THE COURT OF APPEAL

Special Care

Neutral Citation Number: [2019] IECA 109

Record Number: 2019/32

Peart J.
Whelan J.
Baker J.

IN THE MATTER OF PART IVA OF THE CHILD CARE ACT, 1991 AS AMENDED

AND IN THE MATTER OF AN APPLICATION FOR A SPECIAL CARE ORDER IN RESPECT OF G, A CHILD

BETWEEN/

CHILD AND FAMILY AGENCY

APPLICANT/RESPONDENT

- AND –

M. L. (OTHERWISE G.)

FIRST RESPONDENT/

RESPONDENT

- AND -

ORLA RYAN

SECOND RESPONDENT/

RESPONDENT

- AND –

G.

APPELLANT/

CHILD WITH RIGHTS OF A PARTY

JUDGMENT of Ms. Justice Máire Whelan delivered on the 12th day of April, 2019

1. This is an appeal from a special care order made pursuant to Section 23H of the Child Care Act 1991 ("s.23H") by Ms. Justice Faherty in the High Court on the 7th December, 2018. Such an order lasts for three months and may be extended for a total period of up to nine months.

Parties to appeal

2. The proceedings relate to the appellant (hereinafter G.), a minor born on the 25th December 2001. She seeks to set aside the special care order on the grounds, *inter alia*, that the statutory threshold for the making of same was not met and that the order fails to protect, defend and vindicate her constitutional rights, particularly her right to liberty.

3. The first respondent is G.'s mother. G.'s father is not a party to the proceedings. The second respondent is the guardian *ad litem* of G. The third respondent is the Child and Family Agency (the "CFA"). All respondents supported the application before the High Court for the making of a special care order and all oppose the appeal.

4. In addition to G.'s guardian *ad litem* representing her interests through a legal team in the High Court and on appeal, G., as a child with rights of a party, had her own legal team of solicitor, junior and senior counsel at the High Court and for the appeal.

Essential questions

5. The key determinations for this court include:

(a) Whether the evidence before the trial judge entitled her to find, as a matter of law and fact, that the threshold for

making a special care order pursuant to s23H was met. Two sub issues are raised: (i) whether the trial judge erred in determining that the evidence established that G.'s behaviour posed a real and substantial risk to her own life by self-harm/suicide and (ii) whether the trial judge erred in concluding that therapeutic objectives, which included diverting G. from violent tendencies towards others, achieved a relevant welfare benefit within the meaning of s23H.

(b) Whether the court failed to protect and vindicate G.'s constitutional right to liberty and whether the special care order proposed amounted to preventative detention.

(c) Whether sufficient weight was given by the High Court to other views that the making of the special care order was not required in the circumstances of this case – including G.'s own views and those of the Director of Oberstown Detention Centre.

(d) Whether a Medical Report from Professor H. Kennedy was properly received by the Court.

(e) Whether, in all the circumstances the order made complies with Section 23H of the Child Care Act 1991, the relevant Constitutional provisions and the European Convention on Human Rights.

Brief introduction

6. G. is now seventeen years old. Born male, G. has from the aged of fifteen self-identified as a transgender person male to female. Accordingly, at the express behest of G., female gender pronouns are utilised throughout this judgment. It appears relatively little is known about the appellant's early childhood. She was born in Ireland to parents from overseas. She is an only child. It appears that G. was born into a household of extreme depravity and domestic violence. Her parents have been described as seemingly "locked into a sadomasochistic relationship". The mother reported that the father was violent and controlling. By way of example, one Psychological Reports suggest that the "…father prevented mother from breastfeeding or tending to the baby…" G. witnessed her father's abusive conduct towards her mother. G. was also physically and emotionally abused by her father. When G. was old enough the father recruited her to join him in the abuse of the mother.

7. G. was taken into care in 2012 at the age of 10 and has remained in the care of the state ever since, initially residing in foster care arrangements, subsequently in residential care, laterally serving sentences of detention between May 2018 and the 7th November 2018 following convictions in the District Court in May 2018 and July 2018.

8. A central precipitating factor in the CFA seeking interim special care orders and subsequently a full special care order, was G.'s suicidality and her repeatedly expressed intention to take her own life with the date identified as being on her release from Oberstown detention centre. G. contended before the High Court and on appeal that these threats were wholly instrumental – solely aimed at achieving outcomes that were being denied to her – and were not seriously intended. An interim special care order was made pursuant to section 23L of Part IVA of the Child Care Act, 1991 by Faherty J. on the 7th of November 2018 and subsequently on the 20th of November 2018. The latter order remained in place until the full special care order, the subject of this appeal was made by the High Court on the 7th December, 2018. Each of these aspects, to the extent relevant to the issues in this appeal, will be considered more fully hereafter.

The relevant legal framework

Child Care Act, 1991

9. The statutory mandate of the CFA is specified in s.3 of the Act as amended which provides that the agency shall, "promote the welfare of children who are not receiving adequate care and protection." The long title records that the purpose of the Act is "to provide for the care and protection of children". The legislative scheme establishes overarching duties of child protection and s.4 imposes on the CFA a duty to take "into its care" any child who "requires care or protection" which he (or she) is unlikely to receive unless "that child is taken into care."

The statutory framework relating to special care orders for children, which involves intervention to provide secure therapeutic care, was introduced by the Child Care (Amendment) Act 2011 (the "2011 Act") which substituted and inserted Part IVA into the Child Care Act, 1991 ("Part IVA"). Part IVA became operative in the aftermath of the Children's Referendum of November 2012 which enshrined Article 42A in the Constitution. It reflects the legislature's intent to gives substantive effect to certain of the rights enshrined in Article 42A.

10. Part IVA was commenced by Statutory Instrument No. 637 of 2017 Child Care (Amendment) Act 2011 (Commencement) Order 2017 on the 31st December 2017. Prior to the latter date, for the preceding two decades or so, such cases were dealt with pursuant to the inherent jurisdiction of the High Court. All such applications now fall to be determined under Part IVA.

11. Certain definitions are of relevance, as provided for in s.23A of the Act, Part IVA:

"'*Care Requirements*' means the care a child requires having regard to his or her behaviour."

"'*Special Care*' is to be construed in accordance with s.23C; 'Special care order' means an order made under s.23H."

12. Section 23C provides:-

"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 s.23NF; and

(ii) Where the release is required for the purposes of s.23D or 23E in accordance with s.23NG".

13. The process is triggered in the first place by the making of a determination by the CFA that the child in question requires special care. A detailed process is laid down in Section 23F which identifies the prerequisites which are to be met by CFA in reaching that determination.

14. S23F includes the following provisions:

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

(2) Where—

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

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

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

(ii) treatment and mental health services, under, and within the meaning of, the Mental Health Act 2001,

will not adequately address that behaviour and risk of harm and those care requirements, and

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

(i) that behaviour and risk of harm, and

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

……

(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."

15. The statutory pre-requisites which must be established by the CFA to the satisfaction of the High Court before it makes a special care order are set forth in s.23H of the Act which identifies eight separate criteria of which the High Court must be satisfied prior to making a special care order. A number are factual in nature and are uncontroversial, such as evidence of the age of the child and in particular that she has attained the age of eleven years:

"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 F116[Child and Family Agency] has had regard to the recommendations notified in accordance with section 12 of the Act of 2001, or

(ii) it is in the best interests of the child that the family welfare conference was not convened having regard to the information and grounds provided in accordance with section 23F(10),

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

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

(2) A special care order shall specify the period for which it has effect and that period shall not exceed 3 months from the day on which that order is made unless that period is extended under section 23J..."

16. The legislation, which enjoys the presumption of constitutionality, falls to be considered in light of the relevant provisions and with due regard to the provisions of the European Convention on Human Rights and the United Nations Convention on the Rights of the Child as considered more fully hereafter.

17. Article 40.4 states that: "No citizen shall be deprived of his liberty, save in accordance with law".

18. The relevant provisions of Article 42A include the following:

"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.

2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° ….

3. ….

4. 1° Provision shall be made by law that in the resolution of all proceedings –

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

ii) ….

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."

19. Article 5 of the European Convention on Human Rights provides:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

……

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;"

Background

(i). Early childhood

20. A risk assessment report dated March 2017 from Patricia Allan, child and adolescent psychotherapist, of the Tavistock and Portman NHS Foundation Trust offers some limited insights into the dysfunctional family dynamic of G.'s early childhood years. The author expresses the professional assessment that the care received by G. from her parents was "absent, unreliable, perhaps intrusive at times, cruel and probably difficult to predict or understand. The people with the means to care for [her] – [her] parents – were the same people who at times harmed [her] by withholding care or being sadistic in their interactions with [her]. A child in this situation cannot afford to attack their carer or lose them. In order to survive the baby…had to find a way to collude with this perverse parenting, and thereby to internalise it." The mother had not been permitted to hold or soothe G. when she cried, according to the report.

21. The said report suggests that it is possible G.'s mother was her "only source of benign interaction." The report continues: - "According to the history on this case, [G.] witnessed [her] father emotionally, physically and sexually abuse [her] mother. [She] too was alleged to have been emotionally and physically abused by [her] father… It seems likely that becoming father's apprentice meant that [G.] avoided being the direct target of father's abuse, however it also meant [she] had to attack her only source of comfort. In order to protect [herself], [G.] had to attack mother. This would have involved strengthening [her] identification with a cruel and sadistic father and weakening [her] identification with a collapsed but at times benign mother."

22. The professional assessment was that G. "…did not attack mother because of [her] own violent feelings towards her, but was enacting [her] father's rage and cruelty. [She] was being violent 'to order' which, over time, would have a traumatic, brutalising effect, creating an association between cold violence and survival and a disassociation between what [she] was doing and the impact [her] actions were having on [her] victim."

23. The mother left the family home taking G. (then aged almost nine) with her in November 2010. They went to reside in a women's refuge. From November 2010 the mother and G. remained in the refuge. The staff there had significant concerns about the level of violence that had been perpetrated by G. upon her mother. In July 2011 when G. was nine and a half years old, mother and child moved into rented accommodation.

24. A feature of this case is that in an interview with G.'s guardian in 2012, at the time when G. was being taken into care, the father casually acknowledged carrying out repeated acts of domestic violence appearing to lack all insight into the impropriety or deleterious impact of such conduct on herself or others. He appeared to believe that he was "justified in his actions, and tended to dismiss the possibility that his actions had a profound impact upon [G.]"

25. In 2012, after perpetrating a violent attack on her mother, G. was the subject of a care order and has remained in care ever since.

(ii). Foster placements

26. In July 2012 G., aged 10, was placed initially in emergency foster care. After five days she was placed in a longer term foster placement. This placement was terminated after thirteen weeks due to an escalation in G.'s aggressive behaviour. The third placement lasted over a year between late October 2012 and early December 2013, and ended when the foster carers struggled to manage G.'s aggressive behaviour which continued to escalate. G.'s final foster placement lasted from the 6th December, 2013 to the 20th December, 2013, ending when the carers informed the social work department that they could no longer offer a placement beyond the 20th December, 2013. All foster placements had ended prior to G.'s thirteenth birthday.

(iii). Residential care

27. Between December 2013 and the 1st May, 2018 the appellant resided in several different private residential care homes. The initial placement was between the ages of twelve and thirteen and a half and ended because of G.'s aggressive behaviour which had continued to escalate. In June 2015, at the age of thirteen, G. went to another residential placement. The placement broke down due to G's extreme and excessively sexualised behaviour towards female staff. G. was then placed in a different private residential care setting. The Child and Family Agency engaged in several meetings, consultations and sought specialist advice in regard to G.'s harmful, sexualised behaviour in order to be informed of the best placement options for her at that time. G. was subsequently moved to a single occupancy house and engaged with a therapist for a time. That placement broke down in December 2015 at a time when G. was not yet fourteen years of age due to an incident in which she was locked in a room in the unit by another resident and threatened by this peer in a sexual manner. Thereafter, G. was moved to a further residential unit, initially a single occupancy arrangement for a period of twelve weeks. That placement continued between July 2016 and the 1st May, 2018.

28. On the 1st May, 2018, following a violent attack on a care worker, who at the time was driving a motor vehicle, the appellant was admitted to Connolly Hospital, Blanchardstown, for a psychiatric review. That assessment concluded that G. did not suffer from any mental illness. At the conclusion of the assessment on the 3rd May, 2018 the appellant resided for approximately five nights at homeless accommodation and thereafter was remanded in Oberstown Children's Detention Campus (Oberstown) where she remained in detention following convictions and sentences in May 2018 and July 2018 until the 7th November, 2018.

(iv). Educational background

29. In 2014 G.'s formal schooling ended at the age of fourteen. Her refusal to attend school is reported to "have been partly a reaction to not achieving 'perfect' exam results and partly due to [her] no longer being able to tolerate having the one to one support of the Special Needs Assistant." [per report of Patricia Allan]

Thereafter, G. "studied" every day from 9 a.m. to 3.30. p.m., setting up her own "pseudo" school and appearing to study using old school books.

Key Events Leading to the Application by CFA for a Special Care Order

(i). Behavioural issues

30. G. exhibited physical and sexual violence towards staff and other housemates, including an attack on a member of staff in June 2015 when she was then aged thirteen and a half years old. As a result, there were always at least two members of staff with her. It was the view of staff that G.'s physical assaults had a premediated feel and that while there was often a flashpoint precipitating an attack, it was observed that G.'s "response to the flashpoint does not feel completely spontaneous."

31. Staff working with G. noted a general lack of warmth in dealings with staff members "as though they exist only in relation to [her] needs, with no expectation of an exchange which could be friendly or reciprocal. The main feeling that [G.] seems to elicit in others is of wariness and vigilance."

32. The reports observe that G. only attacked female staff members. It was considered that G. is more compliant in relation to male staff than female staff members. G. started to wear makeup at Christmas 2015. At that time, she was sharing a house with a young person who was transgendered. From that time onward G. insists that she identifies as a female and wants to undergo gender reassignment surgery.

(ii). Isolation

33. The staff who cared for G. had a concern that it was important for her development that she return to school and engage more with her peers. They were concerned that she was in danger of becoming too isolated. It was observed that G. did not have any friends and was "often hostile towards other young people who are placed in the same home as [her]. [She] tends to perceive [her] housemates as enemies who are out to get [her] and/or as sexual predators. Ideally [she] would like to live in a house where [she] is the only young person being looked after. [G.] has a strong sense of grievance and often feels that things have gone wrong, or have been done wrongly in regard to [her] care. This leads [her] to make many official complaints."

34. A male member of staff (SH) who worked with G. describes her as always greeting him warily with "why are you here" as though there is "no shared history and SH is experienced by G. only as someone who can impact negatively on [her]…[G.] shows no curiosity towards other people except in regard to how they might be used to meet [her] needs or are likely to harm [her]. There was a sense that [G.] organises [her] sense of self around planned defensive measures, as though planning attacks and counter-attacks and perceiving anyone [she] is in contact with as a potential attacker gives [G.] a sense of internal cohesion." G. is noted to suffer from excruciating levels of anxiety.

(iii). Criminal conduct

35. In recent years, G. engaged in a number of criminal activities. These include an assault, criminal damage and damage to a motor vehicle. G. was charged with a number of offences and a custodial sentence of five months was imposed in May 2018. Subsequently, arising from the 1st May, 2018 assault, detailed hereafter, G. was separately charged in July 2018 and given a further custodial sentence of five months in Oberstown. The said sentences expired on the 7th November 2018.

(iv). 1st May 2018 assault

36. On the 1st May, 2018 G. attended Court on foot of a bench warrant. She was accompanied by two social care workers. As they were driving back to the residential accommodation G. was seated in the back seat of the motor vehicle. She was irate and unhappy at the prospect that she had to return to court a week later for a further remand hearing, and it was suggested to her that should she fail to attend there was a risk that she might be remanded in custody to Oberstown pending the court hearing. G. then lunged without warning at the social care worker who was driving the motor vehicle, grabbing her hair and face. G.'s nails were long and manicured at the time. She dug her nails into the social care worker's eyes, tearing her eyelids. The social care worker required hospitalisation as a result of the injuries sustained. The social care worker managed to stop the car on the public highway. G. repeated "I am going to kill you". G. tore amounts of hair from the head of the social care worker. G. wrapped her legs around the victim's head and chest, refusing to let go and bit the care worker on the hand, continuing to pull at her hair and scrape her face.

37. The Gardaí were summoned. At the Garda station a large clump of the social care worker's hair was found in G.'s pocket. When interviewed by the Gardaí G. expressed a desire to murder the care worker and appeared annoyed that her assault hadn't led to that outcome. She expressed that it was "music to [her] ears to hear her scream and cry while asking [G.] to stop." G. "spoke about planning assaults on staff for weeks and months and had a list of staff [she] wanted to assault for various reasons including how they spoke to [her] in the past. Apart from expressing [her] disappointment that the assault didn't result in [her] desired outcome G. presented gleeful about what had happened." Gardaí expressed concern for the safety of care staff.

38. On the 1st May, 2018, G. informed staff including a psychiatrist at Connolly Hospital Blanchardstown that she had the intention to murder care staff. On assessment the following day G. was found not to present as psychotic and the provisions of the Mental Health Acts were not engaged.

(v). Gender dysphoria - the position pre 2018

39. A risk assessment report was prepared by Ms. Allan of the Tavistock and Portman NHS in March 2017. A view was taken that whilst on paper G. presented as ticking all the correct boxes for gender dysphoria, there was a lack of affect in the way G. described her gender difficulties, as though she was reciting from something she had learned. "All the facts were correct but there was no emotional impact", the report suggested. In other words, there was no sense of any emotional disturbance attached to her alleged gender dysphoria. The potential function that a gender reassignment may have for G. was framed in the psychological report "…in terms of avoiding parts of [herself] that [she] cannot yet bear to accept or understand." In the course of a thirty-minute meeting with the child and adolescent psychotherapist Ms. Allan from the Tavistock and Portman Trust which took place in February 2017 when G. was then fifteen years of age the assessment was that G. was "a young person with a siege mentality, who was on the verge of an offensive attack at all times and who related to me only in terms of how I might impact on [her]."

(vi). Psychological assessment pre 2018

40. Whilst G. does not currently present with any symptoms associated with a mental illness it is the view of all professionals that she is an extremely complex and psychologically disturbed young person. It will be recalled that it was the view of the child and adolescent psychotherapist Ms. Allan in March 2017 that "such presentation could be associated with an emerging, severe personality disorder." That report had embodied a formulation the following analysis: -

> "...[G.] presents a high level of risk to those around [her]. [G.] suffered severe relational trauma in childhood. [She] coped with the privation, deprivation and neglect by becoming highly dismissive of [her] needs for attachment, security and nourishing relationships with caring adults. In an attempt to deny vulnerability and need, [she] became controlling, callous and unemotional. I believe that [she] perceives real emotional intimacy as dangerous, and therefore seeks to control those around [her]. Being in control is the only way [she] can feel safe in a relationship. Control of the other makes relationships less intimate on one hand but not too remote or rejecting on the other, so [she] is invested in keeping others away, but not too far away. Control is achieved through manipulation and at times violence and sexual violence. These are [G.'s] means of achieving a sense of mastery and triumph over fear and trauma, which are now seen in the other rather than the self. They become exciting activities providing a sense of triumph and omnipotence, the opposite of feeling out of control and at the mercy of others which was [G.'s] experience as a baby."

41. That report at page fifteen states: -

> "...[G.] has very little capacity to recognise or manage [her] own feelings which means that anything which disturbs [her] internally, is projected out into [her] environment and then attacked. It appears [she] relates to other people only insofar as they might be able to help [her] further [her) latest scheme to control [her] environment or as enemies that [she] has to control."
>
> "In my opinion, planning to hurt and control others provides [G.] with a sense of internal organisation. Hurting others gives [her] a sense of power and control. The mental stalking and physical pinning down of others in a sexual and/or violent way allows [her] to project the fear of violation into another. The enjoyment [G.] achieves from this is that [she] has successfully avoided being the frightened victim. [She] enjoys the other's fear only on this basis – becoming the creator of fear in others rather than the one helplessly experiencing it."

42. The report expresses the view that: -

> "Real changes in actual risk would only be achieved when and if [G.] manages to start reflecting on [her] experiences and therefore tolerating what [she] finds most difficult – vulnerability, helplessness, and the emotional need of attachment and care."

43. The assessment at page sixteen states: -

> "I believe [G.] has constructed a false victim self instead of being in real contact with [her] real victim self. [She] uses the false victim self to manipulate and emotionally blackmail those around [her]. [She] also provokes others (usually vulnerable) young people into attacking [her] at times, both in order to compound and give strength to [her] false victim self and also to get rid of the other young person".

44. The report found it impossible to assess whether G. was a young person who suffers from actual gender dysphoria. "In discussion with me it was very noticeable that [she] has researched the area and was therefore able to provide a tick-box list of symptoms that are required to the formation of this diagnosis. However, I believe that the important first step would be to address the trauma which is impacting on every aspect of his development, not just [her] gender or sexual identity."

Assessment by Professor Kennedy of position in 2018

(i) *Suicidality*

45. During the course of her detention in Oberstown between the 8th May, 2018 and the 7th November, 2018 G. expressed threats of self-harm and suicide. Whilst in custody in Oberstown G. was referred by the primary care team and also by the ACTS team to Professor Harry Kennedy because of concerns about her threats of suicide. On foot of that referral Professor Kennedy furnished a clinical letter on the 9th August, 2018 which became available to G.'s professionals in September 2018. That letter states: -

> "This is not a court report. I do not have instructions to provide a court report. I do not have consent to prepare a court report. I have not been asked any questions specific to any pending or future court or care proceedings. This clinic letter should not be used as a court report."

46. Professor Kennedy notes in his letter that he interviewed G. with a colleague and a female member of the unit care staff; explaining that he had been asked to carry out an assessment specifically concerning risk of self-harm or suicide for advice to the primary care team at Oberstown. "I explained that we had not been asked to deal with any other issues, for example regarding gender reassignment. I was satisfied that [G.] understood this and was agreeable to proceed."

47. It is noteworthy that Professor Kennedy gave the following summary and advice specifically confined to the risk of suicide in G.:-

> "The threats of suicide are instrumental, designed to achieve another purpose, to manipulate clinicians towards complying with [G.'s] wish to be referred for gender reassignment."

48. It was observed by Professor Kennedy that "claims to have self-harmed by cutting are not currently supported by any scarring evidence. This does not mean they should be dismissed. Any attempt at self-harm can accidently lead to a completed suicide." He also states that G.: -

> "Exhibits callous and unemotional thoughts, communications and behaviours. [G.] does not reason about acts of violence according to conventional 'moral' foundations… such reasoning is at present only egocentric and egosyntonic."

He notes that: -

> "these dispositions appear to be related to acts of physical and sexual violence which at times are instrumental – prepared and goal directed – particularly towards women. While this is a risk factor for further violence, it is also a risk factor for completed suicide."

49. He considered that G.'s documented evidence of factitious illness behaviour – intentionally falsifying a monitoring test for blood pressure and secreting medication in a deceptive way makes "all aspects of [G.'s] account of symptoms, mental states, beliefs and preferences unreliable for clinicians to assess. Risk assessment is therefore not reliable and risk management is particularly difficult."

(ii) *Gender Dysphoria*

50. Professor Kennedy expressed the view that gender reassignment has no place to play in the management of suicide in G.'s case. "[G.] is unable or unwilling to engage in any therapeutic relationship in which the goals and outcomes are not under [G.'s] complete control. Nor is [G.] currently able to enter into the pre-contemplation conversations that could initiate a cycle of change. It is possible that this will change substantially as adolescence progresses."

51. He noted the prominence of "callous unemotional traits" and "an egocentric, egosyntonic attitude towards violence to others". He took the view that this was unlikely to change in the short to medium term. He considered that a neurocognitive functional assessment and an assessment of theory of mind capacity would be helpful to repeat. He concluded that it is evident that G. will continue to assault and "…should continue to be held responsible for any such assaults by being charged and processed through the courts."

52. It was Professor Kennedy's conclusion in August 2018 that;" only a secure care placement would be appropriate to [G.'s] needs. This should not be in a hospital setting, though various forms of psychological help should be offered at intervals – though not exclusively on [G.'s] terms. Crisis interventions including psychiatric crisis interventions will always be available according to clinically assessed need."

2018 Risk Assessment - suicidality

53. An updated risk assessment regarding suicidality, together with the recommendations was included in a report dated the 11th October, 2018 which was before the High Court. At the time of that assessment, G. was sixteen years and nine months. An initial risk assessment *vis-à-vis* suicidality had been carried out in June 2018. G. reported thinking about suicide two to three times a day; often precipitated by a period of time when alone. She reported prior suicide attempts including stockpiling thirty paracetamol tablets in December 2016 and in addition, to numerous attempts to use the shower as a ligature. She described feelings associated with

completed suicide as "comfort and happiness". A degree of planning was reported, an overdose of medication was the chosen means as it was "least likely to cause physical pain." She reported an overall risk of suicide as five out of five ("will kill self"). Lack of access to an appropriate means of suicide was described by her as the principal protective factor. She identified the primary reason for dying as "to end the emotional pain… I would rather feel nothing than feel what I am feeling now."

54. G. claimed the precipitants to the emotional pain centred around "not being recognised as a woman" to which gender reassignment was deemed by her the unequivocal solution. The second key factor was "loneliness". This appears to have been precipitated by her failure to be identified as a woman and observing "other's happiness when I feel like this." She identified "hopelessness" as the third most important driver towards her suicide. She reported a high degree of agitation to complete suicide (5/5), with her discharge from Oberstown scheduled for the 7th November, 2018, identified by G. as the time when this would take place. She described a moderate degree of "self-hate" that was focused on her male body parts (3/5). "When asked to describe the parts of self that were liked, [G.] was unable to answer." G. reported interpersonal isolation and relationship problems. She was unable to identify any important friend or family member and she had no visitors at all whilst detained in Oberstown, and reported seeking isolation whilst on the unit.

55. On review on the 3rd October, 2018 there was reported to be very little movement in the dynamic risk factors previously identified. Suicidal ideation continued to be daily and she reported an unsuccessful plan to attempt suicide by jumping in front of traffic whilst on mobilities from Oberstown, with the physical pain caused by an unsuccessful attempt acting as a deterrent. She reported that the overall risk remained 5/5 as did psychological pain and agitation. Her hopefulness had reduced to 4/5, reporting that "it would be foolish to continue living." It was noteworthy that this disclosure was made notwithstanding that G. was aware that gender reassignment is contra-indicated when a young person presents with significant suicidality risk. Her level of self-hate had improved and stood at 1/5. She identified loneliness as the primary driver that was both powerful in maintaining suicidality and potentially amenable to change. The primary intervention at Oberstown was in managing access to means of completing suicide. The outcome of the CAMHS assessments suggest that she is of moderate to high risk of completing suicide, with lack of satisfactory means to complete suicide the main protective factor.

56. This report notes that prior assessments may have conceptualised G.'s suicidal presentation as instrumental, and goal directed behaviour in order to achieve a desired outcome of gender reassignment; but goes on to state: -

> "Whilst this is possible, empirically supported 'reasons for living'; family, friends, responsibility for others, fear of burdening others, hopefulness plans and goals… are undeniably absent in [G.'s] life. Taken in conjunction with present static risk factors such as history of abuse, suicidal planning, attempts and ideation, it is the opinion of the undersigned that this disclosure should be taken seriously."

The report of October 2018 states at page six: -

> "[G.] has been clear that attempts to dissuade from suicide as a means of coping with distress only increase the desire to do so. Whilst risk remains high, removal of means of completing suicide (in particular medication) in addition to appropriate monitoring and supervision will be important for [G.'s] carers."

57. In reviewing the various placement options post-release from Oberstown Children's Detention Centre the report states: -

> "Special care is clearly not a long term solution for [G.], however it could provide an interim therapeutic community, away from the persecution [G.] reported experiencing on the all-male unit at OCDC. It would also allow ongoing therapeutic input from the ACTS team with a hope that G.'s suicidality would reduce and a community placement could be considered. It is however acknowledged that [G.'s] level of risk (self and potentially other) is likely to present challenges within a time limited special care setting."

A detailed suicide safety plan was annexed to this report which required, *inter alia*, that staff maintain fifteen minute observations at night until G. goes to sleep.

58. At a professional team meeting to consider her placement plan which took place on the 31st July, 2018 it was noted that a significant cause for concern during the assessment process was the risk of suicidality. G. had presented with both historical and dynamic factors in respect of risk of suicide. There is reference to a statement by G. that she had a plan to take pain medication, call an ambulance, cut off her penis and flush it down the toilet.

Interim special care orders 7th November, 2018 and 8th November, 2018

59. An interim special care order was made in the High Court pursuant to section 23L of the Child Care Act 1991 in respect of G. on the 7th November, 2018. That order outlines that the court had regard of the affidavit of Lyndsey Maguire sworn on the 7th November, 2018. The order was made for a period of eight days.

60. Thereafter, the agency sought an extension of the interim special care order on an *inter partes* basis pursuant to s.23N of the 1991 Act committing G. to the care of the agency for the period of thirteen days to be detained at an identified special care unit for the purpose of providing G. with special care. The guardian *ad litem* and G.'s mother supported the application.

Application in High Court

61. The Child and Family Agency brought an application by way of originating notice of motion dated 13th November, 2018 seeking a special care order pursuant to s.23H (1) and (2) of the Child Care Act, 1991 as amended, seeking the committal of G. to the care of the CFA and directing that it detain her in Coovagh House Special Care Unit for the purposes of providing her with special care and further seeking directions that the CFA provide special care together with an application for directions pertaining to such special care order as might be made by the court and consequential directions.

62. The application was grounded on the affidavit of Lyndsey Maguire, a social worker with the CFA, and a number of reports were exhibited.

63. The Reports and opinions put before the High Court and considered included the following:

(i) Social Work Report 24th October, 2018 (erroneously dated 24 May, 2018)

(ii) Report of Dr Noreen Bannon dated 4 May, 2018

(iii) Report of Dr Eamon Raji dated 4 December, 2018

(iv) Special Care Referral Form 8 October 2018

(v) Initial Risk Assessment 6th June 2018

(vi) Updated Risk Assessment 11th October 2018

(vii) Suicide Safety Plan 3 October 2018

(viii) Clinical letter from Professor Harry Kennedy 9 August, 2018

(ix) Email from Director of Oberstown Children Detention Centre, Pat Bergin dated 6 November, 2018

(x) Addendum Social Work Report 3d December, 2018

(xi) Placement Plan progress report 3 December 2018

(xii) Minutes of Professionals meetings 31 July 2018,6th September and 11 October 2018

(xiii) A variety of earlier background material including Lynn Dara Inpatient Discharge Report of Dr Patricia Byrne May 2016 and Tavistock & Portman NHS Foundation Trust Report of Dr Patricia Allen March 2017

The Judgment

64. The application was heard on affidavit on the 6th December 2018 – judgment was reserved overnight. In her judgment the trial judge reviewed in significant detail the family history of G. and her history in care. She then considered the statutory scheme pursuant to s.23H of the Child Care Act 1991 as amended. She identified the statutory proofs and the threshold which had to be met before a special care order could be made by the court. She noted that G. strongly opposed the application and had expressed her views to the court in three separate letters, and by way of a video link, and through her legal representation.

65. The independent expert reports on the behaviour of G., particularly behaviour proximate in time to the making of the application for the special care order, which had been assessed and evaluated by various professional experts with expertise in psychology and/or psychiatry were considered by the trial judge in arriving at a determination whether there was "..a real and substantial risk of harm to [G's] life, health, safety, development or welfare" such as met the statutory threshold for the making of a special care order.

66. The trial judge considered the extensive corpus of reports including psychiatric assessments and noted that there was no evidence of mental illness. She noted the assessment that G. had issues of gender dysphoria and personality traits consistent with narcissistic and anti-social personality. Although G. had admitted assaulting a member of the care home staff, she did not show any remorse for this action.

67. The trial judge considered the clinical letter of the 9th August, 2018 to the GP from Professor Harry Kennedy. The judgment evaluated in detail the evidence regarding the threat of suicide and the professional expert views concerning the risks to G. as identified in the reports, including those of Dr. Harry Kennedy and Dr. Ben Butlin of Tusla, a clinical psychologist who prepared reports in June 2018 and October 2018. The judgment noted in particular the conclusions of Dr. Butlin that: -

> "Taken in conjunction with the present static risk factors such as a history of abuse, suicidal planning, attempts and ideation, it is the opinion of the undersigned that this disclosure should be taken seriously."

68. The judgment also considered the report from Dr. Eamon Raji of the 4th December, 2018 where he carried out an evaluation as to whether G.'s needs might be better met by a psychiatric rather than a social care intervention: "Observing that [G.'s] suicidality is long standing and has included ruminations about suicide, making plans and engaging in suicidal behaviour." The trial judge noted in particular the observations of Dr. Raji, arising from his meeting with G. and her own express views that she was not suicidal and that she did not require special care. The judge noted that the report stated: "She intends to avoid special care and would rather be placed in any residential unit." The said report also observed: "G. is very clear and adamant in her denial of any current suicidal thoughts. When I asked G. on the risk she poses to society or others she was clearly not concerned with this and was surprised that I had felt she is a risk to others based on her history."

69. The judgment observed that Dr. Raji's report had stated: -

> "[G.] does not present with a psychiatric illness but has numerous personality disorder traits in the realms of a Cluster B personality disorders, namely narcissistic, anti-social and emotionally unstable. These personality disorder traits do not warrant inpatient psychiatric admission."

Consideration of G.'s views and wishes by the trial judge

70. The High Court considered the submissions and arguments of the parties including senior counsel on behalf of G. It was emphasised that the report from Professor Kennedy was not a court report as is manifest from his clinical letter.

71. The court heard directly from G. who participated in the High Court hearing by video link.

72. There were three letters from G. before the High Court –

G.'s letter to the presiding judge dated the 9th November, 2018, states *inter alia*:-

> "I understand the reason why I was placed in special care. This was because people believed that I was a risk to myself, because of my suicide ideation. I just want to explain that the reason I feel like this is because I hate my male body and because I was being bullied by the other young people in Oberstown Detention Centre because I was transgender. It is not because I am not in the right state of mind or whatever. And this is why I shouldn't be in a special care unit because

> I'm in the right state of mind and because I feel suicidal for very valid and understandable reasons."

That letter continues:

> "I had felt suicidal in the past and I had self-harmed in the past (which I have not done recently) and I was not placed in special care during this so there is clearly a major inconsistency which is extremely unfair."

G. pointed out that:

> "Pat Bergin the director of Oberstown…explained to me that both himself and the consultant… believed that special care is not the best option for me. He explained to me that Dr. Kennedy believed I don't have a psychiatric disorder but that I have complex issues but these should not be addressed in a special care unit as I have made significant progress recently. I understand there was some confusion around this conversation but this is what Pat Bergin explained to me."

73. However, it does appear that G. subsequently accepted that Dr. Kennedy recommended a secure placement but she does not accept this aspect of his clinical opinion.

Guardian *ad litem* report of Orla Ryan

74. It was ordered by the High Court on the 7th December, 2018 pursuant to s.26 of the Child Care Act 1991 (as amended) that Orla Ryan be appointed as guardian *ad litem* in the proceedings and be permitted to instruct a solicitor, or solicitor and counsel for that purpose.

75. Section 25 of the Act as amended provides:-

> "If in any proceedings… the child to whom the proceedings relate is not already a party, the court may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so, order that the child be joined as a party to, or shall have such of the rights of a party as may be specified by the court in either the entirety of the proceedings or such issues in the proceedings as the court may direct. The making of any such order shall not require the intervention of a next friend in respect of the child."

76. Subsection 2 provides: -

> "Where the court makes an order under subsection (1) or a child is a party to the proceedings otherwise than by reason by such an order, the court may, if it thinks fit, appoint a solicitor to represent the child in the proceedings and give directions as to the performance of his duties (which may include, if necessary, directions in relation to the instruction of counsel)."

77. The guardian *ad litem* provided detailed and thoughtful reports to the High Court and same were available to the trial judge at the hearing. The guardian *ad litem* was initially appointed in the District Court on the 5th October, 2012 and was re-appointed in the District Court on the 23rd June, 2015. She was appointed in the High Court on the 7th November, 2018. Thus, she has ongoing knowledge of G.'s personal circumstances, behavioural and developmental issues for over six years.

78. It appears that when the issue of her personal safety was raised in light of her wish to cut off her genitals G. stated, "Well I don't like having male genitalia and I am quite disgusted by this." When asked by a member of staff if she was actively thinking about cutting off her male genitals she nodded and stated: "…yes the thought is still there. I should be able to have my genitals removed and whether I do it or someone else does it, they should be removed regardless." When concerns regarding her safety, particularly due to her wish to physically harm herself were expressed to G., she stated: "If I perform my own sex change operation I will need to weigh up my options. I need to weigh up the risks. Because I don't want to look weird or strange, as the skin from genitals is used to make a vagina."

79. G.'s reported long-term plan and ambition was to move to Los Angeles to work as a sex worker and in the adult porn film industry in order to achieve fame and to generate money to fund various plastic surgeries through this work. "I want to be a porn actress. You know I am proud of my body, apart from my genitalia."

80. The considered view of the guardian *ad litem* was "that the level of risk posed to G. by her active wish to self-harm cannot be managed outside a secure environment at this point in time. Therefore, it is recommended that G. continues to remain… with a view to transitioning to a specialist residential setting, where G. will be supported to comprehensively address her needs."

81. A subsequent report dated December 5th 2018 from the guardian *ad litem* concludes: -

> "based upon the information known to me in respect of [G.], and taking into consideration [G.'s] wishes and history of this family, it is my view that it is in the best interest of [G.] that she remain in special care for a further period of time. In the interim it will be critical that the Child and Family Agency fast-track all enquiries in respect of potential services which may be in a position to meet the complex needs of this teenager."

82. The court noted submissions on behalf of G., particularly the emphasis on Professor Harry Kennedy's assessment of the instrumental nature of the threats by G. to commit suicide. The judge states at page 12: -

> "While I note counsel's submissions in this regard, I also note that Professor Kennedy says that the claims to self-harm should not be dismissed and that any attempt at self-harm can accidentally lead to a completed suicide."

83. The court noted the clinical opinion of Dr. Butlin as of October 2018 that G. was at "a moderate to high risk of completing suicide." The court considered in detail the reasoning in the report and the basis for that assessment.

84. The judgment gave particular consideration to the views of G. that she did not pose a risk to herself or others and the court weighed the reasons put forward by G. for her expressions of suicidal ideation, namely to achieve an outcome of procuring gender reassignment. The court gave due weight to G.'s views however, concluding that the court could not "in light of all the clinical findings and in light of the views of the professionals as I've set out above, be the determining factor in this case." [page 13 of judgment]

85. The judge took into account the contrary views expressed to the court, including Mr. Pat Bergin of Oberstown, expressed in email correspondence dated 6th November 2018, and concluded that she found that G.'s behaviour posed a risk to her life, safety, development and/or welfare. On the evidence she felt constrained to "afford not a great deal of weight to the view however well founded it was that Mr. Bergin expressed", insofar as he took a stance that special care was not warranted in the case of G. to protect her life, health, safety, development and/or welfare.

86. The court then turned to evaluate whether the requirements of s.23H(1) (c) (i) of the Child Care Act had been met, namely that the provision of care for G. other than special care will not adequately address her behaviours and risks of harm and G.'s care requirements. It was urged on the court that the statutory threshold does not encompass a risk of harm by G. to others. It was contended on behalf of G. that nothing had changed in her circumstances since 2017 to warrant a special care order and that what was required was an alternative placement rather than special care and that no attempts had been made by the CFA to find such an alternative placement.

87. The court after reviewing the evidence concluded that it was satisfied that the requirements of the section had been met in light of the evidence:

> "The test is… whether or not a residential community placement can give G. the therapies and the extent of monitoring and supervision in light of what she presents with. …I am satisfied that on the requisite standard that the agency have satisfied the court that residential community care at this juncture is not suitable or adequate for G. And I should say that having regard to my findings that s.23H(1) (b) and (c) are met I am also satisfied that the requirements of s.23H(1) (g) and (h) are also satisfied."

88. With regard to the contention that the risk of harm to others was not a material factor, the court noted the arguments advanced by counsel on behalf of the guardian *ad litem* that diverting a child from violent tendencies, be it towards the child herself or others does achieve a welfare benefit for the child in question and the judge remarked: "I accept that submission and I take that also into account as to whether or not the requisite test has been met."

89. The court further concluded that the special care order proposed to be made was in the best interests of G. having regard to her complex mix of needs.

Appeal

90. G. appealed the determination of the court and the judge's conclusion that the threshold for the making of a special care order pursuant to s.23H of the Child Care Act 1991 had been met. Twelve grounds of appeal are identified. They include the following: -

> (a) That the making of the order failed to protect, defend and vindicate G.'s constitutional right to liberty.
>
> (b) That the judge in finding that G. posed a real and substantial risk to her own life, or was at risk of self-harm had failed to have sufficient regard of the fact that there was no record of G. ever having tried to commit suicide, or ever having tried to self-harm and that insofar as she had claimed to have wished to commit suicide and self-harm "those wishes were instrumental to achieve certain goals".
>
> (c) Insofar as the trial judge considered diverting G. from violent tendencies towards others would achieve a welfare benefit, the judge was in error taking into account an improper consideration and a factor which led to unlawful preventative detention.
>
> (d) G. had not posed a risk to others since the 1st May, 2018 when she perpetrated an assault for which she had served a period of imprisonment. She had not assaulted further since that date, or for twenty months before that date.
>
> (e) The judge failed to give sufficient weight to the views of Mr. Bergin, the director of Oberstown Children's Detention Campus, who considered that G. did not require special care, and the views of G. herself.
>
> (f) The judge failed to consider adequately whether there was an educational or therapeutic rationale for G.'s detention.
>
> (g) The judge failed to consider adequately that G. was not willing to engage in therapy whilst in special care, or at all, save with regard to her own priorities, notably gender reassignment.
>
> (h) The judge erred in considering the report of Dr. Harry Kennedy which was not intended for court use.
>
> (i) The judge erred in failing to have any, or any adequate, regard to the fact that Dr. Kennedy had declined to clarify whether he believed that G. should have special care.
>
> (j) The judge failed to have any, or any adequate, regard to the repeated wishes of G. not to be in special care.
>
> (k) The judge erred in finding that special care was in the best interests of G.

Approach of this court to the appeal

91. In the instant case it is noteworthy that the matter proceeded by way of affidavit before the High Court. The expert evidence before the court in the form of reports were by and large exhibits to affidavits grounding the application or opposing same. As was stated by McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210 at 217: -

> "… an appellant court should be slow to substitute its own inference of fact where such depends upon oral evidence of recollection of fact, and a different inference has been drawn by the trial judge. But in the drawing of inferences from circumstantial evidence, an appellate tribunal was in as good a position as the trial judge."

92. The principles set out in *Hay v O'Grady* [1992] 1 IR 210, at. 217 per McCarthy J. are less relevant where affidavit evidence is concerned; see *O'Donnell v Bank of Ireland* [2015] IESC 14 at para. 36 per Laffoy J. where, commenting on the applicability of the principles in *Hay v O'Grady*, *she* stated: -

> "… to a large extent the subsequent observations of McCarthy J. as to the role of this Court on an appeal, in reality, are

of no relevance, except, perhaps, that, by analogy to the statement that in the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge, in determining issues that arise on affidavit evidence alone, an appellate tribunal is similarly in as good a position as the trial judge."

93. In the case of *McDonagh v Sunday Newspapers* [2017] IESC 46 Charleton J. stated: -

> "…the role of an appellate court in reassessing what in the court of trial was affidavit or documentary evidence is easier than when witnesses were involved, but even where that is the case, the party claiming that the trial judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong. In *Ryanair v Billigfluege* [2015] IESC 11, it was held at paragraph 6 that: -
>
> 'An appellant arguing for the reversal of any judgment founded on a rigorous analysis of affidavit evidence as to fact bears a heavy burden in seeking to demonstrate that a trial judge has fallen into such error that the decision made is untenable. Separately, on an appeal, errors of law are either demonstrated or not as being present in a High Court judgment.'
>
> In such cases, an appellate court will usually have the benefit of an oral or written judgment setting out what facts have been determined as correct by the trial judge and why."

94. As is pointed out in *Delany and McGrath on Civil Procedure*, 4th Edn. at 23-228:-

> "The question of whether a different approach should be taken where disputed findings of fact are based entirely on affidavit evidence and the exhibits thereto was considered by Charleton J. in *Ryanair Limited v. Billigfluege.de GmbH* [2015] I.E.S.C. 11. He expressed the view that: -
>
> 'Principles based on the superior ability of a trial judge to decide, as between live witnesses, who is to be preferred in terms of credibility or of recollection cannot apply with the same force where facts are merely deposed to on affidavit.'"

95. *Delany and McGrath* (opus cit.) at 23 – 229 correctly analyse the ratio of Charleton J.'s judgment thus: -

> "Charleton J. reiterated that any party appealing a decision bears the burden of demonstrating that the trial judge had been incorrect in relation to the findings of fact which underpinned the decision. He concluded that where an appeal is taken against essential findings of fact drawn from affidavit evidence, 'the appellant must establish an error in those findings that is such as to render the decision untenable', or it may need to be established on appeal that the decision reached cannot be upheld because an essential conflict could not be resolved on the material which was before the trial judge."

96. Since the hearing in the High Court was on affidavit and no application was made to cross-examine witnesses, nor was any witness called, this court is in as good a position to draw inferences from the facts as was the High Court. All of the evidence before the High Court was in the form of the relevant documentation including the affidavits and the documents exhibited to those affidavits, particularly the large volume of medical reports. Clear submissions were made at the hearing to the effect that certain evidence, and in particular the clinical letter from Dr. Harry Kennedy, ought not to be taken to be a court report. The trial judge, noting the objections nevertheless considered the clinical letter and had regard to its terms. It's noteworthy that all of the other parties to the appeal opposed the appeal and seek that the order of the High Court be upheld in the interests of the welfare of G.

Submissions on behalf of G. in the appeal

97. In arguments to this court it was again submitted that the threshold for making a special care order as specified in s.23(C) and 23(H) of the Child Care Act 1991, as amended, had not been met in this case. Counsel relied on the jurisprudence pre-dating the coming into operation of Part IVA of the 1991 Act on the 31st December, 2017, particularly the decision of the Supreme Court in *D.G. v. Eastern Health Board* [1997] 3 I.R. 511 and the High Court decision of MacMenamin J. in *S.S. v. Health Service Executive* 1 I.R. 594. It was contended that the jurisprudence on the inherent jurisdiction of the court to detain a minor was of relevance as was the relevant jurisprudence from the European Court of Human Rights. It was asserted that in the context of the European Convention on Human Rights the State's margin of appreciation could not be construed as being wide. It was contended that applying the jurisprudence to the facts of this case that there was no "clear and convincing" evidence of a "real and substantial" risk to the life of G. within the meaning of s.23H(1)(b) of the 1991 Act. Particular reliance was placed in this regard on the clinical letter of Dr. Harry Kennedy.

98. It was further contended that there was no "clear clinical view" that G. required special care. It was submitted that G. did not pose a real and substantial risk to others. Further, it was argued that the High Court judge took into account an improper consideration in finding that diverting G. from violent tendencies towards others achieved a welfare benefit for the purposes of s.23H. It was argued that if this is a permissible consideration under the statutory code then any child with a record of posing a risk to others could potentially be detained in special care to address his or her violent tendency towards others. In this regard, the statutory provisions, particularly s.23H(1)(b), was contrasted with the provisions of s.25 of the Children Act (England & Wales) 1989 which expressly references the likelihood that a child would injure "*himself or other persons*" as a basis for detention. It is contented that special care in the instant case amounted to preventative detention of G. and as such, violated the guarantees in Article 40.4 of the Constitution. It was argued that in the absence of clear and compelling evidence of risk to herself, and of the need for special care or of therapeutic benefit, the special care order ought not to have been made in the High Court.

Child & Family Agency

99. In their response the Child and Family Agency set out in detail the salient facts and relevant authorities relied on to support their contention that the High Court was correct to find that the threshold for making the special care order had been met by the stark facts in the case. It was argued that in granting the order for special care the court was not disregarding G.'s right to liberty, but was rather engaging in a carefully calibrated exercise of balancing G.'s right to liberty with her other constitutionally protected countervailing rights. It was contended that this was a wholly separate exercise from the question of preventative detention and that G. was not being detained to prevent her from carrying out criminal activity, but rather to achieve the objectives specified in s.23H(1)(g) and 23H(1)(h) of the Act.

G.'s Mother

100. Counsel on behalf of G.'s mother addressed the court and submitted that the High Court judge was correct in her findings at the time of the application; the criteria pursuant to s.23H of the Child Care Act 1991 had been met and that there was no error in law or in fact on the part of the judge.

G.'s Guardian ad litem

101. In a nuanced submission counsel on behalf of the guardian *ad litem* outlined the role of the guardian in this appeal and the importance of the views of the child were emphasised. The submission outlined the threshold required to be reached by the High Court before it could make a determination that an order was warranted pursuant to s.23H of the 1991 Act. It is acknowledged that the order made on the evidence before the High Court was lawful and the guardian *ad litem* believed same to be in G.'s best interests.

Inquisitorial process

102. Given the nature of the legislation and the Act as a remedial social statute it is to be interpreted purposively as was observed by McGuinness J. in Western Health Board v. K.M. [2002] 2 I.R. 493 at 510 where she stated:-

> "There can be no doubt that it is a remedial social statute, and was seen to be such by all who were affected by its provisions… I would therefore accept the submission of the respondent that the construction of the Act of 1991 as a whole should be approached in a purposive manner and that the Act as stated by Walsh J. should be construed as widely and liberally as fairly can be done."

103. With regard to the conduct of proceedings pursuant to the Act, such proceedings are *sui generis*, and as has been stated by O'Malley J. in *K.A. v. Health Service Executive* [2012] 1 I.R. 794 which concerned an application for interim care orders: -

> "I accept that child care cases are not entirely analogous to other litigation; that the judge's role is more inquisitorial than usual and there is a need to preserve a degree of flexibility in order to deal with exceptional circumstances. However, the normal rules are that courts act on evidence and that the parties applying for an order must establish grounds for the making of the order."

That is a correct statement of principle which applies to the construction of Part IVA of the Act.

The Law

Was the threshold for making a special care order pursuant to s.23H met?

104. As Section 23C provides, special care involves detention of the child. It is convenient to repeat the subsection here:

> "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 …"

This statutory provision signals that the intervention proposed must be shown by the CFA to be suitable and likely to be effective and required to address the risk of harm to the child which is posed by her own behaviour. The uncontested evidence is that G. is not suitable for detention under the Mental Health Act, 2001.

105. The first issue to be determined is whether the High Court was correct as a matter of law and fact in determining that the statutory threshold for making a special care order had been made out. The first limb of s.23H requires a determination that G.'s behaviour constitutes a real and substantial risk to her life, health, safety, development or welfare. The words "a real and substantial risk" in s.23H imposes a burden on the CFA to demonstrate to the satisfaction of the High Court by probative evidence the existence of a real risk on substantial grounds arising from her own behaviour to G.'s life, health, safety, development or welfare.

106. The second limb – s.23H (2) requires the court to be satisfied that a special care order is in the best interests of G.

Interpretative approach

107. Assistance can be derived from earlier jurisprudence of the Supreme Court and High Court which considered the limits on the exercise of the inherent jurisdiction of the courts to make detention orders placing a minor in secure care in the interests of their education and welfare. Prior to the introduction of the legislative framework, the pre Part IVA jurisprudence developed a Constitution and ECHR compliant approach which informs the exercise of construing the evidential burden imposed on CFA by s.23H(1). That case law is of assistance in evaluating the extent to which in its exercise of the powers vested in CFA it has acted in a manner which protects and vindicates the constitutional rights of G. implicitly derived from articles 40 and 42.5 of the Constitution and explicitly arising pursuant to article 42A.

108. In *D.G. v. Eastern Health Board* [1997] 3 I.R. 511 Hamilton C.J. described the exercise to be engaged in by the court in balancing the competing constitutional rights of the minor, particularly the conflict between the right to liberty guaranteed to each citizen under the Constitution on the one hand and the minor's welfare and educational needs on the other, when the jurisdiction of the High Court to order the minor's detention is invoked as follows at p. 523:-

> "In this case, the constitutional rights of the applicant involved are -
>
> 1. that set forth in Article 40 of the Constitution, that no person shall be deprived of his liberty save in accordance

with law, and

2. the unenumerated personal rights as set forth by O'Higgins C.J. in the course of his judgment in *G. v. An Bord Uchtála* [1980] I.R. 32, where he stated at p.56: -

> 'Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child, (and others which I have not enumerated) must equally be protected and vindicated by the State …'"

In weighing the competing constitutional rights of the minor to achieve a calibrated constitutional balance Hamilton C.J., concluded at p. 524 that the trial judge in that case had found: -

> "… The welfare of the applicant took precedence over the right to liberty of the applicant. There is ample evidence to support his finding in that regard."

109. In *D.G. v. Eastern Health Board, ante*., Hamilton C.J. in his majority judgment also emphasised the exceptional nature of a detention order for the provision of therapeutic welfare intervention at p. 524 where he stated that the jurisdiction was one:-

> "… which should be exercised only in extreme and rare occasions when the court is satisfied that it is required, for a short period in the interests of the welfare of the child and there is, at the time, no other suitable facility ".

Considering the exercise of inherent jurisdiction and its impact on constitutionally guaranteed rights of the minor, Hamilton C.J., earlier in the said judgment stated at p. 522: -

> "The jurisdiction of the High Court is such jurisdiction as:
>
> (1) is conferred by the Constitution,
>
> (2) may be imposed by statute, and
>
> (3) is necessary to fulfil the obligations imposed on it to defend and vindicate the personal rights of the citizen."

He continued: -

> "Article 40.3.1provides that: -
>
> 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'"

In the course of his judgment in *The People v. Shaw* [1982] I.R. 1, Kenny J. stated at p. 62 in relation to article 40, s.3 that: -

> "The obligation to implement this guarantee is imposed not on the Oireachtas only but on each branch of the State which exercises the powers of legislating, executing and giving judgment on these laws …"
>
> It is part of the courts' function to vindicate and defend the rights guaranteed by Article 40, section 3.
>
> If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights."

He stated at p. 522: -

> "As stated by Ó Dálaigh C.J. in the course of his judgment in *The State (Quinn) v. Ryan* [1965] I.R. 70, at p. 122 of the report: -
>
> 'It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizens that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that *the* courts' powers in this regard are as ample as the defence of the Constitution requires.'"

110. The Supreme Court decision in *D.G*. was the subject of a subsequent determination by the ECHR in *D.G. v Ireland* (2002) 35 E.H.R.R. 1153, where the European Court of Human Rights determined that the detention ordered violated the minor's rights pursuant to article 5 of the Convention by reason: -

> (a) that it was exercised in a penal institution and,
>
> (b) did not constitute educational supervision.

Since that decision, it is generally accepted that the rationale of any detention order must be educational or therapeutic and with no punitive element in order to vindicate the convention rights of the minor.

111. Of particular assistance in devising a robust approach to the determination of the issue of whether the statutory threshold has been reached and the general safeguards that must be attendant on the making of a special care order is the decision of Mr. Justice MacMenamin in *S.S. v Health Service Executive* and others [2008] 1 I.R. 594.

112. The facts in S.S. are of some relevance to the instant case. The minor was aged 15 years at the date of the hearing. He had been in and out of care since the age of six. The expert evidence indicated that he had a serious personality disorder. He had a history of criminal activity and in the past had absconded from non-secured institutions. The guardian *ad litem* and the boy's mother argued that in his best interests it was necessary that further care and attention orders providing for his detention be made on a long-term basis so as to ensure that he would receive psychological, psychiatric and therapeutic treatment and care until he attained

the age of 18 years. They contended that an aspect of the duty owed to the boy by the state actors both under the Constitution and at common law was to uphold and vindicate his personal rights and to provide for his religious, moral, intellectual, physical and social education.

113. The HSE acknowledged its continuing statutory duty to the minor pursuant to the Child Care Act 1991 as well as the Constitution and the European Convention on Human Rights. However, in response to the claim that it was obliged to provide a long-term place of secure care for the minor, the HSE objected that there had been a failure to specify the nature of any such regime, its location, the period of such detention or the exceptional circumstances required to be demonstrated as would be sufficient to invoke the inherent jurisdiction of the High Court for the making of such an order. The primary focus of MacMenamin J.'s judgment centred on whether the inherent jurisdiction of the court extended to making an order for long-term detention in secure care of a minor (an issue which does not arise in the instant case) and, if so, what procedural safeguards should be put in place for the protection of the rights of such a minor, their parents and the needs of the family unit in question in light of the Constitution and European Convention on Human Rights Act, 2003.

114. At pp.610-612 MacMenamin J. considers the balance of rights and rationale in the approach adopted in exercising the inherent jurisdiction of the High Court:

> "The following general observations may be made. First, the powers of the court (subject to other provisions of the Constitution) are as ample as the defence of rights under the Constitution requires. ….
>
> Second, the rationale of any detention order must be educational or therapeutic rather than punitive in order to vindicate the constitutional rights of the minor (see D.G. v. Ireland (2002) 35 E.H.R.R. 1153).
>
> Third, the inherent jurisdiction to detain a minor is an exceptional one which may be invoked only in circumstances of urgency where it is established that the minor is experiencing or in imminent likelihood that he or she will experience a crisis in their welfare that requires the intervention of this court to order detention, and only to safeguard life, prevent a serious risk to life or other serious threat to the care, protection and welfare of a minor.
>
> Fourth, it is impossible to delimit the foreseeable circumstances in which may be proper for an applicant to seek to invoke the inherent jurisdiction of the court because the circumstances of this distinct category of case are infinitely variable.
>
> Fifth, common examples of where this jurisdiction has been invoked include instances of children attempting suicide, engaging in self-harm and indulging in continuous and highly dangerous behaviour or conduct with serious risks to their life or welfare. In a significant number of cases these children have provisional diagnoses that include conduct and personality disorders that are likely to develop a chronic aspect. Sometimes their life or welfare is placed at risk by others where the criminal law must be brought into consideration.
>
> Sixth, the inherent jurisdiction of the High Court does not refer to its general jurisdiction. The special jurisdiction is a part of, or an aspect of, the general jurisdiction of the court.....
>
> Seventh, the source of the inherent jurisdiction of the High Court……..
>
> Eighth, the inherent jurisdiction is a flexible process…..
>
> Finally, but vitally in this context, such power may be exercised only upon the basis of regular review of the balance of rights as an integral part of the procedure itself. These rights must include an adequate opportunity for the views of the minor to be made known to the court in the fulfilment of his or her 'natural and imprescriptible rights'".

115. I would respectfully adopt the approach outlined in the above decisions and find the principles of assistance in the construction of s.23H and the protections necessary for its operation, particularly 23H(1)(b), (g) and (h) of the Act.

Behaviour

116. In the context of 23H(1)(b) it is necessary to consider the nature and extent of the evidence that was before the High Court with regard to the recent behaviour of G. in support of a contention that same posed a real and substantial risk of harm to her life, health, safety, development or welfare within the meaning of the sub-section. The CFA put before the High Court in painstaking detail comprehensive expert assessments and reports addressing in particular the risks of self-harm and suicidality in regard to G. briefly put the said reports included the following: -

> (a) The clinical letter of Professor Harry Kennedy dated the 9th August, 2018 which expressed the opinion that the threats of suicide were instrumental and designed to achieve another purpose. The same were aimed at manipulating clinicians towards complying with G.'s wishes to be referred for gender reassignment; that report also noted "the prominence of callous unemotional traits and an egocentric, egosyntonic attitude towards violence towards others";
>
> (b) The said report observed the claims by G. to have self-harmed by cutting were not supported by any scarring evidence. However, the report cautioned that her threat should not be dismissed and that any attempt at self-harm could lead to suicide;
>
> (c) A meeting of professionals involved in the care of G. took place on the 31st July, 2018 where, *inter alia*, the EPIC advocate, Fiona Murray, observed that G.'s "presentation appears to have taken an escalation". Furthermore, concern was expressed around the comments of G. regarding her threats to remove her own penis;
>
> (d) In June 2018 following her initial detention in Oberstown and pending a further sentencing hearing scheduled for July 2018, a risk assessment was carried out by Ben Butlin where G. was noted to have self-reported an overall risk of suicide of 5 out of 5 and where she described lack of access to the appropriate means of suicide as being her principal preventative factor;
>
> (e) SEN no AG 170 dated the 1st May, 2018 noted G.'s statements to the Gardaí after the assault perpetrated on the social care worker "the victim's screams were music to [G.'s] ears";
>
> (f) The Garda Statement of May 2018 recorded G. had created a list of staff she intended to assault;

(g) The Report of Dr Raji 4th December 2018 noted that "G.. appeared animated and pleased with herself in recounting the event and circumstances surrounding the assault and reports feeling cheated from (*sic* not) knowing the bodily harm she had caused" (emphasis added);

(h) The social work and guardian *ad litem* reports for the second half of 2018 are consistent in their view that G. exhibited little or no empathy towards her victims or insights into her violence and its impact.

Whether the trial judge erred in determining that the evidence established that G.'s behaviour posed a real and substantial risk to her own life by self-harm/suicide

117. It is also noteworthy that during that assessment she was evaluated as exhibiting a high degree of agitation to complete the act of suicide – 5 out of 5 – and identified a preferred date for committing the act of suicide as being the date of her discharge from Oberstown, which date was the 7th November, 2018. She entered special care on that precise date pursuant to the initial interim special care order.

118. In June 2018 G. reported thinking about suicide two to three times per day.

119. By October, 2018, when Dr. Ben Butlin carried out an updated risk assessment with a focus on suicidality, it was noted that there had been historical suicide attempts involving overdoses and hanging with a shower ligature.

120. As of early October, 2018 when Dr. Butlin carried out his updated review, suicidal ideation continued to be experienced daily and G. self-reported an unsuccessful plan to complete suicide by jumping in front of traffic whilst on mobilities and the assessment was that the overall risk of suicide continued to remain at the level of 5 out of 5.

121. Separately, the outcome of the CAMHS assessment on suicidality indicated that G. was a moderate to high risk of completing suicide with a lack of a satisfactory means of completing the act of suicide being the main protective factor.

122. Having due regard to the totality of the evidence before the court, including the clinical letter of Professor Harry Kennedy dated the 9th August, 2018, it is clear that there was significant current evidence of a marked risk of self-harm or suicide demonstrated to the trial judge. The expert evidence was consistent. The expert evidence points inexorably towards a profound lack of maturation giving rise to behaviour which exposes her to severe risk particularly of self-harm and suicide. As the reports note, many of the ameliorating elements one might have expected to find were absent, such as friendship or relationships with third parties, family bonds and the fact that G. did not have any relatives with whom she could relate in this jurisdiction.

Whether the trial judge erred in concluding that therapeutic objectives which included diverting G. from violent tendencies towards others achieved a relevant welfare benefit within the meaning of s.23H

123. It was contended on behalf of G. that acts of violence including physical attacks and sexual attacks perpetrated on females could not come within the ambit of s.23H(1) of the Child Care Act 1991 since they concern risk to another person. However, I very respectfully disagree with that proposition. The behaviour of physically attacking, assaulting, including sexually assaulting another human being, is behaviour which is demonstrably harmful to a young perpetrator such as G. as well as harmful to her victim. Such behaviour gives rise to a real and substantial risk of harm to the development, welfare, safety, health and indeed, depending on the circumstances, potentially even to the life of the assailant G. To live a meaningful life requires socialisation to some degree. That random, gratuitous violent conduct injures others does not at all dilute its capacity to have a profoundly deleterious impact on the development, safety and welfare of a young perpetrator.

124. It is clear from the medical reports and psychological assessments that G.'s conduct in being physically and sexually violent towards staff and other housemates, particularly females, is an expression of the profound psychological trauma and injury suffered as a result of the sadomasochistic behaviour experienced by her within her family during her early childhood and up to her ninth birthday. It appears clear that she suffers "excruciating levels of anxiety" and to date finds it difficult if not well-nigh impossible to engage in a process of self-understanding that requires confronting, with psychological support, the aspect that G. had colluded with her father under his coercion in acts of abuse perpetrated upon her own mother.

125. Section 23 must be accorded a purposive interpretation. Where some of the behaviour of a young person finds its expression in unprovoked, random and sometimes pre planned and pre meditated acts of violence towards others, then the care and protection to which G. is entitled under the Constitution for the vindication or her welfare may in a suitable case require access to a special care order for the purpose of providing therapeutic intervention to address and adjust such behaviour where the expert view is, as in this case, that such intervention is necessary to address the risk of self-harm and in her best interests.

The Constitution

126. It is useful in this context to pause to consider the import of the constitutional provisions regarding the best interest of a child.

127. Article 42A.1 imposes an explicit obligation on the State to recognise the "natural and imprescriptible" rights of all children, and, in so far as practicable, to protect and vindicate those rights. It operates as an explicit acknowledgement that each child has vested in him or her "natural and imprescriptible" rights to which regard must be had when any court enters upon an exercise of making a determination concerning a child which falls within the ambit of any of the subsections of article 42A. In the case of a special care order the vindication of the child's rights under article 42A necessitate the court engaging in a balancing exercise as between the natural and imprescriptible of the child whilst weighing in the balance how best to protect and vindicate those rights and at the same time accommodate the obligation to ascertain and give due weight to the child's views by having appropriate regard to those views and the wishes of the child in question.

128. Article 42A of the Constitution recognises "the natural and imprescriptible rights of all children." Pursuant to Article 42A.2.1 it is declared that "exceptional cases" where there has been a failure of parents "in their duty towards their children" to the extent that their "safety and welfare… is likely to be prejudicially affected", the State "as guardian of the common good shall, by proportionate means provided by law, endeavour to supply the place of the parents". This is always with "due regard to" the rights of the child. It is expressly specified in Article 42A.4.1 that where the State brings proceedings "for the purpose of preventing the safety or welfare of the child from being prejudicially affected" then the "resolution of all proceedings" shall be predicated upon the "best interests of the child shall be the paramount consideration."

129. That the special care order is directed to assisting in resolving G.'s profound problems around control and the abuse of power

and control achieved through manipulation of others and at times violence including sexual violence is, I am satisfied, an intervention necessitated pre-eminently for the purposes of addressing aspects of G's behaviour which in and of themselves pose a real and substantial risk of harm to G.'s life, health, safety, development and/or welfare. Merely because violence, including sexual violence, perpetrates great injury upon others does not detract from the fact that, especially in the case of a young person such as G., such behaviour invariably poses a real and substantial risk of harm to her own life, health, safety, development or welfare.

130. I am satisfied that no inference warrants being drawn from the fact that the language differs from s.25(1)(b) of the Children Act (UK) 1989 which makes reference to a child who is. "…likely to injure himself or other persons". It is a wholly different statutory provision which has been operative in the jurisdiction of England and Wales for approximately thirty years. It is a measure which has not been construed in the context of the hinterland of constitutional rights and protections which obtain in this jurisdiction.

Development

131. "Development", as referenced in the Child Care Act is particularly specific to childhood and adolescence – being the period in one's life when character is built and the individual is empowered to make wiser decisions in their own interests.

132. A key distinguishing factor in the case of legislation directed towards the welfare of minors is the consideration of development. This flows from the reality that in any young person the development pathway is evolving, and in particular emotional maturity has not yet crystallised. In the case of G., very significant disturbances have been identified in her developmental pathway. This causes great suffering and isolation to G., including very profound anxiety as was identified in the reports. In the case of a young person "development" connotes a capacity to evolve and change with appropriate interventions. Professor Harry Kennedy advises in his clinical letter that various forms of psychological help should be offered at intervals in the secure care placement. Whilst he observes that at the time of his meeting with G. she was unable or unwilling to engage in any therapeutic relationship in which the goals and outcomes were not under her complete control, nor was she then able to enter into the pre-contemplation conversations that could initiate a cycle of change. However, he did express the view that, "it is possible that this will change substantially as adolescence progresses."

133. The Child and Adolescent psychotherapist Ms. Allan in the course of her meeting with G. in 2017 observed, "We all have a childhood and it is part of who we are." It is instructive that G. found this statement problematic, responding by enquiring whether the psychologist was from the Gardaí.

134. Late teens represents a time of significant personal development including emotional development and where the individual adolescent is amenable to change and character formation. The expert reports suggest that G. has developed a series of exceptionally destructive reflexes which she appears to deploy as a coping mechanism as a result of the profound emotional trauma experienced in her early childhood and up to her ninth birthday.

135. It is clear from the body of expert reports that G.'s impetuosity severely hampers her ability to make rational and wise decisions in her own best interests. Her behaviour, which appears to be primarily directed towards delivering her immediate or short-term desires, demonstrate a significant and harmful lack of self-knowledge and inability to engage in self-control. The extreme degree of her emotional lability coupled with her lack of insight or understanding of the causes in her past which precluded her from entering into or sustaining normal functional interpersonal relations with her peers and adults leave her at very significant risk of harm from herself and/or from others.

136. Regard must be had to the fact that G. will attain the age of majority in December 2019. There remains accordingly little enough time within which the CFA can discharge its statutory obligation towards G. to assist her towards a process of self-directed realisation and away from what was characterised in one report as "a siege mentality… on the verge of an offensive attack at all times".

137. In a few months from now her time within the care system will come to an end when she attains the age of majority. It is therefore all the more pressing, given the degree of risk her harmful behaviour is precipitating for her, that the very best professional intervention was required to be provided for her upon her release from Oberstown so that in the relatively short time remaining for her in care the best use is made of the facilities and expertise that will enable her to gain insights into her circumstances so that she be empowered to live her best life and achieve personal fulfilment as a functioning member of society and break free from the vicious circle of anomie and total social isolation which afflict and threaten to overwhelm her.

138. Balancing all those considerations, and having due regard to the fact that G. will attain the age of majority in December 2019, the provision of special care was demonstrably necessitated in November and December, 2018 in the best interest of G. and offered the best prospect of her obtaining the necessary therapeutic interventions to enable her development to be adjusted so that she can develop the capacity to participate in society and live her life to the fullest extent possible.

139. In the context of therapeutic intervention, the trial judge found on the evidence that diverting G. from her violent tendencies towards others, including sexual assaults on females, is demonstrably necessarily in her best interests, and offers a further and distinct reason for a special care order being required in her best interests for the purpose of protecting her life, health, safety, development or welfare, and for the purposes of adjusting her behaviour to obviate or abate the real and substantial risks of harm to herself that such conduct poses; including harm to her life, health, development, safety and/or welfare. In my view, she was correct in this finding.

Whether the court failed to protect and vindicate G.'s constitutional right to liberty and whether the special care order proposed amounted to preventative detention

140. The operation of a special care order necessarily involves a deprivation of liberty. The question is whether it can be justified in light of the Constitutional, ECHR and legislative rights and protections which the individual child concerned enjoys. A significant factor in this case is that there was no professional expert evidence put before the High Court to contradict the evidence of the CFA experts that the provision of special care was in G.'s best interests.

Article 37 of the United Nations Convention on the Rights of the Child ("UNCRC") provides: -

> "States Parties shall ensure that:
>
> […]

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

141. Article 37 stipulates that it applies to "every child" deprived of liberty and makes no distinction between the different contexts of deprivation of liberty. While it is not part of our domestic law, Ireland ratified the UNCRC without reservation on the 28th September, 1992 and the European Court of Human Rights has referred to Article 37 of the UNCRC in its jurisprudence examining potential violations of Article 5 of the ECHR, for example in *Popov v. France* (39472/07 and 39474/07) in the context of migrant children who had been deprived of their liberty. It is accordingly appropriate to have regard to its provisions when considering a measure which involves the detention of a child pursuant to the Child Care Act, 1991, as amended.

142. Article 5 ECHR commences with the following words: -

"Everyone has the right to liberty and security of person […]"

143. The European Court of Human Rights has considered the concept of deprivation of liberty in the context of Article 5 of the Convention in a number of cases including, notably, *Storck v Germany* [2005] 43 EHRR 6, paras. 74, 89, and *Stanev v Bulgaria* [2012] 55 EHRR 22, paras. 117, 120. The essential characteristics of a deprivation of liberty within Article 5 appear from the jurisprudence to encompass three components: -

(i) the objective component of confinement in a restricted place for a non-negligible period of time;

(ii) the subjective component of lack of valid consent; and

(iii) the attribution of responsibility to the state.

144. S.23H must be construed with due regard to the jurisprudence on Article 5 of the ECHR. The purpose of Article 5 is to ensure that an individual is not deprived of her liberty without proper safeguards, safeguards which will ensure that the legal justifications for the constraints which they are under are made out by the CFA. The basic rule of statutory construction is that it is deemed to be the legislature's intention that the enactment will be construed in accordance with the general guides to legislative intention laid down by law, and where these conflict, the problem shall be resolved by weighing and balancing the interpretive factors in question. As stated already, the presumption is that the Oireachtas intended to provide a remedy for a particular mischief by virtue of the legislation and accordingly a purposive construction is predicated.

145. It is significant that the legislature has laid down the upper time limit of a special care order as being three months; Section 23H (2) provides: -

"A special care order shall specify the period for which it has effect and that period shall not exceed 3 months from the day on which that order is made unless that period is extended under section 23J…"

A further robust safeguard it to be found in the review provision mandated by s.23I: -

"(1) The High Court shall carry out a review referred to in subsection (4) in each 4 week period for which a special care order has effect and the High Court shall, when making the special care order, or extending it pursuant to an application under section 23J, specify the date or dates for such review."

…..

"(4) The High Court shall, when carrying out a review under this section, consider whether the child continues to require special care to adequately address his or her behaviour, the risk of harm to his or her life, health, safety, development or welfare posed by that behaviour and his or her care requirements and shall have regard to an assessment made in accordance with section 23ND(4).

(5) The High Court may vary a special care order pursuant to a review under this section and may make such other provision and give directions as it, having regard to all the circumstances of the child, considers necessary and in the best interests of the child."

146. The authorities sought to be relied on emanate from the criminal justice sphere and, in my view, are distinguishable. There is no reasonable basis for asserting, in light of the corpus of independent professional expert evidence put before the High Court that a primary or dominant purpose underpinning the application was achieving the preventative detention of G. All criminal offences have been disposed of before the District Courts. It is well established in the jurisprudence of penology that preventative detention as an element of sentencing above and beyond what is appropriate to the particular offences or offences having due regard to the personal circumstances of the offender is not permissible. Dunne J. delivering the judgment of the Supreme Court in *DPP v Daniels* [2014] IESC 64 stated: "In order to reach the conclusion that a sentence included an element of preventative detention, it would be necessary to show that no court acting properly could have imposed the sentence."

147. I find the latter judicial observation of assistance, by analogy, in the instant case. There was a significant body of expert professional independent evidence before the High Court to support a finding that the totality of the behaviour of G. posed a real and substantial risk to her own life, health, safety, development or welfare such that special care was warranted in her best interests. The absence of any expert evidence before the High Court to support a proposition that making a special care order was not in G.'s best interests fatally undermines the proposition that the order could be characterised, on the evidence, as preventative detention.

The appellant has failed to establish that no court acting properly could have made the special care order on the 7th December 2018 based on the evidence which was before the trial judge.

148. Further, the making of a special care order encompasses detailed procedural safeguards and its continued operation requires ongoing independent judicial scrutiny. This affords the necessary degree of safeguards and periodic, independent checks envisaged by the provisions of Article 5 of the European Convention and the Constitution.

149. It is clear from the manner in which the statutory regime is framed, particularly s.23H(2) that a special care order is temporary in nature and in all events shall not exceed three months from the day in which that order is made unless that period is extended pursuant to s. 23J. The CFA has indicated that the case continues to appear on a rolling basis in the High Court list and is reviewed every couple of weeks. However, before making a special care order the court must give careful consideration to the proposed regime and the evidence available regarding the various restrictions that will be attendant on the child's life for its duration. The court must be satisfied that, on the evidence, that the special care order is both necessary and proportionate. In order to be proportionate, the regime proposed must be the least restrictive compatible with the vindication of the life, health, safety, development or welfare of the child in question.

150. The trial judge was correct in her conclusion that the making of a special care order pursuant to s.23H was warranted on the evidence that was before the court as to the nature and gravity of the risk of harm which G.'s own behaviour posed to her safety and welfare. The said behaviour demonstrated clear evidence of the need for high level intervention, which could only be delivered within the framework of a special care order. There was no basis for a contention that the order could or did amount to preventive detention. When the risks identified on substantial grounds and based on expert evidence extend to the life itself of a young person, whether based on suicidality or otherwise, the vindication of her rights warrants or justifies limited interference with the child's right to liberty on welfare grounds and for therapeutic purposes. The measure must be temporary and finite in duration. It must be subject to ongoing independent judicial review on a regular basis.

151. The making of a special care order must meet the standard of proportionality, and it is incumbent on the CFA when seeking such an order to set out and identify unambiguously the operative grounds on which the order is being sought. It is clear on the basis of the available evidence that the agency did intervene with adequate prior knowledge of the case and a comprehensive and compendious *corpus* of expert professional and medical reports, attendances, suicide risk assessments and intervention plans were exhibited and available to all parties to the proceedings. The expert evidence was not challenged before the High Court by G. or on her behalf. No expert suggested that a special care order was not in G.'s best interests.

152. Of note in this case, evidence of which was available to the High Court, was the depth of the investigation undertaken by the CFA prior to bringing the application for a special care order. All of the evidence and views of the witnesses for and against the making of the order was laid before the court. The statutory regime in Part IVA of the Child Care Act,1991, as amended, enjoys the presumption of constitutionality. In circumstances where the evidence shows that a comprehensive sequence of eight separate steps were met by the Child and Family Agency prior to establishing the basis for the making of such an order the statutory threshold was met and the special care order was shown to be in G.'s best interests.

153. In circumstances where the High Court correctly operated the statutory regime, there was clear and compelling evidence before the judge that the CFA in seeking an order pursuant to s.23H on the facts of the instant case were doing so in a proactive, interventionist child care system directed towards addressing behaviour of G., which posed a real risk on substantial grounds of harm to her life and welfare, development, safety and health; same was consistent with the provisions of the European Convention on Human Rights in light of the State's margin of appreciation, and in light of the jurisprudence. The Convention is not directly applicable as part of the law of the State and may only be relied upon in the circumstances specified in the European Convention on Human Rights Act 2003. The jurisprudence is of assistance however in assessing the Convention compliance of Part IVA of the Act.

154. G's detention did not amount to a deprivation of liberty so as to engage Article 5 of the European Convention on Human Rights and Fundamental Freedoms. Further, the order is compatible with the jurisprudence of Article 5 of the ECHR.

Whether sufficient weight was given by the high court to the views, including G.'s own views and those of the Director of Oberstown Detention Centre that the making of the order was not required in the circumstances of this case.

(i) ***Views of the director of Oberstown***

155. The High Court did have regard to the views of the director of Oberstown who considered that a special care order was not warranted in the case of G. The trial judge carefully balanced that view, conveyed by an email, against the expert psychological, medical and psychiatric, clinical and professional opinions and the detailed reports that were put before her in evidence and were available to this court at appeal. I am satisfied on balance that the trial judge was entitled to reach a conclusion that not a great deal of weight ought to be attached to the director's views in that regard. He appears to have been to an extent mistaken in his understanding of the views of Professor Harry Kennedy. He does not appear to have carried out a comprehensive psychological assessment of G. such as could be confidently relied upon by the court or indeed, could have been relied upon by himself as a basis to form an informed, sound and resilient opinion at the time regarding the nature and extent of the substantial risks of harm which G.'s own behaviour posed for her life, safety, development and welfare.

(ii) ***The views of G.***

156. This court has regard to the views of G., as did the High Court. Those views are important. There are detailed letters dated the 9th November, 2018, the 28th of November, 2018 and the 29th of November, 2018. That correspondence sets out very clearly G.'s views and wishes. It provides helpful insights into her personal priorities especially with regard to progressing the gender reassignment process. It supports the expert views to an extent, particularly Professor Harry Kennedy, as to the methodology G. habitually deploys of instrumentality; saying and doing whatever she considers will most likely achieve her current objective. However, the views of G., important as they are, cannot alone be outcome determinative.

157. Section 23H offers an exceptional intervention mechanism intended to operate where all other avenues of intervention have not succeeded and where the eight-fold test set out in the section has been met. The trigger is personal behaviour which poses a real and substantial risk of harm to the young person in question. Whilst the young person may form an intention through lack of insight, lack of understanding or for any other reason not to engage with, or co-operate in the process of intervention, education or therapy, that pronouncement in and of itself, depending on the circumstances and the degree of risk identified may be evidence of the need for a special care order in the first place. Further, professional intervention can often overcome a reluctance or unwillingness to engage with therapeutic interventions. In the instant case, it is also noteworthy that G. is due to sit the Leaving Cert in a couple of

months' time. To do so would represent an important achievement and a significant milestone in her life.

158. In the instant case there is no escaping the fact that G. has a predisposition to say whatever she considers it might take to achieve her preferred outcome, and it appears that her assessment at this time is that if she denies suicidality or that she is a suicidal risk this will achieve the outcome she desires, which is to avoid a special care order and return back to residential care without any of the issues which led to her detention between May and November 2018 in Oberstown being addressed. Having regard to her age, personality issues and profound immaturity this is entirely understandable.

159. G. was very ably represented by solicitor, junior counsel and senior counsel at the hearing of this appeal. That representation accords with the statutory regime to be found in ss. 25 and 26 of the Child Care Act as amended. It was clearly appropriate, having regard to the age, understanding and wishes of G. and the circumstances of this case.

160. To accede to G.'s wishes would, on the evidence, be to deprive her of a vital intervention in circumstances where there was clear and compelling evidence before the High Court and this court that satisfied the court that her behaviour continued to pose a real risk, on substantial grounds, of harm to her life and safety and development, such that the vindication of her best interests required a special care order being made for the purposes of protecting her welfare development, and indeed her life.

Whether a Medical Report from Professor H. Kennedy was properly received by the Court.

161. The litigation concerns a minor. Therefore, the process is inquisitorial in nature. It is imperative that the CFA, and all parties to the application, be at liberty to put before the court any evidence of relevance which may be of assistance to the court in making its determination. The clinical letter was of relevance to the matters in issue. It was a matter for submission by the parties or their representatives as to the weight to be accorded to the clinical letter. It was a matter for the judge to determine the weight to attach to the evidence. There was ample evidence before the court of a probative nature, apart from the clinical letter of Professor Kennedy, to satisfy the statutory threshold that a special care order was required in the case of G. for the purposes of protecting her life, health, safety, development and welfare.

162. It is significant that even the clinical letter of Professor Harry Kennedy of the 9th August 2018, a letter invoked by the appellant herself in support of a contention that the special care order ought not to have been made, states at para. 10 of his said letter: -

> "Only a secure care placement would be appropriate to [G.'s] needs. This should not be in a hospital setting, though various forms of psychological help should be offered at intervals – though not exclusively on [G.'s] terms. Crisis interventions including psychiatric crisis interventions will always be available according to clinically assessed need."

23H(1)(g)

163. 23H(1)(g) provides where the High Court is satisfied that: –

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

164. In the instant case there was very strong expert evidence, outlined above, before the trial judge sufficient to satisfy her that a special care order was required in the case of G. for the purposes of protecting her life, health, safety, development and welfare.

Child welfare character of legislation.

165. The use of the words "requires" in ss.(g) connotes that protecting the life, health, safety, development, or welfare of G. necessitates intervention by means of special care. The decision of Kearns J. in the Supreme Court in *EH v Clinical Director of St. Vincent's Hospital* [2009] 3 I.R. 774 was referred to by counsel for the CFA, as of assistance, by analogy, insofar as it identified the principles to be applied in interpreting the civil detention powers specified in the mental treatment legislation where an applicant sought to be discharged from detention in a psychiatric hospital. The court, in that case, had regard to the design of the legislation and noted that the Mental Health Act of 2001 was designed, "with the best interests of persons with mental disorder in mind".

166. Depending on the facts in each case, decisions of the Superior Courts in the area of detention for mental treatment have tended to lay emphasis on a protective or paternalistic intent of legislation concerning persons with incapacity. This approach, which appears to be in line with decided authority, was reiterated by the Supreme Court in *E.H. v. Clinical Director of St. Vincent's Hospital* [2009] 3 I.R. 774. Kearns J. stated that any interpretation of the term "voluntary patient" in the Mental Health Act, 2001, "must be informed by the overall scheme and paternalistic intent of the legislation as exemplified in particular by the provisions of ss. 4 and 29 of the Act." He noted that such an approach to interpretation had previously been approved by the Supreme Court in the course of a judgment delivered by McGuinness J. in *Gooden v. St. Otteran's Hospital* [2005] 3 I.R. 617.

167. That decision is of some assistance insofar as there is a material analogy between both statutory schemes, having regard to the protective and welfare-oriented character of the legislation in question.

Section 23H(1)(h)

168. Section 23H(1)(h) provides: -

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

It is clear from the structure of the section that a special care order is very much intended to be a measure of short duration and last resort.

By the time this appeal came to be heard the focus of G.'s care was directed towards identifying an appropriate step-down facility from special care. A Report dated 19th February, 2019 by a social worker observes, *inter alia*, that:

"…[.G] requires a higher level of support than a mainstream residential service can offer her at this time….Gleann Alainn has been identified as the most appropriate onward placement for [G.] following her discharge from Coovagh House."

169. It is clear from the evidence that the CFA have adverted to the importance of ensuring that the detention of G. pursuant to the provisions of a special care order is for the shortest duration compatible with addressing her complex welfare needs. As such, it represents a responsible exercise by the CFA of the exceptional jurisdiction to be found in s.23H which application was, on the facts, necessitated by the real and substantial risk of harm which G.'s own behaviour and conduct presents to her life, development, safety, health and welfare. As such, the order is compatible with Article 42A and the constitutional rights of G.

Conclusions and summary

170. A special care order is an intervention that involves the deprivation of a child's liberty. Therefore, there must be strict compliance with the statutory regime and all the pre-requisites to jurisdiction must be met.

171. Part IVA of the 1991 Child Care Act as amended forms part of the overall statutory regime that permits the State to intervene in the lives of children and their families where the welfare of the child warrants such intervention.

172. The reports relied on by CFA show that the primary purpose of the order is to effect therapeutic interventions for the purposes of enabling G. to gain insights into her own issues and difficulties, and to provide her with support and assistance in addressing the challenges that her traumatic life experiences have caused her. It is clear from a reading of the reports in their totality that the psychological impact of the trauma experienced by G. is profoundly self-limiting and precludes her from forming meaningful or constructive relationships with others. This in turn leads to intense loneliness and isolation, and an apparent inability to engage meaningfully with others.

173. The degree of cruelty and dysfunctionality experienced by G. during childhood was extraordinarily severe including the withholding of basic care and sadistic conduct. The evidence of the impact on her welfare and development of this is overwhelming, and bears out the argument that she does require the special care now proposed and that there is every chance that her welfare and development will benefit from the therapeutic care that is proposed.

174. The court must also have regard to the fundamental rights of the child as derived from Article 40 and Article 42.5 in addition to Article 42A in effecting the balancing exercise required by the section. I am satisfied that the approach of the trial judge reflects an effective and constitutionally compliant exercise of the statutory requirements with due regard having been afforded by the trial judge to the vindication of the constitutional rights of G.

175. In conclusion therefore:

(i) The High Court was correct in its conclusion that a special care order was in the best interests of G. and offered the best prospects of addressing the compelling evidence of real and substantial risk of harm that her own behaviour poses to her life, health, development, safety and welfare.

(ii) Contrary to the contentions being advanced on behalf of G. there was clear evidence before the court that G.'s behaviour did pose a real and substantial risk to her own life, and that there was a significant risk of self-harm which warranted the making of the order.

(iii) The clinical letter of Professor Harry Kennedy in its totality identified significant risks to the life of G.

(iv) The court was entitled to have regard to the clinical letter from Dr. Harry Kennedy and indeed it would have been quite improper to withhold that letter from the court. Further, it was open to any party to seek to cross-examine witnesses or to subpoena a witness, had they wished to impugn the views expressed or the findings of fact or the clinical diagnoses and assessments made, and no such step was taken.

(v) The report of Dr. Kennedy is clear in its conclusions with regard to the nature of the intervention that is being recommended, and in particular where he states, "Only a secure care placement would be appropriate to G.'s needs".

(vi) The court did have regard to the views of the director of Oberstown Children's Detention Campus Mr. Bergin, but was not bound to accede to those views in circumstances where more expert views, of which there were many, all disagreed with him.

(vii) The proposition, which appears to underpin elements of the appeal, that a child with violent tendencies towards others does not pose a real and substantial risk of harm by such behaviour to their own life, health, safety, development or welfare, is not accepted. Violent conduct, including violent sexual attacks on females, does pose a real and substantial risk of harm by such behaviour, not alone to the victims of such attacks but also to a young assailant, especially a person who is a minor in the circumstances of G. and particularly where comprehensive, targeted and highly expert intervention offers the prospect of addressing the underlying aetiology for such conduct. Furthermore, such conduct does pose a potentially significant risk to the life of the assailant and therapeutic intervention which has the potential to confer insights and assist in adjusting such personally destructive behaviour is in the best interests of the development and welfare of G.

(viii) The therapeutic regime proposed by CFA was demonstrated to be both necessary for the vindication of the life, health, safety, development or welfare of G. and proportionate and hence compatible with the Act and the Constitution.

(ix) Whilst it is contended that G. did not pose a risk to others by reason that her detention in Oberstown commenced on the 1st May 2018, it is clear from professional expert reports prepared during the term of her detention that she posed a risk to herself and contemplated self-harm and suicidal tendencies which clearly engage s23H of the Act.

(x) There was clear evidence of the potential for educational and therapeutic dimensions in the special care regime proposed.

(xi) The mere fact that G. contended she would not engage with the therapy in special care in and of itself was not a reason to refuse to make the order. Such a stance was to be expected, particularly in circumstances where she had a propensity to make statements that were instrumental in nature and calculated to achieve an outcome. G's instrumental

rationality presumably has played a part in informing her stance to these proceedings. Further, it is to be expected that a high level of professional expertise may have the capacity to overcome her resistance to engagement, for her own benefit, and that she may derive insights into the positive welfare and developmental advantages she can gain from engagement with the process.

(xii) The High Court did have regard to the wishes of G. and heard her evidence by video link, considered all her letters, considered her counsel and the submissions and arguments advanced.

(xiii) The trial judge carried out a careful and comprehensive balancing exercise, weighing the relative rights of G., including her right to liberty *vis-à-vis* her right to have her life and welfare preserved and vindicated and in all the circumstances correctly concluded that G.'s constitutional rights, including her right to life, warranted the making of a special care order in the exceptional circumstances that were established to subsist in this case.

(xiv) The totality of the evidence provided the basis for a finding that a special care order was necessitated to provide a therapeutic intervention which had prospects of addressing the risk in question.

(xv) G.'s detention on foot of the special care order did not amount to a deprivation of liberty so as to engage Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms in light of the statutory safeguards attendant upon the making of the order and the clear statutory regime of supervision and review provided for under the Act and the manner in which the High Court has actively managed supervised and monitored the case throughout the duration of the order.

(xvi) The appellant has not established that the trial judge was incorrect in her determination that, based on the facts as proven before her, the statutory threshold for making a special care order pursuant to s.23H of the Child Care Act 1991 was met.

(xvii) In the circumstances, the Special Care Order was both necessary and proportionate and was validly made.