AN CHÚIRT UACHTARACH
THE SUPREME COURT

O'Donnell C.J.
Hogan J.
Murray J.
Collins J.
Donnelly J.

S:AP:IE:2024:000116

[2025] IESC 2

BETWEEN/

B (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND, Y

PLAINTIFF/APPELLANT

AND

CHILD AND FAMILY AGENCY

DEFENDANT/RESPONDENT

AND

T, Q, MINISTER FOR PUBLIC EXPENDITURE AND REFORM, THE MINISTER FOR HEALTH AND CHILDREN, EQUALITY AND DISABILITY, INTEGRATION AND YOUTH, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Gerard Hogan delivered the 27th. day of January 2025

Part I - Introduction

1. This appeal concerns the question of whether the High Court has jurisdiction to make a finding of contempt of court against a State agency in proceedings which have been commenced by means of plenary summons and in respect of which no penalty – whether imprisonment or a monetary fine – has been sought. Rather unusually, the moving parties in the present appeal have not invoked the conventional contempt of court route prescribed by Ord. 44 RSC but have rather elected to proceed by way of plenary summons in which a declaration has been sought that the defendant Child and Family Agency ("CFA") has been guilty of contempt of court. In order, therefore, to determine this appeal this Court must accordingly re-examine fundamental aspects of the law relating to contempt.

2. I propose to do this presently. Yet it is also necessary to state at the outset that this appeal presents again the issue of how the State deals with deeply troubled children who are desperately in need of a special educational regime. Once again, we find that the State has been unable to find a placement for the child at the centre of the present case, B., because of staff recruitment shortages and the frequent turnover of staff who have been recruited for this very challenging work. And once again we also find that the High Court orders made pursuant to the Child Care Act 1991 (as amended) ("the 1991 Act") requiring the CFA to take a troubled child into the special care regime are allowed to lie fallow and unenforced not just perhaps for one week or two, but in this instance for a period for the best part of eight months.

3. It is the very failure to give effect to High Court orders which has given rise to this contempt application. I regret to say that all of this makes in some respects for depressing and dispiriting reading. At one level one cannot but be dismayed that a young person seems destined to a life of hopelessness, violence and crime without the appropriate State

intervention and support. At another level, the entire affair poses a challenge to the operation of the rule of law and the respect for the democratic order which Article 5 of the Constitution presupposes. Before considering any of these important questions it is necessary first to set out the background facts.

Part II – Background Facts

4. This is an appeal by B and his mother (who for convenience I shall refer to as the plaintiffs) from a judgment of the High Court of Jordan J. delivered on the 3rd April 2024. In that judgment Jordan J. stated, in effect, that the High Court had jurisdiction to deal with contempt only through the procedures prescribed by Ord. 44 RSC and that it did not have jurisdiction to make a finding of contempt of court simpliciter in plenary proceedings: see *B v. Child and Family Agency (No.2)* [2024] IEHC 236. For completeness, I should also record that there is also before the Court an appeal in respect of an award of costs delivered on the 4th July 2024 by Jordan J. in respect of the participation by the guardian *ad litem* in these contempt proceedings: *B. v. Child and Family Agency (No.4)* [2024] IEHC 401. At the hearing of the appeal, it was agreed that the discrete costs appeal should await the outcome of the substantive decision on this appeal.

5. The underlying proceedings concerned the duty of the CFA to give effect to a special care order which had been made by the High Court under the provisions of s. 23H of the 1991 Act in respect of B. He was born in 2009. He is suing through his mother and next friend, Y. B's father, T., is a notice party to the proceedings.

6. B had previously been in the care of the CFA pursuant to an interim special care order made by the High Court on 29th December 2021 and which was followed in January 2022 by a special care order (which order was extended twice). He was later the subject of a special care order which was made on 21st December 2022, and which was again extended twice. B. has a diagnosis of ADHD and has other medical conditions associated with child trauma.

Notwithstanding his period in special care, he has, in the words of Jordan J., "remained a very troubled and vulnerable boy." The court papers disclose B.'s involvement with drugs and violence. He lives a peripatetic, unstructured existence characterised by frequent unaccounted absences from care and a dangerous life on the streets in which he poses a very serious danger to himself and to others.

7. Another special care order was made by the High Court on 14th December 2023. It was the failure to give effect to this order which gave rise to the present proceedings. In the High Court Jordan J. found that the CFA had not given effect to the terms of that order on the ground that it was unable to employ or retain sufficient staff in the special care system, with the result that B was unable to secure a placement in that system. This was said to be a systemic, frequently recurring problem.

8. It is worth noting, however, that apart from largely uncontested evidence in relation to B's personal circumstances, no actual evidence was otherwise given in the High Court. The plaintiffs rested their case on the existence of the court order and the failure to secure a special care placement, the existence of a court order notwithstanding. The CFA's case essentially was that this failure to comply with the terms of the order was not its fault and it pleaded in substance that compliance with this order was to all intents and purposes impossible.

9. In this regard the CFA served a notice to admit facts on the plaintiffs on the 15th March 2024 shortly before the High Court hearing. The plaintiffs agreed to the first eight paragraphs but refused to agree to two other paragraphs. It is sufficient for our purposes to set out the terms of paragraphs 2, 3, 4, 6, 7 and 8 (which were all agreed) and they provide as follows:

> "2. There are physical beds available in purpose-built special care unit(s).

3. Restrictions on availability of beds in special care units results from the non-availability of staff rather than from any limitation on the number of beds.

4. The Agency does not have sufficient personnel to open the additional beds, despite the Agency having devoted monetary resources to the development of the special care system.

6. To increase capacity in special care without appropriate staffing levels would breach [the CFA's] regulatory obligations and put the operation of special care at risk.

7. It is not that the Agency cannot obtain staff simpliciter: it is rather that it cannot obtain staff at current rates of pay presently sanctioned by the Minister for Public Expenditure and Reform.

8. As a public body operating within the constraints of public service pay agreements agreed at a national level, the possibility of the Agency unilaterally offering individualised conditions of employment to staff working in special care is not an option for the Agency."

10. While the general contours of the issue were thus not greatly in dispute as between the parties, the CFA's defence was in essence one of impossibility. Implicit in that defence was that the appropriate funds or pay rates for staff employed in these special care units had not been sanctioned by the Minister for Public Expenditure and Reform. The Minister was not, however, a party to the contempt application and it is only proper to record that this version of events was not at all accepted by him. Counsel for the Minister did, however, appear as a notice party to this appeal and he drew our attention to a subsequent decision of Jordan J. in the High Court, *CFA v. DA* [2024] IEHC 614, a case in which the Secretary General of the Department gave evidence disputing the CFA's analysis of these events. It is true that Jordan J. in that case ultimately ruled in favour of the CFA, but the significance here is that the CFA are (in effect) citing the Minister's unwillingness to sanction the enhanced pay

rates or allowances as the ultimate reason for its inability to perform its statutory functions and to comply with the High Court order. As I have just observed, however, the Minister is not a party to this present application and, in any event, we know as a result of counsel's submissions to this Court that the Minister does not accept this analysis.

11. All of this means that the precise *reasons* for the failure to comply with the High Court order remain contested and while the notices to admit facts are admittedly of assistance this Court nonetheless does not have any real evidential basis by which it could make a finding on this all-important point. This is in itself unsatisfactory, and I shall return at a later stage to this evidential deficit.

Part II – The judgment of the High Court

12. In the substantive judgment dealing with this application, Jordan J. dismissed it on procedural grounds, saying that the contempt application ought to have been brought by way of motion for attachment and committal under Ord. 44 RSC and not (as here) by way of plenary proceedings. In this respect Jordan J. applied the principles enunciated in the recent judgment of this Court in respect of contempt, *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown* [2023] IESC 21. He noted that there not been any compliance with the service or penal endorsement requirements contained in Ord. 41, r. 8 RSC. He also noted that the plaintiff had simply sought a declaration that the CFA was in contempt of court in failing to comply with the previous order.

13. Jordan J. ultimately held that the plaintiff could not invoke the declaratory jurisdiction of the High Court for this purpose and thereby by-pass the provisions of Ord. 41 RSC. He said (at paras. 33 and 34 of his judgment):

> "It is true that the High Court has a wide jurisdiction to grant declaratory orders. However, there is no good reason or need to resort here to the High Court declaratory

jurisdiction as the contempt jurisdiction and procedure is clear and long established. This Court is not persuaded that the plaintiff is entitled to the declaration sought in these plenary proceedings. Even if the order with penal endorsement was validly served before the plenary summons was issued (and it was not), the Court sees no good reason or justification or basis for deviating from the procedures laid down in the Rules for dealing with contempt applications. Quite apart from anything else, granting such a declaration could cause significant issues in respect of subsequent efforts to have sanctions imposed on the contemnor and/or in similar proceedings brought in accordance with the Rules."

14. Since this judgment was delivered there have, however, been two important developments of which this Court was made aware at the hearing of the appeal. First, a place has finally been found for B and he went into special care at the end of July 2024. It appears that he is benefiting from this regime. Second, in quite separate proceedings, Jordan J. conducted a review under s. 23(1) of the 1991 Act of a particular special care placement in which he heard evidence from various parties (including evidence from the Secretary General of the Department of Public Enterprise and Reform) regarding the question of access to special care places. In his judgment in *CFA v. DA*, delivered on 16th October 2024, Jordan J. found that while the payment of special allowances was not the only factor, he concluded (at para. 108) nonetheless that pay was the core reason for the recruitment and retention of staff.

Part III – The arguments of the parties

15. Before proceeding further, it is next necessary to summarise the position of the parties.

The arguments of the plaintiffs

16. The plaintiffs submit that Jordan J. was in error in his judgment of 3rd April 2024 in refusing to grant a declaration that the CFA was in contempt of court on the basis that the only mechanism to invoke that jurisdiction was through a motion to attach and commit, with a penal endorsement on this order, as set out in the Rules of the Superior Courts. The plaintiffs contend that it is possible to invoke the contempt jurisdiction by way of instituting plenary proceedings and that no penal endorsement is necessary in circumstances where no punitive element is sought.

17. The plaintiffs contend that, absent an explanation, the disobedience of a court order is a form of civil contempt. They maintain that the breach of a Special Care Order would give rise to contempt of court, pursuant to *obiter* comments which I made in my judgment in *Re MMcD* [2024] IESC 6. The plaintiffs submit that what is sought is simply a declaratory finding of civil contempt, such as to coerce the CFA to comply with the fourth Special Care Order made on behalf of GB, granted on 14th March 2024 (which has subsequently lapsed for non-compliance. A fifth Special Care Order was made on 20th June 2024, which, as it appears, has also not been complied with to this date).

18. The plaintiffs say that it is incontrovertible that there have been breaches of the Special Care Orders and that the CFA is continuing not to comply, nor has it indicated that there ever will be compliance or communicated what if any steps are being taken to ensure compliance. They contend this is a continuing disobedience, rather than a once-off circumstance.

19. The plaintiffs further submit that the High Court have a wide jurisdiction to monitor and enforce its orders. They submit that in *PMcD v. Governor of X Prison* [2022] 1 IR 741 the Court held that declarations can be made on legal matters and facts which have legal consequences so long as the plaintiff has a legitimate interest to seek them. They maintain

that they have a legal interest in seeking a declaration in this case insofar as GB had a right being breached and an interest in having that breach examined.

20. The plaintiffs contends that there is no impediment to seeking this relief by means of plenary proceedings in circumstances where they are not seeking attachment and committal, where the respondent has no authority to the contrary and it causes no unfairness. The plaintiffs contend that a penal endorsement is not necessary to invoke procedural remedies where one is not seeking attachment, committal or sequestration. The plaintiffs furthermore submits that it is possible and legitimate to find contempt of court *simpliciter* separate to a finding of punishment. Finally, the plaintiffs contends that there is no impediment in the Rules of the Superior Courts to seeking such relief by way of plenary proceedings as they contend that Ord. 42 and Ord. 44 do not say that they are the only route to invoke the contempt jurisdiction and insofar as Article 34.3.1° of the Constitution vests full original jurisdiction to determine matters in the High Court.

The submissions of the Child and Family Agency

21. The CFA contend that the judgment of Jordan J. correctly sets out that contempt is a discrete jurisdiction to be exercised in line with procedures contained in the RSC in the context of Ord. 42 and Ord. 44 alone. The CFA argue that the appeal is misconceived, unsupported and unwarranted. The CFA submit that the Appellant has failed to identify an error of law in the judgment of Jordan J. and that the appeal amounts to an inappropriate request for an advisory opinion from this Court. The CFA do not accept that they have resisted the appeal on purely procedural grounds and states that the substantive points of the Appellant ought to be rejected on the basis of being misconceived, unsupported and unwarranted. The CFA also claims that the tendering of evidence heard in proceedings subsequent to the judgment appealed from by the Appellant in the course of the appeal is inappropriate.

22. The CFA submit that the appeal is unwarranted as there is no correlation between the outcome sought of increasing special care placements on the one hand and contending for a finding of contempt on the other. Moreover, the CFA contend that the relief sought is misconceived insofar as they contend that it conflates the remedy of a declaration of a right; wherein one can sue for a declaration in which a right is in issue, and a declaration of contempt; which is a declaration of a fact or state of affairs. Furthermore, the CFA maintains that contempt of court is in any case not an *inter partes* matter and that the use of plenary proceedings is inappropriate for the invocation of the jurisdiction. The CFA contend that outside a general claim that the jurisdiction is available in a plenary action that the plaintiffs have not submitted that the jurisdiction exists outside the scope of Order 44. The CFA further contend that contempt of court is not itself a cause of action which can be sought independently, and that as such the use of plenary proceedings in this context is inappropriate as it is unclear what underlying cause of action exists in these circumstances.

23. The CFA contend that the plaintiffs have failed to address the feasibility of the use of the contempt jurisdiction. The CFA contend that the plaintiffs failed to raise the question of possible contempt in light of the statutory scheme in the High Court. In this respect, the CFA contend that there is no precedent for the CFA to be subject to contempt insofar as they contend that as a matter of statutory interpretation, an order required by the Child Care Act 1991 is purely facilitative and that failure to comply in those circumstances is not something which gives rise to contempt, in particular as the Special Care Order did not impose a time limit for compliance. The CFA furthermore state that the plaintiffs have not addressed an anomaly of seeking to enforce contempt in circumstances where the enforcement of a civil contempt is to be pursued by the party who obtained the order sought to be enforced. The CFA submit that as it was the party which obtained the order it followed that the plaintiffs have no authority to see it enforced by way of plenary action. The CFA

also dispute whether circumstances in which they are required by law to obtain an order notwithstanding the knowledge that it cannot be satisfied if obtained gives rise to an allegedly contemptuous act.

24. The CFA also dispute that the remedy would be in any case effective or that its grant would have any of the purported intended effects. The CFA submit that while the plaintiffs purport to seek to coerce the Agency to comply with the Special Care Orders, that this coercive force is ineffective as the Special Care Orders it seeks to enforce have expired. The CFA contends the effect of invoking the contempt jurisdiction would be purely punitive. In this respect the CFA contend that the invocation of the jurisdiction is the first step to committal, notwithstanding that the CFA accept that the plaintiffs has made it clear that this is not what is sought. In such circumstances, the CFA contend that the lack of a penal endorsement is a fundamental flaw which is a complete answer to any contempt application. The CFA contend that given the punitive nature that all and any contempt must be proven beyond reasonable doubt and that such has not been proven here. The CFA state that in light of the presumption of innocence that they cannot be compelled to answer interrogatories or give evidence or have inferences drawn from the failure to give evidence. The CFA contend that the plaintiffs must prove that their failure to comply was wilful, deliberate, or a gross affront to the integrity of the Court. While the CFA admit that the circumstances of the plaintiffs are unfortunate and that they cannot provide the special care required, that any failure to comply does not meet these criteria.

Part IV: Whether the High Court can make a contempt order in plenary proceedings

25. Before addressing the substantive issues presented by this appeal it is first necessary to address the jurisdictional issue of whether a party can seek a simple declaration of contempt of court without any accompanying penalty in plenary proceedings.

26. The invariable practice of the High Court heretofore has been that applications for contempt are commenced by means of motions for attachment and committal pursuant to the provisions of Ord. 44 RSC. There does not appear to be any previous reported example of where such proceedings have been commenced by means of plenary summons. Counsel have not pointed to any other case where this procedure had been adopted and no member of the Court is personally aware from practice of a case where this has been done. Given that this matter is thus *res integra* it accordingly falls to this Court to consider the matter as a question of principle.

27. The starting point here is that contempt of court is part of the inherent jurisdiction of the High Court. Article 34.1 of the Constitution commits the administration of justice to the judiciary. It is plain that judges could not faithfully fulfil that mandate unless steps could be taken by them as part of that inherent jurisdiction to enforce their own orders. As O'Higgins C.J. explained (in an admittedly partially dissenting judgment) in *The State (Director of Public Prosecutions) v. Walsh* [1981] IR 412 at 426:

> "…under the Constitution it is the solemn duty of judges to see that justice is administered in the Courts. Surely the imposition of this duty carries with it both the power and the corresponding duty to act in protection of justice, if its fair or effective administration is endangered or threatened. In my view, the judicial power of government…is sufficiently extensive to authorise the Courts to take any action that is necessary for the administration of justice."

28. One could also add that so far as the special circumstances of the present case are concerned, the order made by the High Court directing that B. be received into special care

was designed to have his safety and welfare protected. It was, of course, never intended that the courts would be simply powerless to take steps to ensure that a judicial order giving effect to legislation of the kind which was generally contemplated would be allowed to lie fallow and unimplemented. The courts are, after all, required by Article 40.3.1º to defend and vindicate these rights "as far as practicable."

29. Perhaps the closest authority – such as there is – on this point is the decision of this Court in *Re Earle* [1938] IR 485. Here the grandmother of an infant girl disobeyed a High Court order which had been made by O'Byrne J. He had directed her to produce the body of the young girl and it would appear that she wilfully disobeyed that order. On the return date O'Byrne J. found her to be in contempt and he directed that she be imprisoned for six months or until she should sooner have purged her contempt.

30. Ms. Earle then appealed to this Court, contending that such an order could only have been made following the service of a notice of motion "setting out the grounds of the application, together with copies of any affidavits intended to be used" in the manner provided by Ord. LXXXIV of the Rules of Supreme Court (Ireland) 1905: see [1938] IR 485 at 486. As it happens, this Court sat with a court of four judges who were equally divided on this issue, so that the order of O'Byrne J. was thereby affirmed.

31. Insofar as any wider principle can be drawn from this decision, I find the reasoning of Meredith J. ([1938] IR 485 at 507) to be more compelling:

> "For the purpose of upholding and protecting the authority of the Court there has always been an inherent jurisdiction in the Court to intervene of its own motion by committal for a contempt that then and there openly defies the authority of the Court. I do not consider that either the old Crown Office Rules or the Rules of the Supreme Court, 1905, contained in Order LXXXIV, were intended to limit or regulate the exercise of this jurisdiction."

32. These comments of Meredith J. in *Earle* are accordingly further authority for the proposition that the power to attach for contempt is part of the inherent jurisdiction of the High Court. Although nothing greatly turns on this, I think that it might be more accurate to say that while Ord. 44 regulates the contempt jurisdiction, I do not think that it can be said to limit its exercise.

33. In expressing this view, I have not overlooked the point so forcefully advanced by counsel for the CFA in support of its contention that a contempt application could only be brought in accordance with the requirements of Ord. 44 RSC. Here reliance was placed on the provisions of s. 14(2) of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act") which provides that:

> "The jurisdiction which is by virtue of this Act vested in or exercisable by the Supreme Court [and] the High Court… shall be exercised so far as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by rules of court, and, where no provision is contained in such rules and so long as there is no rule with reference thereto, it shall be exercised as nearly as possible in the same manner as it might have been exercised by the respective existing courts or judges by which or by whom such jurisdiction was, immediately before the operative date, respectively exercisable."

34. It is true that the contempt jurisdiction is one which is both "vested" in the High Court and is also "exercisable" by that Court within the meaning of this sub-section. It is vested in that Court in that it was a jurisdiction which, as Gavan Duffy P. observed in *Attorney General v. Connolly* [1947] IR 213 at 218-219, had previously been vested in the former High Court of Justice for Southern Ireland between 1921 and 1924, which jurisdiction s. 8(2)(a) of the 1961 Act then vests in the present High Court. It is also exercisable by that Court since this constitutionally derived inherent jurisdiction is part of the "original and

other jurisdiction as is prescribed by the Constitution" which is exercisable by that Court by virtue of s. 8(1) of the 1961 Act.: see again the comments of Gavan Duffy P. in *Connolly*, [1947] IR 213 at 221-222.

35. The short answer to this objection is that even where the plaintiffs proceed by way of plenary summons, this is a procedure which they are in principle entitled to exercise. Ord. 1, r. 1 RSC permits and, indeed, requires that this procedure to be adopted in all cases "save as otherwise provided by these Rules." Unless, therefore, Ord. 44 RSC mandated that applications for contempt could *only* be brought under the provisions of that Order – and, in my view, it does not – then the plaintiffs were permitted by the RSC to proceed in this fashion. Even where this slightly novel procedure is adopted, then the commencement of a contempt application by means of the plenary procedure is, in fact, the exercise of the High Court's jurisdiction by means of rules of court in the manner contemplated by s. 14(2) of the 1961 Act.

36. If, therefore, the High Court enjoys an inherent jurisdiction in contempt matters, the question then arises as to whether the plaintiffs are entitled to seek a declaration simpliciter that the CFA are in contempt of court. It appears that the declaratory remedy was originally pioneered by the Victorian Chancery judges and the jurisdiction to grant a declaration was expressly conferred on the pre-1877 Irish Court of Chancery by s. 155 of the Chancery (Ireland) Act 1867. Yet even though the remedy may have been developed in the Chancery Courts it has also been stated that a declaratory judgment has its origins in statute and rules of court rather than equity as such, so that "it is not true equitable relief": see *Chapman v. Michaelson* [1909] 1 Ch. 242, *per* Fletcher Moulton L.J.

37. At all events, even though s. 155 of the 1867 Act was subsequently repealed by the Statute Law Revision (No.2) Act 1893, as I observed in *Wicklow County Council v. Fortune (No.4)* [2014] IEHC 267, "the actual language of s. 155 of the 1867 Act is now reflected in the

wording of the present Ord.19, r. 29 of the Rules of the Superior Courts 1986 and the principle is now one which has been firmly embedded in our legal system for well over a century." In *Fortune (No. 4)* I went on to say that:

> "In any event, the declaration is simply an essential aspect of this Court's general and full original jurisdiction. After all, Article 34.3.1º of the Constitution provides that this Court shall have 'a full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.' If this Court could not grant a declaration of right in an appropriate case, it is hard to see how this constitutional mandate "to determine all matters and questions" could properly be fulfilled…"

38. The circumstances in which declaratory relief may be granted have been explored in a series of leading decisions, of which the judgment of Walsh J. in *Transport Salaried Staffs' Association v. Córas Iompair Éireann* [1965] IR 180 is perhaps the best known. Dealing with the scope of the declaratory jurisdiction Walsh J. stated ([1965] IR 180 at 202-203):

> "In modern times the virtues of the declaratory action are more fully recognised than they formerly were and English decisions and dicta in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formerly exercised 'sparingly' and 'with great care and jealousy' and 'with extreme caution' can now, in the words of Lord Denning in the *Pyx Granite Co. Ltd. Case* [1958] 1 QB 554, at p. 571, be exercised 'if there is good reason for so doing,' provided, of course, that there is a substantial question which one person has a real interest to raise and the other to oppose. In *Vine v. The National Dock Labour Board* [1957] 2 WLR 106, Viscount Kilmuir L.C., at p.112, cites with approval the Scottish tests set out by Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd*. [1921] 2 AC 438, who said, at p. 448:— 'The question must be a real and not a theoretical question;

the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.' It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight."

39. This decision was applied in *O'Donnell v. Dún Laoghaire Corporation* [1991] ILRM 301 where Costello J. described a declaratory judgment ([1991] ILRM 301 at 311) as: "[…] one which declares the rights of the parties and because defendants, and in particular public bodies, respect and obey such judgments they have the same legal consequences as if the court were to make order quashing the impugned orders and decisions." These general principles also find expression in the judgments of this Court in *McD. v. Governor of X Prison* [2021] IESC 65, [2022] 1 IR 741 regarding the scope of the declaratory remedy. While a majority of this Court held that it would be inappropriate to grant a declaration in respect of the operation of a grievance policy within a prison, this was simply because the complaints policy did not in itself involve any question of legal rights as between the parties: see [2022] 1 IR 741, 804-806 per Charleton J.

40. This line of case-law has a particular resonance for the present case. It is probably fair to say that the plaintiffs have no real desire to see that any form of punishment such as a fine is imposed on the CFA. Their objective was to secure a special care placement for B. Echoing the comments of Costello J. in *O'Donnell*, one might normally suppose that a court order to this effect would have been sufficient and that such and would have been complied with by the public body concerned. It is plain that the plaintiffs only sought the next step more or less out of a sense of desperation when there seemed little immediate prospect that the order would otherwise be obeyed or that a place would be found for B. And, unlike the situation in *McD*, the present case very much concerned the enforcement of legal rights. If

the plaintiffs stopped short of seeking orders for committal or some other form of coercive or penal order, it appears to have been motivated by a desire to increase the pressure incrementally and in the hope of avoiding a mere severe order being made against an agency which was plainly attempting to fulfil its statutory duty.

41. As it happens, this very issue was considered by Collins J. in the English case of *R. (JM) v. Croydon LBC* [2009] EWHC 2474 (Admin), [2010] PTSR 866 at 869. He drew a distinction between "the ability to make a finding of contempt, which will lead to no punitive sanction save for payment of costs, and the ability to punishment for contempt as a means of enforcement. It is the latter which would be covered by RSC Ord. 45." (This is the penal endorsement requirement which corresponds to Ord. 41, r. 8 of our RSC). Collins J. went on to say (at 870) that in cases involving orders against public bodies a penal endorsement was not necessary:

> "A failure to comply with an order can be dealt with by an application to the court for a finding of contempt and, if necessary, a further mandatory order which may contain an indication of what might happen should there be any further failure to comply."

42. Indeed, the earlier decision of the House of Lords in *Re M* [1993] UKHL 5, [1994] 1 AC 377 also clearly shows that all issues of Crown immunity aside (a consideration which, of course, would have no application in this jurisdiction), the courts could enforce court orders by way of both contempt and injunction.

43. There is thus clear English authority for the proposition that one may seek a simple declaration that a public body has been guilty of contempt. This is far from a pointless exercise, since a finding that a public body has been guilty of contempt of court would itself represent a very serious finding, with significant implications for the administration of

justice and the rule of law. Collins J. also held that a penal endorsement was not necessary in such circumstances.

44. There is, in any event, clear authority involving a decision of this Court that a finding of contempt of court simpliciter is possible even in cases which do not involve public bodies and that such a finding may serve the purpose of persuading the contemnor to change their ways and to comply with the order: see *Gore-Booth v. Gore-Booth* (1962) 96 ILTR 32 at 38. In that case this Court simply found the defendants – who had disobeyed a High Court interlocutory order and had obstructed the removal of cattle from a particular estate – were guilty of contempt, with Lavery J. observing (at 38):

> "With hesitation and some fear that it may be acting with undue leniency, the Court does not propose to make an order for committal to prison….These defendants will, I hope, appreciate the consideration given to them and guide their future conduct accordingly."

45. It is true that in my judgment in *Pepper Finance v. Persons Unknown* [2023] IESC 21, [2023] 1 ILRM 381, I said that the penal endorsement requirements of Ord. 41, r. 8 RSC were "fundamental" to contempt applications. Those comments were, however, made in a context where it was sought to enforce a court order against purely private individuals with a financial penalty or imprisonment as the ultimate sanctions. This remains the position where it is sought to imprison or fine the alleged contemnor by means of a contempt application. The present case is, of course, a different one in that it is made in circumstances where no penal enforcement is thereby sought: as Collins J. indicated in *JM* no penal endorsement is required where a mere declaration of contempt is sought.

46. In these circumstances the plaintiffs have clearly satisfied the *Transport Salaried Staff's* tests as applied by Charleton J. in *McD*. There was a good reason to seek a declaration of this kind. Second, there was a real and substantial issue to be determined. Third, the CFA

had a real interest in opposing the grant of any declaration to the effect that they had been in contempt of court. To sum up, therefore, one may say that the High Court has an inherent jurisdiction to enforce its judgments via the contempt process. While that jurisdiction is regulated by Ord. 44 RSC, the Rules do not prescribe an exclusive procedure in that regard. It follows that the plaintiffs were accordingly in principle entitled to seek a simple declaration to the effect that the CFA were guilty of contempt.

Part V – What findings should the Court now make?

47. It remains to consider what, if any, finding, this Court should now make.

48. It is true that so far as the plaintiffs were concerned it was, in one sense, sufficient for them to point to the existence of the High Court order and the admitted failure of the CFA to comply with that order. At that point the evidential burden switched to the CFA: it was for it to show that its failure to perform the order was in some way excusable. The CFA might have accomplished this by showing that it made every good faith effort to comply with that order and that the "strict compliance" which is generally required of the addressees of court orders was rendered impossible either by factors such as *force majeure* or the actions of a third party which rendered performance impossible: see generally, Law Reform Commission, *Consultation Paper on Contempt of Court* (July 1991)(at 151).

49. If, however, the finger is to be pointed at such a third party – such as in this instance the Minister for Public Enterprise, National Development Plan Delivery and Reform – this must be done directly and not – as in this case - obliquely. Such a third party must be joined to the proceedings and that party must be given every opportunity to answer the case against them.

50. As I have already observed, it is the evidential deficit in this case which precludes this Court from making any further order. The High Court could not really be expected to make

findings of contempt – whether by means of declaratory order or under the Ord. 44 jurisdiction – without a firm factual foundation, generally involving oral evidence. It cannot realistically do so by reference to admissions on the pleadings or carefully constructed admissions of fact. This is especially the case where (as here) a State body is in admitted breach of a court order, but wishes to avoid a formal finding to this effect. If a plea of impossibility or *force majeure* is indeed the defence, then the evidential basis for this needs to be advanced in conspicuously clear terms.

51. If (as here) the CFA's case was one of good faith and impossibility of performance by reason of the conduct of a third party (in this instance, the Minister), then the Minister would have to have been formally joined (and not just a notice party) to the application. The Minister would have to have had the opportunity of being heard and to lead evidence to rebut the case thus made against it. Since none of this happened in the present case, I consider that it would be wrong of this Court to proceed on the limited admissions of fact made in the course of the pleadings and the notices to admit facts. The Court could not in such circumstances safely proceed to make any evidential findings in a matter as serious as this either as against or in favour of the CFA and certainly not in respect of a third party who had not been joined to the proceedings. It is very unsatisfactory that this central issue was not addressed in evidence rather than be hinted at.

52. One might add, *en passant*, that the present case did not actually get to the point of establishing by evidence that it was impossible for the CFA to comply with an order of the High Court made pursuant to a statutory provision. In these circumstances it is unnecessary to consider the position which might arise if it were contended (and established) that such impossibility was procured or otherwise brought about by a positive decision of another Department of State in respect of the resources available to the CFA. It is, of course, to be hoped that such a state of affairs would never come about. In the event that they did, it is

perhaps sufficient to say that this Court would then have to give anxious considerations to the general principles outlined elsewhere in this judgment.

53. The CFA was, perhaps, entitled to seek to raise a purely technical defence to the proceedings, although as a State agency charged with the statutory duty of protecting the safety of troubled and vulnerable children, one might have thought that a more constructive approach could and should have been taken vis-à-vis the judicial arm of the State. There was nevertheless no reason why those technical (and, as it transpires, misplaced points) could have been made along with evidence explaining precisely why the CFA considered it was impossible to comply with an order of the Court. The High Court was, I think, entitled to a full explanation on affidavit from the CFA as to why it could not comply with the order which had been made against it and the steps which the CFA had taken in that regard.

54. In these circumstances, I would formally allow the appeal insofar as Jordan J. found against the plaintiffs on jurisdictional grounds. I would instead rule that they were entitled in principle to seek a simple declaration of contempt, if needs be by way of plenary proceedings.

55. There remains the fact that a State agency established by the Oireachtas did not comply with a specific High Court order for the best part of eight months. This may well have been because it lacked the means to do so and that compliance was rendered effectively impossible. One way or another, it is a totally unsatisfactory state of affairs which challenges the very operation of the rule of law.

56. It is, perhaps, worth recalling that the High Court did not spontaneously make such an order under the 1991 Act from, so to speak, a clear blue sky. The High Court made that order to give effect to a law which had been made by representatives of the People in the Oireachtas who had been duly elected after a fair and free election. All of this is provided for, directly or indirectly, by Article 5, Article 6, Article 15.2.1º and Article 16 of the Constitution.

Every judge has made a formal declaration to the uphold the Constitution and the laws in the manner required by Article 34.6.1º and they are accordingly bound to give effect to the terms of the Constitution and the law, if needs be by means of the coercive contempt powers.

57. With a view to assisting the Court, counsel for the Minister for Public Enterprise, National Development Plan Delivery and Reform helpfully supplied the members of the Court with a booklet of correspondence between the CFA and the Minister for Children, Equality, Disability, Integration and Youth between 20th September 2024 and 15th October 2024. It is clear from that correspondence that the CFA made a case for enhanced pay scales, saying (in a document dated August 2024) that the "new set of scales is a key requirement in stabilising the workplace within the special care sector and will play a pivotal role in effectively addressing the current challenges."

58. While the document – and subsequent correspondence – shows that serious efforts have been made in official circles to resolve the issue, one must also again observe that any defence of impossibility can really only be determined following a full hearing with oral evidence in the High Court. And serious-minded and earnest as that correspondence was, it does not appear to show any real appreciation of the gravity of the – almost unprecedented – situation whereby the CFA found itself unable – for whatever reason – to comply with a High Court order for the best part of eight months. One is left with the impression from this case that the CFA considered that the matter should really have been left to it to negotiate and resolve with the two relevant Departments.

59. As I observed in *Re McD* [2024] IESC 6, the Taoiseach gave the requisite money message for the purpose of Article 17.2 in order to facilitate the passage of the 1991 Act and its various amendments. It is implicit in the grant of this money message that the Government is prepared to grant supply to its statutory agencies which will enable them in turn to

perform their statutory functions, not least when the High Court makes an order requiring them to do so. If it is subsequently considered that this particular legislation imposes too great an administrative or financial burden on the State and its agencies, then the solution lies with the Oireachtas so that the law in question can be either repealed or amended if it is considered that it is possible to perform the State's constitutional duty in a way that places a somewhat lesser burden on the CFA without, of course, jeopardising the essence of the constitutional rights of these vulnerable children as identified in cases such as *FN v. Minister for Education* [1995] 1 IR 409 and *SS v. Health Service Executive* [2007] IEHC 189, [2008] 1 IR 594. But for so long as the 1991 Act remains on the statute books it is the obligation of the courts to enforce it.

60. In this context, it is perhaps worth observing that one of the possible misconceptions which have lingered since the decision of this Court in *TD v. Minister for Education* [2001] 4 IR 259 is the belief that Ministers are immune from the contempt process. Yet there is no basis in law for this supposition for, as Walsh J. also explained in *Byrne v. Ireland* [1972] IR 241 at 281 "…the whole tenor of our Constitution is to the effect that there is no power, institution, or person in the land free of the law save where such immunity is expressed, or provided for, in the Constitution itself."

61. Article 28.2 of the Constitution provides: "The executive power of the State shall, *subject to the provisions of this Constitution*, be exercised by or on the authority of the Government." (Italics supplied). At its most basic, the executive power provided for by Article 28.2 involves giving effect to legislation passed by the Oireachtas while simultaneously respecting and enforcing court decisions. In this respect, any comparison with *TD* is superficial. As Hickey "Reading *TD* Down" (2022) *Irish Judicial Studies Journal* 19 has observed, this decision has perhaps been somewhat over-interpreted in some

quarters: it was, after all, in his felicitous phrase, a case about the judicial *exercise* of executive powers rather than judicial *review* of executive powers.

62. In *TD* this Court reiterated the need for the courts to respect the separation of powers and to refrain from making orders that could usurp the function of the executive in an area then within the executive's exclusive area of decision-making. By contrast, the entire topic is now the subject of legislation subsequently enacted by the Oireachtas and to which it is the courts' obligation to give effect.

63. The exclusive right to legislate is, of course, assigned to the Oireachtas by Article 15.2.1º and it is one of those other provisions of the Constitution to which the exercise of the executive power by the Government is subject. It follows that it is the right of the Oireachtas alone both to make and to unmake law. One aspect of the executive power is that it is duty of the Government to ensure that laws enacted by the Oireachtas are given effect and enforced. But the Government enjoys no right to suspend or to disapply the law, for if such a power were to be allowed, it would be tantamount to saying that the Government could in effect secure a repeal of the law without the necessity for legislation. This would plainly violate Article 15.2.1º. Thus, for example, in *Duggan v. An Taoiseach* [1989] ILRM 720 Hamilton P. held that a Government instruction to suspend the operation of the Farm Tax Act 1985 was unlawful for precisely this reason.

64. It must be recalled that it is of the essence of the democratic order that the members of the Oireachtas are answerable to the electorate for the legislation which they enact. This means that the Government cannot allow a form of legislative Potemkin village to spring up so that (as here) the impression is created that the Oireachtas has acted decisively in the case of troubled children by providing statutory obligations in respect of special care, while at the same time the effective enforcement of these obligations is prevented or frustrated or is otherwise allow to lie fallow by Government actions or inactions.

65. As I explained in *Re McD* (at paras. 122-124) the present case is unlike *Brady v. Cavan County Council* [1999] 4 IR 29. That was a case where the applicant had sought an order of mandamus requiring the Council to discharge its statutory duty to repair a road which was admittedly in a state of extreme disrepair. The road was, however, just one of hundreds in the same county in a similar state of disrepair and the Council frankly admitted that it did not have the resources to finance the large-scale road construction programme which would have been necessary to enable it to discharge this function.

66. By contrast, this case, like the facts in *Re McD*, concerns very specific statutory provisions designed to reflect the general principles of Article 42A and which apply to a small cohort of highly dependent and vulnerable children. As I said in *Re McD* *"*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." If it is considered that these statutory provisions impose too great a financial or other burden on the State or its agencies, I repeat that the solution lies in the Oireachtas amending or otherwise diluting the force and reach of these provisions in a manner which is nevertheless consistent with the constitutional rights of the children concerned. Absent such legislative changes it is the clear duty of the Government to comply with the law as enacted by the Oireachtas and as interpreted by the courts. Should this not happen and the debacle of the present case is repeated, then the plain fact of the matter is that a finding of contempt of court cannot be far away.

Part VI – Overall conclusions

67. In summary, therefore, I would allow the appeal on the ground that Jordan J. was in error in holding that the plaintiffs could not seek a simple declaration that the CFA was in

contempt of court. Indeed, in cases involving public bodies this procedure would, generally speaking at least, represent the best way of proceeding, at least in the first instance. A finding of contempt of court would in itself be a serious matter for the public body concerned.

68. The CFA's defence was, as we have seen, essentially one of impossibility. If that is so, the matter should be determined by way of an oral hearing in the High Court. The matter was too serious to be determined by reference to the pleadings or by formal concessions or notices to admit facts. Besides where, as here, the defence effectively implicates a third party such as the Minister, that party must be formally joined to the proceedings and given an opportunity to defend the case. In any event, given that the case involved the (admitted) non-compliance with a court order, the CFA ought to have fully explained the basis on which it said that compliance was impossible and the steps it had taken to secure that compliance.

69. Given that a place has now been found for B., I consider that the fairest outcome is that the appeal should simply be allowed with no further order. (The issue of costs will have to be dealt with separately). This judgment will, perhaps, have served to clarify the law and to indicate the steps which should be followed in any such future application.

70. There remains the deeply troubling fact that a High Court order designed for the benefit of a disturbed and vulnerable young man was not complied with by State authorities for the best part of eight months. This State rightly prides itself on its respect for the rule of law and, as we have had occasion to remark in recent cases such as *Re Article 26 and the Judicial Appointments Commission Bill 2022* [2023] IESC 34, the commitment to democracy reflected in constitutional provisions such as Article 5, Article 6, Article 15 and Article 16 is a key part of the State's identity as a free society. In that regard it must be said clearly that the persistent non-compliance with High Court orders of this kind such as we

have seen in this case undermines that constitutional commitment to democracy and respect for the rule of law.