**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2023] IEHC 559**

**[2023 1024 JR]**

**IN THE MATTER OF M BORN ON THE [DATE] OF SEPTEMBER 2007**

**AND**

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

**AND**

**IN THE MATTER OF THE CHILDCARE ACT 1991 (AS AMENDED) AND THE INHERENT JURISDICTION OF THE HIGH COURT**

**BETWEEN**

**M (A MINOR SUING THROUGH HER GUARDIAN AD LITEM AND NEXT FRIEND HELEN TULLY)**

**APPLICANT**

**AND**

**THE CHILD AND FAMILY AGENCY**

**FIRST NAMED RESPONDENT**

**AND**

**MM**

**FIRST NAMED NOTICE PARTY**

**AND**

**MMM**

**SECOND NAMED NOTICE PARTY**

**RECORD NO 2023 / 1025 JR**

**THE HIGH COURT**

**JUDICIAL REVIEW**

**IN THE MATTER OF B (A MINOR BORN ON THE [DATE] OF FEBRUARY 2007 AND**

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

**AND**

**IN THE MATTER OF THE CHILDCARE ACT, 1991 (AS AMENDED) AND THE INHERENT JURISDICTION OF THE HIGH COURT**

**BETWEEN**

**B (A MINOR SUING THROUGH HIS GUARDIAN AD LITEM AND NEXT FRIEND FRANCIS O'CALLAGHAN)**

**APPLICANT**

**AND**

**THE CHILD AND FAMILY AGENCY**

**FIRST NAMED RESPONDENT**

**AND**

**BB**

**FIRST NAMED NOTICE PARTY**

**AND**

**BBB**

**SECOND NAMED NOTICE PARTY**

**JUDGMENT of Mr. Justice Mark Heslin delivered on the 13 day of October 2023**

Two applications were heard together, on an urgent basis, on 5 October 2023. The circumstances of each child-applicant are different, but the legal issues are the same in both. For reasons which will become obvious, this court has attempted to minimise delay with respect to a decision.

**Introduction**

**1.** In the manner presently explained, both applicants are children, aged 16, who meet the criteria for admission to special care. The respondent does not suggest that special care is not what both children need. The respondent acknowledges that it is in breach of its statutory obligations pursuant to the Childcare Act, 1991 (as amended) ("the 1991 Act"). In particular, the respondent concedes that it was obliged to make a "*determination"* pursuant to s. 23 (F) (7) of the 1991 Act. Furthermore, the respondent concedes that it is in breach of statutory obligations pursuant to s. 23F (8) of the 1991 Act given its failure to *"apply"* to this Court for a special care order.

**2.** The respondent contends that the appropriate response by this Court should be limited to the making of declaratory orders reflecting these admitted breaches of statutory duties. However, the respondent is strongly opposed to the court granting any mandatory orders which would require the respondent to comply with its statutory obligations. The respondent argues that mandatory orders would be impossible to comply with; would be futile for the court to make; and would be of no possible benefit to the applicants. Why the respondent adopts this stance was pleaded, as follows, in each statement of opposition:-

"*Due to capacity and staffing challenges within Special Care, the Agency is currently unable to provide a specific timeframe as to when the Agency will be in a position to make an application to have* [the Applicant] *admitted to Special Care.*
*This is despite every effort being made by the Agency to address these capacity and staffing challenges. The Agency is continuing to engage in comprehensive care planning regarding* [the Applicant] *in order to manage and mitigate against any potential risks while* [the Applicant] *awaits admission to Special Care"* (see paras. 5 and 6 of the statement of opposition in respect of the application brought by M, which mirrors, precisely, the pleas at paras. 6 and 7 in the statement of opposition in respect of the application brought by B).

**3.** Before proceeding further, I want to express my gratitude to counsel for the applicant, respondent and notice parties, respectively, each of whom made oral submissions with great clarity and skill, supplementing detailed written submissions, all of which I have carefully considered. During this judgment I will refer to the principal submissions made. For present purposes it is sufficient to say that the notice parties, through their respective counsel, emphasised their serious concerns for the child in question and, in each case, support the applications, i.e. contend that this court should make appropriate mandatory orders, in addition to declaratory relief.

**Pleaded relief**

**4.** In addition to reporting restrictions; the appointment of a Guardian ad litem ("GAL"); and leave pursuant to O. 84, r. 20 (items 1 to 3, inclusive) the relief sought, from item 4 onwards of para. (e) of the applicant's statement of grounds, is as follows:

*"4. A declaration that the decision of the respondent to defer making the determination pursuant to section 23F (7) of the Childcare Act 1991 (as amended) until a place in special care is available, despite having considered and approved that the applicant meets the criteria for special care under section 23 of the 1991 Act, is in breach of its statutory duties and is unlawful.*

*5. An order of certiorari quashing the decision of the respondent to defer its duty to comply with the provisions of section 23 of the 1991 Act as amended by part IVA of the Childcare Act 1991 in respect of the applicant, pending a placement in special care becoming available for [the applicant].*

*6. If necessary, an order of mandamus directing the respondent to determine (in accordance with section 23F (7)of the Childcare Act 1991 as amended) whether [the applicant] requires special care.*

*7. Further, if necessary, an order of mandamus directing the respondent to make an application for an order placing the minor in special care if it determines that the child requires such care under section 23F (7) of the Childcare Act 1991 as amended.*

*8. A declaration that the respondent has failed in its continuing duties and obligations to provide appropriate care and accommodation to the minor in accordance with its statutory duties and in particular its duties pursuant to the Childcare Act 1991, as amended, and of Bunreacht na hEireann, in particular Articles 40.3 and 42A thereof.*

*9. Further, if necessary, an order of mandamus directing the respondent to provide appropriate care and accommodation to the minor in accordance with its statutory duties and in particular its duties pursuant to the Childcare Act 1991, as amended*."

Para. 4 of each Statement of Grounds goes on to seek relief by way of an early return date; damages; further or other relief; and costs (items 10 to 13, inclusive).

**The 'net' dispute**

**5.** It is fair to say that the hearing before me centred around relief in the following terms:-

- a declaration that the respondent has breached the statutory obligations imposed upon it by s. 23F (7);
- a declaration that the respondent has breached the statutory obligations imposed by s. 23F (8);
- a mandatory injunction requiring the respondent to comply with its statutory obligations *per* s. 23F (7); and
- a mandatory injunction requiring the respondent to comply with its statutory obligations *per* s. 23F (8).

**The 1991 Act**

**6.** To understand relevant statutory provisions in context, it is appropriate to make reference to Part IVA of the 1991 Act, which sets out the regime for the bringing of all applications for special care.

**Duty to provide special care / special care units**

**7.** Section 23B begins in the following terms:

> **"***Provision of special care and special care units.*
> *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..* (emphasis added)

The use of the word "*shall*" in s.23B makes clear that the respondent is mandated to provide special care in "*special care units*".

**Special care**

**8.** The definition of "*special care*" is given in s23C, as follows:

"*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.***"**

**Determination that a child requires special care**

**9.** Section 23F of the 1991 contains, in relevant part, the following provisions:-

"*Determination by [Child and Family Agency] that child requires special care.*

*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…"*

**"…it shall make a determination…"**

**10.** Of critical importance to the present applications is sub-section 23F (7) which provides:

*"(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…"*

**Application for special care order**

**11.** The following sub-section makes clear that where a determination has been made under s. 23F(7) the mandatory duty to apply for a special care order is triggered:

*"(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 added)

**Notice obligations – S.23G**

**12.** The application for such an order is dealt with in the following sub-sections. Section 23G deals with notice requirements and duties to inform relevant parties, as well as circumstances where notification may, following application by the Respondent, be dispensed with by this Court, which may "… *make such other provisions and give other directions in respect of such notice, as it, having regard to all the circumstances of the child, considers necessary and in the best interests of the child*" (emphasis added).

**Special care order – S. 23H**

**13.** Section 23H is entitled "special care order" and begins:

"*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 <u>may</u> make a special care order in respect of that child*." (emphasis added)

**14.** Sub-section (2) of s.23H goes on to provide that a special care order shall specify the period (not exceeding 3 months, unless extended) for which it has effect and provides, *inter alia*, that "*…the High Court may make such other provision and give direction, as it, having regard to all the circumstances of the child, considers it necessary and <u>in the best interests of the child</u>*" (emphasis added).

**Future application under s.23H**

**15.** Before proceeding further, I want to stress that nothing in this decision is intended to usurp the role of such judge as may, in the future, consider an application pursuant to s. 23H. The foregoing issue is something which the applicants, through their counsel, addressed explicitly by making clear in oral submissions that, at any future application where this Court is asked to make a decision

pursuant to s. 23H, it would be open to the respondent to make similar arguments to those made in opposition to the present applications.

**16.** In the manner I will presently return to, where matters currently 'sit', in terms of compliance (or not) with the sequential provisions of s. 23 of the 1991 Act, seems to me to undermine the proposition that, it would be *futile* for this Court to grant mandatory orders of the type sought by the applicants on the basis that it would be *impossible* for the respondent to comply with same.

**17.** Put simply, this is because the central relief sought by the applicants is for this Court to do no more than require the respondent to do what s. 23F (7) and (8) already require of them, namely, to get to the stage of applying for special care.

**Constitutional rights**

**18.** In addition to the applicants' enshrined rights pursuant to Art. 40.3, Art. 42A begins *"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."* Art. 42A.4 goes on to provide:

> *"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 prejudicial 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.*
>
> *2. Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."* (emphasis added)

Thus, the context in which these two applications proceed is the rights of each child which the Constitution explicitly recognises as imprescriptible and guarantees to protect and vindicate, in the manner articulated in Art 42A.

**Best interests of the child**

**19.** An emphasis on the *best interests of the child* is something which infuses the 1991 Act. It seems to me that this focus, in the context of the duties imposed on the respondent, is reflective of the emphasis in Art 42A on the child's rights and best interests. Thus, two comments seem appropriate. First, the legislation focusses on "*the*" child, namely, *the* child in question and *their* best interests (i.e. the focus is not on other parties or other factors). Second, it seems to me that the best interests of these particular applicants must be the primary consideration for this Court, an approach which their constitutionally-protected rights not only legitimises but, it seems to me, mandates.

**20.** In very real terms, the respondent is the vehicle or method chosen by the Irish People (by means of legislation enacted by the Oireachtas) to *ensure* that the rights of each child in the

applicants' situation *are* protected and vindicated in the manner required by Art 42A. These rights very obviously include Art 40.3 rights. At the risk of stating the obvious, there is no conditionality in Art 42A. There is no question of it being legitimate, irrespective of the reason, for some, but not other, children in the applicants' position having their rights protected and their best interests secured.

**Statutory parent**

**21.** The significance of the best interests of the child, in the context of the respondent's duties, can also be seen in Section 18(3) of the 1991 Act which provides that:

> *" (3) Where a care order is in force, the [Child and Family Agency] shall—*
> *(a) have the like control over the child as if it were his parent; and*
> *(b) do what is reasonable (subject to the provisions of this Act) in all the circumstances of the case for the purpose of safeguarding or promoting the child's health, development or welfare;*
> *and shall have, in particular, the authority to—*
> *(i) decide the type of care to be provided for the child under section 36;"* (emphasis added)

In the manner presently explained, full care orders were made in relation to each of the applicants. Thus, the respondent is their 'statutory parent' with all the foregoing obligations to each of them.

**Provide care in the child's best interests**

**22.** Section 36 provides:

> ***"36.****—(1) Where a child is in the [care of the Child and Family Agency] [subject to subsection (4),] [the [Agency] shall] provide such care for him, subject to its control and supervision, in such of the following ways as it considers to be in his best interests—*
>
> > *(a) by placing him with a foster parent, or*
> > *(b) by placing him in residential care (whether in a children's residential centre registered under Part VIII, in a residential home maintained [by the [Agency] ] or in a school or other suitable place of residence), or*
> > *(c) in the case of a child who may be eligible for adoption under the Adoption Acts, 1952 to 1988, by placing him with a suitable person with a view to his adoption, or*
> > *(d) by making such other suitable arrangements (which may include placing the child with a relative) [as the [Agency] ] thinks proper.*
>
> *(2) In this Act, "foster parent" means a person other than a relative of a child who is taking care of the child on behalf of [the [Child and Family Agency] ] in accordance with regulations made under section 39 and "foster care" shall be construed accordingly.*
> *(3) Nothing in this section shall prevent [the [Child and Family Agency] ] sending a child in its care to any hospital or to any institution which provides nursing or care for children suffering from physical or mental disability…"* (emphasis added)

**Real people - relevant facts**

**23.** Before proceeding further, it is necessary to set out, in some detail, certain relevant facts concerning the applicants and their respective situations. This is because, whilst this judgment must engage with relevant constitutional and statutory provisions, what cannot be lost sight of is that the present applications concern *real* people, namely, two young people whom, the evidence establishes, are suffering actual and ongoing harm of the most serious and shocking sort, both of whom have acute needs which continue to go unmet.

**The circumstances of Child M**

**24.** M has only recently turned sixteen. Her family have been known to the respondent (or "Agency") for several years. When M's mother was remanded to prison in 2021, M and her siblings were placed with extended family members for a period, before M and her sister were returned home to their father for a period.

**25.** Section 12 of the 1991 Act (which concerns the power of An Garda Siochana to take a child to safety) was invoked on the night of 11 May 2021, as M and her sister were found in the home of a known sex offender.

**26.** Following a short emergency foster placement, both girls were placed in a certain residential placement. M's sister ultimately transitioned to a mother and baby residential unit following the birth of her child. M has remained in the aforesaid placement to date.

**27.** M has had a very troubled history and there were concerns, whilst M was in the family home, around suspicions of physical, sexual and emotional abuse and neglect.

**28.** When M lived with an adult sister for a period, she was caused to witness horrific acts of domestic violence perpetrated on her sister by her sister's partner.

**29.** When she went to her residential unit, where M is now the sole occupant, she only attended school for a short period of time from September 2021. Education was gradually discontinued by M. Despite relevant avenues being explored and trialled, including home tuition, M has now entirely disengaged from education since the second half of 2022.

**30.** M has disengaged or opted out entirely from all therapeutic avenues which have been offered to her during her placement.

**31.** M experienced huge personal loss between October 2021 and April 2023. Siblings, an uncle and an aunt died in tragic circumstances. M was particularly close to these siblings and spoke to them, daily, prior to their deaths.

**32.** During the two years up to May 2023, despite positive engagement with staff, there were concerns in relation to threats and assaults on staff members; stealing money; property damage; fire setting; the consumption of alcohol and cannabis; and suspected cocaine use.

**33.** M has also been admitted to hospital on a number of occasions due to passing out from alcohol misuse, the first of these being in October 2022.

**34.** M's GAL suggested that serious consideration be given to a special care placement in or around November/December 2022.

**35.** There was a brief improvement in M's behaviours in the approach to Christmas 2022, but matters continued to deteriorate from the early part of 2023. Concerns related to absconding from the placement; alcohol misuse; drug use; inappropriate relations with older adult males; property damage and the exchange of serious threats between M and others.

**36.** Matters deteriorated further as of May 2023 when M befriended a particular peer group which escalated the level of risk taking to include an increasing number of 'missing from care' (or "MIC") episodes; an inappropriate relationship with an older male; consorting daily with a peer group regularly engaged in drug and alcohol misuse and anti-social behaviour, together with physical altercations in the community.

**37.** This continued throughout May and June 2023, during which time M began a relationship with a new boyfriend and her risk profile worsened. M began to take cocaine and 'laughing gas' and there were suspicions that M's boyfriend had harmed her in an instance of domestic violence.

**38.** M was also the subject of a credible threat to harm her, arising from a drug debt against her boyfriend.

**39.** As of late June 2023, M was informed of the consideration, once again, of a special care application, as she did not seem to comprehend the danger she was placing herself in.

**40.** M was removed to a place of safety comprising of a respite holiday home where she remained until early July 2023. However, on her return, M reverted to previous behaviours.

**41.** M broke up with her boyfriend who appears to have shared intimate images of them on social media.

**42.** When the couple renewed their relationship, there was an arrangement in place for M to be presented to fight in an organised fight against her boyfriend's former girlfriend.

**43.** The GAL addressed the issue of special care directly with M on 13 July 2023. M minimised the professional concerns, indicating that she was only taking "*a bit of drugs"* and reasoned that "*special care would not change me, nothing will*".

**28 June 2023 – complex case meeting**

**44.** The respondent held a "complex case meeting" in respect of M, on 28 June 2023. The respondent's minutes of the said meeting comprise Exhibit "HT 1" as referred to in the affidavit of Ms. Helen Tully, M's GAL, sworn on 7 September 2023. The Court understands that "*MIC"* and "*MCIC"* refer to "Missing in care" and "missing child in care", respectively. The following comprise certain verbatim extracts from the respondent's minutes of the aforesaid complex case meeting:-

> "*Since mid – April 2023, M's risk – taking behaviour includes several MIC incidents, increased substance and alcohol misuse. While M is MCIC, she is spending times in the homes of unknown adult males and on more than one occasion, M has been physically threated by the males. While M was MCIC on 27/5/23, she said she (sic) a man threatened to kill her and attempted to strangle her. From 20/5/23 – 31/5/23 while M was MCIC, she reported that she got into a car with two men aged 19/21 years old. M stated the men were driving dangerously and crashed into another vehicle….*
>
> *….*
>
> *M spent the night in an unknown male's house reportedly using cocaine, cannabis and drinking alcohol. On 12/6/23 M returned from MCIC overnight, very intoxicated and said she had used cocaine. M still had a bag of cocaine in her possession and began to take it in her room. M became very heightened and used an aerosol can and a lighter as a weapon towards staff, the Gardai were called and M was brought to the station.*
>
> *The following matters were raised by this Forum:*
>
> - *M's behaviour has escalated in the past month, with MCIC incidences, alcohol and substance misuse and spending time in the company of unknown adult males and has reported being threatened with harm.*
> - *There is concern around sexual behaviour, with M being at high risk of sexual exploitation.*
> - *GAL is recommending special care.*
> - *AGS is also recommending special care and have expressed view that M ought not to remain in [location given].*
> - *M's boyfriend's family are known to Gardai.*
> - *An overriding concern is the risk to M while MCIC and reported instances of sexual conduct with older men. On two occasions M looked for emergency contraception but with no clear memory of what happened.*
> - *On one occasion, M was taken to hospital unresponsive and intoxicated and had in her possession a large sum of money and cannabis.*
> - *M reported being held against her will by an older male at his house.*
> - *Behaviour has escalated a lot recently and has become more erratic since the death of her [sibling]*

*MCIC instances are less likely to be with family now.*

- *M is currently in a unit – it is not single occupancy; GAL has requested if the private provider would consider single occupancy.*
- *M is still close to her sister. [her sister] is focused on parenting her baby and the two have not seen each other in two – three weeks.*
- *M does have a good relationship with one or two of her key workers and has been in her placement a while now and knows the staff. Risks presenting are to herself, much less to staff or other residents.*
- *M has demonstrated an openness to engage with services.*
- *A high volume of SEN reports – 37 – have been made in relation re M since April.*

*The following was agreed:*

- *The forum recommends, based on the current level of at – risk behaviours that M, would benefit from a period of stability which would be provided by Special Care, to break the current cycle of behaviours. This would also facilitate engagement with therapeutic services. On this basis a referral to Special Care needs to be progressed".* (emphasis added)

**45.** This represents what was agreed by the respondent at the complex case meeting which it held as long ago as 28 June 2023. What was *"agreed"* at that meeting speaks to the respondent having been *satisfied,* as of 28 June 2023, that there was, at that point, at least *reasonable cause to believe that the child requires special care*. I am fortified in this view by the provisions of s. 23F (5), discussed presently.

**14 July 2023 – family welfare conference**

**46.** A family welfare conference (as required by s. 23F(5)) was convened by the respondent and took place on 14 July 2023. The respondent's minutes of same comprise Exhibit "HT 2" to Ms. Tully's affidavit. Before looking at their contents it is appropriate to note that (*per* s. 23F(5)) the obligation on the respondent to convene same arises *"… if it is satisfied that there is reasonable cause to believe that the child requires special care …"* and consultations have taken place in accordance with subsection (3) (or not, in light of subsection (4) of s. 23F). The aforesaid wording in subsection (5) mirrors precisely that found in subsection (7).

**47.** My point is that the respondent had to be *"satisfied that there is reasonable cause to believe that the child requires special care"* to convene a family welfare conference. It was and it did. In the manner presently explained, the evidence demonstrates that the outcome of the family welfare conference was for the respondent, as a matter of fact, to *remain* satisfied that there is reasonable cause to believe that the child requires special care.

**48.** The following comprise certain *verbatim* extracts from the respondent's minutes of the 14 July 2023 family welfare conference (wherein reference to the "social work department" constitutes a reference to the respondent's social work department):

> "*The social work department's purpose for the convening of a F.W.C. (at the time of referral):*
> *To ensure all other avenues have been explored as application is being made for M to go to*

*secure care due to concerns about her safety. M is frequently missing from care and engaging in alcohol and substantial drug use. M is often in the company of older men while under the influence and there are concerns of child sexual exploitation*." (emphasis added)

**49.** I pause here to observe that, for the respondent to state, on 14 July 2023, that *"application is being made for M to go to secure care"* is entirely consistent, indeed only consistent, with the respondent being satisfied, at that point, that there was reasonable cause to believe that M required special care, given the then situation (just as it had to be so satisfied, in advance, as this triggered the obligation under s. 23F (5) to convene a family welfare conference).

**50.** As will presently become clear, there has been no material improvement in the situation. On the contrary, things have deteriorated, markedly and in the most serious manner, in the weeks and months since but without, of course, special care even being applied for.

**51.** Returning to the 14 July 2023 document, it sets out, in tabular form, grave concerns held by the respondent as well as by M's family with respect to M. These concerns could hardly be more serious or shocking and are put, as follows, on internal pages 3 and 4 of the respondent's 14 July 2023 minutes:

*"What are we worried about?*

*M's family and professionals are worried that:*

- *M is going missing from care almost every day, nobody knows her whereabouts, she is using cocaine, drinking, smoking cannabis, and they are concerned she is with (sic) when she runs away.*
- *M is being sexually exploited and sexual videos of her have been shared on social media by a young man.*
- *M is drawn towards a certain peer group in the community who are known to gardaí, she sees these relationships as more important than her relationship with her family or [current placement]*
- *M has said she is not going to change and sees herself as just having fun.*
- *M has had a lot of loss and trauma in her life and tends to sabotage good attachments.*
- *The family cannot keep M safe and [the current placement] fear they cannot keep M safe.*
- *M's mother got a call from M very distressed asking her to go and get her and begging her mother to help her.*
- *M's relationship with her mother has broken down, they can be abusive to each other, and M has also drifted away from other family members that she was close to.*
- *M is taking drugs from strangers, she has had sexual encounters with older men who give her drugs, she was threatened with a knife by a male and has been assaulted.*

- *M does not remember what happens to her because of the drugs she is been (sic) given and returns to [the current placement] in a concerning state.*
- *M wants to get pregnant and is refusing to take contraception.*
- *M has been seen going into an apartment with an adult man and she has been seen getting dropped off in a car by different men.*
- *M disclosed she had sex with a man who had given her drugs, she is not using protection, refuses contraception and is at risk of becoming pregnant or STI's.*
- *M will get seriously hurt, because in the month of May she disclosed that she was almost strangled, and a man tried to kill her.*
- *M was in a car accident with males and using gas canister, she was not seriously injured, but there is a worry that she could be seriously hurt and in danger when engaging in this behaviour."*

**52.** I pause here to observe that, as well as constituting concerns of the gravest sort, the foregoing includes statements to the effect that neither M's family nor her placement, (where she remains to this day) can keep her safe.

**53.** Nor is it simply a list of fears for what *could* happen. On the contrary, it discloses grave harm already caused to M, and harm which is ongoing, including sexual exploitation, physical violence and risk to the very life of someone who, as of the date of the family welfare conference, was a child of 15. Returning to the document, it proceeds to record *"Decisions"* made:

*"Decisions made at the family welfare conference:*

- *The family agreed with Tusla and [the current placement] that there is huge concern M is putting herself at serious risk when she runs away and needs to be placed in secure care so that she does not come to serious harm and is safe with structure and routine and getting supports she needs to build back positive relationships with her family and [the placement].*
- *The family support the decision of Tusla to make a special care application for M and feel this is the only option for M.*
- *Tusla and the family agree with [the placement] that they cannot keep M safe.*
- *[The placement] agree they will continue to support M if a special care placement is approved for her.*
- *The family and professionals agree that M has a lot of potential and with the structure and routine of special care she will get the help she needs to get back to herself.*
- *M's mother and brother agree to support M if she is in special care and will visit her to ensure family connections.*
- *[The placement] agreed to support M."* (emphasis added)

**54.** Plainly, the foregoing constitute decisions made by the respondent as long ago as 14 July 2023 and the explicit reference to *"the decision of Tusla to make a special care application"* for M is consistent with the respondent being, at that point *"satisfied that there is reasonable cause to believe that the child requires special care"*. The family welfare conference report concluded as follows:

"*Recommendations:*

*It is the recommendation of the family welfare conference that decisions made at the family welfare conference will be shared M's social worker (sic) with Tusla Special Care Committee for a further consideration as they continue to assess and review the danger of M's actions when she runs away from her placement at [named].*

*It is the recommendations of the family welfare conference service that an application for secure care is sought for M, taken* (sic) *into consideration her lack of insight into the level of risk she is posing on herself and her refusal to engage in a safety plan with her family and Tusla. All attendees acknowledged that there are no other family, or care placements available to keep M safe and all agreed that a period of stability in a structured environment where relevant assessments and therapeutic input can be put in place, so that a sustained plan can be made for her future care."*

**55.** In light of the foregoing, after the family welfare conference, the respondent remained satisfied that there was reasonable cause to believe M required special care (just as the respondent was so satisfied, thereby triggering the requirement (*per* s. 23F(5)) to convene the said conference.

**56.** With a view to relating the facts of this case to the structure of s. 23F, subsection (6) is of no relevance in the current situation (as it concerns a situation where the respondent is satisfied that it is not in the best interests of the child to convene a family welfare conference). Thus, the next step in a process comprises s. 23F(7). As already seen, this provides that where a family welfare conference has been convened (or not, *per* subsection (6)) and the respondent *"… 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"*. ("emphasis added").

**57.** Although not reflective of any formal step mandated by s. 23F, the internal process within the respondent involves consideration of cases by its Special Care Committee ("SCC"). The respondent describes the SCC as an ad-hoc committee comprised of:

> *"… persons with specialised knowledge in the area of childcare who consider on a national basis applications by local social work teams, and their recommendations inform a final decision making in cases where a question of admission to special care arises. That final decision which is in the form of a statutory determination is made under the delegated authority of the Chief Executive Officer by the Service Director, National Residential Care."* (para. 15 of the Statement of Opposition)

**17 July 2023 – referral form**

**58.** Exhibit "HD 6" to Ms. Tully's affidavit comprises a very detailed 'referral form' in respect of M which was completed within 3 days of the family welfare conference, namely, on 17 July 2023, by the respondent's social worker involved in M's case. The final page of the referral form states *inter alia* the following:

*"M is in a cycle of problematic drug & alcohol use and is at extremely high risk of child sexual exploitation & grooming. This is being exacerbated by M's current environment social circle. M has experienced a high level of loss with the death of her [siblings] and with her sister … moving out of [the placement]. M is experiencing a significant level of rejection with the breakdown of her relationship with her mother and older siblings. M needs to be removed from her current environment*.

*The residential placement at this point will not break the current cycle of destructive behaviours which M is in and cannot keep her safe within the community.*

*…*

*On what date did the Social Work Department decide to make the referral for special care: 28.06.23"* ("emphasis added")

**59.** For the respondent's Social Work Department to *decide*, on 28 June 2023, to refer M for special care is consistent with the respondent being satisfied at that point that there was reasonable cause to believe that M required special care. It will, of course, be recalled that 28 June 2023 was the date of the complex case meeting in respect of M (and earlier I referred to what was agreed by the respondent at that meeting i.e. *"a referral to special care needs to be progressed"*). I now turn to the meeting of the SCC, which considered M's case on 08 August 2023.

**8 August 2023 – SCC meeting**

**60.** The outcome of the said meeting is detailed in a letter, dated 10 August 2023, sent by the respondent's SCC to the social worker, within the respondent, who completed the referral form. It was also cc-d to the respondent's social work team leader; principal social worker; area manager; and regional chief officer. The first paragraphs stated the following:

*"The National Special Care Referrals Committee met by Microsoft Teams on 08.08.23 in relation to the above referral.*

*I wish to advise you on behalf of the National Special Care Referrals Committee that the case of M was considered taking into account (a) the special care referral form and supporting documentation presented by the Social Work Department and (b) guidelines for referrals to special care …"*

**61.** Having set out all of the documentation which the SCC considered, the letter continued as follows:

*"Young Person's Presenting Issues*

- *History of neglect.*
- *Anti-social behaviour.*
- *Criminal behaviour.*
- *Non-school attendance.*
- *In the company of a known sex offender.*
- *Substance and alcohol misuse.*
- *Threatening towards staff.*
- *Fires setting.*

- *Property damage.*
- *Vulnerable.*
- *Not coping well with the sudden death of her older [sibling].*
- *Episodes of missing in care for days at a time.*
- *Attending hospital as a result of her drug and alcohol abuse.*
- *Getting into cars of older unknown males.*
- *Staying out overnight in the homes of unknown males.*
- *Disclosed she had sexual intercourse with an older male while under the influence.*
- *Risk of sexual exploitation.*
- *In possession of sums of cash and drugs.*
- *Returning to the residential unit intoxicated and in a heightened state.*
- *Threatened as a result of her boyfriend's large drug debt.*

*The Committee reviewed the circumstances of this young person having recourse to the above documents and the opportunity to speak with the Social Work Department. The determination of the National Special Care Referrals Committee is that the case of M now fulfils the Criteria for Admission to Special Care, please be advised that the referral information has been forwarded to the Director for Special Care for determination in accordance with the legislation*.

*When a care referral has been deemed legislatively compliant, [named] arranges a Special Care Order application preparation meeting (SCOAP meeting).*
*It is essential this happens without delay once the young person has been allocated a bed to ensure the speedy development of a programme of special care (PSC)."*
("emphasis added")

**62.** The respondent's SCC plainly made a *"determination"* that M requires special care. It does not seem to me than any other interpretation of the foregoing is possible. It is true that the SCC drew a distinction between, on the one hand, its determination and, on the other, the Service Director for Special Care ("service director") making a determination. However this distinction is nowhere found in s. 23F. The respondent's SCC clearly, and appropriately, laid emphasis on the importance of avoiding delay once matters reached a certain stage. However, the evidence demonstrates that delay *prior* to a formal determination by the service director is just as damaging to the child in question as delay *after* that point and, in the manner explained in this judgment, is unlawful.

**September/October**

**63.** To see, further, the very real and damaging effect of delay on the child in question, I now turn to an affidavit sworn by M's GAL, Ms. Tully, on 4 October 2023. In this affidavit, the GAL made averments in relation to events of the previous weeks and she exhibited relevant documentation concerning same, in particular the relevant "Significant Event Notification" ("SEN"). It is sufficient for present purposes to quote the following paragraphs from Ms. Tully's affidavit:

*"[4] … I beg to refer to the following documents which I have gathered and which are a true and accurate reflection (as best I can support) of just some of the interactions between the stakeholders in M's life, upon which marked with the letters 'HT1' I have signed my name prior to the swearing hereof:*

*(a) SEN 294 - this refers to M being found unresponsive in [place named] late on Sunday night the 1st of October 2023. It was suspected she had ingested cocaine which was cut with Fentanyl (a new drug considerably more potent than heroin). She ultimately discharged herself from ICU at [named] Hospital later on during that early morning.*

*(b) An email from the manager of M's Unit at [her current placement] to confirm the presence of cocaine and benzodiazepine in her urines, but confirming that the same tests cannot test for Fentanyl which had been suspected.*

*(c) The notification to gardaí of Young Person Absent at Risk form referable to the incident where she was unconscious on Sunday night.*

*(d) An email from the manager of M's residential unit alluding to M's most recent child sexual exploitation concern from the 27th of September last. She was reportedly in a house with a known paedophile seeking drugs wherein he masturbated and exposed himself to M and her peer.*

*(e) The child sexual exploitation information of concern reporting form referable to the visit to the paedophile's house where there were significant amounts of drugs present.*

*(f) An email from the GAL noting that M's boyfriend was hospitalised on the 27th of September 2023 following a stabbing.*

*(g) SEN 286 - including details referable to M being subject to threats on the 26th of September from men with weapons (shotgun and slash hook) as they were searching for her boyfriend.*

*(h) SEN - referable to M's birthday when she engaged in alcohol and substance misuse and her boyfriend attacked his own mother causing her damage and M being pressured to make a statement to refute his mother's allegations.*

*(i) The notification to gardaí of Young Person Absent at Risk form referable to the incident where a peer's foot was run over by an older male who had allegedly attempted to kidnap M by taking her away in his van.*

*[5] For the avoidance of doubt, I say and affirm that the level of risk she presents with has escalated to a perilous level such that all professionals involved with M have a significant worry around whether she can actually stay alive in the short to medium term. She shows minimal insight into just how dangerous her lifestyle is and as such, time is of the essence for a bed to be sourced. Every day she is not in special care is causing her harm."* (emphasis added)

**64.** It is in light of the foregoing facts, against the backdrop of the child's Art. 40.3 and Art 43A rights, and the respondent's statutory obligations, that an appropriate judicial response must be given.

**Delay – child M**

**65.** I have deliberately looked closely at the sequence of events in order to understand the factual position, including the delay on the part of the respondent in making what it regards as a *formal* statutory determination pursuant to s. 23F(7). The latter is something the respondent has still not done and contends that it should not be required to do. This must be seen in the context of delay during which two things can be said with confidence.

**66.** First, from 23 June 2023 onwards, the respondent has regarded M as needing special care and there has never been a dissenting voice within the respondent, regardless of what individual, or committee, represented the views of the respondent during its internal processes. Second, throughout that period M has suffered real and serious harm of the gravest sort.

**67.** The fact that the respondent has put in place internal processes and the fact that the respondent's internal processes have not yet produced what it describes as a *formal* statutory determination within the meaning of s. 23F(7) cannot serve to undermine the objectives of Part IVA, or the specific obligations in s. 23F.

**68.** The evidence before this Court allows for a finding that, at all material times from 28 June 2023, the respondent has been *satisfied* that there existed "*reasonable cause to believe that the child requires special care*". As of 14 July 2023, the respondent had already told M's family of its *decision* to make a special care application for M, being a decision the family supported. Its SCC made such a *determination* on 8 August 2023. Despite this, the respondent argues to this court, in October, that no *determination* as to whether M requires special care has been made within the meaning of s. 23F(7).

**69.** Whilst I accept that the submission that no formal determination has been made is advanced *bona fide*, it seems to me to be an approach which seeks to prioritise 'form over substance', at the expense of mandatory obligations in the 1991 Act, and constitutes an attitude on the part of the respondent which ignores the facts in relation to its consistently expressed views.

**Internal processes**

**70.** I want to emphasise that in circumstances where s.23F is silent as to the methodology pursuant to which the respondent complies with its statutory obligations, it is entirely appropriate that the respondent put in place internal processes. Nor is it any function of this Court to criticise the processes adopted. However, adherence to internal procedures, which are nowhere laid down in s. 23F cannot legitimise delay which the Oireachtas did not contemplate or authorise, where the effect is to breach explicit statutory obligations, which are themselves reflective of the child's constitutional

rights. Internally developed procedures must reflect the specific obligations, and cannot undermine the underlying aims, of the statute, which, in this case, emphasises the need for expedition.

**71.** The point, of course, is fidelity to what is required by the 1991 Act, in furtherance of the best interests of the relevant child and consistent with the statutory duties on the respondent, not adherence to internally-developed procedures, regardless of how *bona fide* such adherence may be.

**72.** Internal processes cannot be used as an excuse for delay and, without doubt, there has been significant and, to my mind, egregious delay on the part of the respondent in making what, *per* its own internal processes, amounts to a formal determination within the meaning of s. 23F(7). On its case, it still has not done so.

**63 days of delay**

**73.** Even if one were to ignore the entire period from 28 June 2023 (when the respondent's Social Work Department decided to make the referral for special care) to 08 August 2023 (when the respondent's SCC met and made the determination that M fulfils the criteria for admission to special care) the delay since has been extreme and egregious, having regard to the circumstances of the child in question. The foregoing is not to suggest that the period of 40 days between the Social Work Department's decision and the SCC's adequately reflects the urgency required by the 1991 Act.

**74.** From 08 August 2023, to the date of the hearing before me, comprises delay of 9 weeks and 2 days (i.e. 63 days). I have deliberately used the terms 'extreme' and egregious' in light of the following: (1) throughout this period, M has not only been exposed to risk, she has suffered actual and extremely serious harm; (2) the respondent is aware of this harm; (3) the respondent is obviously aware of its delay: (4) recalling that (*per* s.23H (2)) the default position is that a special care order "*shall not exceed 3 months*", the delay is more than 2/3rds of the duration of a special care period; (5) regardless of how genuinely the respondent holds to the view that it is entitled to 'hold off' making any *formal* statutory determination within the meaning of s. 23F(7), the delay on the part of the respondent is deliberate; (6) in the manner presently examined, the respondent knows it was not lawful to delay making a determination; (7) without a successful outcome to the present application, this delay will continue in an open-ended fashion (no specific date having been identified for any *formal* determination to be made in the future).

**Urgency**

**75.** It is clear from a reading of Part IVA of the 1991 Act that delay is anathema to its specific provisions and underlying objectives. One need only take a cursory look at the provisions of s. 23F to see this illustrated. Section 23F(2) refers to a child's behaviour posing *"… a real and substantial risk of harm to his or her life, health, safety, development or welfare"*. It could not seriously be suggested that, where the foregoing arises (as it did for the child in question) the matter is other than extremely urgent. Thus, even if this Court puts entirely to one side the 40 - day period up to the 08 August 2023 determination by the respondent's SCC (and that, in my view, is not the type of delay envisaged by the Oireachtas when, at issue, is the need to protect a child's life, health,

safety or welfare) the delay thereafter is (a) extreme; (b) damaging to the child; and (c) runs contrary to the will of the Irish people as expressed in legislation enacted by the Oireachtas.

**76.** The analysis thus far applies equally given the circumstances of the second child applicant and I now turn to I now turn to their circumstances.

**The circumstances of Child B**

**77.** B is a child aged sixteen. B has been diagnosed as suffering from oppositional defiant disorder; mild expressive language difficulties; and moderate receptive language difficulties. B was also found to have met the criteria for a diagnosis of autism spectrum disorder. The applicant was under review for an assessment regarding suspected ADHD. However, the second half of the assessment was not completed.

**78.** B has been known to the respondent and its statutory predecessor in title, the HSE, since approximately March 2012 when he presented with inappropriate behavioural issues.

**79.** The applicant's GP had indicated that B would benefit from ADHD medication. However, it was contra-indicated to prescribe such medication, when it may negatively impact with the unknown, but potent, cocktail of drugs which the applicant appears to be taking on a daily basis.

**80.** The applicant also has a heart murmur and stimulant medication could not be prescribed without the necessary medical tests being completed. The relevant ECG has not been undertaken due to an escalation in the applicant's behaviours.

**81.** On 26 April 2022, B presented to a certain Garda station, stating that he did not want to go home to his mother (his parents are separated). He admitted to suicidal thoughts and thoughts that he might harm others, specifically his mother, if he returned home. Section 12 of the 1991 Act was invoked for the purpose of facilitating a GP review and B was discharged to his father the following day.

**82.** On 18 January 2023, s. 12 of the 1991 Act was again invoked, when B again refused to return to his mother's home where he was then residing. An interim care order was granted, the then–plan being for the child to transition from care to reside with his father, with support from the respondent.

**83.** On 21 March 2023, s. 12 was again invoked, as B was running away and refusing to return to either his mother or his father.

**84.** B was placed in emergency foster care and an emergency care order was granted on 23 March 2023, pursuant to s. 13 of the 1991 Act. For the sake of clarity, s. 13 empowers the District Court to make an emergency care order where that Court is of the opinion that there is reasonable cause to believe that:-

"*(a) there is an immediate and serious risk to the health or welfare of a child which necessitates his being placed in the care of the Child and Family Agency, or*
*(b) there is likely to be such a risk if the child is removed from the place where he is for the time being"*.

**85.** Section 12 was invoked once more on 29 March and, again, on 30 March 2023, due to the lack of any suitable foster placement. B was sent to a certain residential unit in Leinster and to a certain hospital in Munster as alternative places of safety.

**86.** A further emergency care order was granted on 28 April 2023, following the expiry of a voluntary care arrangement from the child's mother. B remained in the care of the respondent under a special emergency arrangement ("SEA") awaiting a residential placement and has been under a sequence of SEAs since and to date.

**87.** The first interim care order was granted on 3 May 2023. On 22 May of this year, Mr. O'Callaghan was appointed by the District Court as the child's GAL.

**88.** A 28–day extension was granted to the interim care order on 7 June 2023. A full care order was granted on 5 July 2023 for a period of one year.

**89.** Section 47 of the 1991 Act provides that:-

"*Where a child is in the care of the Child and Family Agency other than special care under Part IV A, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order"*.

**90.** On 5 July 2023, arising out of the breadth of the concern and the escalation of the child's level of risk as evidenced at the District Court hearing, that Court made a direction under s. 47 of the 1991 Act that a placement would be sourced, forthwith, for the child. The learned District Judge directed that:- "*The Child and Family Agency apply immediately for special care. The Court directs details of said application to be sent to parties, solicitors and the parties' solicitors may communicate directly with the committee. The Special Care Committee will not delay the determination"* (emphasis added). It is a statement of the obvious to say that what the learned District Judge directed the respondent to do has not been done.

**91.** The child's GAL swore an affidavit of verification with regard to the contents of the statement of grounds, wherein the sequence of SEAs to date are described having been of *"minimal benefit to the child and merely acting as a means of temporarily containing him".*

**92.** The child's placement history since 26 April 2022 includes 15 different placements, between short–term fostering placements; social admissions to a certain hospital; emergency out of hours placements; and a number of SEAs sometimes in hotels.

**20 July 2023 - Family welfare conference**

**93.** A family welfare conference was convened by the respondent. As noted earlier, the obligation on the respondent to convene a family welfare conference is triggered where "*…it is satisfied that there is reasonable cause to believe that the child requires special care…"* and the relevant consultation requirements have been complied with.

**94.** The then–situation and the decisions made by the respondent are clear from the "*outcome of the family welfare conference"* dated 20 July 2023, a copy of which comprises Item (g) of Exhibit "FOC 4" to the affidavit sworn by the child's GAL on 6 September 2023:-

> "*DECISIONS AND RECOMMENDATIONS OF THE FAMILY WELFARE CONFERENCE*
> *Under s. 23 (F) of the Childcare Act 1991 (as amended) the decision of the family welfare conference is that [B] in respect of whom the conference was convened is in need of Special Care or protection (which [B] is unlikely to receive unless an order is made in respect of [B]).*
>
> *[B's] Guardian ad Litem told the conference that [B] has been missing in care for significant periods of time. [The GAL] explained that [B] has spent one night out of seven weeks in his placement. There has been a massive deterioration in his behaviour, he is frequently intoxicated, does not recall events. He has confirmed that he is dealing drugs for persons unknown and is possession [sic] of large quantities of money.*
>
> *The GAL noted the additional complications for [B] in terms of understanding the potential dangers that he is exposed to. [B] has a severe receptive language disorder and has ADHD which he is not receiving treatment for due to his substance misuse.*
>
> *[Named] from the social work department explained that [B's] behaviour has deteriorated rapidly in the last few weeks. His substance misuse is a significant worry. He is acting for others in terms of facilitating drug deals and he does not recognise the danger that he is in. [B's] father [BBB] noted that [B] was distant on the phone, is anxious to end their conversations. [BBB] said [B] seems unaware to the dangers around him and when he asked him would he come home [B] said no. [BBB] said that [B] will end up dead unless something is done fast.*
>
> *[BB], [B's mum] said that [B] doesn't understand what he is doing. He doesn't seek out his family. He has not tried to meet his siblings. [BB] is constantly worried about what is happening to [B]. [BB] said that if [B] was at home and behaving like this he would be taken off his parents.*
>
> *RECCOMENDATIONS*
> *All participants agree with the social work department's recommendation 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….*".

(emphasis added)

**95.** The foregoing is consistent with the respondent being satisfied *after* the family welfare conference that there was reasonable cause to believe that B required special care, just as it was so satisfied *before* convening the family welfare conference.

**96.** The gravity of the situation and the significance of the risk to the very life of the child can be seen from the following statement by the respondent's social work department:-

> "*It is the view of the SW Department 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. B requires focused therapeutic intervention in a special care unit, which can offer a period of stability while keeping him safe.*
>
> *The initial priority for B is to provide a safe environment first and then work on the complex needs he presents with to ensure he has the ability to regulate his emotions and manage the distress along with withdrawing from all the substances he has been abusing over the past number of weeks.*
>
> *B requires a period of time whereby he can experience stability and consistency away from the chaotic world that he is choosing to live in because of his ever–increasing risk–taking behaviours due to his lack of awareness and sense of danger. B requires a routine whereby he can manage a standard day that involves getting up, going to school, doing homework, doing an activity he enjoys, and going to bed. If B were to engage in a standard daily routine away from chaos and engage in therapeutic work it is hoped that B would be able to return to functionally living in mainstream residential care with peers. Currently B's situation is getting worse, his behaviour is deteriorating by the day, he is using drugs consistently and getting more aggressive towards staff".* (emphasis added)

**20 July 2023 - referral form**

**97.** A detailed special care referral form was completed by the respondent on the same date as the family welfare conference, namely 20 July 2023. I pause to say that this very obviously reflects prompt action consistent with the urgency of the situation, as a matter of fact, and also consistent with the emphasis on urgency which is manifest from the specific provisions in Part IVA of the 1991 Act. In other words, at *that* point in time, action on the part of the respondent chimed with its obligations. Unfortunately, this did not remain the position.

**98.** A copy of the referral form comprises exhibit "FOC 3" to the GAL's affidavit. The penultimate page states *inter alia* the following:-

> "*Neither of B's parents can meet his needs and the CFA cannot meet his needs at this time. He is being referred to special care with the view that an application for special care would be warranted at this time due to severity of his risk–taking behaviour, the severity at which*

*this is escalating and the concern that <u>there is nowhere that can ensure B is safe other than somewhere secure.</u>*

*According to B's previous speech and language reports he has significant difficulties with receptive and expressive language along with a diagnosis of ODD and ASD. B's therapeutic needs cannot be met at this time as B will not engage with the supports out in the community, however, without all other distractions, I believe his engagement would be very positive and hugely beneficial for him.*

*There has been a massive deterioration in B's overall presence (sic) and circumstances over the last couple of months, he has become addicted to very strong drugs along with engaging in criminal activities such as stealing and assaulting vulnerable people and dealing drugs. B currently is not only not having his needs met, but he is also putting himself at great risk of being targeted and attacked….*

*…..*

*On <u>what date did the social work department decide to make the referral for special care</u>: <u>5th of July 2023</u>".*

(emphasis added)

**99.** The fact that the respondent's Social Work Department decided to make a referral for special care as of 5 July 2023 is entirely consistent with the respondent being satisfied, at that point, and thereafter, that there was reasonable cause to believe that the child required special care. It will be noted that this was the same date as the matter was before the District Court and the learned Judge made a direction pursuant to s. 47 of the 1991 Act, which has been referred to.

**25 July 2023 – SCC meeting**

**100.** The respondent's SCC met by 'Microsoft Teams' on 25 July 2023. The outcome is clear from the letter dated 26 July 2023 which was sent by the respondent's SCC to the respondent's 'team leader'. Having referred to the SCC's consideration of the referral form; supporting documentation supplied by the respondent's social work department; and the guidelines for referrals to special care, the letter stated:-

"*<u>Young Person's Presenting</u>*

*<u>Placement Breakdowns</u>*

- *Residing in a special emergency arrangement*
- *Violent, aggressive behaviours*
- *Verbal abuse*
- *Diagnosis of ASD and ODD*
- *Receptive and expressive difficulties*
- *Engaging in street fights*
- *Low mood*
- *Property Damage*
- *Suicidal ideation*
- *Begging*

- *Concerns around B selling drugs*
- *Episodes of Missing in Care*
- *Engaging in substance misuse*
- *Coming to attention of Gardai and picking up charges for criminal damage, drunkenness, theft, public order offences and assault*
- *Videos of B seriously assaulting a vulnerable man*
- *No educational placement*

*The Committee reviewed the circumstances of this young person having recourse to the above documents and the opportunity to speak with the Social Work Department.*
*The determination of the National Special Care Referrals Committee is that the case of [B] now fulfils the criteria for admission to Special Care, please be advised that the referral information has been forwarded to the Service Director for Special Care for determination in accordance with the legislation ….."*
(emphasis added).

**101.** Observations made earlier apply equally to the foregoing. In short, regardless of what had come before, it is a matter of fact that the respondent made a "*determination"* on 25 July 2023 that B fulfilled the criteria for admission to special care. This can only be consistent with the respondent being *satisfied,* at that juncture, that there was *reasonable cause to believe* that B required special care.

**102.** Had the respondent, in accordance with its internal procedures, promptly made what it regards as the formal determination (or not, for stated reasons, although it should be stressed again that the respondent does not suggest that either child does not need special care) no delay issue would arise. However, just as in the case of child M, there was plainly a conscious decision made by the respondent *not* to act in accordance with its own processes. The aim of this inaction was to try and avoid obligations binding on the respondent. However, that approach cannot undo established facts. These include that the body within the respondent designated to consider the matter did so and in fact formed the view referred to in s. 23F (7) which view triggers the following mandatory obligation: *"….it shall make a determination as to whether the child requires special care"* (emphasis added).

**103.** The position which pertained as of 25 July 2023, when the respondent's SCC met and reached a determination, has not improved. It has deteriorated, in the manner presently outlined.

**Delay – child B**

**104.** Even if one were to ignore the period from 5 July, 2023 (when the respondent's social work department decided to make a referral for special care) to 25 July, 2023 (when the respondent's SCC determined that the B fulfils the criteria for admission to special care) the delay between 26 July, 2023 and the hearing before me comprises over 11 weeks (78 days). That delay is, of course, continuing and, as matters stand, there is no visible 'end point' to this delay given the respondent's

opposition to mandatory orders. Just as the 63 days of delay in respect of child M (up to the hearing before me 8 days ago) is extreme and egregious, the same is true in relation to 78 days.

**105.** To see the grave harm which this child has suffered as a consequence of the delay it is appropriate to refer to exhibit "FOC1" to the GAL's affidavit sworn on 4 October 2023, wherein Mr. O'Callaghan provides a detailed update. This 5-page document contains a litany of harms and risks and covers the period from 20 July to 01 October 2023. The following are merely a selection:

> "*20.07.2023 B wakes up at approximately 14:00h and immediately begins to drink glasses of vodka in front of his care staff whilst also smoking cannabis in his SEA placement. He absconds at 15:40h and returns the following morning at 05:15h accompanied by the gardaí. It is noted that B has a black eye and is under the influence.*
>
> *…*
>
> *22.07.2023 B went missing from his placement at 16:00h and did not return until the following morning at 05:30h where he complained about a pain in his jaw having been in a fight. He was reported to be intoxicated and went to bed before waking up in the afternoon in significant pain. B was brought to [named] hospital, where following x rays, he was admitted due to his jaw being broken. B has also several teeth loose after this altercation.*
>
> *25.07.2023 B has surgery on his jaw.*
>
> *…*
>
> *27.07.2023 B is discharged from [named] hospital with pain medication and a clear plan from doctors around the need to mind his jaw in the coming weeks. B remained in his placement until 22:00h in order to take his scheduled pain meds but then proceeded to abscond. He returned at 04:20h the following morning.*
>
> *29.07.2023 B remains in his room until 20:00. He presents to staff as fully dressed and intend on leaving his placement. He is persuaded to remain until 20:00h in order to take his medication, following which he absconds. He returned the following day at 06:30h.*
>
> *…*
>
> *01.08.2023 B showed staff a video on Snapchat of a boy on a trolley in hospital with a stab wound in his leg. This boy was saying "B got his revenge, karma is a b*tch". Staff asked B what happened. B was laughing and said the 19 year old who broke his jaw got stabbed by him. He then said he wasn't finished with him until he stabs him in the neck. The guards were called around 7.30pm. At 10pm B absconded again and guards came at 10:40pm. The guards took a statement from staff. B returned to the property at 07:00h the following morning, reporting to staff that he was "off his face last night". B also stole €150 from a staff member's handbag the previous day and became very aggressive towards that staff member when they asked for the money to be returned.*
>
> *…*
>
> *03.08.2023 B wakes at 16:10 and absconds from the placement at 16:30. He is returned to the property by gardaí who located him in [named] at 05.15h the following day.*

*04.08.2023 B wakes with significant pain in his mouth and jaw. He is brought to [a named hospital] where it is established he had developed a severe infection at the sight of his surgery. He is admitted for the following seven days and receives a number of antibiotics.*

*…*

*17.08.2023 Having only returned from the previous night at 05.30h B remains in his bedroom until late afternoon. He absconds immediately at 16:30 and only returns the next morning at 08:30h.*

*21.08.2023 Again absconds at 23:00h and returns the following morning at 05:35, reporting to staff that he had been caught up in a garda drug raid of a house he was in. B reported that he hid underneath a bed in the property and was not located by the gardaí.*

*…*

*08.09.2023 B informs his staff that he cannot remember the last day he was completely sober from drink or drugs. Leaves home at 14:00h. Gardaí make contact with staff at 20:40h to advise he has been arrested for stealing alcohol from local [named] shop. Staff collected B after he had received a caution and returned to the SEA placement at 23:00h. At 23:30h B once again absconded and returned at 05:15h intoxicated. He proceeded to smoke cannabis in the living area of the home.*

*09.09.2023 B absconds at 17:30 having slept all day without eating any food. He is returned at 02:00h by gardaí from [named location]. He is described as being "extremely high by the staff team who report that he falls around the home and is threatening and aggressive towards them. At 02:20 B absconds once the gardaí leave the home. He returns at 07:15 clearly under the influence.*

*…*

*12.09.2023 B wakes up at 18:10 and reports to staff he was arrested last night for a public order offence. He shows staff a white iPhone which he claims to have stolen. At 23:15 B leaves the home and returns at 05:50 intoxicated.*

*13.09.2023 19:45h B leaves the home claiming he is going to get drunk with friends. He is returned to the home at 04:00 by the gardaí under the influence of drink and drugs. He is threatening towards staff and gardaí and engages in property damage in the home.*

*14.09.2023 B returns at 07:00 to the property having left in the early evening the night previously. B is soaked from the rain and reports that he fell asleep at the courthouse in [named location] and slept there through the night.*

*…*

*19.09.2023 18:05 wakes up having slept all day, 18:20 B absconds and is returned to the unit by gardaí at 04:45. B is under the influence and reports to staff that he took cocaine. He issues threats that he will have his friends come and steal staff's car.*

*…*

*28.09.2023 B remains in bed for the entirety of the day, only coming down the stairs at 00:00 before absconding at 00:10. He returns at 06:45 clearly under the influence of drink and drugs.*

*29.09.2023 B reported to his staff at 12:10 today that he had just taken a tablet and felt "boozy". He proceeds to sleep for several hours before going to the cinema with a staff member. He returned to his placement from the cinema at 23:15 and absconded at 00:00. He returns the following morning at 05:30 clearly under the influence.*

*30.09.2023 B does not wake for the entirety of the day, only presenting to staff at 00:00 when he absconded immediately. Again he is gone for the entirety of the night, returning at 05:30.*

*01.10.2023 B went to bed at 08:00 and sleeps until 20:30, again taking no food or water for the whole day. He absconded from his placement at 23:30 and returned at 06:35".*

**Actual v. potential harm**

**106.** Having looked at the circumstances of each child, and whilst it may involve repetition, there is nothing notional or *potential* about the harm each has suffered. This is not a situation where these children *may* in the *future* come to harm. The evidence allows for a finding of fact that the respondent is of the view that their respective placements are unsafe; do not meet their needs; and that both have *already* suffered, and *continue* to suffer, harm of the most serious kind as a consequence of the respondent's delay in complying with its obligations. In addition, and as the respondent is aware, their very *lives* are at risk as a consequence of not receiving the special care which both children need, and which the respondent alone can provide (*per* its statutory obligations under the 1991 Act, which obligations it has failed to discharge).

**No criticism of individuals**

**107.** Nothing in this judgment is intended as a criticism of anyone, in a personal sense. This Court does not doubt for a moment that staff at all levels within the respondent act *bona fide* and work to the best of their abilities to try and secure positive outcomes for the most vulnerable. There is no question of this Court finding that any individual within the respondent has acted otherwise. That is not, however, the complete or relevant analysis.

**Consequences of the respondent's decisions**

**108.** Irrespective of the fact that there is simply no question of any individual within the respondent acting other than diligently and in good faith, the evidence, nonetheless, allows for the following findings: that (i) with a view to trying to avoid the triggering of its obligation (*per* s. 27F(8)), the respondent decided *not* to complete its internal procedures and make, pursuant to same, what it regards as the *formal* s. 23F(7) declaration in each case; and (ii) during the resultant delay, both children have suffered life threatening-harm and continue, daily, to be caused such harm. Moreover,

these decisions by the respondent have created, as it well knows, an impassable 'roadblock' to each child securing the special care they need.

**Internal procedures**

**109.** A central submission made by the respondent is to the effect that it *cannot* form a view other than in accordance with its own procedures. Thus, argues the respondent, the determination made by the SCC in each case was not a determination within the meaning of s. 23F (7) because the procedures which the respondent has put in place *require* the latter determination to be made by the service director. Again, this Court makes no criticism of the putting in place, within the respondent, of appropriate procedures. The point, however, is that the manner in which the respondent has chosen to operate its internal procedures has introduced delay which is impermissible and unlawful, having regard to the explicit provisions of Part IV A of the 1991 Act, and amounts to a breach of the respondent's statutory obligations. It has also created a situation where the best interests of these children have not been met, and their constitutional rights have not been vindicated or protected.

**Concession regarding declarations**

**110.** Since putting in opposition papers, the respondent concedes that it is in breach of its statutory obligations to make a determination (*pe*r s. 27 F (7)) and to apply for special care (per s. 27 F (8). The respondent's opposition to mandatory orders which would, in truth, do no more than require the respondent to do what s. 23F (7) and (8) oblige them to do must also be seen in the context of the very real harm suffered by M and B during each day that passes without the respondent *complying* with its statutory obligations (as opposed to acknowledging ongoing breaches, without remedying same).

**Every reasonable effort to provide appropriate care**

**111.** In urging the Court to refuse the mandatory relief sought by the applicants, the respondent pleads, *inter alia*, that:-

> "*24. In respect of the immediate care and welfare issues facing M, the Respondent asserts that <u>it is taking every reasonable effort (short of special care) to provide appropriate care</u> for M in his* (sic) *special emergency arrangement in* [address]."
>
> *"25. In respect of the immediate care and welfare issues facing B, the Respondent asserts that <u>it is taking every reasonable effort (short of special care) to provide appropriate care</u> for B in his special emergency arrangement in* [address]".

**112.** An examination of the evidence before this Court allows for a finding that, irrespective of the *effort* being made (and taking nothing away from the dedication and hard work of individuals, in what must be very difficult circumstances) the respondent is *not* providing *appropriate care* for either of these children. In the manner explained, thus far, the harms which prompted these applications are shockingly serious and, if anything, have become more so, but have been inappropriately addressed.

**Affidavit by Director**

**113.** In opposing the reliefs sought by the applicants, the respondent has furnished affidavits sworn by the interim national Director of Children's Residential Services ("the Director"). It is clear that the respondent takes the view that no application for special care can or should be made until a specific and fully-staffed bed has been identified in relation to the child in question (a stance which, in the manner I will presently return to, seems to take no account of this Court's decision in *LM*).

**Staffing issues (14 out of 26 beds available)**

**114.** The focus of the Director's affidavit is on the current predicaments faced by the respondent in providing a special care service and significant emphasis is laid on the difficulty in terms of staffing-levels, something which also featured heavily in legal submissions. At para. 22, the Director avers *inter alia* that:-

> "*there is physical capacity for 26 children in the three Special Care units currently in operation in Ireland. In terms of actual bed capacity available, I say that as at the date of swearing hereof, there are 14 beds available. All of the available beds in Special Care are currently occupied"*

**115.** At para. 23 the Director goes on to aver *inter alia* that:-

> "*The Agency's Special Care management currently is engaged in hiring from three different agencies, both on permanent basis and ad hoc bases…. there is no barrier in using Agency staff. There is a wider staffing crisis in residential care in Ireland and private residential services have had to close units due to the staffing crisis".*

**116.** With respect to staffing levels, the Director avers *inter alia* at para. 24 that:-

> "*…there is no doubt but that at present, restrictions on availability of beds in Special Care and in appropriate onward placements results from the non – availability of staff rather than from any limitation on the number of beds"* (emphasis added)*.*

**117.** The Director's affidavit provides information in relation to the difficulties concerning staff recruitment and he avers, *inter alia*, at para. 26 that:-

> "*Between January 2020 and August 2023, 159 staff have either left Special Care, transferred or retired. I say that regrettably the Agency is not a position to match staff attrition with staff recruitment in Special Care".*

**118.** The Director's affidavit goes on to refer, *inter alia*, to the impact, on staffing, of challenging behaviour; the role played by physical injury in reducing staff numbers; the extremely stressful nature of the work; the challenges presented by the European Working Time Directive in terms of flexibility as regards operating rosters and the filling of staff vacancies by means of overtime; the many alternative employment options available to potential staff; and the Director also avers, *inter alia*, at para. 34 that:-

"*As a public body operating within the constraint 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".*

**119.** The Director's affidavit also contains averments with respect, *inter alia*, to the profile of young people availing of special care; the fact that the respondent does not have access to psychiatric services within its own remit; and actions taken by the respondent to address the relevant challenges. At para. 39 the Director avers, *inter alia*, that:-

"*At the current time there is a chronic lack of appropriate step–down placements. This, in turn, is negatively affecting the Agency's ability to move children on from Special Care as soon as possible, with the result that placements in Special Care do not become available as quickly as might otherwise be the case".*

**120.** Reference is made at para. 41 to a document entitled "*Strategic Plan for Residential Care Services for Young People 2022 – 2025"* which the Director exhibits. At para. 41 he avers *inter alia* that: "*As set out in that document, the agency plans to increase the number of residential beds by 110 over the next three years. However, there are additional external challenges which may impact on those plans…",* with reference made, *inter alia*, to "*supply and demand challenges*" in the property market "*along with other issues i.e. such as community objections*…".

**121.** Averments are also made in relation to specific property which the respondent is currently engaged in purchasing. At para. 44, the Director avers *inter alia* that: *"In addition to seeking to expand the portfolio of 'in house' accommodation owned and operated by the Agency, the Agency also has engaged with a number of private residential providers with a view to establishing additional residential provision…"* and details of engagement with a number of private providers are given from para. 46 onwards.

**122.** Averments are also made by the Director in relation to, *inter alia*, the respondent's recruitment drive (from para. 50 onwards). At para. 54, the Director avers *inter alia* that:-

"*In order to attract staff to Special Care, it is the Agency's professional assessment and opinion that it is necessary, at a minimum, to increase the Special Care allowance to €10,000 per annum from the current €2,187. The Agency is of the view that this increased allowance will provide an incentive for staff to seek and remain in employment within Special Care, particularly when taken together with the measures that we are taking in relation to work environment issues. A business case for this has been made and submitted to the Department of Children, Equality, Disability, Integration and Youth, this quarter, in respect of special care services".*

**123.** It is averred at para. 55 that a *"business case"* was forwarded on 14 September 2023 for submission to the Department of Public Expenditure and Reform.

**124.** At para. 57, the Director makes averments in relation to the respondent's belief that:-

"*…by expanding the range of qualifications which would be eligible for employment in Special Care, it would increase the numbers of persons whom the Agency could recruit to staff the Special Care units. An agreement has been reached with the Trade Union, FORSA, to expand the Social Care qualification criteria for those working in the Special Care environment".*

**125.** The Director also makes averments with respect to "*staff retention initiatives",* a dedicated "*retention project team*" having been established in 2022 (para. 58). Averments are also made in relation to "*staff wellbeing groups*" which have been set up within Special Care since early 2018 "*with the intention of supporting and retaining staff and improving their working environment"* (para. 60).

**126.** Other initiatives are averred to including supervision and professional development (para. 61); a critical incident stress management system as an additional staff support (para. 62); health and safety committees (para. 63); changes in practices including an individualised programme for each young person (para. 65); activities for staff and young people and enhanced facilities available to both (para. 66); and additional resource demands in accommodating and supporting children and families from Ukraine and children seeking international protection.

**127.** At para. 69, the Director makes the following averment:-

"*…it is likely that for the foreseeable future, the Agency will experience ongoing and significant difficulties in staff recruitment and retention which impair its ability to make available all beds in Special Care. This is an ongoing and systemic problem which is not confined to a simple question of financial resources, but which relates to the very nature of the work involved in the provision of Special Care".*

**128.** The Director's affidavit (which is identical in both cases) concludes with the following averments:-

"*73. I say and believe that the 1991 Act expressly imposes the onus of operating a Special Care system firmly on the shoulders of the Agency. I wish to assure the Court that the Agency does not in any way seek to transfer that statutory obligation to the Court, nor could it lawfully do so, and I say and believe that how this situation can be dealt with will be a matter for legal submissions at the hearing".*

**HIQA**

**129.** With respect to the role of the Health Information and Quality Authority ("HIQA"), the respondent's written submissions refer to the Health Act, 2007 ("the 2007 Act") pursuant to which HIQA's functions include setting standards on safety and quality in respect of services provided in accordance with the 1991 Act (see s. 8 thereof). HIQA may conduct investigations in relation to the safety, quality and standards of services described in s. 8, if it believes on reasonable grounds that there is a serious risk to the health or welfare of a person receiving those services or of a failure to comply with the provisions of the 1991 Act (see s. 9 thereof).

**130.** Section 46 of the 2007 Act makes registration mandatory and s. 47 prohibits the provision of false or misleading information in an application for registration or renewal in respect of a designated centre. S. 48 deals with the procedure for application for registration and such application may be granted, or refused, pursuant to s. 50. Section 51 of the 2007 Act provides for the cancellation of registration; the variation or removal of a condition to registration; or the attachment of a further condition. Among the grounds for any such measures are that the designated centre is being or has been carried on other than in accordance with any requirements or conditions imposed under the 2007 Act or any other statutory provision which the Chief Inspector considers to be relevant (see s. 50(2)(c) of the 2007 Act).

**131.** Section 56 prohibits any person from holding out a place as a designated centre where it is not registered as such under the 2007 Act. Section 79 provides that it is an offence to contravene a number of sections, including sections 46; 47; or 56. Such an offence may be tried summarily or on indictment with a maximum penalty of two years imprisonment and/or a fine of €70,000.

**Regulations**

**132.** Pursuant to s. 101 of the 2007 Act, the relevant minister shall make regulations in respect of designated centres. As outlined in the respondent's written submissions, these comprise S.I. No. 6735/2017 - Health Act 2007 (Registration of Designated Centres) (Special Care Units) Regulations 2017 (the "Regulations"). These Regulations came into operation on 1 January 2018 and govern the registration of special care units. The respondent draws particular attention to Regulations 14 to 16, inclusive, which provide, *inter alia,* that the registered provider *"… shall ensure that the number, qualifications, experience, suitability and availability of staff members in the special care unit is appropriate, having regard to the number and assessed need of children detained in the special care unit, the statement of purpose and the size and layout of the special care unit"* (Regulation 14(1)).

**133.** Regulation 14(2) specifies that the registered provider must ensure that children receive continuity of care and support, especially where staff are employed on less than a full-time basis. Regulation 14(3) prohibits the employment of someone in a special care unit unless the registered provider is satisfied that they are suitable to work there and the registered provider has obtained specified records and documents concerning them. Regulations 14(4), (5) and (6) refer to the registered provider ensuring that there are appropriate numbers of staff present in the special care unit at all times to supervise each child in accordance with the requirements of registration; that an appropriate level of supervision and support is provided to staff; and that each person working as an intern, trainee, or as part of vocational training is not calculated for the purposes of ensuring appropriate staff numbers.

**134.** Regulation 15 deals with training and staff development and mandates that staff have access to appropriate training and are informed of the provisions of legislation and/or regulations, standards and guidelines, with obligations on the person in charge to ensure copies of the foregoing are available to staff and that records of professional development and training are kept.

**135.** Regulation 16 deals with staff supervision and support and obliges the person in charge to ensure that an appropriate level of professional supervision and support is provided to staff members in the special care unit.

**Regret and upset**

**136.** In submissions, counsel for the respondent made very clear that his client both regrets, and is upset by, the position it finds itself in. I do not for a moment doubt that is so.

**Staffing**

**137.** Consistent with the Director's averments, it was submitted that the primary obstacle facing the respondent relates to providing sufficient staff to service the special care beds which the respondent has.

**Financial resources**

**138.** In oral submissions it was emphasised that financial resources, as opposed to sufficient staff, are available. The respondent's written legal submissions state, *inter alia* (see para 5 of each):

> "*The Agency has the financial resources and physical facilities to provide Special Care"* (emphasis added)

**139.** In light of the foregoing, this is not, for example, a situation where the needs of the child applicants are so rare that a question might arise in relation to the obligation, for example, to dedicate significant sums of necessarily scarce public funds to the construction of physical facilities to meet serious, but extremely uncommon, needs. On the contrary, the physical facilities are there and the respondent does not plead lack of funds.

**Impossibility/futility**

**140.** The respondent's central contention is that no mandatory orders should be made as it would be *impossible* for the respondent to comply with them and, therefore, *futile* for the Court to make them. This submission reflect precisely the stated purpose of the Director's affidavit (see para. 3 thereof) namely:

> "*…to explain in detail the circumstances that have given rise to a situation in which it is not possible at this point in time for the Agency to make an application to the High Court, for an Order, admitting this young person to Special Care"*(emphasis added)

**141.** I take a different view for the following reasons. The Director's affidavits undoubtedly disclose serious and ongoing difficulties, in particular, with staff recruitment and retention. However, nothing in the evidence before this Court - be that HIQA requirements or the Regulations' provisions, or otherwise - renders it impossible for the respondent to *make* a s. 23F (7) *determination.*

**142.** Similarly, the evidence does not establish that it would be impossible for the respondent to *apply,* per s. 23F (8), for a special care order. To date, the respondent has done neither, despite statutory obligations mandating it to do so.

**143.** Whilst the respondent takes the view that no application for special care can or should be made until a specific and fully-staffed bed has been identified in relation to the child in question, the evidence allows for a finding that it is possible for the respondent to do what the Oireachtas requires of it (*per* ss. (7) and (8) of s.23F). Several further comments are necessary at this juncture.

**144.** First, this Court is not being asked to deal with an application for a *special care order*. That is something governed by s. 23 (H). Matters have not yet reached that stage. Why? Because the respondent has failed to comply with the antecedent provisions of s. 23F (7) and (8).

**145.** Second, were this an application for a special care order pursuant to s. 23H (and it is not) the Court hearing such an application would have to be "*satisfied"* of a range of matters which are set out at paras. (a) to (h), inclusive, of s. 23H and, if so satisfied, that Court "*may"* make a special care order and, as noted earlier, would also enjoy the discretion to make, *inter alia*, necessary directions having regard to all the circumstances of the child, in their best interests (*per* s23H (2)).

**146.** Third, commenting on the Court's discretion pursuant to s. 23H, Meenan J. stated the following at para. 10 of his very recent decision, in *LM v. The Child and Family Agency* [2023] IEHC 289, delivered on 23 May 2023,:-

> "*Thus, although the High Court has discretion in making a special care order, this discretion is to be exercised having regard to the circumstances and needs of the child. It follows from this that the non-availability of a placement for a child in a special care unit cannot be a reason for the Court not to make a special care order"* (emphasis added)

**147.** Fourth, despite this Court, in *LM*, making clear (in May) 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 (pursuant to s. 23H) the self-same reason is being advanced by the respondent (in October) as a basis for not taking what are *preliminary* steps, which the respondent knows it must take, of making a declaration (*per* s. 23F (7)) and making an application (*per* s. 23F (8)) in each case, but which, *of themselves*, cannot give rise to a special care order. If non availability of a placement cannot be a reason for the Court not to make a special care order, it cannot be a reason for the Court not to require the respondent to apply for same.

**148.** Fifth, despite the urgency with which each of the children were entitled to expect their respective cases to be dealt with (i.e. the sequential obligations in s.23 complied with by the respondent) it is entirely unclear whether, and, if so, when, the s. 23H - stage will be reached, if at all, without appropriate relief from this Court,

**149.** In relation to the question of the respondent making *determinations*, the evidence discloses that from at least 25 July 2023 (in the case of B) and 08 August 2023 (in the case of M) the respondent had, as a matter of fact, made such determinations. The granting of mandatory relief will, in truth, result in the respondent's internal processes reflecting, as to form, what, in substance,

has been the position for weeks and months. Doing so will, insofar as s. 23F (7) is concerned, bring an end to an admitted breach of statutory obligations. It will also advance matters in practical terms for the benefit of each child, given that such determinations trigger the obligation to apply for special care.

**150.** Similarly, to require the respondent to *apply* for special care in respect of each child reflects their acute needs and risks as already assessed and determined by the respondent and, again, does no more than ensure that the respondent complies with its legal obligations.

**151.** Despite the skill with which the arguments are made, resistance to mandatory orders on the basis that they cannot be complied with is misconceived. Thus, I take the view that reliance on *Brady v. Cavan County Council* [1999] 4 IR, and other authorities to the effect that discretionary relief should be refused where it was futile to grant it, cannot avail the respondent.

**152.** *Brady* was a case where the applicants sought an order of mandamus with respect to the failure of the respondent County Council to maintain a road, pursuant to the Roads Act, 1993. This Court granted an order of mandamus which was successfully appealed. The context in which the dispute arose is starkly different to the present cases. *Brady* concerned the repair and maintenance of roads. The present applications concern the rights of vulnerable children who have already suffered real harm, as well as their lives being at risk. In *Brady,* the respondent County Council lacked finances. In the present applications, the respondent has the financial resources and physical facilities to provide special care. Most significantly, and in contrast to *Brady*, the best interests of these applicants must be at the heart of the Court's decision, against the backdrop of the applicant's Article 40.3 and Article 42A rights, and the duties imposed on the respondent as statutory parent of both children.

**153.** Insofar as the respondent relies on this Court's decision in *Hoey v. Minister for Justice* [1994] ILRM 334 stark differences also exist in relation to (i) the facts in the present case, in particular the circumstances of each child; (ii) the constitutionally protected rights of the applicants, which provide the backdrop; and (iii) the legislative context, in terms of the various duties on the respondent, not merely to comply with a cascading set of obligations in a formal way, but to secure the best interests of each child applicant. Briefly put, two solicitors obtained an order of *mandamus* directing the County Council in question to provide courthouse accommodation in Drogheda. In his 3 September 1993 decision, Lynch J. held:-

> "*It is quite clear that the obligation under the 1935 Act of providing, maintaining and financing suitable courthouse accommodation rests on the Local Authority. It is not open to the Executive by arrangements made with the Local Authority or by promises made to the Local Authority to relieve such Local Authority from the obligations expressly imposed upon them by the 1935 Act. True, there can be no objection to the Executive agreeing to indemnify the Local Authority against the cost of observing the requirements of the 1935 Act".*

**154.** In the present case the respondent submits that it is not seeking to be relieved of its statutory duties pursuant to Part IVA of the 1991 Act, but submits that the granting of mandatory relief in the form sought by the applicant would be ineffectual. In the manner explained in this judgment, there is no evidence before the Court which would allow for a finding that there is any impediment to the respondent both making a formal determination (under s. 23F (7)) and making an application for a special care order (as required by s. 27 F (8)).

**Seeking to be relieved of statutory obligations**

**155.** Furthermore, it seems to me that, in substance, the respondent *is* seeking to be relieved of its statutory duties pursuant to Part IVA of the 1991 Act. By virtue of the respondent's failure to ensure that adequate staff are in place to allow for the operation of all special care beds available to it, there are no adequately-staffed beds for these child applicants when the need them. And it is for this very reason the respondent argues that, in effect, the 'pause button' should be pressed on the respondent's statutory obligations (which obligations, in my view, reflect the applicants' constitutional rights). In reality, the respondent asks this Court to countenance a situation where, for so long as the respondent continues to fall short of its duty to provide adequate staffing to operate special care beds, explicit obligations on the respondent (under the 1991 Act) and the rights of each child (constitutionally – guaranteed and reflected in the 1991 Act) should *not* be given effect to. This is, in my view, to seek to be relieved of statutory duties to each child applicant, with reference to how long it takes the respondent to comply with its obligations to provide staff.

**156.** In the present case there is no doubt whatsoever about the respondent's duty and no doubt about the ability of the respondent to comply fully with s. 23F ss. (7) and (8). Thus, reliance on the decision in *State Modern Homes (Ireland) Limited v. Dublin Corporation* [1953] IR 202 cannot avail the respondent. Whilst the Court stated that:-"*… an order will not be made if it is clear that it would be impossible of performance…"*, that simply does not arise in the present applications in respect of ss. (7) and (8) of s.23F.

**Benefit**

**157.** With respect to the respondent's reliance on the decision in *State (Shannon Atlantic Fisheries) v. Minister for Transport and Power* [1976] IR 93, wherein (at p.100) Finlay P. (as he then was) accepted the general principle that:-"*the Court should in its discretion refuse to make an order of certiorari in a case where it is clear that the Applicant can derive no benefits from it…"* this cannot be said in the present case.

**158.** In my view, the applicants would be in a more beneficial position, namely, closer to securing the special care they need, had the respondent complied with what are mandatory statutory obligations resting upon it. Thus, for the respondent to be required by the Court to do what the Oireachtas already requires of it will be of material benefit to the applicants, as it gets them further towards securing the special care which they require. Later in this judgment, I will return to this topic, given a submission by the respondent which acknowledges this reality. As mentioned

elsewhere in this judgment, the respondent does not suggest that these applicants do not *need* special care.

**159.** Equally, there is no question of this Court breaching the principle, articulated in *Derrybrien Development Society Limited v. Saorgus Energy Limited* [2015] IESC 77 to the effect that:- "*the Court does not make futile orders"* (*per* Denham C.J. at 66). There is nothing futile about requiring the respondent to do what the Oireachtas already requires of it.

**Declarations would be "more than adequate"**

**160.** The respondent contends that the declarations made by Meenan J. in *LM* would be "*more than adequate"* to meet the needs of the applicants in the present case. Thus, it is important to look in some detail at that decision. The judgment begins in the following terms:-

> "*1. The issue at the heart of this application is one that frequently arises in judicial review proceedings. The issue is whether lack of resources, be they financial or otherwise, relieve an authority such as the respondent (the CFA), from discharging their statutory duties*.
>
> *2. As will be clear, the applicant is a deeply troubled person posing serious risks both to herself and others. The Oireachtas by enacting the Childcare Act 1991 (as amended) (the Act of 1991) has set out a statutory framework whereby care, safety and support can be given to the applicant. However, the CFA, the body designated to put these steps in place, maintain that they have not done so because of the absence of a placement for the applicant due to a lack of resources. The CFA have also raised issues that the placement of the applicant in such a unit without resources could potentially expose it to sanction by the Health Information and Quality Authority ("HIQA")".* (emphasis added)

**161.** It is clear from para. 1 of the judgment in *L.M.* that the reference to *"resources"* included non-financial resources, such as staffing. The position which pertained in *LM* and the arguments made by the respondent in relation to the lack of an identified bed, due to staffing issues, mirror precisely those in the present applications.

**Numerous cases/similar issues**

**162.** Meenan J. went on (at para. 3) to make clear that *LM* was:-

> "*….one of a number of applications that are pending in the Court in which similar issues are raised and this case was designated by the Court as a 'lead case'*".

**163.** I draw attention to the foregoing to illustrate that the situation which these child applicants face is far from new. It may well be new to the child and new to the notice parties in each case, but it is certainly *not* new to the respondent. It is a systemic problem of long standing affecting numerous cases, but a problem not yet solved by the respondent who has the duty to resolve it. That seems to me is a relevant factor in a decision to grant, or not, mandatory orders which are discretionary. It is something which, in my view, weighs in favour of granting appropriate mandatory relief.

**164.** Having referred to the specific circumstances of the applicant in question, Meenan J. cited ss. (1), (7) and (8) of s.23F, noting that the wording in subs. (7) and (8) is "*mandatory in nature".*

**165.** At para. 9 Meenan J. quoted from s. 23H, subs. (2), making clear, at para. 10 (something which bears repeating):

> "*10. Thus, although the High Court has discretion in making a special care order, this discretion is to be exercised having regard to the circumstances and needs of the child. It follows from this that the non-availability of a placement for a child in a special care unit cannot be a reason for the Court not to make a special care order*". (emphasis added)

**Clear statement of the law**

**166.** Even if this Court was dealing with a s. 23H application (and it is not) the foregoing statement of the law could not be clearer and, for the reasons given in this decision, it seems to me to undermine entirely the respondent's opposition to mandatory orders of the type sought with respect to s.23F (7) and (8).

**167.** The following passages from the judgment in *LM* were opened to this Court:-

> "*13. In the course of the proceedings, the applicant served on the CFA a Notice to Admit Facts as follows:-*
>
> *(1) The respondent's service director, National Residential Care, has never refused to make a determination under s. 23F(7) of the Childcare Act 1991 where same has been recommended by the respondent's Special Care Committee unless there has been a material change in circumstances in respect of the presentation of the relevant child in the period between the decision of the Special Care Committee and the determination of the service director, National Residential Care.*
> *This fact was admitted by the CFA.*
>
> *(2) Since the judgment in (A.F. v. Child and Family Agency Unreported, 28 January 2019, Faherty J.), the respondent's service director, National Residential Care, has always made a determination under s. 23F (7) within three weeks of the Special Care Committee's decision that a child requires special care.*
> *This fact was admitted by the CFA.*
>
> *(3) Since the judgment in A.F. v. Child and Family Agency [2019] IEHC 435, the respondent has always moved any application for a special care order within three weeks of the Special Care Committee's decision that a child requires special care.*
> *This fact was admitted by the CFA.*
>
> *14. It should be noted that, as regards (1) above, there has been no 'material change in circumstances' of the applicant".* (emphasis added)

**168.** During the hearing before me, counsel for the respondent indicated, very appropriately, that they were unclear as to the extent to which a reply to a notice to admits facts in one case could be relied on for the purposes of another case. However, I regard myself as entitled to rely on the judgment delivered in *LM* of which the foregoing forms a part.

**SCC decisions always followed**

**169.** The fact that the respondent's service director has *never* refused to make a s. 23F (7) determination, where the respondent's SCC recommended same, speaks to the reality that delay in making the relevant determinations for B and M began on 25 July and 08 August 2023, respectively; was deliberate; and was with the aim of avoiding binding statutory duties. The three weeks referred to in *LM* is in stark contrast to the delay in these applications comprising multiples of that period.

**170.** Furthermore, in the period since this Court dealt with *LM*, there has been a material *increase* in the delay on the part of the respondent in making what it regards as formal s. 23F (7) determination. No such determination was made for either M or B, notwithstanding *months* of delay post-dating the relevant SCC determinations in each case. This also seems to me to weigh in favour of this Court granting mandatory relief.

**171.** The very real and acute harm caused to both children which continues to be suffered, day in, day out, also weighs in favour of granting mandatory orders, in my view.

**172.** The only change in circumstances being further deterioration in each child's situation also weighs in favour of granting mandatory relief.

**173.** In *LM,* the respondent argued, *inter alia*, that the application was 'moot' as the child in question had become the subject of a special care order and had been placed in special care. Referring to the well–known passage from the judgment of McKechnie J. in *Lofinamakin v. Minister for Justice & Ors.* [2013] IESC 49, Meenan J. made the following clear at para. 23:-

> " . . . *it is necessary to note that the instant case is not a 'stand alone' case but one of many that raise, effectively, the same issue. Thus, though the issue may not be live in the instant case it is live in several others so determining this case is not an academic exercise but will have a direct bearing on many other cases".*

**174.** The foregoing *dicta* echoes para. 82 (vii) (f) of *Lofinamakin,* wherein reference was made to: "*the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law".* Satisfied that the matter was not moot, Meenan J. considered the comprehensive judgment of Faherty J. in *AF. v The Child and Family Agency (unreported, 28 January 2019)* ("*AF (no. 1)"*) stating, from para. 28:-

> "*28. Faherty J. had to consider the interpretation to be given to s. 23F(7) of the Act of 1991. She stated:-*
>
> > *'125. The fundamental rule is that the Court is to give the words used in the relevant statutory provisions their ordinary and natural meaning. It is only if the intent of the*

*Oireachtas is not discernible from the ordinary and natural meaning of the words that the Court should embark on other interpretative tools, for example a purposive or teleological approach. This principle applies to remedial social statutes as equally as to other statutes'*.

*and at p. 52:-*

'*139. …applying the literal and ordinary meaning of the words in s. 23F(7), once the CFA is satisfied that there is reasonable cause to believe that the conditions set out in s. 23F(2)(a), (b) and (c) are met, and where the procedural requirements of s. 23F(3) – (6) have been satisfied, if the CFA is satisfied pursuant to s.23F(7) that there is reasonable cause to believe that the child requires special care it must make the necessary determination. This is evidenced by the use of the word "shall" in s. 23F (7) …*'

*Faherty J. could have concluded her judgment at this point but, helpfully, considered the relevant section applying a purposive or teleological approach. In doing so Faherty J. considered four options put forward by the respondent.*

*29. The four options put forward by the respondent were as follows:-*

*(i) The Referrals Committee could defer consideration of all special care applications until a special care placement is available;*

*(ii) The respondent could proceed to make the requisite determination as soon as the Referrals Committee has deemed that a child meets the criteria for special care, but the respondent would hold off making an application to the High Court until a placement comes available;*

*(iii) As soon as the Referrals Committee has deemed that a minor meets the criteria for special care, the respondent should without delay make a determination in accordance with s. 23F (7) and, thereafter, again without delay make an application to the High Court for a special care order;*

*(iv) The respondent <u>does not make a determination under s. 23F (7) in respect of any case until a special care placement is available</u>".* (emphasis added)

**175.** Mootness is, very obviously, does not arise in these applications. The fact that, from 23 May 2023, onwards, the respondent was aware that it could *not* lawfully decide *not* to make a determination under s. 23F (7) until a special care placement was available is illustrated by the balance of Meenan J.'s judgment. From para. 30, the learned judge stated:-

"*30. In considering these options, Faherty J. stated:-*

*'185. In my view, whether adopting a literal or purposive approach, the CFA's statutory obligation where the pre-conditions of s. 23F(2)(a) – (c) are met and the procedural steps set out in s. 23F (3)-(6) complied with, is to make a determination as to whether the child in question requires special care. The emphasis is s. 23F (7) is the requirement for special care. To my mind, where, as in these cases, it is*

*expressly acknowledged by the CFA that A.F.'s and C.K.'s circumstances require special care, I cannot accept that the policy of the CFA to defer the making of a determination under s. 23F (7) until a placement becomes available is consistent with the plain and ordinary reading of s. 23F, or indeed with the purpose of the 1991 Act or Part IV A thereof'.*

*31. This cannot be considered as anything other than a clear statement of the law".* (emphasis added).

**176.** I pause to note that option (iv) is plainly what the respondent chose in respect of both child applicants in the present case, in the wake of the determinations by the respondent's SCC, in July and August, respectively. In circumstances where the judgment in *LM* was delivered on 23 May 2023, the respondent made this choice full in the knowledge of what this Court had decided in *LM,* i.e. knowing that this was not a legitimate or lawful choice.

**177.** Returning to *LM*, At para. 31, Meenan J. noted that, notwithstanding the judgment of Faherty J. in *AF (no.1)* whilst a s. 23F (7) determination was made, no application was made for a special care order under s. 23F (8) as there was no placement available. This gave rise to a further application and the decision of O'Regan J. in *A.F. (a minor) v. The Child and Family Agency & Ors.* [2019] IEHC 435 ("*AF (no. 2)*").

**178.** With reference to the decision in *AF (no. 2)* Meenan J. went on to state the following:

*"32. … O'Regan J. referred to the judgment of Faherty J. and stated that the respondent had argued that the Oireachtas was aware, when implementing s. 23F, of significant difficulties encountered by the respondent in recruiting staff for the purposes of providing special care facilities. O'Regan J. stated:-*

*'25. The argument aforesaid was unsuccessful before Ms. Justice Faherty and that order has not been appealed. Nevertheless the same arguments are made before this Court in respect of subs. 8.'*

*33. Having considered the arguments of the respondent in respect of the obligations imposed by s. 23F(8), O'Regan J. stated:*

*'29. …Rather, I am of the view that in accordance with the respondent's own guidelines the subsection requires some element of expedition in making the application to the High Court and any delay in the making of such application should be referable to the process of proceeding with the application before the High Court (for example some delay in the swearing of the requisite affidavit) and should not be referable to circumstances entirely unrelated to the Applicant or the determination that a need for special care exists as made by the C.F.A., namely, the availability of a fully staffed placement and prioritisation of an individual applicant for such placement.*

*30. The fact that it may be in ease of a High Court list system not to make such application until a fully staffed placement is available and an applicant will be afforded priority in respect of that placement is not in my view a relevant consideration in or about an understanding of the true meaning and intent of subs.8 (see the Interpretation Act 2005).'*

*and*

*'**Conclusion***

*33. In conclusion in all of the circumstances I am satisfied that the deliberate and intentional policy of the respondent not to take any steps to apply to the Court as per the mandate incorporated within subs.8 at a time when the requirements of subs.1 to subs.7 of s.23F have been fulfilled (based on available placement and priority status) is inconsistent with the meaning of subs. 8. Further in circumstances where there has been a full compliance with subs.1 to subs.7 with a failure to take any step whatsoever in fulfilment of the mandated requirement of subs.8, for a period of nineteen days, without any timescale or explanation connected to the process of such application proffered for the making of the application to the High Court, is unlawful.'"* (emphasis added).

**179.** At para. 34 of *L.M.,* Meenan J. made clear that, given the decision of the SCC, in that case, by means of its 14 December 2022 letter, and the absence of any material change in circumstances:

*"[34] … the CFA was under a statutory duty to make the determination referred to in s. 23F(7). Having made that determination, the CFA was obliged to make an application to the High Court for a special care order under s. 23F(8). The absence of a placement did not relieve the CFA from these obligations. This is clear from the wording of the relevant sections of the Act of 1991 as found in the judgments of Faherty J. and O'Regan J."* (emphasis added).

**180.** In the manner examined earlier in this decision, the only change in circumstances has been a deterioration in the situation for M and for B, respectively. Meenan J. went on to state the following at para. 34 of *L.M.*:

*"35. It is clear from ss. 23F(7) and (8) and the provisions of s. 23H in relation to the making of special care orders that the central determining factor is what is in 'the best interests of the child'. There is no statutory provision to the effect or by implication that the failures of others to provide resources for the provision of placements should be visited on a child requiring the making of a special care order."* (emphasis added).

**181.** The failure, regardless of the reason or reasons, to provide a fully-staffed bed for each of these applicants is, very obviously, not a failure on *their* part. It is a failure on the part of others, namely, the respondent.

**What the respondent already knew**

**182.** *LM* was delivered on 23 May 2023, which is in excess of two months *prior* to the consideration by the respondent's SCC of B's case (on 25 July, 2023) and of M's case (on 8 August, 2023). *AF (no.1) was* delivered on 28 January 2019; and *AF (no. 2)* was delivered on 20 June 2019.

**183.** What was already clear to the respondent, following this Court's decisions in (*A.F. No. 1)*; *A.F. (No. 2)*; and *L.M.* is that the unavailability of a placement, whether due to a failure to secure adequate staffing, or otherwise:

- does not relieve the respondent of their duty to make a s. 27F(7) determination;
- does not excuse a failure to make an application under s. 27F(8); and
- is not a reason for the Court not to make a special care order on foot of a s. 27H application.

**184.** Despite the foregoing, the respondent took no step to fulfil the mandated requirements of either subs. (7) or (8) of s. 23. Nor is there any evidence that the inordinate delay in either of the present applications is referable to the process of proceeding with the application. On the contrary, the evidence allows for a finding that the respondent has made a deliberate choice *not* to proceed, despite declarations by this Court putting its obligations beyond doubt.

**185.** In the Supreme Court's decision in *Sinnott v. Minister for Education* [2001] 2 IR 545, Denham J. (as she then was) made the following clear (p.20):

> "*In general the matter of a mandatory order will not arise. It is a practice for the executive when an issue is being litigated that could give rise to a mandatory order, to indicate that should the decision be against the State a declaratory order would be sufficient. Similarly, the courts assume that decisions will be implemented and that mandatory orders are not necessary. Thus a declaratory order, if any order is necessary, is usually appropriate. However, I would not exclude the rare and exceptional case, where, to protect constitutional rights, the Court may have a jurisdiction and even an duty to make a mandatory order.*" (emphasis added)

**186.** In *AF (no.1)* this Court stated (at para. 194) *"…the Court proposes to grant a declaration that the deferral by the CFA of the making of a determination under s.23F(7) in respect of AF and CF until a placement becomes available is unlawful having regard to the mandatory obligations imposed on the CFA under s.23F of the 1991 Act."* (emphasis added). That was almost 5 years ago, in January 2019.

**187.** This Court, in *L.M.,* made the following declarations on 23 May 2023 (see para. 37):

> *"(i) A declaration that the decision and/or policy of the CFA to defer the making of a determination under s. 23F(7) of the 1991 Act by reason of the non-availability of a placement is unlawful.*
>
> *(ii) A declaration that, having made a determination under s. 23F(7) of the Act of 1991, a failure to make an application to the High Court for a special care order under s. 23F(8) by reason of the lack of availability of a placement is unlawful."*

**188.** It is the foregoing declaratory relief which, according to the respondent, would "*be more than sufficient"* to meet the applicants' needs in the present case. For the reasons set out in this judgment, I disagree.

**Deliberate action contrary to Court decisions**

**189.** Whilst no pleasure is taken in saying so (and no criticism is directed at any individual(s)) it can fairly be said that the respondent has deliberately acted other than in accordance with the findings of this Court, of which it has long been aware, including relevant declarations previously given, over a period of years. This, in my view, weighs heavily in favour of appropriate mandatory relief.

**190.** On the specific facts in *L.M.,* the respondent's SCC met on 13/14 December 2022 to consider the applicant's case. By letter dated 14 December, 2022 the SCC made a decision (quoted at para. 11 of the judgment in *L.M*.) namely: *"A determination of the National Special Care Referrals Committee is that the case of L.M. now fulfils the criteria for admission to Special Care. Please be advised that the referral information has been forwarded to the special director for special care for determination in accordance with the legislation".* The foregoing mirrors exactly what the respondent's SCC determined in relation to each of the applicants' cases.

**The onus of operating the Special Care system**

**191.** As noted earlier, s. 36 of the 1991 Act provides that where a child is in the care of the respondent, it shall provide such care to the child, subject to respondent's control and supervision, which the respondent considers to be in the child's *'best interests"* (with the section going on to refer, *inter alia*, to foster care; residential care; other suitable arrangements, etc). As appropriately acknowledged in the Director's affidavit: *"the 1991 Act expressly imposes the onus of operating a special care system firmly on the shoulders of the Agency".* In particular, that means it is the respondent's obligation, and no other's, to provide an adequately-staffed special care bed for the child who needs it.

**Breach of constitutional rights**

**192.** The 1991 Act does not state that the respondent must make a declaration and bring an application for special care "*subject to an identified and fully-staffed bed being available*". Nor is the positive obligation on the respondent to provide appropriate care to a child, in their best interests, subject to a qualification that *less* than appropriate care, i.e. care falling short of the child's best interests, is permissible in any circumstances (e.g. due to third party staffing issues, or otherwise).

**193.** As statutory parent of each of the children in this application (full care orders having been made) the respondent was, and is, required to provide an *appropriate* placement i.e. consistent with the child's *best interests*, not otherwise. Current placement arrangements are *not* appropriate and are *not* in the best interests of either child. On the contrary, each child continues to suffer harm daily and there very lives are at risk. Against the backdrop of Articles 40.3 and 42A, both children need care and protection which they are not currently receiving. This is plainly contrary to the best interests of each child and constitutes a breach of their constitutional rights.

**Circularity**

**194.** Without intending any disrespect, and directing no criticism at any individual(s), it does not seem unfair to summarise the respondent's position as follows: (i) I accept that I have the legal duty to provide an adequately staffed bed for each child who needs special care; (ii) I have been unable to do so due; (iii) this is due to a range of challenges in respect of hiring and retaining staff; (iii) I accept that this failure to provide an adequately staffed bed is mine, not any failure by the child who needs special care; (iv) I accept that I am in breach of the legal obligations imposed on me by s. 23F ss.(7) and (8); (iv) I will consent to declarations to that effect; (v) but the Court should not compel me to abide by my legal obligations; (vi) this is because I have failed in my legal obligation to provide adequately staffed beds. The 'circularity' in this approach is obvious. The result is for the respondent's failure to staff special care places to be visited on the child in each of the present applications (precisely what Meenan J. made clear, in *LM*, is impermissible). It is also an approach which, in my view, does not seem to focus sufficiently on the *circumstances* of *the* child, or *the* child's *best interests* (something mandated by the 1991 Act and the constitutional rights which provide the relevant backdrop).

**Needs**

**195.** In the present case, counsel for the respondent made clear that he had no instructions to suggest, nor was it the respondent's case, that special care is not what both of these children need. Looking at matters with a focus on *the* child in each application, if this Court were not to grant appropriate mandatory relief, (i) it would be to ignore the circumstances and needs of these children; (ii) it would be to ignore the evidence which establishes that their needs must be met as a matter of urgency; and (iii) it would be to act contrary to the best interests of these vulnerable children.

**Triaging / prioritising**

**196.** It is submitted on behalf of the respondent that, in a hypothetical scenario where one special care bed was currently available, this Court should not be asked to decide which child could avail of it. Regardless of the skill with which this submission is made, such a 'thought experiment', does not seem to me to be particularly helpful. There is no question of this Court being asked to make such a decision. To the extent that, due to the respondent's failure to provide two special care beds for two children who need them, a 'triaging' exercise, based on perceived 'priority', is undertaken, such an approach is not, in my view, focused on the circumstances and best interests of the child. It is not an approach which responds appropriately to the needs of each the children in that scenario. It is an approach which seems to proceed on the basis that, where two children have an assessed need for special care, the availability of a staffed-bed for one child permits the respondent to *breach* its statutory duties to another i.e. that, of two children in need, only one can be accommodated and that this is lawful.

**197.** I feel bound to reject the foregoing approach as inconsistent with a best interests analysis and constituting less than it required of the respondent by virtue of the obligations imposed upon it by Part IVA of the 1991 Act as well as manifestly less than required by Articles 40.3 and 42A. These constitutional rights cannot be interpreted as legitimising a situation where child M needs special

care and child B needs special care but only one is afforded access to it, regardless of what metric(s) are employed in a triaging or prioritising exercise. That approach may be a 'least worst' option adopted by the respondent in good faith as a matter or practicality, but it is *not* a lawful option, in my view, having regard to the requirements of the Constitution and the mandatory obligations imposed on the respondent by Part IVA of the 1991 Act.

**"…cannot at the present provide special care…"**

**198.** For the purposes of resisting the mandatory relief sought by the applicants, the respondent's written submissions state the following, under the heading: *"IMPLICATIONS OF HIQA OVERSIGHT"*:

> *"29. It is clear from the foregoing statutory framework that the Agency is subject to significant obligations pursuant to the Health Act, 2007. The Agency is bound by the requirements of the 2007 Act, and to act in breach of that Act with regard to special care and the provision of special care units could expose the Agency and/or officers of the Agency to criminal sanction.*
>
> *30. The implications of HIQA oversight are important to bear in mind when considering the position of the applicant that the respondent should simply apply to the High Court for a special care order despite the fact that no special care placement is available and that to do so in the absence of the requisite number of suitably qualified and trained staff would bring the Agency into a position of non-compliance with its mandatory regulatory obligations. Any placement provided for this child could not satisfy the requirements of the Health Act, 2007 and otherwise may risk criminal sanction. This would be an illogical and absurd outcome. It is important to note that this issue has not in any previous decision on special care been considered.*
>
> *31. The Agency is faced with the reality that, due to the requirement for compliance with the requirements of the Health Act, 2007 (and the relevant Regulations), it cannot at the present provide special care in respect of a small number of children under Part IVA of the Child Care Act, 1991,"* (Emphasis added)

**199.** The respondent's statement that it "*cannot"*, at present, provide special care to vulnerable children who need it, irrespective of how "*small*" that number of children may be, fortifies me in the view that, as matters stand, the respondent is *not* acting in the best interests of these child applicants, despite its statutory duty to do so; and that their constitutional rights are *not* currently being respected, defended or vindicated, as far as practicable.

**200.** Furthermore, the submission that it is currently impossible to admit one or both applicants to special care, given the registration requirements with HIQA and the potential consequences of a future breach of the Regulations, also seems to me to focus on difficulties faced by the respondent arising out of the failure on the part of the respondent to ensure that the special care beds which it is obliged to provide are capable of being operated. It is not an analysis which focuses on the circumstances, or meeting the needs, of the applicants, in their best interests.

**Risks**

**201.** Given the emphasis, laid by the respondent, on its staffing difficulties and the potential risks (and not dismissing how significant they are, or suggesting anything other than good faith on the part of all individuals employed by the respondent, and a fervent desire for improvement in the situation) it seems necessary, at this point, to engage with the respondent's argument with reference to risks.

**202.** Before doing so, I want to make clear that it would be entirely impermissible for this Court to ignore, in coming to a decision on these applications (i) the explicit injunction in Article 40.3; (ii) the obligations laid down by Article 42A; and (iii) the express provisions of the 1991 Act and the duties imposed on the respondent. However, were the foregoing to be 'put to one side', momentarily, and were the question to be asked: "*What would the 'least worst' outcome would be, given the harms and risks disclosed by the current facts?"* the following emerges.

**203.** The evidence establishes that if there is an insufficient complement of staff to meet the number of children in special care, a range of harms could arise. These can be summarised as follows: (i) it could prejudice the care provided by the respondent to other special care service users; (ii) it would add to the burdens on staff and potentially create increased risk for staff and those in special care; and (iii) it could result in a breach of regulatory requirements and also potentially give rise to sanction, including criminal sanction.

**204.** The foregoing are certainly serious and material risks, albeit against the backdrop of the respondent's averred efforts, which are ongoing, to try and ensure that there *are* sufficient numbers of staff available (i.e. the situation is fluid and evolving). Indeed, at the conclusion of the hearing before me, I agreed that the matter could be mentioned at short notice if there was any "further development" (in other words, if it transpired that one or more fully staffed special care beds became free before I delivered this judgment, the Court would be notified). Obviously, this was entirely appropriate, as a matter of practicality.

**205.** However, and not for a moment suggesting that a 'least worst' approach is legitimate, the risks identified by the respondent speak to very significant, but *potential* harms. By contrast, there is nothing potential about the harms suffered by each child, which could hardly be more serious. It is harm which has already occurred, and which continues to occur, unabated, day by day for so long as their needs for special care are not met. It is harm of the most extreme kind and, even if one were to place 'in the scales' the very serious *potential* harms identified by the respondent and, on the other side, the extreme *actual* harm suffered by these applicants which continues unabated, including the very real risk to life, the latter must outweigh the former, in my view.

**206.** To illustrate this, one need only ask the following question: *Is it better for the child to die due to want of care, or for that child and others to face risks associated with less than optimal care?* To my mind the answer is clear. In such an entirely sub-optimal scenario, where the respondent has not ensured sufficient staff to operate all special care beds, there is a strong argument that the right

to life of each of these child applicants takes precedence over any potential infringement of the rights of others, be they service users or staff.

**207.** I want to emphasise, however, in the clearest of terms, that the foregoing is not intended to sanction anything *less* than the care mandated by Part IVA of the 1991 Act or anything less than reflects the rights of each child applicant, given their particular circumstances and needs. Nor does this Court have any jurisdiction to 'dilute' the rights of the child in each application (be they statutory or constitutional) or the concomitant duties resting on the respondent (found in the statute of 1991, and reflective of constitutional imperatives).

**The role of this Court**

**208.** It cannot be disputed that an important element of this Court's role is to vindicate and defend rights guaranteed by Articles 40.3 and 42A. The evidence discloses not only appalling harms actually suffered, but risk to life. This obliges the Court in the present application to require that the respondent not only *recognises* its statutory obligations but *conform* with them, without delay, with regard to these children. For the reasons set out in this judgement, I am satisfied that this is one of those exceptional and rare cases where intervention by this Court is required. Indeed, were this Court *not* to grant appropriate mandatory orders, it would be to abnegate its responsibilities under Bunreacht na hÉireann.

**Positive obligations**

**209.** I want to emphasise that this Court is not finding positive obligations, hitherto unexpressed, which are binding on the respondent (whether by reference to constitutional provisions or by means of a purposive interpretation of legislation, the outcome of which is implied duties). The positive obligations are *already* there, in the clearest of terms, in the literal meaning of the words which the Oireachtas, reflecting the will of the People, have chosen to use in the 1991 Act.

**Lesser quality**

**210.** It seems to me that a refusal by this Court to make mandatory orders would be for this Court to act as if the applicants' Art. 40.3 and 42A rights are of a *lesser* quality than those enjoyed by others (including, in particular, other children who need special care and who *have* been provided with same).

**211.** It would be for this Court to conduct itself as if the applicants' constitutional rights, including to life, bodily integrity and equal access to necessary care, and the obligation on the respondent to provide placements which meet their best interests *can* be 'diluted' with reference to, for example, the attractiveness, or not, of employment in the special care sector. Nothing in the constitutional provisions which provide a backdrop to this case, and nothing in the 1991 Act, allows for such a view.

**212.** To look at matters through the lens of the words employed in the Constitution, I cannot accept the use, in both Art. 40.3 and Art 42A, of the words *"as far as practicable"* allows for the decrease

(or, for that matter, increase) of the constitutional guarantee and protection of the rights of these children, depending on the vagaries of the employment market for care staff, from week to week, month to month, or year to year (and the 'knock on' effect on the availability of adequately-staffed special care beds at different points in time). That cannot be so. Why? Because it would be for this Court to say – without jurisdiction, and in flagrant opposition to the provisions in the Constitution enacted, adopted and given by the Irish People to the People - that the rights of each child applicant are not *imprescriptible*. It would be to say that their constitutional rights are, instead, entirely *variable*, temporally and qualitatively, in response to, for example, the terms and conditions of employment in the special care sector at a particular point in time; the success, or not, of staff retention policies operated, at a given time, by the respondent; and/or wider 'market forces'. It would be to say that a potentially infinite range of factors, entirely outside the child's control can, nonetheless, determine the level of protection, be it lesser or greater, which their constitutional rights can expect at any given time. This cannot be.

**"Steps towards" special care**

**213.** The essence of the respondent's argument against the mandatory orders sought in each application is put as follows at paras. 50 and 51 of the respondent's written submissions:-

> "*50. The Agency reiterates that this case does not concern a lack of funding on the part of the Agency. The Agency has the funding to operate and maintain a full complement of Special Care units and wishes to do so. Where a child is deemed to meet the criteria for special care the Agency wants to make the necessary applications as soon as possible. As noted above, the difficulty is that it has not proved possible to recruit or retain a sufficient level of suitably qualified staff to allow for that situation to be implemented. Hence, the Court is not being presented with a situation that amounts to anything close to a wilful default or refusal to comply with statutory obligations.*
>
> *51. The Agency submits that the Court should not make any form of mandatory order requiring the Agency to take steps towards an admission or actually admitting a young person to Special Care"* (emphasis added)

**214.** Para. 51 makes explicit the reality that the granting of the mandatory orders sought by the applicants would constitute "*steps towards"* the special care they need. This seems to me to undermine entirely the proposition that requiring the respondent to comply with the statutory duties imposed on it by s. 23F ss. (7) and (8) would be impossible; futile; or of no *benefit* to the applicants. It would take them closer to an appropriate placement, as the respondent acknowledges. That acknowledgment is no more than a recognition of reality. Mandatory orders will take the applicants closer to having their needs met, consistent with their best interests. As I have been at pains to point out in this judgment, matters have not reached the stage of s. 23H (for the simple reason that the respondent deliberately failed to comply with ss. (7) and (8) of s. 23, which are essential precursors to a s. 23H application).

**215.** This Court wishes to state clearly that it has, on numerous occasions, witnessed the results of herculean work under very difficult circumstances carried out with commitment, sensitivity and professionalism by a wide range of dedicated individuals at various levels within the respondent. Nothing in this judgment takes away from that.

**216.** However, the evidence, nonetheless, allows for a finding that there has been a deliberate and wilful failure on the part of the respondent to comply with s. 23F (7) and (8). No other finding is possible, in my view, given that, well before the SCC made determinations in respect of each of these child applicants, the respondent had received the judgments of this Court in *A.F. (no1)*; *A.F.(no. 2)* and in *LM*, and was squarely on notice of the relief previously granted, but chose inaction, rather than to comply with what the Oireachtas requires of it, contrary to declaratory orders (noting, also, that the first of the declaratory orders made against the respondent, in *LM*, as regards s.23F (7) is, in substance, identical to the declaratory order in *A.F. (no.1)* made against the respondent almost 5 years before).

**217.** The respondent's written legal submissions conclude in the following terms:-

> *"55. A mandatory or declaratory order (other than that accepted by the Agency), which are discretionary reliefs, should not be made:-*
>
> - *Where the Agency wishes and intends to apply for Special Care as soon as possible;*
> - *Where the Agency has made every effort to comply with Part IV A of the 1991 Act;*
> - *Where applying for a Special Care order will result in an order to which effect cannot be given;*
> - *Where admitting the young person will jeopardise not only his own welfare interests, but also those of other children in the unit and staff; and*
> - *Where any such admission likely will cause the Agency to be in breach of its regulatory obligations and potentially subject to criminal sanction"* (emphasis added)

**218.** With respect to the Agency's stated wishes and intentions, it has chosen not to comply with its statutory obligations pursuant to s. 23F (7) and (8) despite having had the benefit of decisions by this Court (in *A.F. (no 1); A.F.(no. 2);* and *LM*) and, therefore, knowing that such a stance was unlawful and impermissible. Thus, the evidence allows for a finding that the respondent has *not* made every effort to comply with Part IVA of the 1991 Act. It has deliberately decided against complying with s. 23F (7) and (8), despite being fully aware that the absence of a placement did not relieve the respondent of its duties.

**219.** In the manner explained in this judgment, orders requiring compliance with s. 23F (7) and (8) are *not* orders to which effect cannot be given.

**220.** The proposition that admitting these children to special care will jeopardise their welfare or that of others ignores the fact that each child applicant has already suffered egregious harm, which is ongoing, and their very lives are at risk as a consequence of *not* being admitted to special care. Thus, even if viewed exclusively through the lens of harm, (and, in the manner explained earlier in this judgment, that is not the correct approach) the appalling harm suffered on an ongoing basis by

these child applicants, and the risk to their very lives, would plainly seem to outweigh the potential harms, to them or others, arising from suboptimal care being provided temporarily. Similar comments apply in relation to the potential harm in the form of a breach of regulatory obligations and potential criminal sanction. However, I stress again that this is *not* the correct analysis, as it is one underpinned by the proposition that it is lawful for a child needing special care not to receive a special care bed. It is not.

**221.** Standards applicable to special care units are undoubtedly provided for in the 2007 Act and in the Regulations made thereunder. However, the respondent cannot avoid their statutory responsibility to provide adequately staffed beds to each of these child applicants (whom it acknowledges, needs such) on the basis that the standards imposed are too onerous, in particular, as regards staffing levels, especially in circumstances where the respondent is the body with the statutory obligation to ensure adequate staffing levels (in the context of safeguarding and promoting the health, development and welfare of these children, as their statutory parent).

**222.** The headnote in the reported decision of the Supreme Court's judgment in *T.D. v. The Minister for Education & Ors* [2001] 4 IR 259 states *inter alia*:-

> "*3. That the doctrine of separation of powers would not protect the executive where there was a clear disregard of its constitutional powers and duties: the courts would act to protect the rights of those affected by such disregard or breach of duty. This could include, in exceptional circumstances, making a mandatory order against the executive Byrne v. Ireland [1972] IR 241; East Donegal Co – operative Livestock Mart Limited v. Attorney General 1970 IR 317; Mac Mathúna v. Attorney General [1995]1 IR 484 and The State (Quinn) v. Ryan [1965] IR 70 considered.*
>
> *Per Murray J. that the term "clear disregard" in this context could only mean a conscious and deliberate decision by an organ of State to act in breach of its constitutional obligations*".

**223.** The State is not a party to these proceedings, but in the present case there *has* been a *conscious and deliberate decision*, by the respondent, *not* to comply with the statutory obligations imposed upon it by s. 23F (7) and (8). The response by this Court must be to make mandatory orders to bring an end to this.

**Solutions**

**224.** I emphasise again that nothing in this judgment is intended to direct how financial resources should be spent. As I have previously noted, the respondent emphasises that it *has* the financial resources and the requisite beds, the problem being the lack of suitably qualified staff to enable the respondent to operate all the special care beds at its disposal. This, of course, distinguishes the situation from that in *Brady*.

**225.** Insofar as the Director of the respondent has averred to the range of potential solutions to the staffing problem, it is no function of this Court to choose between potential solutions. This is for at least two reasons.

**226.** First, this Court has no expertise in the area and is not in a position to make any informed decision about which one, or more, potential solutions may be effective.

**227.** Second, whilst the respondent emphasises that it does not lack financial resources, it seems to me that one of the potential solutions to the staffing issue canvassed by the respondent could potentially involve financial resource decisions, which this Court cannot make and is not purporting to make (it will be recalled that the respondent is of the view that, in order to attract staff to special care, it is necessary to increase the special care allowance and it is further averred that a "*business case*" to this effect was forwarded to the Department of Children, Equality, Disability, Integration and Youth on 14 September 2023, for submission to the Department of Public Expenditure and Reform). It will also be recalled that the respondent believes that the range of eligible qualifications for employment in special care should be increased and that such an agreement has been reached with the relevant trade union to expand the social care qualification criteria.

**228.** This Court is not dictating *how* the staffing issue is to be addressed and is making no spending decisions. Nor is this Court in a position to know which one or more of the potential solutions canvassed by the respondent will be successful (or, for that matter, what alternatives, not yet articulated, may be thought appropriate as a contribution to the solution).

**229.** However, this Court is entitled to say, in the clearest of terms, that the current situation is unacceptable and must be addressed immediately. Why? Because a failure to address it involves an ongoing failure to vindicate and protect the rights, including the right to life, person, safety, and welfare, of some of the most vulnerable in our society, specifically these two children, contrary to the Constitution adopted by the Irish People and the provisions of the 1991 Act, which reflect the will of the People.

**230.** The difficulty which the respondent seeks to rely on in the present case is far from new. At paras. 30 and 31 of the applicant's written legal submissions, this Court's attention is drawn to the judgment of Reynolds J. in *CFA v. KM* [2018] IEHC 651 wherein, at para. 14, the learned judge stated, *inter alia*, that: "*. . . it is imperative that the staffing issue is addressed as a matter of urgency to ensure a continuum of State care to the most vulnerable children in society"*.

**231.** Almost five years has elapsed since that judgment was delivered on 20 November 2018 and, just as Reynolds J. did then (see *CFA v. KM* para. 18), I am directing that a copy of this judgment be furnished to the relevant Departments, forthwith. Given that, in the context of making averments concerning potential solutions to the respondent's long-standing staffing issues, the Director of the respondent identifies (in paras. 54 and 55) both the 'Department of Children, Equality, Disability, Integration and Youth' and to the 'Department of Public Expenditure and Reform', I am directing that a copy of this judgment is forwarded to both immediately. Mindful of Art. 6 and emphasising that nothing in this decision breaches the sacrosanct 'separation of powers' principle, the mutual respect between co-equal branches of Government requires that the Executive and Legislature are made aware of this judgment, not least because the respondent is a creation of the Oireachtas but,

in the manner and for the reasons identified, has failed in its statutory duties, as a consequence of which the constitutional rights of two of the State's most vulnerable citizens have been, and continue to be, breached.

**232.** In conclusion, for the reasons set out in this judgment, I am satisfied that in these exceptional circumstances, the appropriate intervention by the Court is to grant appropriate mandatory as well as declaratory relief, in particular, and in respect of each application: (i) a declaration to the effect that the respondent has breached the statutory obligations imposed upon it by s. 23F (7); (ii) a declaration that the respondent has breached the statutory obligations imposed by s. 23F (8); (iii) a mandatory order requiring the respondent, forthwith, to comply with its statutory obligations *per* s. 23F (7); and (iv) a mandatory order requiring the respondent, forthwith, to comply with its statutory obligations under s. 23F (8).

**233.** With a view to minimising delay, this judgment is being given electronically. The legal representatives of the parties are invited to liaise, forthwith, on the appropriate form of order, including as to costs, which reflects this Court's decision. Once agreed, or in the event of any dispute, the matter can be listed for mention before me at the earliest date convenient to all parties.