THE COURT OF APPEAL

CIVIL

[2022 No. 19]

Birmingham P. **Neutral Citation Number [2022] IECA 107**

Haughton J.

Barniville J.

IN THE MATTER OF FO, A CHILD,

IN THE MATTER OF PART IVA OF THE CHILDCARE ACT 1991

IN THE MATTER OF ARTICLE 42(A) OF THE CONSTITUTION OF IRELAND

AND IN THE MATTER OF AN APPLICATION TO EXTEND THE DURATION OF SPECIAL CARE ORDER IN RESPECT OF FO

BETWEEN

THE CHILD AND FAMILY AGENCY

FIRST RESPONDENT

AND

L.L.

APPELLANT

AND

L.H.

SECOND RESPONDENT

JUDGMENT of the President delivered on the 9th day of May 2022 by Birmingham P

1. On 11th January 2022, the High Court (Jordan J.), in the course of the Minors' List, extended a special care order in respect of F ("the minor"). He did so on foot of an application by the Child and Family Agency ("the CFA") to extend an order then in place. The application was supported, albeit with great reluctance, by LH, the minor's *guardian ad litem* ("GAL"), but was opposed by LL, the minor's mother. Before addressing what occurred in the High Court and the arguments that have been advanced in this Court arising therefrom,

it is appropriate to say something about the background to the application brought by the CFA and to refer to the relevant statutory architecture, including the legislative history.

Background

2. F is fifteen years of age. He was born in June 2006, and has been in the care of the CFA since late November 2011. The child's history is a very troubled one: fourteen placements have broken down; there was concern that he was using, and indeed, supplying and dealing drugs; he engaged in physical violence, including violence directed at foster carers; and he participated in organised fights that were videotaped and posted on social media. He is a talented boxer. One incident saw him involved in an encounter which saw a 15-year old child from an ethnic minority being "bottled" in the face, followed in response by an assault on F by an adult from that community. Another placement broke down as a result of F's involvement in the intimidation of an elderly neighbour, giving rise to concerns about retribution against F from vigilante groups.

3. Concerns in relation to F heightened during mid/late 2021. The concerns centred on, but were not confined to, the use and dealing of illicit drugs, the risk to others involving assaults on care staff and previous foster carers, and concerns heightened by his prowess as a boxer. There were also concerns about acts of criminal damage which precipitated such a response within the local community that there were efforts made by that community to secure his removal from the area where the placement was. Further concerns were raised about risks to his life, safety, health, development and welfare. He was absent from education. While he had started secondary school in September 2019, there was very limited attendance from November 2019 onwards. There were frequent episodes of him being missing in care, to the point where, prior to being placed in special care, he was hardly ever in his placement. At this stage, he had entirely disengaged from the various agencies and

support services that were supposed to be working with him, such as speech and language support, psychology, psychiatry and social work. At this stage, there was also an engagement with the criminal justice system.

4. All of the conditions for special care would seem to have been satisfied, but the CFA was slow to move, presumably because of pressure on resources and a shortage of beds, though the matter was brought before the Special Care Referrals Committee (the CFA's decision making body) on or around 31st August 2021, when F was approved for a period in special care. However, in a situation where, despite the fact that all concerned, including F's mother, were in agreement that special care was warranted, no application was presented before the Court, and in these circumstances, the GAL felt compelled to bring judicial review proceedings. This was a highly unusual development. In the course of the appeal hearing, senior counsel on behalf of the GAL made the point that in his twenty years working in this area, this was the first occasion that he had moved such an application. The GAL's application for judicial review was initially adjourned to be heard on notice, but gave rise to the CFA moving an application for an interim special care order on 5th October 2021, which was given effect to with assistance from An Garda Síochána. An application for a further interim order was made on 8th October 2021, before an application was made for the full special care order on 13th October 2021, which, in the ordinary way, was due to expire on 12th January 2022. It should be noted that all three orders were supported by all relevant parties: the CFA, the GAL, and the minor's mother.

5. After F was placed in Crannóg Nua with the assistance of An Garda Síochána, he initially struggled to adapt to the special care regime. This would not be at all unusual; however, he soon settled. The submissions on behalf of the appellant describe the period in special care in these terms:

> "As of the 10th December 2021, the final Court Review of the Special Care Order, F's engagement with ACTS [Assessment Consultation Therapy Services] was excellent, he was attending weekly therapeutic sessions and engaging in a Speech and Language Assessment, he was attending all of his medical appointments (*e.g.* CAMHS, optician, dentist, GP for medical check *etc*), he was engaging well with extra-curricular activities and engaging successfully with his mobilities away from the unit. He was impressively participating throughout his child in care reviews, had settled into his school routine and was applying himself positively to his education programme, attending daily and had been awarded student of the week. His behaviours had improved and he planned to stay in school on leaving special care. He was looking healthier and his diet was improving. He was progressing in all areas that had been requested of him."

6. In the usual way, F's placement in special care came before the High Court for review on a number of occasions. From the first such review, on 28th October 2021, the need for an onward placement or stepdown facility to which F could transition at the end of the special care order was flagged. The issue was initially raised by the GAL and was also a concern for the child's mother. As early as the first review date, Jordan J., the judge having charge of the Minors' List, was of the view that a suitable onward placement should be identified as soon as possible.

7. The issue was brought to the fore again by both the GAL and F's mother when the matter was listed on 25th November 2011. On that occasion, Jordan J. referred to the fact that a suitable stepdown placement was required and that it was important that this issue be expedited so that there could be a lengthy transition. He indicated that he expected progress in relation to an onward placement before the next listing. It must be said that it does appear that since October 2021, the CFA had been making efforts to identify an onward placement,

but notwithstanding that, when the matter was back before the Court on 10th December 2021, it was reported that the efforts had not been successful and it was indicated that there would be an application to extend the special care order.

8. The application to extend came on for hearing before the High Court on 11th January 2022. Before I turn to consider that application, it should be noted that the availability, or rather the non-availability, of a suitable onward placement was central both to the hearing in the High Court and subsequently to the proceedings before this Court.

The Statutory Architecture

9. The statutory framework governing the special care regime was introduced by the Child Care (Amendment) Act 2011, s. 10 of which substituted and inserted Part IVA into the Child Care Act 1991. Part IVA, which was commenced on 31st December 2017 by S.I. No. 637 of 2017, is the key provision in this regard.

10. Prior to this, cases of this nature, involving the temporary civil detention of troubled minors at risk, were dealt with for many years, going back to the early 1990s, by the High Court pursuant to the inherent jurisdiction of that Court (see *FN* [1995] 1 IR 409 and *DG* [1997] 3 IR 511). The statutory regime that has been put in place now closely mirrors the principles and procedures that evolved while the High Court dealt with these matters pursuant to the inherent jurisdiction.

11. So far as material, the statutory provisions in issue are as follows:

> "**23C.—** In this Part 'special care' means the provision, to a child, of—
>
> (*a*) care which addresses—
>
> (i) his or her behaviour and the risk of harm it poses to his or her life, health, safety, development or welfare, and
>
> (ii) his or her care requirements,

and includes medical and psychiatric assessment, examination and treatment, and

(*b*) educational supervision,

in a special care unit in which the child is detained and requires for its provision a special care order or an interim special care order directing the Health Service Executive to detain the child in a special care unit, which the Health Service Executive 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—

. . .

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 Health Service Executive 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 Health Service Executive cannot provide to the child unless a special care order is made in respect of that child,

(*e*) the Health Service Executive has carried out the consultation referred to in section 23F(3) or, where the Health Service Executive 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),

. . .

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 and shall—

. . .

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).

. . .

23J.— (1) Where a special care order has been made in respect of a child and the Health Service Executive is satisfied that there is reasonable cause to believe that—

(*a*) the child is benefiting from the special care provided to him or her pursuant to the order,

(*b*) notwithstanding paragraph (*a*) and having regard to the assessments made by the Health Service Executive under section 23ND(4), the risk of harm to the child posed by his or her behaviour continues to exist,

(*c*) the child requires the continuation of the provision to him or her of special care to adequately address that behaviour and risk of harm and his or her care requirements which the Health Service Executive cannot continue to provide to the child unless the period for which that special care order has effect is extended,

(*d*) the provision of—

(i) care by the Health Service Executive to the child, 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 or risk of harm or the care requirements of the child, and

(*e*) the continuation of the provision of the special care and, for that purpose, the continuation of the detention of the child in a special care unit, is required to protect his or her life, health, safety, development or welfare,

the Health Service Executive shall, subject to subsection (2), apply to the High Court to extend the period for which the special care order has effect for the purpose of continuing the provision of special care to that child.

(2) Not more than 2 applications may be made under this section.

. . .

(7) Where the High Court is satisfied that—

(*a*) the conditions specified in paragraphs (*a*) to (*e*) of subsection (1) are satisfied in respect of the child, and

(*b*) the continuation of the detention of the child in a special care unit is in the best interests of the child,

the High Court may, subject to subsection (8), extend the period for which the special care order has effect and the High Court may, having regard to all the circumstances of the child, vary the special care order and make such other provision and give directions as it considers necessary and in the best interests of the child.

(8) Each extension of the period for which a special care order has effect shall not exceed 3 months."

Submissions

12. The appellant says that the legislature's reference to the phrase "continues to exist", set out in s. 23J(1)(b) above, precludes, on a literal interpretation, reliance upon behaviour that previously but no longer exists. It is said that the three distinct assessments that the High Court is required to make – labelled as the "adequacy test" in s. 23J(1)(c), the "alternative

care test" in s. 23J(1)(d) and the "necessity test" in s. 23J(1)(e) – are wholly inconsistent with the narrow focus, as contended for by the CFA, on only those alternatives that the CFA is then in a position to provide. It is said that if it were otherwise, the tests set out in ss. 23J(1)(c)-(e) would be redundant, as the "best interests test" provided by s. 23J(7) would be the sole consideration. To this, the CFA retorts that what the appellant contends operates on the basis that a child actually in need of special care should be discharged to face risks in the community because 'notionally', they could be provided with a community placement, even though, in reality, no such placement was available, adding that it is impossible to see how such a proposition could be seen as vindicating the rights of a child or as being in the best interests of a child. The CFA says that if a purposeful approach is taken, the position is clearer. The long title of the Child Care Act 1991 sets out that it is "to provide for the care and protection of children and for related matters". It is hard to see, the CFA submits, how a purposive approach could see a child discharged into the community to the uncertain future of the after-hours service where no suitable follow-up placement was actually available.

13. As it is a statute which provides for civil detention and thus restricts liberty, the case is made on behalf of the appellant that a strict interpretation is mandated. However, in truth, the issue of strict compliance is not really in dispute, nor could it ever be. Indeed, it is accepted by all that any application for an order providing for a detention, or extending a special care order and subsequently extending the detention, will not be entertained unless the statutory conditions are met in full. If authority for that proposition is needed, it can be found in this Court's decision *in Child and Family Agency v. ML* [2019] IECA 109, wherein Whelan J. commented at para. 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."

14. For my part, I find myself in complete agreement with that observation.

15. The appellant cautions against any suggestion that significance can be attached to the fact that the application was dealt with in the High Court by a judge fully familiar with the background, and associated with that, any suggestion that familiarity with the history could dilute the focus on whether the risky behaviour was continuing at the time of the application. The appellant goes somewhat further and says that the situation has now been reached where further detention is contraindicated, drawing attention to the following passage in the report of the GAL:

> "The current position is that F has served his time in special care. He has done everything that has been asked of him, he has engaged meaningfully in his placement plan, he is engaging in his therapeutic plan, he has built bridges with some of his family members, and he has gained insight into his journey through the care system. What F needs is to have absolute certainty on what will happen next. He has expressed frustration about feeling let down and he is not coping with the uncertainty, and this is having a destructive impact on his wellbeing".
>
> (Emphasis added by appellant)

16. No issue has been taken, either in the High Court or before this Court, with the best interests ground; rather, it is pointed out that the statutory criteria and the best interests test are cumulative, with the best interests test described as operating as a legislative backstop. The appellant complains that the High Court judge erred in failing to focus on the statutory criteria and in applying a limited welfare test designed to satisfy the purpose of protecting the child.

17. The unavailability of a stepdown placement saw the GAL placed in an unenviable position. She was clear that there could be no question of F being detained any longer than was necessary. Notwithstanding her view that it was the failure of the CFA to identify and

provide a placement that had given rise to what was, by any standards, a very unsatisfactory situation, she felt compelled to recommend the making of a further special care order, albeit a shorter order than sought, in order to minimise any risk of harm. The judge took on board the various suggestions put forward by the GAL, including the proposal that the extension of the order be for a period shorter than that sought. Initially, the approach advocated by the GAL and taken up by the Court appeared to have borne fruit; at a Directions List on 28th January 2022, the Court was told that a suitable placement for F had been found in the community. There was reference to this in the course of the written submissions on behalf of the CFA, leading me to wonder whether the matter might be moot. Sadly, those hopes were not long in being dashed, and within days of the submission, it emerged that the hoped for placement would not be available.

18. While the judge's remarks were understandably somewhat terse, it is clear from a reading of the transcript that he felt that the matters in respect of which he was required to be satisfied had indeed been established to his satisfaction. For my part, I am in no doubt he was fully justified in so concluding. Indeed, I would go further and say it is my view that it would have been unthinkable if he had come to any other conclusion. Lest there be any doubt, I want to state unequivocally that I am satisfied that all the statutory criteria were met. Specifically, I am satisfied that F is benefiting from his time in special care; indeed, there is effective unanimity on that point. As to the remaining statutory conditions set out in s. 23J(1), I propose to comment on these in turn, but I would preface my remarks by saying that there is a considerable overlap, and observations made in relation to one condition could, for the most part, readily be applied to others.

Section 23J(1)(b) -Risk of Harm

19. I am in no doubt that the risk of harm which saw F taken into special care continues to exist. We must remind ourselves of the extent of the concern at the time, perhaps put most

graphically by F himself, when he referred to being found dead in a body bag. I am in no doubt that all the evidence before the High Court pointed in one direction: that the risk continued to exist. The extent of the risk which existed at the time he was taken into care meant that it could not be expected that the risk would evaporate quickly. I would draw attention to an observation made by F's social worker, Ms. Ailish Walsh, that F would be at "dire risk of reverting to his dangerous behaviour, dysregulation, and exposure to exploitation" if the order was not continued. I would also draw attention to the view of the GAL who commented:

> "[F's] special care placement continues to be absolutely necessary at this current time … It is the guardian's view that [F] is undoubtedly in the right place and the need to put the reactions [*sic*] of special care and the removal of his liberty is of absolute necessity at this current time."

I am struck by the contrast that the GAL drew between the effectiveness of special care and the history of previous placement. She commented:

> "It is the guardian's view that [F] is being challenged on his behavioural patterns in a way that has never happened before, but that this is being done in a safe way and [F] gets a lot of support from staff to help him understand and reflect on events that have happened. By contrast when [F] was in mainstream residential care, he avoided being challenged and he was able to control his own environment by getting aggressive, abusive and threatening towards staff and then he could leave the house of his own accord. The benefit of special care for [F] is that Crannog Nua is a secure and regulated environment."

Section 23J(1)(c) – The Adequacy Test

20. I am also satisfied that what has been labelled as the "adequacy test" has been met. While the CFA has apparently been seeking out a placement since October 2021, one had not

become available by 11th January 2022. While a degree of frustration at the failure in this regard is very understandable, one cannot lose sight of the fact that the CFA was not just seeking any placement, but a suitable and appropriate placement, one requirement being that it would be a placement that would not break down, something that was not easy to deliver when one considers that fourteen other placements had broken down.

Section 23J(1)(d) – The Alternative Care Test

21. From what I have already said, it follows that I am satisfied that the so-called alternative care test was also met. Quite simply, the situation was that as of 11th January 2022 – there just was no alternative.

Section 23J(1)(e) – The Necessity Test

22. As to the so-called necessity test, I repeat my view that I am in no doubt that this statutory condition was met. In terms of options available to the High Court judge, in my view, it was absolutely necessary that F should continue to be detained in special care in order to protect his life, health, safety, development and welfare. Any alternative regime that actually existed, as distinct from options that one would wish to see available, would have exposed him to very grave risk indeed.

Conclusion

23. I have addressed the issues in terms of the choice that was presented to the judge in the High Court to extend special care or to discharge F to the community and the uncertainties of the out-of-hours service. While referring to this as a binary choice in the course of exchanges with counsel, in my view, it was a choice which could be exercised only one way. It is clear from the transcript and the submissions of the parties in this Court that the High Court was dealing with a particularly complex and difficult case. However, it is also clear that the judge was conscious of and concerned about the fact that problems with

identifying stepdown placements were arising all too frequently. It was clear to all concerned that this was not a new phenomenon. Indeed, that picture that emerges clearly from the judgment of Reynolds J. in *CFA v. TN* [2018] IEHC 651, a judgment which she requested be brought to the attention of the relevant Department and Minister. Indeed, my own experience of having charge of the list pre-2014 reminds me that difficulties were not uncommon, sometimes in securing entry to secure care placement (as it was then usually referred to), and sometimes difficulties at the other end with identifying stepdown placements. All these factors confirm to me that this is a long-term problem. However, I do not believe that there can be any question of a judge allowing himself or herself to be overwhelmed by frustration into making an order which was not in the best interests of the child.

24. I am of the view that the orders made in the High Court were unquestionably in the best interests of F. For that reason, and specifically because all of the statutory preconditions to the making of the order were met, the appeal must be dismissed.