting of any mandatory orders which would require the CFA to comply with these statutory obligations. This is because, the CFA argued, any such mandatory orders could not be complied with given the impossibility of recruiting and retaining the appropriate staff at present pay levels. This is the issue which is at the heart of the proceedings.

- 39.** In his judgment Heslin J. noted that the 1991 Act was the mechanism whereby the State sought to safeguard the rights of each child are protected and vindicated in the manner required by Article 42A. He observed that there is no conditionality in Article 42A and therefore no question of it being legitimate for some children to have their rights protected and bests interests secured, but not others.
- 40.** Heslin J. observed that since 23rd June 2023, the CFA regarded M as in need of special care, and that in the interim M has suffered “real and serious harm of the gravest sort”. The fact that the CFA’s own internal processes have not yet produced a *formal* statutory determination pursuant to s. 23F(7) cannot undermine the objectives of Part IVA of the 1991 Act, or the specific statutory obligations under s. 23F. The suggestion that no formal determination has been made therefore, was therefore regarded by Heslin J. as prioritising ““form over substance” at the expense of mandatory obligations in the 1991 Act”. As such, Heslin J. concluded that adherence to internal procedures which are not mandated by, or laid down in, s. 23F could not legitimise delay where the effect of this was to breach explicit statutory obligations, particularly obligations designed to give effect to the child’s constitutional rights.

41. In respect of M, Heslin J. noted that a period of 63 days had elapsed since the CFA’s Social Work Department decided to make the referral for special care. The judge characterised this delay as “extreme” and “egregious” having regard to, *inter alia*, the serious harm M has suffered during this delay, the CFA’s awareness of the delay and harm which has occurred, and the CFA’s deliberate refusal to make a formal statutory determination within the meaning of s. 23F(7). Heslin J remarked that where “... a real and substantial risk of harm to his or her life, health, safety, development or welfare” arises in respect of a child (as under s. 23F(2)), it cannot be suggested that the matter is other than extremely urgent, and – putting to one side the 40 day delay up until the 8th August 2023 determination by the CFA’s SCC – the delay thereafter was characterised by Heslin J. as extreme, damaging to the child, and running contrary to the will of the People as expressed in legislation enacted by the Oireachtas.

42. In relation to B, Heslin J. noted that putting aside the period from 5th July 2023 when the CFA’s social work department decided to make a referral for special care to 25th July 2023 (when the CFA’s SCC determined that B fulfilled the criteria for admission to special care), the subsequent delay between the 26th July 2023 and the hearing before Heslin J. in the High Court comprised 78 days. Just as the delay of 63 days in respect of M was extreme and egregious, Heslin J. observed that the same was true in respect of the delay of 78 days in the case of B.

43. Heslin J. noted that the harm each child has suffered was not simply notional or potential but amounted to actual harm which will continue to be suffered as a consequence of the CFA’s delay in complying with its statutory obligations. Heslin J. therefore found first that, the CFA decided not to complete its internal procedures and make a formal s. 23F(7) declaration with

a view to attempting to avoid triggering its obligation under s. 27F(8); and second, that during the ensuing delay, both children have suffered life threatening harm and continue to suffer such harm.

44. Heslin J. said that the main obstacle facing the CFA related to the provision of sufficient staff, and in oral submissions before the Court it was emphasised that financial resources *are* available, but that the necessary number of staff are not. As such, Heslin J. considered that this was not a case where, for example, the needs of the applications so rare that significant sums of public funds would need to be dedicated to the building of facilities to meet serious but extremely uncommon needs – rather, the physical facilities do exist, and the CFA does not contend that it does not have the requisite funds.

45. As noted by Heslin J., the CFA’s central contention was that no mandatory order should be made as it would be both impossible for the respondent to comply with them and therefore futile for the High Court to make them. While Heslin J. did not doubt the ‘serious and ongoing difficulties’ faced by the CFA, in particular in relation to staff requirement and retention, he nevertheless suggested that nothing in the evidence before the High Court rendered it impossible for the respondent to make a determination under s. 23F(7). Moreover, he suggested that the evidence did not establish that it would be impossible for the respondent to apply, under s. 23F(8), for a special care order.

46. Furthermore, Heslin J. noted the recent decision in *LM v. The Child and Family Agency* [2023] IEHC 289 and suggested that this decision made it clear that the non-availability of a placement in a special care unit cannot be a reason for the Court not to make a special care order under s. 23H. As a result, Heslin J. stated that if the non-availability of a special care placement cannot be a reason for the Court not to

grant a special order, it cannot be a reason for the Court not to require the respondent to apply for a special care order.

47. As a result, it was stated that an important element of the role of the High Court is to vindicate and defend constitutional rights as found in Articles 40.3 and 42A. Heslin J. was therefore satisfied that the proceedings at hand were “exceptional and rare” such that intervention by the High Court was required, and that were the Court not to grant appropriate mandatory orders, it would abnegate its responsibilities under the Constitution.

48. Heslin J. emphasised that the Court was not finding “hitherto unexpressed” positive obligations binding on the CFA – rather, such positive obligations were already provided for in the actual words used in the 1991 Act. Furthermore, for the Court to refuse to make mandatory order would be for the Court to conduct itself as though the constitutional rights of M and B can be “diluted” by, for example, the attractiveness of employment in the special care sector – a position flagrantly at odds with the guarantees in Article 42A. In these circumstances, Heslin J. made an order of *mandamus* requiring the CFA to apply for a special care order in respect of each child.

The two judgments of Jordan J.

49. After judgment was delivered by Heslin J. on 13th October 2023, the matter came before Jordan J. On 25th October 2023, Jordan J. delivered two separate judgments with record numbers 2023 353 MCA and 2023 354 MCA.

50. Record number 2023 353 MCA concerned an application for a special care order in respect of B by the CFA. As stated by Jordan J., it was suggested that there were two other applications to be heard after the application concerning child B, and that

the CFA was of the opinion that one of the children is in greater need than the other two, and that the order should be made in that case but not the others. Jordan J. considered this an “unacceptable presentation or an unacceptable approach” to the obligations of the CFA.

- 51.** As I have already noted, s. 23H of the 1991 Act states that, subject to the High Court being satisfied of various matters listed at s. 23H(1)(a)-(h), “the High Court may make a special care order in respect of that child...”. Jordan J. was satisfied that each of the criteria as listed in s. 23H(1)(a)-(h) were met, and concluded that B was at very serious risk, with the situation disimproving with time.
- 52.** Jordan J. recognised the staffing difficulties faced by the CFA and he noted the argument that there is a discretion afforded to the High Court in the last line of s. 23H(1), with the use of the word ‘*may*’. Noting the Supreme Court judgment in *O’Donnell v. South Dublin County Council* [2015] IESC 28, Jordan J. suggested that it would be inappropriate for the Court to engage in an attempt to work around the staffing shortages in the CFA and to decline to make an order simply because the word “may” is used in s. 23H(1). Even if such a discretion did exist, it would have to be exercised with regard to the evidence before the Court and the paramount consideration of the welfare of B. As such, Jordan J. concluded that there was no reasonable basis on which the Court could refuse or should refuse to grant the order sought by the CFA, and granted a special care order as sought, refusing to grant a stay on the order as it would not be appropriate to do so having regard to the peril B is in and the urgency of the matter at hand.
- 53.** Record number 2023 354 MCA concerned an application brought by the CFA for a special care order for M, and Jordan J. delivered a separate but similar judgment in respect of this application. As noted by Jordan J., despite the CFA being of the view

that a special care order is required, the CFA nevertheless asked the High Court *not* to make the order because there was no bed available. Jordan J. was of the opinion that the Court would have failed in its obligations if it did not grant the special care order sought.

54. Noting the provisions of s. 23 H of the 1991 Act, Jordan J. suggested that there exists a body of authority to the effect that the use of the word ‘may’ can mean ‘shall’ when used in certain statutory contexts. Jordan J. stated that in the context of the welfare considerations that exist in childcare proceedings and having regard to the matters which the Court must be satisfied of before making a special care order, if the Court is so satisfied then the word “may” must mean “shall”. He took the view that the evidence before the Court compelled him to make the requisite special care order. As a result, Jordan J. granted the order as sought, and refused to grant any stay on this order, as to do so would have been “entirely inconsistent” with the findings made in terms of the situation of child M.

Court of Appeal Judgment

55. The CFA subsequently lodged an appeal with the Court of Appeal and sought a stay on the order of Jordan J. in respect of child B. That application was refused by Costello J. in an *ex tempore* judgment on 3rd November 2023.

The Determination of this Court granting leave pursuant to Article 34.5.4^o

56. This Court granted leave to appeal each of the orders made by Heslin J. and Jordan J. respectively in respect of both children in a single composite determination ([2023] IESCDET 138). In applying for leave to appeal pursuant to Article 34.5.4^o, the CFA contended in essence, first, that the Court should have made a declaration

to the effect that the Agency had failed in its statutory duties pursuant to s. 23F(7) and s. 23F(8), and should have refrained from making a mandatory order which the CFA contended it could not comply with. Secondly, the CFA argued that s. 23H conferred a discretion on the Court which should not be exercised to require the CFA to do something which it could not do, on the evidence, as this impossibility would render any order to this effect futile. The respondents all accepted that the appeal raised issues of general public importance and did not oppose the application for leave. This Court considered that an issue of general public importance did arise which touches and concerns the civil detention of among the most vulnerable children in the State and the jurisdiction of the courts to make mandatory orders for such detention and decided that the exceptional circumstances of these cases reached the constitutional threshold for a direct appeal to the Supreme Court.

Part IV – The Submissions of the Parties

Submissions of the CFA

57. The CFA notes that both M and B have been placed in special care beds on 4th November 2023 and 13th November 2023 respectively. The CFA suggest that the Agency was of the view that in placing M in special care she presented the greatest risk and need of the children who, in the opinion of the Agency, met the criteria for an application for special care. However, the CFA contends that B was at lesser risk than other children who also met the criteria for an application for special care and that this is the first time that the CFA has placed a child in special care who did not present the highest risk, which has resulted in a situation where another child who is a greater risk is left without a special care placement. As such, the CFA emphasises its concern that the prioritisation of children for special care is

“contingent on factors other than the presentation of that child”. It is further noted that nine children are without special care placements despite meeting the criteria for an application in respect of same. As a result, the CFA suggests that where there are an insufficient number of beds for children who meet the criteria for special care, the High Court has discretion to refuse to grant an application for special care, taking into account the unavailability of a placement and the assessment of the CFA of the competing needs of other children at high risk.

58. The CFA submits that the legal issues can be distilled into four questions:

- (i) Was Heslin J. correct in making mandatory orders compelling the CFA to apply for special care in the absence of a special care bed?;
- (ii) Was Jordan J. correct in holding that he had no discretion to refuse to make a special care order once the criteria under s. 23H(1)(a)-(h) were met?;
- (iii) If the High Court in hearing an application under s. 23H has a discretion to refuse to make a special care order even when the criteria under s. 23H(1)(a)-(h) are satisfied, what is the nature and extent of that discretion?;
- (iv) Is the unavailability of a bed in special care a ground for the High Court to refuse to make a special care order in exercising this discretion?

59. The CFA contends that the first discretion contained in the statutory scheme from the commencement of the process contained at s. 23F(1) is that the High Court ‘*may a special care order ...*’ as stated at the end of s. 23H(1). It is only at this point, the CFA submits, that the legislation provides for a discretion.

- 60.** The CFA accepts that there are circumstances in which the use of the word ‘*may*’ in legislation can be interpreted as providing for a mandatory duty, yet contends that ‘*may*’ in s. 23H does not give rise to a mandatory interpretation. This is because: s. 23H refers to the High Court using its discretion and not a county council or planning authority; the plain meaning of the word ‘*may*’ is permissive and not mandatory; the overall statutory scheme points to a permissive interpretation because s. 23H(1)(g) is the only use of the word ‘*may*’ or provision for a discretion in either s. 23F or s. 23H; and finally, an order under s. 23H amounts to civil detention, and to deprive the High Court of discretion in the making of such an order would deprive the statutory scheme of “an important check or balance”. The CFA cites for this purpose the decision of Whelan J. in *Child and Family Agency v. M.L. (Otherwise G.)* [2019] IECA 109, suggesting that the independent judicial supervision of the High Court is an important factor in the special care regime.
- 61.** If the word “may” in s. 23H is indeed permissive and the High Court does have a discretion not to make a special care order, the CFA submits that such a discretion *cannot* relate to the matters set out at s. 23H(1)(a)-(h) as these issues will have been determined by the time the Court’s discretion is engaged. As a result, the Court’s discretion cannot relate to whether the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare; whether care other than special care is appropriate for the child; and whether special care is an appropriate form of care for that child. It is therefore submitted by the CFA that the *only* other factor remaining to engage the Court’s discretion under s. 23H is the availability of an appropriate special care bed. The CFA suggests that the child opposing the application may be another factor at play, but that this is more properly part of the consideration as to whether or not special care is required.

62. The CFA therefore submits that the High Court has discretion under s. 23H to consider the availability of special care beds and the competing interests of children who otherwise meet the criteria for special care beds. The CFA considers that it is open to the High Court therefore to consider a range of orders in addition/alternative to a special care order (including, *inter alia*, the staying of an order for special care), taking into account the unavailability of a special care bed.
63. Furthermore, it is submitted by the CFA that the nature of the orders made by Heslin J. are contingent on the existence and nature of any discretion of the High Court under s. 23H, which, in the opinion of the CFA, includes a consideration of the non-availability of special care beds. The CFA therefore submits that if the High Court has no discretion, or a very limited form of discretion, then the mandatory orders of Heslin J. trigger the issues of impossibility and/or futility. As a result, if the judgment of Jordan J. is correct in respect of the discretion of the High Court as a matter of law, the CFA suggest that the force of their submissions on impossibility and futility increase significantly as Heslin J. was operating ‘under a misapprehension of the law when he made those mandatory orders’. This is because, in the words of the CFA, ‘the effect of those orders would be almost indistinguishable from ordering that a child be placed in special care’. This leads to further difficulty, the CFA submits, in that a decision as to the prioritisation of a child for special care is made by the Court without the full knowledge of the various children who may be at risk and without an assessment of which child is at greater risk than others.

Submissions of Guardians *ad Litem* (on behalf of M and B)

- 64.** The submissions of the respective guardians *ad litem* contend that the High Court judgments of Heslin J. and Jordan J. are carefully balanced and fair and justly made on grounded legal foundation, and stress that these judgments arise from an “entirely intolerable situation” which is of the CFA’s own making.
- 65.** The GALs suggest that the CFA’s explanation for its inability to comply with its statutory duties is in substance the same as was rejected by the High Court in *In re KM* [2018] IEHC 651, where Reynolds J. urged the CFA to address its own staffing issue as a matter of urgency to ensure care to the most vulnerable children in society. The GALs note that the judgment in *KM* was not appealed. They suggest that the CFA has failed to address its own staffing issues in the five-year intervening period since the judgment in *KM*, and suggest that the evidence shows that these staffing issues have deteriorated.
- 66.** The GALs further point to *A.F. No. 1*, *A.F. No. 2* and *LM* and suggest that in these judgments the CFA has been reprimanded by the High Court in similar circumstances, and again note that none of these judgments were appealed by the CFA.
- 67.** The GALs contend that the High Court has made repeated declarations to the effect that the CFA is in breach of its statutory duties, yet despite this, the CFA has failed to address the staffing issues it contends are the root cause of the delays. The GALs emphasise, moreover, that in the case of both of these children, there was consensus among the relevant professionals within the CFA, and the parents of each of the children, that both are urgently in need of special care. Despite the urgency of the situation the GALs contend that the CFA failed to do which they are mandated to do under the 1991 Act and apply for special care.

- 68.** The GALs contend that the orders sought were warranted, justified, proportionate and wholly necessary as a result of the CFA’s “clear and conscious disregard for previous declarations and its indication and acknowledgement that any future declarations would be futile in terms of its ability to meet its statutory obligations.” They also note that the mandatory orders made by Heslin J. were capable of being complied with and were so complied with and suggest that the CFA is statutorily mandated to manage and maintain the system of special care and it not legitimate or reasonable for the CFA to refuse to place these children in special care because of its own “staffing issues”.
- 69.** In setting out the statutory regime which details special care, the GALs suggest that the primary obligation to provide, maintain and administer special care units lies with the CFA and that this obligation entails ensuring that there are sufficient places in special care units to meet the needs of children in respect of whom special care orders have been made.
- 70.** The GALs submit that the statutory obligations imposed on the CFA by the 1991 Act must be considered in conjunction with, and in a manner which vindicates the constitutional right of children as found in particular in Article 42A and 40.3.1 of the Constitution.
- 71.** The GALs submit that Heslin J. entitled to make mandatory orders and that it was appropriate for him to do so. They argue that neither order caused difficulty for the CFA, as the second mandatory order was carried out within a number of days. They further suggest that it is arguable that the first mandatory order was unnecessary as the CFA had already determined that both children required special care.
- 72.** The GALs contend that a divergent approach has emerged between the granting of mandatory orders in constitutional cases, as opposed to mixed constitutional and

statutory claims cases, suggesting that the courts have been more inclined to grant mandatory orders in cases where there has been a statutory obligation or entitlement which the respondent has failed to fulfil which occasions a breach of constitutional rights. This is in contrast to a more ‘*restrictive approach*’ to purely constitutional rights cases.

73. Both GALs argue that the test as set out by Keane C.J. and added to by Murray J. in *TD v. Minister for Education* [2001] 4 IR 259 is met on the facts of his case, and that the failures of the CFA impact directly on the welfare and fundamental personal rights of M and B which constitutes *clear disregard* under *TD* of the CFA’s constitutional obligations and statutory duties. Indeed, they suggest that the acknowledgment of the CFA that it “cannot (or will not) do any more than it is doing represents the very essence of a conscious and deliberate decision by an organ of the State to act in breach of its constitutional obligations.”
74. The GALs refer to a number of decisions post-*TD* and suggest that subsequent judgment have served to dilute some of the language in that judgment. They suggest that the instant cases do not concern the directing of the State as to how to distribute scarce resources, but suggest that the effect of the mandatory orders was simply to require the CFA to do what it was required of it by statute and to make an application for a special care order.
75. The GALs further submit that the CFA is the statutory parent of these children, with all the corollary parental duties and obligations, and that the CFA has unique and special knowledge of the vulnerabilities and risk profiles of these children.
76. In respect of the judgment of Jordan J., the GALs suggest that the comparative analysis of when ‘*may*’ can mean ‘*shall*’ as emphasised by the CFRA is a ‘*red herring*’ and serves to obscure the central issues in the appeal. They suggest that it

is clear that even is the word ‘*may*’ was not read as meaning ‘*shall*’ in s. 23 H, Jordan J. would exercise such discretion in favour of making the special care orders, and that therefore this Court should not interfere with the lawful exercise of discretion by the High Court. They suggest that the High Court judge should be afforded a ‘*significant margin of appreciation*’ in this regard.

Submissions of the Parents of Child M and Child B

77. The parents of child M and child B (*‘the parents’*) submit that the State is under a positive obligation to safeguard the life, dignity, physical integrity and essential welfare of both children, and contend that it is uncontested that the only mechanism by which to achieve this was and remains special care.
78. The parents further suggest that the CFA have failed to provide adequate placements and have repeatedly applied a policy where they will not make a determination under s. 23(7) until a special care placement is available. This is despite being held to be in breach of its statutory duties in *A.F. (No. 1)*, *A.F. (No. 2)* and *LM*, none of which the CFA chose to appeal.
79. The parents further contend that the orders are not futile, and suggest that there is a benefit to a child having a determination made under s. 23F(7) and an application being made under s. 23F(8) because, as soon as a placement becomes available a child can be placed in it without any delay in having to make an application to the High Court for an order. This is especially important in cases where a child’s life may be at risk or they are at risk of sexual exploitation or physical violence. Furthermore, a special care order requires Court oversight by way of regular and fixed statutory review under s. 23I of the 1991 Act, which the parents contend is a tangible benefit for a vulnerable child, and provides reassurance to the child’s

parents. They further note that the orders granted by Heslin and Jordan JJ. were followed ‘*relatively quickly*’ by the children being allocated beds in special care.

- 80.** They furthermore submit that the CFA are mandated to prepare an annual report on the adequacy of its services, and that there is utility in a special care order being made even where it cannot be effected immediately in order to provide oversight and transparency.
- 81.** In respect of the orders granted by Heslin J., the parents submit that they were not futile and that the granting of mandatory orders was the only step which could have been taken to try to vindicate the statutory and constitutional rights of M and B given the history of the CFA’s ‘*grave default*’. The parents suggest that in general terms the granting of a mandatory order to give effect to a statutory obligation is an appropriate remedy where the body which bears that responsibility has failed to discharge its obligations. The parents submit that the appeal at issue can be distinguished from *Brady v. Cavan County Council* [1999] 4 IR 99, as the 1991 Act places an explicit obligation on the Court to have regard to the best interests of the child as the paramount consideration, that the principles of interpretation applicable to a remedial social statute apply such that the 1991 Act should be construed as widely and liberally as can fairly be done, and that the constitutional rights of the children are engaged in a manner which did not arise in respect of the relief sought in *Brady*. These rights not only impose an interpretive obligation on the Court, but Article 42A imposes a specific obligation on the Court to consider the best interests of each child.
- 82.** It is further submitted that the fact that *JB* was allocated as a result of a Court order, rather than because he was the child most in need in the opinion of the CFA, supports the suggestion that the making of the mandatory order which gave rise to

the application for special care was not futile and it led to the CFA meeting its statutory duty in respect of B.

83. The parents submit that the CFA was correct not to rely on *TD* as it is ‘entirely distinguishable’ from the present appeals, and that the appropriate test is located at para. 61 of the judgment of O’Donnell CJ in *Burke v. Minister for Education* [2022] IESC 1.
84. In respect of the orders of Jordan J., the parents submit that the Court’s primary duty is to ensure that legal obligations are complied with and the constitutional rights are respected. Jordan J. was also obliged to have regard to the best interests of the child as a paramount consideration, and in such circumstances, he was required, on the facts, to make special care orders. The parents emphasise that *O’Donnell* was not relied on by Jordan J. in his judgment, and that he found that any discretion afforded to the Court must be exercised with regard to the paramount consideration of the child’s rights.
85. The parents furthermore contend that the Oireachtas could not have intended that the placement of a child in special care would be contingent on factors such as the availability of a special care place, and if it had so intended, s. 23F and s. 23H could have been made subject to such a condition. Finally, the parents suggest that the use of the word “may” in s. 23H may have been inserted in part “out of deference” by the Oireachtas to the judicial branch.

Submissions of the Attorney General

86. While the Attorney General was not a party to these appeals, he nonetheless appeared qua *amicus curiae* in order to assist the Court.

- 87.** In respect of the interpretative principles as to whether a statutory provision is permissive or mandatory in nature, the Attorney suggests that while the words used in a statutory provision are clearly important in determining whether it is mandatory or permissive, those words must be interpreted in the context in which they exist. The Attorney submits that before a special care order is made, the High Court must be satisfied that it is in his or her best interests and also that it is necessary for the purpose of protecting the life, health, safety, development, or welfare of that child. As a result, the Attorney suggests that it is difficult to reconcile the concept that the High Court would make these two findings and then exercise its discretion to refuse to make a special care order, especially given the constitutional context in which the 1991 Act, and s. 23H exists. As such, the Attorney submits that if it is determined that only special care can adequately protect the child, that it would seem likely that the Oireachtas intended that such a child would obtain special care.
- 88.** Furthermore, given the obligation on the Court to determine an application for special care on the basis of the best interests of the child as the paramount consideration, the Attorney submits that it is difficult to see, if the requirements set out in s. 23H(1) are met, how a discretion could or would arise as to whether to make the order sought.
- 89.** In considering the statutory backdrop to the wider body of children who require care, the Attorney further submits that this backdrop appears consistent with a policy that if a child requires special care the CFA should provide such a place.
- 90.** The Attorney contends that the 1991 Act and Part IVA specifically, provide an important means whereby the State carries out its constitutional obligation to protect and vindicate the rights of children, and in such circumstances the provisions of the

Act should be construed ‘*as far as possible in a manner consistent with the vindication of such rights*’.

91. The Attorney does note however that if performance of a statutory obligation is impossible, there is longstanding authority for the proposition that a court should not make a mandatory order given the nature and effect of a special care order. As a result, he points to s. 23NF of the 1991 Act which may provide a means whereby a special care order could be made but the issue of impossibility could be avoided. Section 23NF permits the variation of a special care order or interim special care order to authorise the release of the child from the special care unit for various specified purposes.
92. Finally, the Attorney submits that it is clear that the function of making applications for special care order under s. 23F(8) are mandatory in nature, and no issue in regard to impossibility would appear to arise.

Part V – Whether the High Court should have granted an order of mandamus directing the CFA to make an application or a special care order

93. The first question which arises on this appeal is whether the High Court should have granted an order of mandamus directing the CFA to make the appropriate application to the High Court for a special care order in respect of each child. An order of mandamus will, of course, only be made where it is just and convenient to do so and whether this is so will in turn depend on the statutory context. Here, however, the statutory context is absolutely clear.
94. As we have already seen, s. 23F(7) provides that where “the Child and Family Agency is satisfied that there is reasonable cause to believe that the child requires

special care it shall make a determination as to whether the child requires special care.” The phraseology of the sub-section contains familiar statutory terms (“satisfied”, “reasonable cause to believe”). Thus, the use of the term “satisfied” in this context connotes a state of affairs such that the decision-maker must form a view which is *bona fide*, factually sustainable and not unreasonable: see, *e.g.*, the seminal judgments to this effect of O’Higgins C.J. in *The State (Lynch) v. Cooney* [1982] IR 337 at 361 and that of Blayney J. in *Kiberd v. Hamilton* [1992] 2 IR 257 at 265.

95. Approached in this way, this question really answers itself, not least because the CFA did not even make the statutory determination which it was required to make by s. 23F(7). On any view of the distressing facts of these cases the CFA could not properly have concluded other than that there was “reasonable cause to believe” that both children required special care. As a human tragedy played out right in front of their eyes over the summer of 2023, the CFA prevaricated and failed to perform its statutory duty. It ought to have made the determination necessarily envisaged in those circumstances by s. 23F(7) and its failure to do so can only be described as inexcusable. In the face of overwhelming evidence as to the treatment which these children required, the failure to do so was can only be regarded as an example of a statutory body refusing to give effect to legislation enacted by the Oireachtas.

96. In fairness to the CFA, it accepts that a declaration could be made that it was in breach of its statutory duty under s. 23F in failing to make such a determination. It rather makes the case that it ought not to be compelled by mandamus to make such a determination. Of course, once the CFA had made such a determination, it was then obliged by the complementary provisions of s. 23F(8) to make an application

to the High Court for a special care order. Faced with what can only be described as a studied failure to apply the relevant statutory provisions, in my view Heslin J. was perfectly correct in making the requisite order of mandamus. This Court has frequently emphasised in a series of recent judgments –such *Costello v. Ireland* [2022] IESC 44 and *In re Article 26 and the Judicial Appointments Commission Bill* [2023] IESC 34 – that the Constitution’s commitment to democracy and the rule of law are perhaps among the most fundamental features of the State’s constitutional order and constitutional identity. As Dunne J. observed in the *Judicial Appointments Commission Bill* (at paragraph 11) “it is principally through the enactment of legislation duly passed by a majority in a democratically elected Oireachtas that law is made for the State.”

97. A statutory agency such as the CFA is bound to uphold the Constitution and the law. It is not entitled to take it upon itself – even for the best of motives – to disregard that which the Oireachtas has prescribed as mandatory. Yet it is hard to avoid the impression that this is precisely what the CFA did in the present case. Working back from its (admittedly legitimate) concerns regarding the availability of appropriate staff, it refrained from making the appropriate determination envisaged by s. 23F(7) because it knew that this would lead on to a High Court application for a special care order by virtue of s. 23F(8). As I have, however, just explained there was no legal basis by which it could refrain from forming the requisite opinion for the purposes of s. 23F(7).

98. In these circumstances, I consider that Heslin J. was perfectly correct in making the mandamus order in respect of both cases. Both cases were, in the words of Henchy J. in *The State (Sheehan) v. Government of Ireland* [1987] IR 550 at 562, examples of “a breach of an explicit and unambiguous duty imposed by the relevant statute,

and which called for an order of mandamus.” I would accordingly dismiss the CFA’s appeal against the making of this order. I propose now to turn to the more difficult issues raised by the appeal against the making of the order by Jordan J.

Part VI – The proper construction of s. 23H(1)

- 99.** The first issue which arises in the appeal against the order of Jordan J. is the proper construction of s. 23H(1) itself. The structure of the sub-section is again a not uncommon one. It provides that where the High Court is “satisfied” that eight enumerated criteria have been complied with, it “may” then make an order providing for the detention of the children for the purposes of a special care order. The eight criteria themselves all relate to the welfare of the child itself and these conditions are not expressed to be resource dependent. It is perhaps sufficient to point to s. 23H(1)(g) by way of example. This sub-section provides that the High Court must be satisfied that such an order is required for the “purpose of providing special care” and that such “is in the best interests of the child.”
- 100.** It is true that s. 23H(1) uses the word “may” by providing that the Court “may” make a special care order. By contrast, s. 23H(2) provides that the High Court “shall” specify the “period for which [the special care order] has effect.” Many of the arguments advanced here concerned the circumstances in which the word “may” must in its proper context be read as “shall”. Much of this jurisprudence was exhaustively canvassed in the various judgments of this Court in *Heneghan v. Minister for Housing* [2023] IESC 7, [2023] 2 ILRM 1 and it is perhaps unnecessary to repeat this exercise here.
- 101.** Here I disagree with the argument advanced by various parties that the Oireachtas was wary of using the term “shall” because of possible constitutional constraints

regarding an unwarranted intrusion into a protected judicial sphere. It is well established that the Oireachtas may in principle provide for mandatory orders such as provisions which state, for example, that where the District Court is satisfied of the existence of facts A, B and C it shall make order D: see *The State (O'Rourke) v. Kelly* [1983] IR 58. What it cannot, however, do is to provide that such an order *must* be made by the court *simply* because a witness gives particular evidence (*The State (McEldowney) v. Kelliher* [1983] IR 289) or *simply* because the accused belongs to a particular category of offender (*Ellis v. Minister for Justice and Equality* [2019] IESC 30).

102. For my part, I consider that the use of the word “may” in these circumstances does imply the existence of a discretion as to whether to make a special care order. After all, as Henchy J. observed in *Sheehan*, the different use of the words “may” and “shall” in the same section of an Act of the Oireachtas can scarcely be other than deliberate: see [1987] IR 550 at 561.

103. I consider that the same principle applies here. The High Court’s decision as to whether to order a special care order is not rendered mandatory simply because it is satisfied that all the eight enumerated conditions have been complied with. The Court retains a residual discretion designed to cater for unusual circumstances in the nature of *force majeure*, but perhaps not entirely confined to unforeseeable events. Given, however, that s. 23H(1)(h) requires the High Court to be satisfied that the making of such an order is in the best interests of the child in question – thereby giving force and reality to the constitutional injunction contained in Article 42A.4.1^o – the circumstances in which the High Court could properly decline to make such an order where these eight enumerated conditions are satisfied would have to be exceptional. Such exceptional circumstances would necessarily be

divorced from the constraints on the CFA's ability to give effect to that order at the time of the making of that application. It may well be if an event in the nature of *force majeure* occurs *after* the CFA initiates its application to the High Court that this would render compliance with the order sought impossible. In those circumstances the Court might on these particular facts having been drawn to its attention by the CFA then decline to make the order sought. It cannot, however, be the case that the CFA can first initiate such an application and then in that application to the High Court urge that the Court should not make the order it is mandated by law to seek and which, formally, it is seeking.

104. The critical question for the purposes of this appeal is whether the absence of resources in terms of retaining staff is among the category of these exceptional, residual circumstances contemplated by s. 23H(1). It is to that question to which we can now turn.

Part VII – Whether the High Court should have declined to make the special care order under s. 23H(1) by reason of the lack of resources

105. 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. Before exploring this question any further, I should also note one argument advanced by the Attorney General, namely, that s. 23NF of 1991 Act provided a mechanism which might address this problem.

106. Section 23NF(2)(a) permits the CFA to apply to the High Court to vary the terms of a special care order so as to permit the child to be released so that he or she can be placed in a children's residential centre. (Other sub-sections of s. 23NF allow the

court to make an order releasing the child for specific purposes, such as medical treatment (s.23NF(1)(c)) or to attend a recreational event (s.23NF(1)(e)). The argument advanced on behalf of the Attorney General was that this sub-section allowed the children to be admitted into special care, but then to be released into the care of a residential centre on a temporary basis in the event that no bed was available in special care unit.

107. I do not doubt but that there might be cases where the making of such variation orders under s. 23NF could well be justified in appropriate circumstances. Yet it cannot be supposed that this provision provides a legally appropriate solution to the problem at hand. As several members of the Court observed in the course of the oral argument, the use of this sub-section for the purpose of ensuring an alternative *ad hoc* solution to actual detention in special care in circumstances where no bed was available for the young person in question would be inconsistent with the entire statutory scheme.

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. Section 23NF(7)(a) furthermore provides that the High Court may vary the terms of the special care order only where the Court is satisfied that "the release is necessary for

the protection of [the child's] life, health, safety, development or welfare and is in the best interests of the child.”

- 109.** One may thus observe that the entire s. 23NF procedure is designed with the welfare of the child in mind. It was not designed to operate as a short-term panacea to deal with the exigencies of a staff recruitment and retention crisis. Accordingly, the systematic use of s. 23NF for the purposes of fashioning an *ad hoc* solution of this kind to the issues of staff recruitment and retention for special care units is simply not legally justifiable.
- 110.** Returning now to the merits of the appeal, one curious feature of this application before Jordan J. to which I have already alluded was that while the CFA formally applied for a special care order under s. 23H (having, of course, been ordered to do so by the earlier order of Heslin J.), it actually contended in the course of that application that no such order should be made precisely because of the acute difficulties it encountered in securing the appropriate staff to supervise the special care order placements. That very incongruity strongly suggests that grounds of the kind relied upon by the CFA in support of its opposition to the making of the order (which it had formally applied for) do not constitute a sufficient basis for declining to grant this relief.
- 111.** It is true that the defence of impossibility finds expression in many areas of the law, ranging from the doctrine of frustration in the law of contract to the principle that equity will not act in vain and that a court will thus not grant an order which is impossible to perform. There is, of course, established authority that mandamus is a discretionary remedy and that such an order will not be made if its performance has been rendered impossible by the absence of the appropriate resources: see, e.g.,

The State (Modern Homes (Ire.) Ltd. v. Dublin Corporation [1953] IR 202; *Brady v. Cavan County Council* [1999] 4 IR 99.

112. In *Modern Homes* Maguire C.J. referred with approval to a venerable Victorian authority on this point, *Re The Bristol and North Somerset Railway Co.* (1877) 3 QBD 10. Here the Court refused to make an order requiring the company to construct a bridge over its railway track in the manner required by statute. This was a real instance of impossibility: the defendant was an all but defunct private company whose sole asset comprised in the vivid words of Cockburn C.J. of that “airy nothing – a reversion upon a perpetuity.” It had no prospect at all of being able to raise the funds necessary to comply with any order to repair the bridge. It is worth stating immediately that the present cases *are* different. As the CFA confirmed in the hearing before Heslin J., the CFA has the requisite financial resources and the secure units available: the problem pertains rather to the acute difficulties it has experienced in the retention and placement of staff at present rates of pay.

113. 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.

114. For my part, I would reject any real comparisons between this case and that of *TD*. That was a case where the High Court had directed the Government to build a particular type of secure facility to cater for troubled teenagers. This Court set aside this order, saying it was an infringement of the separation of powers in that the

judiciary had usurped a function more properly within the exclusive domain of the executive. There is, perhaps, a danger that this decision can be over-interpreted. *TD*, was in Professor Hickey's words, a "highly distinctive appeal concerning the question as to whether a High Court judge had been entitled under the Constitution to hand down a mandatory order directing Government ministers to take all necessary steps to facilitate the building and opening of a five bed high support unit at Elm House in the County of Limerick on or before 31st October 2000": see Hickey, "Reading *TD* Down" (2022) 20 *Irish Judicial Studies Journal* 19.

115. The critical difference between *TD* and these two appeals is that the Oireachtas has now legislated on this topic. To that extent the present cases are the obverse of *TD*. In *TD* part of the debate focussed on whether the judiciary were exceeding their constitutional remit by directing the executive as to the precise manner in which public resources should be applied. Part of the problem with this was that, on one view, the judiciary had assumed the exercise of executive powers by making the prescriptive orders which it did in the first instance (albeit reversed on appeal to this Court). Here the issue is a different one: the judiciary are not presuming to legislate or to exercise executive powers, but rather seeking to ensure that legislation duly enacted by the Oireachtas is actually complied with.

116. In contrast to the position which obtained in *TD*, there is now no question of the treatment of disturbed teenagers engaging in high-risk behaviour being governed exclusively by the Government exercising its executive functions under Article 28.2 of the Constitution, since what was then simply an executive function since has been supplanted by legislation. As this Court observed in the *Judicial Appointments Commission Bill* there is, generally speaking, at least, no *ex ante* bar to the Oireachtas regulating by legislation an area hitherto covered by executive action

under Article 28.2. By thus giving effect to a valid legislative command, this Court is thereby fulfilling the separation of powers and upholding – rather than violating – the Constitution.

117. While it is clear from *TD* itself that the care, education, and treatment of these deeply troubled children is an executive function, there is no suggestion that the Oireachtas was not constitutionally entitled to enact legislation prescribing the conditions by which such children would be detained in order to facilitate such treatment. In these circumstances then, generally speaking, the executive cannot in effect frustrate the exercise of these legislative powers by failing to provide for the requisite resources as would enable this to be done or otherwise plead its own failures in this regard as an answer to the non-compliance with the statutory obligation.

118. The very fact that a money message was supplied by the Taoiseach for the purposes of Article 17.2 in respect of this legislation and – perhaps even more pertinently – the fact that the Minister for Children and Youth Affairs signed a commencement order in December 2017 in respect of the amendments to the 1991 Act effected by the Child Care (Amendment) Act 2011 may all be regarded as an implicit promise by the executive that the requisite funding would be made available and that the operational burden presented by this new legislation was not considered to be too onerous.

119. What is clear, however, is that the operation of these provisions of the 1991 Act (and the amendments effected thereto by the Child Care (Amendment) Act 2011) did involve a cost – and a substantial cost – to the public purse. If the Government had considered that the costs to the public funds of such a proposed legislative measure were likely to be excessive, it could effectively have vetoed the measure

by refusing to issue the appropriate money message under Article 17.2. Alternatively, the Minister could have decided not to have commenced the relevant provisions of the 1991 Act as amended. If at any stage after the passage into law and the coming into force of the Act it was considered that the obligations contained in it were too onerous then it could have been amended.

120. Given, however, that the 1991 Act (as amended) is now law having been duly commenced by the Minister, it becomes the duty of the judicial branch to see that it is appropriately enforced in accordance with ordinary democratic norms and general rule of law principles. In that respect the presumption must be that the Government will ensure that the appropriate funds are made available to ensure that these statutory obligations are properly discharged. If these statutory obligations prove to be too onerous, then, in the words of Lynch J. in *Hoey v. Minister for Justice* [1994] 3 IR 329 at 343, the remedy lies in securing either a legislative amendment or repeal of the law:

“If the executive wishes to limit or reduce such [statutory] obligations, the executive must introduce the appropriate legislation to the Oireachtas and persuade the Oireachtas to enact the same.”

121. In *Hoey* Lynch J. granted an order of mandamus requiring a local authority to fulfil a statutory duty to repair a courthouse which had fallen into a state of disrepair. The Minister had purported to tell the local authority that he did not require it to perform its statutory duty. It was not surprising that Lynch J. held that this instruction was unlawful. This decision was, however, distinguished by this Court in what to date has been its leading decision on the question of mandamus, resources and the performance of a statutory duty: *Brady v. Cavan County Council* [1999] 4 IR 99.

122. In *Brady* the applicant sought an order requiring the Council to perform its statutory duty to repair a particular road which was admittedly in a state of extreme disrepair. Having succeeded in the High Court, this decision was reversed by a majority of this Court. The Council pointed to the fact that the road was just one of hundreds in the county which had been left in such a poor state of repair and that it simply did not have the resources to finance the large-scale road reconstruction programme which would have been necessary. This Court considered that these reasons were sufficient to justify its decision to refuse to make an order of mandamus.

123. The present case is quite different, in that (unlike *Brady*) this case concerns very specific statutory provisions which apply only to a very small cohort of troubled children. The application of these highly precise statutory provisions cannot realistically be interpreted as being resource dependent and, in any event, they have been enacted against the backdrop of the requirements of Article 42A in order to ensure the best interests of these children. It may be in any event that aspects of the reasoning in *Brady* may possibly need to be re-assessed in the light of the contemporary case-law dealing with the rule of law and modern separation of powers thinking, but this is something which lies well beyond the parameters of this appeal.

124. In this respect I cannot improve on the words of Lord Sales in *R. (Imam) v. London LBC* [2023] UKSC 45, [2023] 3 WLR 1178 at 1193:

“When it is established that there has been a breach of such a duty, it is not for a court or modify or moderate its substance by routinely declining to grant relief to compel performance of it on the grounds of absence of sufficient resources. That would involve a violation of the principle of

the rule of law and an improper undermining of Parliament’s legislative instruction.”

125. To repeat, therefore, if legislation of this kind proves to be too onerous or costly, then the solution lies in either amending or even repealing the legislation in question.

126. 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).

Part VIII – Enforcement of the High Court order

128. There remains the question of the enforcement of any such special care order. As Dunne J. said when delivering the judgment of the Court in the *Judicial Appointments Commission Bill* (at paragraph 11) the “entire structure of the Constitution presupposes the existence of a state governed by the rule of law. Article 5 describes the State as a democracy, yet with without the appropriate rule of law guarantees, the essential democratic character of the State could not be assured.” In a democratic state governed by the rule of law, all organs of the State are accordingly obliged to comply with court orders of this kind.

129. In the event that the CFA cannot bring about a state of affairs whereby the s. 23H(1) order of the High Court is complied with, then the possibility of enforcement by means of the contempt jurisdiction would naturally arise. At this point, however, the issue of contempt remains a purely hypothetical one and the issues which might arise in any such application would have to receive the most careful consideration.

Part IX- Conclusions

130. In summary, therefore, I am of the view that Heslin J. was perfectly correct in holding that the CFA was obliged to make a determination under s. 23F that it should apply for a special care order in respect of both M and B. In view of the overwhelming evidence that these deeply troubled teenagers required this care, the CFA could not properly have reached any other conclusion.

131. While it is true that s. 23H(1) does not necessarily *oblige* the High Court to make the requisite special care order even where the eight enumerated conditions pertaining to the welfare of the child are satisfied, the circumstances in which it could decline to make any such order are exceptional. The courts are obliged to give effect to legislative commands contained in Acts of the Oireachtas. In doing so, the courts are upholding – rather violating – the Constitution by giving effect to the wishes of the primary lawgiver in accordance with the democratic structure of the State.

132. As s. 23H is not expressed to be resource-dependent, I consider that Jordan J. was correct in making the special care orders pursuant to s. 23H(1) in these appeals.