THE HIGH COURT

JUDICIAL REVIEW

2018 No. 759 J.R.

M.G.

(SUING BY HIS MOTHER AND NEXT FRIEND J.G.)

APPLICANT

AND

THE DIRECTOR OF OBERSTOWN CHILDREN DETENTION CENTRE

THE MINISTER FOR CHILDREN AND YOUTH AFFAIRS

IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 3 May 2019.

OVERVIEW

1. These proceedings raise issues as to the nature and extent of the legal constraints which apply to the director of a "children detention school" (as defined) in taking measures for the maintenance of order at the school. The Applicant contends that before a child detainee can be separated from his or her peers on even a temporary basis, the director of a school is obliged to comply with certain procedural requirements. More specifically, it is submitted that a child detainee is entitled (i) to a formal written decision containing adequate reasons for the separation; (ii) to notice of the terms of the separation, including its duration; (iii) to an opportunity to make representations; and (iv) to an opportunity to appeal the decision.

2. This submission is predicated on an argument that the separation of a child detainee from his or her peers represents an interference with the child's constitutional right to dignity and bodily integrity, and that such interference triggers a concomitant requirement for certain procedural safeguards. The Applicant places much emphasis in this regard on the judgment in *S.F. v. Director of Oberstown Children Detention Centre* [2017] IEHC 829; [2018] 1 I.L.R.M. 459.

3. A related argument is made to the effect that the disparity of treatment between adult prisoners and child detainees contravenes the constitutional right to equality before the law as provided for under Article 40.1 of the Irish Constitution. It is said that an adult prisoner has the benefit of certain safeguards under the Prison Rules 2007 which do not extend to persons detained at a children detention school, and that this difference in treatment represents unjustified discrimination.

4. The principal relief sought in the proceedings is an order of *certiorari* in respect of certain separation measures applied to the Applicant over the course of a six-day period in September 2018.

5. For the reasons set out in detail herein, I am satisfied that the measures taken by the Director of Oberstown Children Detention Centre in respect of the Applicant were lawful. The decision to separate the Applicant from his peers on a temporary basis was entirely proportionate given the risk which his behaviour at the time presented to staff and other detainees. The evidence indicates that the objective of the separation measures was a safety and security objective, and that there was no punitive objective involved.

6. There was no obligation upon the Director to comply with the elaborate procedural requirements contended for on behalf of the Applicant in circumstances where (i) the separation measures were necessary to address an urgent situation; (ii) the separation measures were very limited and were reduced in severity over the course of the six days; and (iii) the separation measures were not intended to serve a punitive objective. It was sufficient protection for the Applicant that the Director complied with the *Single Separation Procedures* (July 2018).

7. The Applicant's reliance on the judgment in *S.F. v. Director of Oberstown Children Detention Centre* is misplaced. The separation measures applied to the Applicant in the present case do not exhibit any of the features which had been of considerable concern to the High Court in *S.F.* In particular, the Applicant had been provided with access to exercise, and to telephone contact with his family, at all times. The Applicant was also allowed to reside in his own room, and had access to educational and recreational materials. Moreover, the separation measures only applied for a period of six days, with the restrictions being reduced in severity over the course of those six days.

8. The Applicant's contention that there was a breach of the guarantee of equality before the law under Article 40.1 of the Irish Constitution is unfounded. First, the comparison between an adult prisoner and a child detainee is inapt in circumstances where the two are not similarly situated. Secondly, and in any event, Article 40.1 expressly allows for the enactment of legislation which has due regard to differences of capacity. The difference in treatment of offenders based on age provided for under the Children Act 2001 serves a legitimate legislative purpose, is relevant to that purpose and treats both classes fairly.

FACTUAL BACKGROUND

9. The Applicant is currently detained at Oberstown Children Detention Centre ("*Oberstown*") pursuant to a number of detention orders made by the District Court following his conviction for various criminal offences. The Applicant is under the age of 18 years, and thus comes within the definition of a "child" under the Children Act 2001.

10. The within judicial review proceedings principally concern events in September 2018 at Oberstown. These events were triggered by an incident on 16 September 2018. More specifically, on the evening of 16 September 2018 the Applicant was involved in an incident in the sports hall at Oberstown. No details of this incident have been provided by the Applicant's side, but it has been addressed in the affidavit filed by Pat Bergin, the Director of Oberstown ("*the Director*"). The relevant extracts from the Director's affidavit have been set out in an Appendix to this judgment. For present purposes, the incident might be summarised as follows. It seems that the Applicant and two other young people engaged in an eight-hour stand-off with staff. It is averred that the Applicant directed verbally abusive slurs of a highly sexualised nature and threatening language towards residential social care and night

supervising staff, and that the Applicant only agreed to return to the residential unit at approximately 1.30 a.m.

11. As appears from the Director's affidavit, the Applicant was thereafter subject to separation measures pursuant to a six-day plan running up to 24 September 2018. The Applicant is described as having been threatening towards staff and as having expressed his intention of hurting them or his fellow residents at various points during 17 September 2018 and 18 September 2018.

12. It should be noted that the separation measures applied to the Applicant were limited. In particular, the Applicant was allowed to reside in his own bedroom. The Applicant was permitted to engage in physical activity, in some instances in the company of a peer. The Applicant was also allowed access to the so-called multi-purpose room.

13. The Applicant was allowed to make telephone calls to his girlfriend, his mother and father, and his solicitor. A consultation between the Applicant and his solicitor took place in Oberstown on 18 September 2018.

14. These proceedings were instituted by way of an *ex parte* application for judicial review made on 20 September 2018. The High Court (O'Connor J.) directed that the application for leave be made on notice to the Respondents. Leave to apply was subsequently granted on 21 September 2018. The principal relief sought in the proceedings is an order of *certiorari* in respect of the separation measures applied to the Applicant in September 2018.

15. The application for leave was grounded on the affidavit of Matthew Kenny, who is the solicitor acting on behalf of the Applicant. This affidavit is dated 20 September 2018. It seems that, as of that date, the Applicant was still subject to limited separation measures.

16. As noted above, the Applicant's solicitor had held a consultation with the Applicant in Oberstown on 18 September 2018. The solicitor describes the position of the Applicant as of that date as follows in his affidavit of 20 September 2018.

> "12. Subsequently, on the 16th September 2018, the Applicant was one of a number of children involved in a disturbance in the gym of Oberstown Children's Detention Centre. I say and am instructed that in the aftermath of this incident, the Applicant was subject to an ad hoc punishment regime.
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> 13. I say and I am instructed that the Applicant has been detained in solitude since this incident. The Applicant has been prevented from interacting with the other boys. The Applicant has been prevented from attending school and has been denied access to all social activities and communal meal times.
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> 14. I say and am instructed that the Applicant was involved in another disturbance on the 17th of September when being given solitary exercise, whereby he refused to return to his solitary confinement and was forcibly returned to this regime."

17. The solicitor's affidavit goes on to make various criticisms of the absence of procedural safeguards attending this alleged "solitary confinement". The affidavit then details an exchange of correspondence between the solicitor and the authorities at Oberstown. The affidavit turns finally to describe briefly earlier examples of alleged "solitary confinement" said to have occurred in July 2018 and August 2018, respectively.

18. For reasons which have not been explained, the Applicant's side never filed any further *substantive* affidavit setting out the details of the separation measures complained of. This is unsatisfactory. The Applicant, as the moving party, bears the onus of proof in the judicial review proceedings. The Applicant should, therefore, have set out in detail the manner in which he was treated over the six-day period of which he complains. In particular, the Applicant should have explained the precise nature of the separation measures to which he was subject on each of the six days. Given that the Applicant is not yet eighteen years old, it might have been appropriate to apply to address these matters by way of oral evidence before the High Court. Directions could have been sought in this regard pursuant to Order 84.

19. In circumstances where the initial application for judicial review had been made as a matter of urgency—whilst the Applicant was subject to ongoing separation measures—it is perhaps understandable that the grounding affidavit was sworn by the Applicant's solicitor based on his consultation with the Applicant at Oberstown. However, the case was not listed for hearing until April 2019, and there was thus ample time to file further substantive affidavits. This was not done. Instead, short affidavits were filed by the Applicant and his mother (who is his next friend for the purposes of the litigation). These affidavits merely purport to confirm the content of the Statement of Grounds. It will be recalled that the Statement of Grounds was filed on 20 September 2018, i.e. at a time while the separation measures were still ongoing. The two affidavits were not sworn until October and November 2018, respectively, and thus these affidavits could have—and should have—addressed the events of September 2018 in detail.

20. As appears from the judgment of the High Court in *S.F. v. Director of Oberstown Children Detention Centre* [2017] IEHC 829; [2018] 1 I.L.R.M. 459, the determination of whether separation measures represent a breach of a child's constitutional rights necessitates a fact-specific inquiry as to the precise nature of the separation. On the facts of *S.F.*, the High Court attached special significance to (i) the complete absence of any form of exercise (outdoor or otherwise) for the detainees for a substantial period of time, and (ii) the absence of any family contact, whether by way of telephone contact or face-to-face encounter. These objectionable features were not part of the separation measures applied to the Applicant in the present case.

21. A further substantive affidavit should have been filed in the present case in order to ensure that the High Court had before it a detailed description of the separation measures complained of, and, in particular, details of the length of time for which each aspect of these measures was in place. The description of the Applicant as having been subject to "solitary confinement" does not appear to have been accurate even as of 17 September and 18 September 2018. Certainly, it is not an accurate description of the measures applied on the subsequent days.

22. The failure of the Applicant to file a further substantive affidavit has resulted in the unsatisfactory position whereby there is no direct evidence before the court which provides a detailed description of the separation measures.

23. The Director has filed an affidavit which does provide a more detailed description of the separation measures than the Applicant's side have provided, but it is not immediately apparent to what extent this description is based on direct knowledge or hearsay. The Applicant has not sought to cross-examine the Director on his evidence, nor to have the affidavit excluded on the basis that it contains hearsay. It seems, therefore, that this court can only proceed on the basis that that evidence is uncontroverted.

24. There is no affidavit evidence which addresses the Applicant's understanding of *why* it is that separation measures were applied to him in September 2018. In effect, the following plea on the part of the Director at paragraph 7 of the Statement of Opposition has

been left unanswered.

> "7. The Applicant was fully aware of the reasons why he had to be managed in accordance with the Separation policy after the events of the 16th September 2018. It is denied that the Applicant was not provided with an opportunity to make representations in respect of his punishment. Efforts were made to contact his parents straight away to inform them that he had been placed on separation and his solicitor attended at the Campus and met with the Applicant on the 18th September 2018. Due to on-going security concerns arising from the Applicant's behaviour, special arrangements had to be made in order to facilitate the meeting between the Applicant and his solicitor."

DISCOVERY OF DOCUMENTS

25. The Applicant had sought discovery of certain documentation from the Director. It appears, but this is not entirely clear from the papers before the court, that agreement was reached whereby the following category of documents would be made available to the Applicant's side by way of voluntary discovery, i.e. without a formal order for discovery.

> "All documents, notes (including handwritten notes), papers, memoranda, minutes of meetings and emails relating to or referring to the Applicant's behaviour and the response to same by the First Named Respondent, its servants or agents on 6th July 2018, 15th August 2018 and 16th September 2018."

26. No agreement had been reached as to the use or admissibility of these documents for the purposes of the proceedings. It is, on the basis of the *Bula / Fyffes* principles, open to parties to agree (i) that discovered documents can be placed before a trial judge without formal proof, and (ii) that the documents can be taken to represent *prima facie* evidence of the truth of the contents thereof. (*Bula Ltd. v. Tara Mines Ltd*. [1997] IEHC 202 and *Fyffes plc v. DCC plc* [2005] IEHC 477). In the absence of such an agreement in the present case, counsel on both sides concurred that the court should not receive a copy of the discovery documents. (This occurred at 3.05 p.m. at the hearing on 3 April 2019).

27. A second category of documents had been sought as follows.

> "All external and internal reviews, reports, papers and/or memoranda relating and/or referring to the adequacy of the Second Named Respondent's response to disturbances by detainees, including but not limited to the Goldson/Hardwick Operational Review of Oberstown Children Detention Campus."

28. This second category had been the subject of an application before the High Court, and, by reserved judgment, the application for discovery was refused. [Title of judgment redacted].

ALLEGED BREACH OF RIGHT TO DIGNITY AND BODILY INTEGRITY

29. The Applicant contends that the separation measures applied to him in July 2018, August 2018 and September 2018 represented a violation of his right to dignity and bodily integrity. Counsel for the Applicant relies in this regard upon the judgment in *S.F. v. Director of Oberstown Children Detention Centre* [2017] IEHC 829; [2018] 1 I.L.R.M. 459 ("*S.F.*"). The judgment in *S.F.* concerned the legality of separation measures imposed by the Director on a number of detainees over a three-week period. These measures had been imposed following a serious disturbance at the campus, involving approximately eight young persons, including the four applicants, who had taken control of a unit within the campus, gained access to the roof and caused considerable damage (including fire damage). The High Court (Ní Raifeartaigh J.) held that whereas the Director has legal authority to separate a detainee from his peers where this is necessary for the maintenance of order and to prevent damage to property or injury to persons, the Irish Constitution imposes limits to what action he can take. Solitary confinement of a young person may only be imposed in circumstances which render it strictly necessary. See paragraphs [115] to [116] of the judgment in *S.F.* as follows.

> "The question then is how all of the principles identified in cases relating to the separation or solitary confinement of adults apply to the situation of young persons in detention schools and whether they require to be modified in any way. It seems to me that at the most general level, the principles are the same in the sense that the principle of proportionality continues to apply. Insofar as there is any difference when it comes to young persons, it must be that both the Executive and the courts must be particularly vigilant to ensure that the measures taken were strictly necessary, by reason of the greater potential for damage or harm being caused to a young person by the measure than might be caused to an adult of average mental health. To this extent, it seems to me that the international materials demonstrating a heightened concern regarding the use of solitary confinement in respect of young persons, referred to earlier, may be taken into account by the Court. Indeed, Oberstown's own Separation Policy accepts this heightened risk and cites some of the international materials in question, as has been seen.
>
> I do not think, however, that the Court is entitled to declare in some sort of absolute fashion that there is a blanket prohibition on the solitary confinement of juvenile offenders under the Irish Constitution. It seems to me that the most appropriate conclusion that can be drawn from the authorities is that solitary confinement of a young person may be imposed in circumstances, which render it, and for so long as it is, strictly necessary, and no longer."

30. The nature of the separation measures applied to the applicants in *S.F* is set out in some detail in the judgment. Each of the applicants had been searched and then placed in a locked bedroom. Each bedroom had a mattress but no bed linen. The water was switched off in the shower attached to the bedroom. The applicants were subject to the following additional features of deprivation: (a) no outdoor exercise; (b) no medical visits; (c) no phone calls with or visits from family; (d) no access to any form of distraction such as music-playing device, television, writing materials, reading materials or anything of that kind; (e) no access to any location other than the locked bedroom, i.e. no access to the multi-purpose room; and (f) contact with staff through the hatch only. These deprivations were gradually removed or ameliorated over the course of the three-week period. The High Court concluded that—save with two specific aspects of the separation regime—there had been no breach of any substantive constitutional rights of the applicants. The two aspects of considerable concern were identified as follows at paragraphs [129] and [130] of the judgment.

> "However, there were two specific aspects of the separation regime which have caused considerable concern to the Court. In respect of these two matters, I have reached the conclusion that in each of these two areas, there was a breach of constitutional rights in respect of which the Court's role in policing the boundaries of constitutionally permissible Executive action does rightfully come into play. The first of these is the complete absence of any form of exercise (outdoor or otherwise) for a substantial period of time during the separation regime. The importance of exercise for young persons was recognised by Oberstown's own Separation Policy and, in my view, rightly so. The Director has put forward the justification that it was not possible to provide exercise because the yard was overlooked by the other bedrooms and would have led to interaction between the young persons. However, I am not persuaded that, given the size of the

campus, no other options could have been devised, with appropriate staff escorts. There is no evidence that any alternatives were considered and rejected. While I fully accept there were legitimate concerns, it seems to me that the complete absence of any form of exercise for such a length of time has not been shown to be strictly necessary in accordance with the constitutional requirement of proportionality.

I am of the same view with regard to the young person's contact with their families, whether by way of telephone contact or face-to-face encounter. I can well understand the inconvenience, and perhaps risks, of arranging for this in the midst of heightened security concerns, but again I am not persuaded on the evidence put before the Court that no method at all could have been be devised for addressing those concerns."

31. The evidence before the court in the present case indicates that the nature of the separation regime imposed on the Applicant was far less harsh than that in issue in *S.F.* In particular, the two features of the separation regime in *S.F.* which were of considerable concern to Ní Raifeartaigh J. are absent.

32. More generally, reference is made to the judgment of the Court of Appeal in *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216; [2015] 2 I.L.R.M. 316, which addresses the role of the courts and the separation of powers as follows.

"Separation of Powers

91 It must also be said that a mandatory and specific order of this kind cannot easily be aligned with the separation of powers and the Government's function as the Executive authority. The Prison Governor is part of the Executive. As Hogan J. remarked in Connolly:

'In view of the acute difficulties involved in prison management, the judicial branch can but rarely be prescriptive in terms of specific conditions of prison conditions, not least given that this is ultimately the responsibility of the executive branch. In these circumstances, it would be generally inappropriate to lay down any *ex ante* rules regarding solitary confinement. In this regard, the supervisory function which the Constitution ascribes to the courts must therefore often be confined in the first instance to prompting, guiding and warning the executive branch lest these precious values of human dignity (in the Preamble) and the protection of the person (in Article 40.3.2) might inadvertently be jeopardised in any given case. Even as in cases such as *Richardson* and *Kinsella*, where a specific finding of constitutional violation is called for, absent compelling circumstances, it will generally be appropriate as an initial step to give the executive branch (and, by extension, the prison service) an opportunity to remedy this breach in early course.'

92. As part of the executive function of the State, the Governor manages the prison and decides what is necessary for prisoner safety. The Court cannot and interfere in routine management and a *fortiori* cannot micromanage the prison by specifying a particular regime for a prisoner save in the most exceptional of circumstances, see, e.g., by analogy the comments of Hardiman J. in *TD v. Minister for Education* [2001] 4 I.R. 287. The judgment in this case, represents an interference with the executive function.

95. It is generally incompatible with the constitutional structure of separation of powers for the Court to impose on the Governor specific requirements as to the management of a particular prisoner. The powers available to the Courts for supervisory jurisdiction by way of judicial review or Article 40 operate at a different and indeed more radical level."

33. In all the circumstances, I do not think that the threshold for a finding of a breach of substantive constitutional rights has been met. I therefore reject this aspect of the Applicant's claim.

PROCEDURAL SAFEGUARDS

34. In addition to alleging a breach of his substantive constitutional rights, the Applicant also contends that there has been a breach of his right to fair procedures. The Applicant asserts an entitlement (i) to a formal written decision containing adequate reasons for the separation; (ii) to notice of the terms of the separation, including its duration; (iii) to an opportunity to make representations; and (iv) to an opportunity to appeal the decision. (See paragraphs 59 and 64 of Applicant's written legal submissions. See also E.18 and E.19 of the Statement of Grounds.)

35. The Applicant's case for saying that he is entitled to these procedural safeguards is advanced by reference to the following two arguments. First, it is contended that the separation measures applied to the Applicant represented a form of *punishment*, and that this triggers a right to fair procedures. Secondly, it is contended that even if the separation measures are not to be regarded as a *punishment*, the Applicant is nevertheless entitled to fair procedures as a concomitant right to ensure that any separation measures are proportionate. Reliance is placed in this regard on the judgment in *S.F.* I address each of these arguments under separate headings below.

Separation measures represented a form of punishment

36. The Applicant submits that the separation measures applied to him represented a form of *punishment*. This argument is developed as follows in the written legal submissions.

"59. In the instant case the Applicant was provided with no procedural safeguards relating to the imposition of separation and associated deprivations. The Applicant has not been provided with any formal written decision containing adequate reasons regarding the imposition and continuation of this punishment regime. The Applicant was denied an opportunity to make representations in respect of this punishment regime. The Applicant was denied an opportunity to appeal the decision to subject him to this punishment regime. The Applicant has not been informed of the proposed duration of the punishment and is consequently subject to an indefinite period of segregation.

60. If it is alleged that the Applicant has behaved inappropriately, he is entitled to a hearing as if he were an adult prisoner. He is, in the interests of natural justice, entitled to a finite punishment and to be made aware of the terms of that punishment, including its duration. If he is found to have breached the discipline of the campus, he is entitled to a review of any finding against him and/or an appeal."

37. Tellingly, reliance is placed in this regard on *Kenny v. Governor of Portlaoise Prison* [2017] IEHC 581. That judgment is concerned with the application—not of Rule 62—but of Rule 67 of the Prison Rules 2007 (as amended in 2013). Rule 67 is concerned with the holding of an inquiry into an allegation of a breach of prison discipline. On the facts of *Kenny*, a determination had been made that the applicant, an adult prisoner, had breached prison rules by receiving contraband during a visit from his spouse/partner. The

determination was made on the basis of the assistant governor's review of CCTV footage of the alleged incident. The following sanctions were imposed on the prisoner for a period of 35 days. The prisoner was (i) ordered to wear prison clothes; (ii) prohibited from specific activities/evening recreation; (iii) prohibited from specific activities/use of the gym; (iv) prohibited from having personal visits; (v) prohibited from having personal phone calls; and (vi) prohibited from possessing specific articles.

38. The High Court (Ní Raifeartaigh J.) held that the Prison Rules are required to be read and informed by principles of constitutional fair procedures. Ní Raifeartaigh J. further held that whereas the disciplinary inquiry under Rule 67 did not require anything like the full panoply of an adversarial hearing, the basic evidence, namely the CCTV footage, upon which the decision-maker was proposing to base his decision, should have been shown to the prisoner so that he could have an opportunity to comment upon it.

39. I do not think that the position in which the Applicant found himself in September 2018 is analogous to that of the adult prisoner in *Kenny* for the following reasons. First, the Prison Rules 2007 do not apply to Oberstown. Whereas the Applicant makes a specific plea that the absence of procedural safeguards similar to those provided for under Rule 62 represents a breach of the constitutional guarantee of equality before the law (discussed below at paragraph 62 *et seq*.), no such plea has been made in respect of Rule 67.

40. Secondly, there is no plausible basis for saying that the separation measures applied to the Applicant represented a form of punishment.

41. The Director has averred as follows at paragraph 61 of his affidavit.

> "61. The placing of the Applicant in accordance with the Campus' Single Separation Policy was undertaken in the circumstances set out above, solely to ensure the personal safety of the Applicant, as well as other residents of the unit, and the general security on the campus. At no time was the Applicant placed on separation as a punishment for his involvement in the events of the 16th September 2018."

42. It is clear from the description of the measures as set out in the Director's affidavit that they were intended to assist in the management of the Applicant's behaviour. As outlined, the Applicant had threatened—and continued to threaten—to harm staff members and other detainees. None of this evidence has been controverted by the Applicant and no application has been made to cross-examine the Director.

43. Accordingly, even if the Prison Rules had applied to Oberstown, no requirement for an inquiry of the type mandated under Rule 67 would have arisen on the facts of the present case. Section 13 of the Prisons Act 2007 (sanctions for breach of prison discipline) expressly provides at subsection (6) that nothing in that section prevents the governor taking immediate provisional or protective measures to maintain order and discipline or prison security.

44. Thirdly, the limited separation measures applied to the Applicant fall well short of the sanctions applied to the prisoner in *Kenny*, and do not trigger a requirement for a hearing.

Procedural safeguards necessary to ensure proportionality

45. The Applicant has submitted, in the alternative, that even if the separation measures are not to be regarded as a punishment, the Applicant is nevertheless entitled to fair procedures for the same reasons as set out in the judgment in *S.F.* at [117] to [119] as follows.

> "It also seems to me that certain procedural safeguards must be observed in order to ensure that proportionality is carefully observed and that steps are taken to monitor whether the young person is actually being harmed by the measures taken.
>
> I appreciate that the issue of procedural safeguards has been dealt with in the 'adult prisoner' cases through the prism of Rule 62 of the Prison Rules and not through the constitutional lens. However, my understanding of the authorities is that certain procedural safeguards were viewed as intrinsic and fundamental to ensuring the lawful use of solitary confinement because of the potentially far-reaching consequences of such confinement in terms of psychological impact and the importance of the particular rights at stake. In my view, this must be all the more so in respect of young persons and that certain minimum procedural safeguards must be mandated by the Constitution and cannot simply be dependent on there being in existence a set of rules or regulations. It is sometimes the case that constitutional rights can generate procedural as well as substantive rights. To take one example, in *Damache v DPP* [2012] 2 IR 266, in which the Supreme Court held section 29(1) of the Offences Against the State Act, 1939, as inserted by s.5 of the Criminal Law Act, 1976, inconsistent with the Constitution, it was held that the constitutional right to the inviolability of the home was such that the issuance of a warrant to search a dwelling should adhere to fundamental principles including the involvement of an independent decision maker, who was able to assess the conflicting interests of the State and the individual in an impartial manner, and that best practice was to keep a record of the basis upon which the search warrant was granted. Thus, the substantive constitutional right to the inviolability of the dwelling generated certain specific procedural safeguards.
>
> While again I do not think it would be appropriate for the Court to be overly prescriptive about what is required by the Constitution in terms of procedural safeguards, certain safeguards have been repeatedly referred to both in domestic and international contexts, including the jurisprudence of the European Court of Human Rights, and it seems to me that these minimum constitutional safeguards must involve; (1) some element of formality concerning the decision to separate and any subsequent decision to continue the separation; (2) some form of review at appropriate intervals and at some appropriate level of seniority; (3) some form of notification to the prisoner as to the duration of the measure or, in cases where the prisoner or detainee can affect the duration of the measure by his own conduct, information about what he has to do in this regard; (4) some method by which the voice of the detainee can be factored into the decision-making process, if not at the outset of the detention if circumstances do not make this practicable, certainly upon its renewal at intervals; and (5) appropriate medical or psychological monitoring to ensure that actual harm is not being caused."

46. These findings must be seen in the context of the separation measures applied to the detainees in *S.F.* It will be recalled that the detainees had been subject to separation measures for a period of some three weeks, and, for part of this time, the measures had included deprivations in terms of access to bedding, running water, physical exercise, educational and recreational materials and contact with family members.

47. It occurs to me that separation measures must achieve a minimum threshold of severity before an entitlement to fair procedures of the elaborate nature contended for by the Applicant is triggered. Even then, the right to fair procedures may have to be delayed

where *urgent* action is required especially where the need for urgent action arises from the conduct of the detainee. See, by analogy, *Dellway Investment Ltd v. National Asset Management Agency* [2011] IESC 4, [2011] 4 I.R. 1, [344].

> "In a number of cases countervailing factors have successfully been invoked to justify a failure to observe *audi alteram partem*. The dominant countervailing factor in these cases is extreme urgency: a need for immediate action in the circumstances of the case, sometimes caused by the person seeking to be heard."

48. I do not think that it is inconsistent with the judgment in *S.F* to say that separation measures must achieve a minimum threshold of severity. The judgment in *S.F.* at [118] emphasises the potentially far-reaching consequences of solitary confinement in terms of psychological impact. It seems reasonable to infer from this that the finding that there is an entitlement to procedural safeguards is predicated on the separation measures at issue reaching a particular threshold.

49. I also rely in this regard on the judgment in *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216; [2015] 2 I.L.R.M. 316 (cited at paragraph 32 above).

50. The separation measures applied to the Applicant in the present case do not exhibit any of the features which had been of considerable concern to the High Court in *S.F.* In particular, the Applicant had been provided with access to exercise, and to telephone contact with his family, at all times. The Applicant was also allowed to reside in his own room, and had access to educational and recreational materials. Moreover, the separation measures only applied for a period of six days, with the restrictions being reduced over the course of the six days.

51. I am satisfied, therefore, that there was no obligation upon the Director to provide procedural safeguards of the *specific type* contended for by the Applicant, i.e. the very formal procedure contended for at paragraphs 59 and 64 of Applicant's written legal submissions.

No evidence that procedural safeguards not complied with

52. For the reasons set out above, I am satisfied that there was no obligation upon the Director to provide procedural safeguards of the specific type contended for by the Applicant. Lest I am incorrect in this conclusion, I propose to consider whether the evidence before the court establishes that the procedural safeguards were not complied with.

53. The procedural safeguards contended for by the Applicant by reference to the judgment in *S.F.* have been summarised as follows in the Applicant's written legal submissions.

> "64. In the instant case the Applicant has been segregated on three occasions and there has been (1) an absence of any formality *concerning the decision* to separate and the subsequent decision to continue the separation; (2) no review at appropriate intervals and at some appropriate level of seniority; (3) no notification to the Applicant as to the duration of the measure or information about what the Applicant has to do to affect the duration of the measure by his own conduct; (4) no method by which the Applicant's voice was factored into the decision-making process."

54. These procedural safeguards are different from—and less onerous than—the very formal procedures contended for at paragraphs 59 and 64 of Applicant's written legal submissions. See also paragraphs E.18 and E.19 of the Statement of Grounds.

55. For the reasons set out below, I am satisfied that the Director and staff of Oberstown complied with the school's *Single Separation Policy*. This is in contrast to the facts of *S.F.* where, it will be recalled, the High Court had found that the authorities had failed to comply with their own separation policy. See paragraph [120] of the judgment as follows.

> "Ironically, Oberstown's own Separation Policy provided for many of these safeguards, including the provision of an independent advocate for the young person subjected to separation, and written authorisations by persons at appropriate levels of seniority. However, these safeguards were not observed in the present case. The decision-making seems to have been at a very informal level. There do not appear to have any written authorisations from the Director setting out the precise reasons for and objectives of the separation both at the commencement of the period of separation or at regular intervals during the period of separation. For the reasons set out in the authorities discussed above, an element of formality in this regard is important in ensuring that the appropriate objectives sought are kept firmly in focus. One consequence of the absence of any such formal written decision of any kind in the present case is that it has proved difficult for the Court to reconstruct the Director's thinking regarding the need for separation at any given time. Indeed, it is not entirely clear whether the Director did engage in direct decision-making in this regard at all relevant times or whether some decision-making was in fact delegated to Unit level. […]"

56. As explained in the Director's affidavit in the present case (Appendix I), the *Single Separation Policy* had been revised following the judgment of the High Court in *S.F.* Separation is defined under the Policy as follows.

> "Separation in this policy is when a young person is separated from his or her peers to a room designated for separation, for as short a period of time as is necessary, due to one or both of the following reasons:
>
> - Where a young person is likely to cause significant harm to her/himself or others;
>
> - Where a young person is likely to cause significant damage to property that would compromise security and impact on the safety of others."

57. It is also averred by the Director that revised procedures came into effect in July 2018 (hereinafter "*Single Separation Procedures*"). It appears that the effect of these revisions is that many, if not all, of the procedural safeguards identified in the judgment in *S.F.* have now been put on a more formal footing albeit still on a non-statutory basis. The first two safeguards mandate some element of formality and a revision at an appropriate level of seniority before separation measures can be applied and extended. These requirements are achieved by the following features of the *Single Separation Procedures* (July 2018).

58. The *Single Separation Procedures* (July 2018) provides that the decision on any separation beyond 15 minutes is to be made by a Unit/On Call Manager, and that if separation is to continue beyond an 8-hour period or if a young person is to remain in a protection room overnight, it must be authorised by the Deputy Director of Operations or the Director. The Director will decide on authorisation where the three-day period has been reached.

> "Where a young person was on separation prior to bedtime and there is a request to continue the separation the

subsequent morning, the following process applies:

> 4.1.1. 8.00 am handover – Night Manager brings a copy of all separation forms relating to young people on separation at bedtime the previous night.
>
> 4.1.2. On Call Manager and Deputy Director review these Incident Form/Continued Separation Form.
>
> 4.1.3 On Call Manager and working Unit Managers work with the relevant unit staff to undertake an up-to-date assessment of any separation where there is a request to have the separation re-commence. Where it is proposed to continue the separation, the Continued Separation Form is to be to be commenced. Records relating to the current situation are to be used to inform this authorisation and reviewed by the Unit/On Call Manager.
>
> 4.1.4. At 1pm daily the On Call Manager is to send a text to the Director advising of the name of all young people on separation at that time.
>
> 4.1.5. At weekends where there are ongoing separations the On Call Manager is to liaise with the On Call Deputy Director via telephone regarding separations that require a Deputy Director/Director authorisation."

59. There is no evidence before the court which indicates that these procedural safeguards were not complied with in respect of the separation measures applied to the Applicant. Nor has the Applicant sought to cross-examine the Director on his affidavit.

60. Insofar as the third procedural safeguard asserted, i.e. notification of the detainee, is concerned, the Applicant has not adduced any evidence to the effect that he did not understand why the separation measures were being imposed, nor that he did not understand what actions on his part would result in their being lessened or ended. Similarly, there is no evidence that the Applicant did not have an opportunity of making his views known during the process even on an informal basis. In the circumstances, the Applicant has failed to discharge the onus upon him as the moving party in the judicial review proceedings.

61. The evidence does indicate that the Applicant had medical attention available to him during the period of six days.

ARTICLE 40.1 / EQUALITY BEFORE THE LAW

Submissions

62. The Applicant has sought, at D.12 of the Statement of Grounds, a declaration that the Respondents have violated the Applicant's constitutional guarantee of equality. The legal grounds upon which this declaration is sought are not entirely clear from Part E of the Statement of Grounds. The only grounds which identify a possible comparator against which any alleged discrimination might be assessed are those at E.18 and E.19 as follows.

> "18. The Applicant is in a less favourable position to an adult detainee who was (*sic*) the benefit of rule 62 of the Prison Rules 2007 when subject to punishment while in custody.
>
> 19. If it is alleged that the Applicant has behaved inappropriately, he is entitled to a hearing as if he were an adult prisoner. He is, in the interests of natural justice, entitled to a finite punishment and to be made aware of the terms of that punishment, including its duration. If he is found to have breached the discipline of the campus he is entitled to a review of any finding against him and/or an appeal."

63. Rule 62 of the Prison Rules 2007 has been set out in an Appendix to this judgment. As appears therefrom, Rule 62 empowers a prison governor to give a direction that *for a specified period* a prisoner shall not (a) engage in authorised structured activities, (b) participate in communal recreation, or (c) associate with other prisoners. Certain safeguards must be complied with: in particular, a direction must be reviewed not less than once in every seven days, and a prisoner has an implicit right to make representations (Rule 62(6)(d)). Rule 62 has to be read in conjunction with Rule 27 (which is also set out in the Appendix).

64. The Prison Rules 2007 do not apply to Oberstown. Oberstown is not a "prison" as defined. An amendment had been enacted under section 144 of the Criminal Justice Act 2006, which amendment would have applied prison legislation to a children detention school *pending* the making of rules for the management of children detention schools under section 179 of the Children Act 2001. However, this amendment was subsequently repealed on 31 March 2017 without ever having been commenced. (Children (Amendment) Act 2015 (No. 30 of 2015), section 3(2), S.I. No. 111 of 2017).

65. The Applicant contends that this disparity of treatment between adult prisoners and juvenile prisoners is unlawful by reason of the guarantee of equality before the law contained within Article 40.1 of the Irish Constitution. (See written legal submissions, page 7).

66. Leading counsel for the Applicant, Mr Patrick McCarthy, SC, placed much emphasis on the judgment in *Byrne v. Oberstown Children Detention School* [2013] IEHC 562; [2014] 1 I.L.R.M 346. That case concerned the distinction in treatment as between juvenile offenders who were being detained in St. Patrick's Institute and Oberstown, respectively. The rules on the remission of sentences applied only to those in St. Patrick's Institute. The High Court (Hogan J.) held that the guarantee of equality in Article 40.1 of the Irish Constitution applies to legislation governing the sentencing process, and that a law which differentiated between offenders so far as eligibility for remission is concerned engages Article 40.1. Hogan J. held that there was no objective justification for treating juvenile offenders differently by reference simply to the place of their detention. See paragraphs [36] and [37] of the judgment as follows.

> "Summing up, therefore, it can be said that a custodial regime which brings about such a stark difference in terms of the release dates of offenders simply because of the location of the place where they serve their period of detention as a result of the application of the remission rules to one place of detention (St. Patrick's Institution), but not to another (Oberstown) immediately engages the application of Article 40.1 with its fundamental command of equality before the law. This is especially so given that such sharply different treatment in terms of custodial release dates impacts significantly on the core constitutional right of personal liberty as protected by Article 40.4.1.
>
> Such a starkly different treatment of otherwise similarly situated young offenders could be objectively justified if it could be shown that detention at Oberstown was, in the words of Laffoy J. in *McM.*, essentially different and served fundamentally different purposes in terms of criminal justice policy than detention regimes operating elsewhere within the juvenile justice regime. While accepting fully the laudable goals, aims and inspirations of Oberstown and accepting further that the applicant would probably personally benefit from an extended stay in such a controlled environment, nevertheless

> the language and structure of the 2001 Act itself entirely negatives any argument that Oberstown is essentially different in this respect from other detention centres."

67. Mr McCarthy, SC, submitted that it follows from this judgment that, for the purposes of Article 40.1, the appropriate comparators for Oberstown are other prisons in the criminal justice system. Thus when considering the treatment of prisoners in respect of matters such as remission, discipline, good order and segregation, the comparison is between adult prisoners and child detainees. Counsel further submits that it is illogical to seek to draw a distinction between adult offenders and juvenile offenders in terms of procedural safeguards applicable to punishment and segregation. If the Oireachtas had sought, in a paternalistic way, to detain the Applicant for reasons other than punishment, then it would not have been done via the Children Act 2001. This Act makes it clear that the Applicant is detained in Oberstown as a *punishment* for offences he has committed. Equality under the law means that the Applicant is entitled to the same degree of certainty and procedural fairness as an adult prisoner. Counsel emphasises that the Applicant is not saying that Rule 62 of the Prison Rules 2007 has to be applied word for word, but rather that a similar—and not a lesser—procedural safeguard has to be applied to juvenile offenders.

68. On behalf of the Respondents, Mr Conor Power, SC, submits that *Byrne* did not involve a comparison between an adult offender and a juvenile offender, but rather a comparison between two different classes of *juvenile offenders*, i.e. those in Oberstown and those in St. Patrick's Institute. Mr Power, SC, placed emphasis on a number of passages from the judgment in *Byrne* which expressly refer to "the juvenile criminal justice system", "the juvenile justice regime" and "similarly situated juvenile offenders". Counsel cited in particular paragraphs [30], [36], [37], [40], [43] and [53] of the judgment.

69. Counsel also relies on the judgment of the High Court (Reynolds J.) in *B. (A Minor) v. Oberstown Children Detention Centre* [2018] IEHC 601 wherein the contrasting positions of (i) a child detainee at a children detention school, and (ii) an adult prisoner has been expressly recognised. The case concerned the availability of what is described as enhanced remission of sentence. An adult prisoner who has engaged in authorised structured activity may apply under Rule 59(2) of the Prison Rules 2007 (as amended) to the Minister for enhanced remission. The term "enhanced remission" is defined as meaning such greater remission of sentence in excess of one quarter, but not exceeding one third, of the term of imprisonment as may be determined by the Minister. The Prison Rules 2007 do not apply to child detainees. The applicant sought to argue that the disparity of treatment between adult prisoners and juvenile prisoners in this regard breached the guarantee of equality before the law under Article 40.1. Reynolds J. rejected this argument stating that the regime in place for the detention of juveniles has to be distinguished from that which applies to adult prisoners. See paragraphs [34] to [38] of the judgment as follows.

> "However, an important distinction has to be drawn on the facts of the instant case. It is well established that the guarantee of equality before the law as contained in Article 40. 1 does not require identical treatment for all persons without any recognition of different circumstances. Referring to this principle in the *Byrne* case, Hogan J. stated as follows:
>
> > 'Yet it is also true that a good deal of latitude must be admitted for the purposes of Article 40. 1 scrutiny where the Oireachtas differentiates between classes of persons for reasons of social policy, provided always that the differentiation is intrinsically proportionate and reasonable…'
>
> The applicant's contention that the current regime amounts to a violation of his rights simply does not stack up. He is detained in Oberstown Detention Centre pursuant to the provisions of the Act of 2001 and is subjected to the same regime as all other juveniles detained under the same provisions. The facts therefore of the instant case are clearly distinguishable from those in the *Byrne* case.
>
> Upon further analysis, it would appear that if the Court was to accept what was being urged upon it, it would mean that any distinction drawn by the Oireachtas at a policy level between the procedures that govern child and adult detention respectively are unlawful and in violation of the equality guarantee. Put simply, this couldn't have been what the Oireachtas intended. If it had so intended, it would have said so in clear and unambiguous terms.
>
> Further, the Court is cognisant of the fact that the regime in place for the detention of juveniles has to be distinguished from that which applies to adult prisoners. The detention of children is primarily focused on rehabilitation rather that punishment, with a multiagency approach that is customised to meet the individual needs of the child and its best welfare interests. The Act of 2001 imposes duties on the respondent in respect of a tailored approach to the individual needs of a child in detention with a view to securing a sustained rehabilitation. It is clear that the opportunity to avail of an enhanced remission regime could potentially conflict with a situation where a planned and coordinated release with other agencies is envisaged. In addition, the Director of Oberstown has considerable discretion in relation to how a child's detention should proceed, including the power to give a child temporary leave from the school where the Director deems it to be appropriate. Such provisions are clearly more appropriate for children than a provision for enhanced remission.
>
> In all the circumstances, the Court is satisfied that it is not appropriate to compare the regime that applies to the applicant with the regime that applies to adult prisoners."

70. Counsel submits that Reynolds J. rightly distinguished the earlier judgment of the High Court (Hogan J.) in *Byrne* (discussed above).

71. For the sake of completeness, it should be noted that the judgment in B*. (A Minor) v. Director of Oberstown Children Detention Centre* is now the subject of an appeal to the Supreme Court. See the Supreme Court's determination of 20 February 2019, *sub nom*. *M.G. (A Minor) v. Oberstown Children Detention Centre* [2019] IESCDET 46.

> "The Court considers that the applicant has raised an issue of general public importance, being the question whether children serving custodial sentences are entitled to the same treatment in respect of remission as adults. Although the case is technically moot, it is accepted that the question may fall into the category of issues that affect a reasonably significant number of individuals while tending to 'evade capture' in that such sentences are, in the case of children, generally of relatively short duration. The Court will, accordingly, grant leave to appeal on this issue."

72. More generally, the Respondents placed emphasis on the special nature of children detention schools. Reference was made to the judgment of the High Court (Barr J.) in *J. v. District Justice Delap* [1989] I.R. 167 at 169/70 which had described the nature of the precursor to a children detention school, namely a reformatory school, as follows.

> "Trinity House is a school which is under the aegis of and managed by the Department of Education. It is staffed by

> teachers and others qualified in social work and allied disciplines. It has no connection whatever with the Prison Service or the Department of Justice. Its primary purpose is to provide long term training and educational facilities to assist young offenders in making a new start in life and to acquire a useful place in society. It is not intended as a place of punishment per se, far less is it geared for or intended to be a place of detention for short-term prisoners. The only characteristic which it has in common with a prison is that in the ordinary course each inmate is obliged to remain in the custody of the school director for a specified period which may vary from not less than two years to not more than four years. I do not accept that the fact of compulsory detention alone implies that persons who are sent to the school by the Courts are being imprisoned for the period of their detention in the penal sense envisaged by Walsh J. in *Sheerin's* case. An obligation to remain at a place for the education and training of young offenders does not, in my view, convert a school into a penal institution analogous to a prison, nor ought the period of education and training which a young offender spends there be regarded as a period of imprisonment in the penal sense of that term. I accept that such detention has in it an element of punishment, but its primary purpose is educational and, most importantly, the period of detention is in the main related to the function of the school as a place of instruction and correction. The duration of a prison sentence on the other hand is primarily related to the gravity of the offence which gave rise to it and the character of the convict."

Discussion

73. Article 40.1 of the Irish Constitution provides as follows.

> "1. All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

74. One practical effect of the "equal before the law" provision is that a *statutory* right may have to be extended to a wider class of individuals than that defined under the relevant legislation. This can be illustrated by reference to the facts of *Agha (A Minor) v. Minister for Social Protection* [2018] IECA 155; [2018] 2 I.L.R.M. 351. That case concerned the eligibility criteria for receipt of a universal social welfare payment colloquially known as "child benefit". Eligibility is assessed by reference to the residency of the parent, rather than the child. This produced the result that child benefit was not payable in respect of a child, who was an Irish Citizen, in circumstances where her mother, a third country national, did not yet have an immigration permission allowing her to reside in the State. The Court of Appeal held that this represented unjustified discrimination against the *child* when compared to other citizen children. The effect of the judgment is that the Legislature would have to amend the eligibility criteria. (The judgment is currently under appeal to the Supreme Court ([2018] IESCDET 204).

75. For present purposes, what is of note is that—notwithstanding that there is no *constitutional* right to the universal payment of child benefit—the applicant was able to lay claim to the *statutory* right by reliance on Article 40.1 Put otherwise, whereas the Legislature has *discretion* as to whether or not to make provision for a universal child benefit payment, once it has chosen to introduce such a payment, it is not permitted to discriminate between citizen children on the basis of their parent's immigration status.

76. The gravamen of the Applicant's complaint in the present case is that the failure to extend the procedural protections provided for under Rule 62 of the Prison Rules 2007 to a *child detainee* in a children detention school represents unjustified discrimination. For the purpose of this argument, the Applicant does not have to establish that there is a *constitutional* right to such procedural protections, but rather has to establish that the omission to extend the *statutory* right under the Prison Rules 2007 to a child detainee represents unjustified discrimination.

77. As the legislative history discussed at paragraph 64 above indicates, this distinction in treatment represents a deliberate legislative choice, with a statutory amendment—which amendment would have applied prison legislation to a children detention school *pending* the making of rules under section 179 of the Children Act 2001—being repealed on 31 March 2017 without ever having been commenced. The Applicant's position thus involves a direct challenge to the current version of the legislation.

78. In order to succeed in his equality argument, it is necessary for the Applicant to establish, first, that two similarly situated individuals or classes of individuals are being treated differently by the legislation; and, secondly, that this difference in treatment is not capable of justification.

79. The starting point is to identify an appropriate comparator. The test for an appropriate comparator has been set out in *M.R. v. An tArd Chláraitheoir* [2014] 3 I.R. 533, [241] as follows.

> "[…] Any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement."

80. As noted above, the Applicant seeks to draw a comparison between a child detainee and an adult prisoner who has the benefit of Rule 62 of the Prison Rules 2007. With respect, this supposed comparison is inapt for a number of reasons as follows.

81. First, the circumstances in which the Applicant found himself in mid-September 2018 are not the same as those catered for under Rule 62. The Applicant was not subject to punishment, and no *a priori* decision had been taken to the effect that he was to be subject to separation measures for a specified period of time. The *Single Separation Policy* (May 2017) expressly states at page 1 that "Single separation must only be used for the shortest period necessary". Rule 62 of the Prison Rules 2007 addresses a different contingency. Rule 62 empowers a prison governor to give a direction that *for a specified period* a prisoner shall not (a) engage in authorised structured activities, (b) participate in communal recreation, or (c) associate with other prisoners. Such a direction must be reviewed not less than once in every seven days.

82. As appears from the judgment of the High Court (O'Malley J.) in *Dundon v. Governor of Clover Hill Prison* [2013] IEHC 608, the restriction on association with other prisoners must reach a particular point before the rule becomes applicable. On the facts of *Dundon*, the applicant prisoner had been placed in a high security part of the prison. This part of the prison was sparsely populated. For much of the time, the applicant had association with only one other prisoner on a continuous basis, with some contact with one other man. The applicant had no access to educational activity.

83. The High Court held that where a prisoner's situation is *de facto* akin to a Rule 62 regime, then consideration must be given to formalising the regime. See paragraphs [79] to [80] and [83] of the judgment as follows.

> "In *Devoy*, it was accepted by the respondent, and held by Edwards J. that there is a 'presumption' arising out the combination of Rules 27 and 62 in favour of a prisoner being permitted to associate with other prisoners. On the authority of *Devoy* I conclude that where a restriction on such association reaches the point at which Rule 62 becomes applicable, it should be invoked so that the notification and oversight provisions take effect.
>
> For the avoidance of doubt it should be made clear that the courts have no role in the micro-management of these issues. It is also accepted that a prison setting is fluid. Prisoners come and go, whether by way of release or transfer, movement to another part of the prison or travelling to court or hospital etc. The status of a prisoner remaining in the unit does not alter with each such development. However, it may be of assistance to recall that Rule 62 requires a weekly review. It seems to me that where a prisoner's situation is *de facto* akin to a Rule 62 regime for a period of days approaching that length of time, and does not appear likely to change within it, consideration must be given to formalising the regime.
>
> […]
>
> It seems to me that where a Governor maintains a high security unit of this nature, it is necessary to monitor the situation of prisoners in it. Where, as in this case, the numbers in the unit drop and a prisoner is not authorised to engage in education, work or training, it is incumbent on the Governor to consider either relaxing the regime to which the prisoner is subject or invoking Rule 62 if the conditions for such invocation exist. Assuming, from the way that this case ran, that the Governor was unwilling to do the former, I conclude that he should have made a formal decision in relation to the latter – on the evidence presented, he had grounds for so doing from at least the 9th May, 2013. This would have conferred upon the applicant the protection involved in regular review and notification and, if the situation continued for more than three weeks, the oversight of the Director of the Prison Service."

84. The facts of *Dundon* are in stark contrast to those of the present case. It is incorrect to suggest that—had an adult prisoner been subject to the (minimal) separation measures applied to the Applicant for six days in mid-September 2018 (which did not involve the withdrawal of all educational activity)—such a hypothetical adult prisoner would have been entitled, by reference to Rule 62 of the Prison Rules 2007, to the procedural safeguards now contended for by the Applicant.

85. In truth, the circumstances in which the Applicant found himself in mid-September 2018 more closely approximate to those addressed under *Rule 64* of the Prison Rules 2007. Rule 64 makes provision for accommodating a prisoner in a "special observation cell" where it is necessary to prevent the prisoner from causing imminent injury to himself or herself or others, and all other less restrictive methods of control have been or would, in the opinion of the Prison Governor, be inadequate in the circumstances. There is no provision made for a hearing or representations from the prisoner in this regard.

86. Of course, the very fact that neither rule is precisely on point confirms the fallacy of seeking to draw a comparison between two very different legislative regimes.

87. This leads to the second—and more fundamental—reason that the comparison between a child detainee and an adult prisoner is inapt. The legislative regimes applicable to each are so vastly different that a valid comparison cannot be drawn between the two for the purposes of Article 40.1.

88. The difference between the two statutory regimes can be illustrated by reference to the following features of the regime applicable to children who have been convicted of a criminal offence. The principles relating to exercise of criminal jurisdiction over children are set out as follows at section 96 of the Children Act 2001.

> "96.—(1) Any court when dealing with children charged with offences shall have regard to—
>
> (a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and
>
> (b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.
>
> (2) Because it is desirable wherever possible—
>
> (a) to allow the education, training or employment of children to proceed without interruption,
>
> (b) to preserve and strengthen the relationship between children and their parents and other family members,
>
> (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
>
> (d) to allow children reside in their own homes,
>
> any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.
>
> (3) A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.
>
> (4) The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.

(5) When dealing with a child charged with an offence, a court shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society."

89. As appears, a period of detention should be imposed on a child only as a measure of last resort. Section 96(5) seeks to balance the potentially competing interests of the child, the victim and the protection of society.

90. There is a statutory prohibition on a court passing a sentence of imprisonment on a child or committing a child to prison. (Section 156 of the Children Act 2001). Instead, a court may impose on a child a period of detention in a children detention school (Section 142 of the Children Act 2001).

91. The principal object of such schools is as follows.

"158.—It shall be the principal object of children detention schools to provide appropriate educational, training and other programmes and facilities for children referred to them by a court and, by—

(a) having regard to their health, safety, welfare and interests, including their physical, psychological and emotional wellbeing,

(b) providing proper care, guidance and supervision for them,

(c) preserving and developing satisfactory relationships between them and their families,

(d) exercising proper moral and disciplinary influences on them, and

(e) recognising the personal, cultural and linguistic identity of each of them,

to promote their reintegration into society and prepare them to take their place in the community as persons who observe the law and are capable of making a positive and productive contribution to society."

92. Moreover, the relationship between the director of a children detention centre and a child detainee is significantly different from that as between a governor of a prison and an adult prisoner. This is evident from the provisions of section 180 of the Children Act 2001. As appears from subsection (8), a director has more extensive obligations.

"(8) Where a child is detained in a children detention school, the Director of the school shall—

(a) have the like control over the child as if he or she were the child's parent or guardian, and

(b) do what is reasonable (subject to the provisions of this Part) in all the circumstances of the case for the purpose of safeguarding or promoting the child's education, health, development or welfare."

93. The Applicant's argument involves an oversimplification of the legal position. In effect, what the Applicant seeks to do is to point to a *single* provision of the Prison Rules 2007 in isolation, and then to argue that the absence of a similar legislative provision in the case of a child detainee is indicative of unjustified discrimination. The implication of the argument is that the absence of an analogue to Rule 62 in the case of a child detainee is one of the only differences in treatment between adult prisoners and child detainees. In truth, the actual legal position is that the two statutory regimes are so vastly different that the two classes cannot be regarded as similarly situated for equality purposes.

94. Finally in this regard, the Applicant's reliance on the judgment in *Byrne v. Oberstown Children Detention School* [2013] IEHC 562; [2014] 1 I.L.R.M 346 is misplaced. Properly understood, the comparison in that case was between two classes of juvenile offenders inter se. This is evident, in particular, from paragraphs [30], [36], [37], [40], [43] and [53] of the judgment. *Byrne* is not authority for the proposition that a child detainee and an adult prisoner are similarly situated for the purposes of making a comparison under Article 40.1.

Differentiation in treatment between child and adult offenders is justified

95. For the reasons set out above, I do not think that a valid comparison can be drawn for "equality before law" purposes between child detainees and adult prisoners by reference to Rule 62 of the Prison Rules 2007. In truth, the Oireachtas has chosen to differentiate between children and adults at a much earlier stage, i.e. at the threshold for entry into the criminal justice system. There are important differences in the procedure applicable to children who are alleged to have committed an offence as compared to adults. The procedure applicable to children is provided for principally under the Children Act 2001. Provision is made under that Act for charges against children to be heard by the District Court exercising its jurisdiction as the Children Court. The Children Court may in certain circumstances deal summarily with a child charged with an indictable offence. The Children Court also has powers to involve the Child and Family Agency in proceedings. Relevantly, the sanctions applicable to a child who has been *convicted* of an offence are different than for an adult. A period of detention should be imposed on a child only as a measure of last resort. (Section 96(2) of the Children Act 2001). There is a statutory prohibition on a court passing a sentence of imprisonment on a child or committing a child to prison. (Section 156 of the Children Act 2001). Instead, a court may impose on a child a period of detention in a children detention school (Section 142 of the Children Act 2001).

96. The Applicant has not sought to challenge any of these legislative choices under the Children Act 2001. This is unsurprising as such a challenge would inevitably have failed. Article 40.1 expressly allows for the enactment of legislation which has due regard to differences of capacity. The difference in the treatment of adult and child offenders provided for under the Children Act 2001 serves a legitimate legislative purpose, i.e. the rehabilitation of young offenders and the need to reflect the special physical, psychological, emotional and educational needs of children; is relevant to that purpose, and treats both classes fairly. It is consistent with Article 42A of the Irish Constitution.

97. The Applicant, at page 14 of his written legal submissions, accepts that classifications based on age are not, of themselves, constitutionally invalid, but submits that they must be capable of justification. The following passage from *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321 at 346 is cited by the Applicant in support of that submission.

"Article 40.1, as has been frequently pointed out, does not require the State to treat all citizens equally in all circumstances. Even in the absence of the qualification contained in the second sentence, to interpret the Article in that

manner would defeat its objectives. In the present context, it would mean that the State could not legislate so as to prevent the exploitation of young people in the work place or, at the other end of the spectrum, to make special provision in the social welfare code for the elderly. The wide ranging nature of the qualification which follows the general guarantee of equality before the law puts beyond doubt the legitimacy of measures which place individuals in different categories for the purposes of the relevant legislation.

In particular, classifications based on age cannot be regarded as, of themselves, constitutionally invalid. They must, however, be capable of justification on the grounds set out by Barrington J. in *Brennan v. AG* [1983] ILRM 449 as follows:-

> 'The classification must be for a legislative purpose… it must be relevant to that purpose, and… each class must be treated fairly.'"

98. Although not referred to in the Applicant's written legal submissions, this passage has been cited with approval by the Supreme Court in another "age classification" case, namely *D. v. Residential Institutions Redress Review Committee* [2009] IESC 59; [2010] 2 I.L.R.M. 181. Having set out the said passage, and a passage from *In re Article 26 and the Planning and Development Bill 1999* [2000] 2 I.R. 321, Murray C.J. then stated as follows.

> "Neither the statement of Hamilton C.J. that such legislation must be 'capable of justification' nor that of Barrington J that a 'classification must be for a legitimate legislative purpose' should be interpreted as imposing a burden of justification on the Oireachtas, save, it may be, for cases of invidious categories of the sort considered to be 'presumptively at least, proscribed by Article 40.1 [though] not particularised…' (see Hamilton C.J. *In the matter of the Employment Equality Bill 1996,* cited above at page 347). It was there said that: 'manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.' The respondent accepts that age, as a ground of alleged discrimination, does not raise the sort of concerns that are posed by these types of discrimination, and that the State is not required to justify discrimination in this case. It is submitted, however, that the State is required to identify a possible justification. The Court is satisfied that it is a matter for the respondent to demonstrate a *prima facie* basis for the claim that the classification is discriminatory."

99. The Applicant has failed to demonstrate a *prima facie* basis for claiming that classifying children differently for the purpose of post-conviction detention involves discrimination.

100. The legislative classification reflects a distinction in capacity as between adults and children, and as such is authorised under the second paragraph of Article 40.1. The classification also seeks to advance the objective of rehabilitation of child offenders. The nature of a child detention school (as defined), and its objectives and purposes, are different from those of an adult prison. The principal object of children detention schools as set out at section 158 of the Children Act 2001 has been cited at paragraph 91 above.

101. In this regard, the following passages from the dissenting judgment of Denham J. in *D.G. v. Eastern Health Board* [1997] 3 I.R. 511 at 535 are instructive. Although Denham J. differed from the majority in *D.G.* as to the outcome of the case, her analysis of the implications of the difference in capacity between a child and an adult for the purposes of Article 40.1 is consistent with the general tenor of the subsequent case law.

> "(c) Equality
>
> No adult could be ordered to a penal institution in circumstances such as those existing here. It would be preventative detention, which is unconstitutional. Thus the child is not equal to the adult. However, the Constitution clearly envisages equality being affected by differences in capacity. Thus, the mere fact that such an order could not be made of an adult does not per se render it unconstitutional.
>
> However, the rational for such loss of equality by the child is that the loss of liberty is for the welfare of the child. Consequently loss of liberty to enhance education and the training and development of a child is of a different character. The function of a children's institution is education, correction and care, it relates to the capacity of the person, it is not delivering a punishment. It is of the essence of the institution that it be educational and caring and consequently fundamentally a school or child care establishment staffed by appropriate personnel. In contrast a penal institution is an institution for punishment staffed by prison officers. It may well have medical, educational and training facilities but they are not the raison d'etre of the institution.
>
> A deprivation of liberty by placement in a child care institution carries with it the concept of the welfare of the child. A prison does not. Thus the inequality suffered by the child by being placed in a penal institution in such circumstances relative to the position of an adult is unconstitutional, the applicant's right to equality has been breached by this order. The rationale which exempts a child care institution does not apply. Further, approaching the matter as to equality between children, it must be queried whether a child from a different background, who brought a civil action, would find himself ordered to be detained in a penal institution."

102. Whereas these passages are directed to the issue of *preventative* detention (as opposed to post-conviction detention), and the contrasting functions of a child care institution and a penal institution, a similar analysis can be applied to the contrasting functions of a child detention school and a penal institution.

103. For the reasons set out above, I am satisfied that the Children Act 2001 serves a legitimate legislative purpose. It is next necessary to consider whether the difference in capacity relied upon, i.e. the age classification, is relevant to that legislative purpose and that each class is treated fairly. What is meant by "relevant" in this context can be illustrated by reference to the judgment in *Brennan v. Attorney General* [1983] I.L.R.M. 449 ("*Brennan*").

104. *Brennan* concerned a challenge to the Valuation Acts. The challenge was based, in part, on the fact that the rateable valuations were out of date, having been assessed some eighty years previously. It was argued that the Valuation Acts failed to hold citizens equal before the law because the Act failed to provide a rational and fair system of valuing citizens' property. The High Court (Barrington J.) held that whereas it was entirely appropriate and permissible that the legislature should classify landholders by reference to the value of their lands and that it should impose liabilities or confer benefits on this basis, the unit of measurement employed was so out-dated and inaccurate that it failed to achieve the legitimate purpose which the legislature had in mind. Put

otherwise, the classification relied upon, i.e. the old assessment of the value of the lands, was not "relevant" to the legislative purpose in circumstances where the valuation relied upon was so out-dated and inaccurate.

105. Barrington J. also discussed the concept of relevance by reference to the judgment in *de Búrca v. Attorney General* [1976] I.R. 38 which concerned qualifications on acting as a member of a jury.

> "[…] Nevertheless the Court considered the provisions of Article 40 Section 1 relevant to the issue. It took the view that a person's sex, or the question of whether he or she did or did not own a particular kind of property, were not relevant to his or her capacity to act on a jury or to his or her social function as a juror.
>
> It is not clear whether the Court took the view that the discrimination effected by the Jury Act was 'invidious' but it certainly took the view that it was not constitutionally acceptable as not being relevant to the legislative purpose in hand. It may be that all discrimination between citizens not relevant to a legitimate legislature purpose is invidious."

106. (The Supreme Court ultimately rejected the plaintiffs' equality argument in *Brennan* on the basis that the alleged inequality did not concern their treatment as *human persons* but rather concerned the manner in which, as occupiers and owners of land, their property had been rated and taxed. See *Brennan v. Attorney General* [1984] I.L.R.M. 355. Notwithstanding this, the Supreme Court has subsequently approved of the High Court's general formulation of the legal test for equality in a number of judgments, including, as noted above, *In re Article 26 and the Employment Equality Bill 1996 and In re Article 26 and the Planning and Development Bill 1999).*

107. The requirement that the differential criteria must be "relevant" to the legislative purpose is intended to ensure that there is a reasonable relationship or proportionality between (i) the differential criteria, and (ii) the difference in treatment. For example, the case law indicates that a person's *gender* is not "relevant" to legislation governing qualifications for serving on a jury (*de Búrca v. Attorney General* [1976] I.R. 38), but may be relevant to legislation which criminalises sexual acts between minors and exempts a female child from certain of those offences (*M.D. (A Minor) v. Ireland* [2012] IESC 10, [2012] 1 I.R. 697 ("The danger of pregnancy for the teenage girl was an objective which the Oireachtas was entitled to regard as relating to 'differences of capacity, physical and moral and of social function', as provided for in Article 40.1 of the Constitution.")).

108. Applying these principles to the facts of the present case, I am satisfied that the difference in capacity, i.e. the age of an alleged offender, which informs the difference in treatment under the Children Act 2001, is "relevant" to the legislative purpose. More specifically, the difference in treatment under the Children Act 2001 as between child offenders and adult offenders—both prior to and post their conviction—reflects the special physical, psychological, emotional and educational needs of children. I am also satisfied that the difference in capacity would also be "relevant" to a legislative choice that the relationship between the director of a child detention school and a child detainee is more *paternalistic* than that between a prisoner governor and an adult prisoner. This difference in capacity would justify legislation which provides that a director can take measures in the interests of the health and safety of a child detainee—or of their fellow detainees—without the necessity for a formal or adversarial hearing of the type envisaged under the Prison Rules 2007.

109. As the judgment of the Supreme Court in *D. v. Residential Redress Review Committee* indicates, classifications based on age are not presumptively suspect, and the courts will show some deference to the Legislature's policy choices. This does not mean that the Legislature is at large. The difference in treatment must be "relevant" to the difference in capacity, i.e. the age classification. The legislative choice that a child offender should be detained in a children detention centre as opposed to a prison, and be subject to a more paternalistic regime, is "relevant" in this sense. The difference in treatment reflects the different capacity, and, in particular, the specific educational and emotional needs of a child as compared to an adult.

110. Of course, it is possible to imagine *other* differences in treatment which are less obviously "relevant" to a classification based on age. For example, the current version of the legislation provides that (i) the penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind (Section 96(4) of the Children Act 2001), and (ii) that the Children Court cannot impose a term of detention longer than the term of detention or imprisonment which a court could impose on an adult who commits the same offence. (Section 149 of the Children Act 2001). Were amending legislation to be introduced which allowed a child offender to be detained at a children detention school for a period which *exceeded* the maximum sentence of imprisonment which could be imposed on an adult offender, then it might be argued that such a difference in treatment does not meet the "relevance" test. Whereas classification based on age can justify a difference in treatment in terms of the *quality* of detention, i.e. at an educational institute rather than a conventional prison, it is less immediately obvious that a difference in *quantity* i.e. the period of detention, is justified. Certainly it would be difficult to justify a *longer* period of detention for a child. (c.f. *J. v. District Justice Delap* [1989] I.R. 167). Similar concerns might arise in the context of legislation which differentiated between adult and child offenders in terms of the availability of the enhanced remission of sentences. As noted at paragraph 71 above, this is an issue which is currently under consideration by the Supreme Court in *M.G. (A Minor) v. Oberstown Children Detention Centre* [2019] IESCDET 46.

111. The Legislature is also constrained by the requirement to respect *other* constitutional provisions. Whereas the differences in the procedure applicable to a child, as opposed to an adult, who has been charged with a criminal offence introduced under the Children Act 2001 can be justified by reference to a difference in capacity, the legal position might well be otherwise were an attempt to be made to *deny* children the right to elect for a jury trial in the case of a non-minor offence on a different basis than applies to adults. The current legislation allows the Children Court to deal summarily with an indictable offence in certain circumstances, but this is subject to the child, on being informed by the court of his or her right to be tried by a jury, consenting. A legislative amendment which applied a differentiated test for non-jury trials for children and adults would be vulnerable to challenge. Similarly, if legislation were introduced which entrenched on the rights of a child as protected under Article 42A of the Irish Constitution, it would be vulnerable to challenge.

112. There was some suggestion—in the Applicant's written legal submissions—that differentiation on the grounds of age would only be justified where the legislation does not put a child in an inferior position. In particular, the judgments in *Landers v. Attorney General* (1975) 109 I.L.T.R. 1 and *X.Y. v. Health Service Executive (No. 2)* [2013] IEHC 490; [2013] 1 I.R. 592; [2014] 1 I.L.R.M. 170 were cited as cases where the differences in treatment were only upheld because the impugned legislation did not leave a child in an inferior position when compared to an adult.

113. With respect, I do not think that this submission is correct. Where legislation applies different treatment to different classes, it will follow, almost by definition, that one of the classes will be treated *less favourably* than the other. (In some instances, the legislation will seek to compensate for an existing disparity in the position of the two classes, e.g. the payment of pensions to older persons who are less likely to be able to fend from themselves). That is the essence of a difference in treatment. The principal

question for the courts is whether the difference in treatment is justified by reference to the criteria by which the classification is made. The legal test in this regard is that set out in *Brennan*, as approved by the Supreme Court.

114. Lest I am incorrect in this, I am satisfied in any event that the Children Act 2001 provides a number of what might be described as "benefits" to alleged child offenders. See in particular sections 96 and 156 cited earlier. Taken in the round, these benefits outweigh any alleged omission of procedural rights approximating to those found under Rule 62 of the Prison Rules 2007. Put shortly, the Children Act 2001 does not put a child in an inferior position.

Conclusion on Article 40.1 / Equality before the Law
115. The Applicant's contention that there has been a breach of the guarantee of equality before the law under Article 40.1 of the Irish Constitution is unfounded. First, the comparison between an adult prisoner and a child detainee is inapt in circumstances where the two are not similarly situated. Secondly, and in any event, Article 40.1 expressly allows for the enactment of legislation which has due regard to differences of capacity. The difference in treatment of offenders based on age serves a legitimate legislative purpose, is relevant to that purpose and treats both classes fairly.

CLAIM FOR MANDATORY RELIEF AGAINST MINISTER
116. The Minister has a discretionary power ("may") under section 221 of the Children Act 2001 to make regulations with respect to *inter alia* the control and management of children detention schools and the maintenance of discipline and good order generally in them.

117. The Applicant has sought mandatory relief against the Minister as follows. See paragraph D.7 of the Statement of Grounds.

> "7. An Order of Mandamus by way of application for judicial review compelling the Second Named Respondent to enact rules governing the control and management of children detention schools and the maintenance of discipline and good order generally in them."

118. This claim was not pressed at the hearing before me. For the sake of completeness, however, I should formally record that this claim is dismissed. The terms of section 221 of the Children Act 2001 are permissive, and do not make it mandatory for the Minister to introduce regulations.

119. The legal position is analogous to that considered by the Supreme Court in *State (Sheehan) v. Government of Ireland* [1987] I.R. 550. In that well-known case, the Supreme Court held that the Government was not obliged to bring section 60 of the Civil Liability Act 1961 into operation. See page 561 of the reported judgment as follows.

> "In my opinion, however, s. 60(7), by vesting the power of bringing the section into operation in the Government rather than in a particular Minister, and the wording used, connoting an enabling rather than a mandatory power or discretion, would seem to point to the parliamentary recognition of the fact that the important law reform to be effected by the section was not to take effect unless and until the Government became satisfied that, in the light of factors such as the necessary deployment of financial and other resources, the postulated reform could be carried into effect. The discretion vested in the Government to bring the section into operation on a date after the 1st April 1967 was not limited in any way, as to time or otherwise."

120. In *Rooney v. Minister for Agriculture and Food* [1991] 2 I.R. 539 at 546, the Supreme Court (*per* O'Flaherty J.) doubted whether the courts would have jurisdiction to review a decision by the Minister of Agriculture to operate an extra-statutory scheme instead of exercising his power to make orders under the Diseases of Animals Act 1966 in the absence of *mala fides*.

EUROPEAN CONVENTION ON HUMAN RIGHTS
121. The Statement of Grounds includes the following plea in respect of the European Convention on Human Rights at E.26.

> "26. The imposition of the current conditions amounts to a sanction imposed on the Applicant in violation of his rights under Article 3 and Article 6 of the European Convention on Human Rights."

122. This ground was not pressed at the hearing before me. For the sake of completeness, I should record that I am satisfied that the minimal separation measures imposed on the Applicant in mid-September 2018 did not reach the threshold to engage Article 3 of the European Convention. Moreover, it is well established that the European Convention is not directly applicable in the domestic legal order. No claim for a declaration for incompatibility was made pursuant to the European Convention on Human Rights Act 2003. Nor was the Irish Human Rights and Equality Commission joined to the proceedings as would be required where a declaration of incompatibility is being sought.

123. In any event, for the reasons set out in the judgment in *S.F.*, at paragraphs [135] to [137], I am satisfied that it is unnecessary to consider any alleged breach of the European Convention in circumstances where the protection from torture or inhuman and degrading treatment under the Irish Constitution is at least equal to, if not greater than, the protection afforded by the European Convention.

124. I also rely on the recent judgment of the Court of Appeal in England and Wales *in R (On the application of A.B.) v. Secretary of State for Justice* [2019] EWCA Civ 9 (which was cited by the Respondent).

CONCLUSION
125. The application for judicial review is dismissed for the reasons set out in detail herein.

126. A short summary of the principal reasons has already been set out at pages 1 to 3 above, and will not be repeated here.

APPENDIX I

EXTRACT FROM DIRECTOR'S AFFIDAVIT
"Incident of 16th of September 2018

46. On the 16th September 2018, a Sunday evening, at approximately 5 pm the Applicant, along with two other residents of the Oberstown campus who had earlier been smoking together in the sports hall, engaged in an 8 hour stand-off with staff. The Applicant and the two other young people scaled up onto a basketball net in the campus sports hall, and refused to cooperate with Residential Social Care Workers and Night Supervising Officers. The Applicant directed verbally abusive slurs of a highly sexualised nature and

threatening language towards residential social care and night supervising staff. The Applicant refused to co-operate and come down from the basketball net for a period of 8 hours. During the stand-off, staff attempted to engage and encourage the Applicant to co-operate. At approximately 1.30 am, the Applicant agreed to return to the residential unit.

47. I say that on the following morning, the 17th September 2018, the Applicant refused to take his medication. At approximately 10 am, a phone call was made to his mother to advise her that the Applicant was on separation. However, the phone was not answered. The Applicant's mother's phone did not have an answering machine, and therefore it was not possible to leave a message. The Applicant was allowed out to the yard. Whilst there, as staff were trying to re-integrate the Applicant into the unit routines, the Applicant again became threatening towards staff and another stand-off occurred in the yard. Ultimately, this resulted in the Applicant having to be restrained and brought to a Protection Room. Whilst in the Protection Room, the Applicant refused to engage with staff thereby resulting in a further stand-off. The Applicant then subsequently walked back to his room at approximately 11 am. However, when back in his room, the Applicant again became aggressive towards staff. It was noticed that he had a bleed on his knee, and he was offered medical assistance – which he refused. A further unanswered phone call was made to his mother. However, later further telephone calls were made to both his mother and father and both were advised of the incident, and that the Applicant had been placed on separation.

48. As a result, staff telephoned the Deputy School Principal and requested that his education pack be brought to his bedroom. Later, when returned to his bedroom, the Applicant was allowed to make a phone call to his girlfriend and accepted lunch. He was allowed to go to the multi-purpose room. He also placed a call to his solicitor. He then made a second call to his girlfriend. Throughout the course of the evening he continued to make threatening comments to staff, and expressed his intention of hurting them.

49. I say that on the following morning, Tuesday 18th of September 2018, the Applicant again refused to take this medicine, shouting at the nurse attending to get out. At approximately 10 am, staff who were attending to the Applicant again contacted the Deputy Principal for the Applicant's Education Pack. During the morning the Applicant began threatening to hurt staff or his fellow residents if he was not transferred from Unit 7. Whilst in the multi-purpose room, the Applicant refused again to engage with staff and would not leave the room. While he remained in the multi-purpose room, the Applicant's solicitor, who had been booked in for a visit, arrived to have a consultation with him. Due to management concerns relation (*sic*) to the Applicant's disruptive and aggressive behaviour, the consultation had to be held in the unit where the Applicant was then residing. The normal practice would have been for the consultation to take place in a designated visiting area in a separate building.

50. The consultation between the Applicant and his solicitor lasted approximately 15 minutes, and afterwards the Applicant's behaviour became aggressive and threatening to members of staff. As a result, the Applicant had to be restrained and brought to the protection room. During the course of the day, the Applicant was allowed make four telephone calls, including to his mother and father. All four calls went unanswered. He later telephoned his girlfriend and spoke to her.

51. Later that same day, I received a letter by way of e-mail from the Applicant's solicitor, in which he stated that the Applicant was at that time the subject of a punishment regime, which involved *inter alia* solitary confinement, removal from school with a loss of social activities and communal meal times. The letter also claimed that as I had failed to provide a complaint in writing to the Applicant, and refused to allow the Applicant '*to be heard*', my actions had offended the requirements of natural justice. Accordingly, I was called upon to suspend by '*punishment'* pending commencement of rules of detention close quote. I beg to refer to a copy of the said email upon which marked with "PB4" I have signed my name prior to the swearing hereof.

52. In a replying email also dated the 18th September 2018, I assured that the Applicant's solicitor that the Applicant had not been subject to any punishment regime, nor indeed any form of punishment. His solicitor was also advised that staff at the campus had done everything they could to assist the Applicant to manage his behaviour and that techniques such as prompting and other appropriate interventions were being used by staff to establish the cause of the Applicant's aggressive and disruptive outbursts. I beg to refer to a copy of my email upon which marked 'PB5' I have signed my name prior to the swearing hereof.

53. I say that as a result of the Applicant's continuing disruptive behaviour, Management put a 6 day plan in place, running up to the 24th September 2018, to assist and offer support to the Applicant.

54. Under the Plan it was decided that a dedicated member of staff would be assigned to the Applicant on each shift. These members of staff were required to actively engage with the Applicant and to offer him support. Under the Management Plan the Applicant was to be under constant observation in accordance with the Campus Safety Plan. Staff were also to permit the Applicant to use the multi-purpose room and the lounge area in the Unit. Whilst in his bedroom, staff were instructed to observe him at five minute intervals. When the Applicant was asleep, fifteen minute observations were maintained.

55. Staff were also instructed to allow the Applicant to attend the yard where he could engage in physical activity. This activity could take place in the company of a peer if staff concluded that this would be appropriate. In terms of make mealtimes, it was decided that the Applicant would be allowed have his meals in the dining area, once he was properly behaved. The Applicant was also allowed to make phone calls in his bedroom or in the multi-purpose room.

56. Specifically, it was decided that the Applicant was to be allowed to mix with three other boys who were resident on the Campus. They were identified as [Names redacted] during the day. Staff were required to monitor the mix of boys and their interactions with the Applicant when they were in the lounge area and when engaging in activities. However, if staff were to perceive that the activity or engagement with peers was becoming problematic, the procedure to be followed involved removing the Applicant from the engagement with his peers and the activity continued with the Applicant and a member of staff on a one-to-one basis. Again, by way of a general instruction, staff were asked to continually monitor the Applicant's progress, and review where appropriate.

57. During the six-day period, regular reviews were conducted by designated persons including Unit Managers and Deputy Directors and Director (designate). Regular engagement with the young person was undertaken by residential social care workers. Medical and clinical staff on campus also reviewed and engaged with the Applicant during the periods of single separation. He was facilitated with making phone calls to his family, and daily written records evidence telephone calls to either his father, mother, girlfriend and solicitor. The Applicant was also provided with opportunities to access fresh air when he was taken to the yard.

[…]

Single separation policy
61. The placing of the Applicant in accordance with the Campus' Single Separation Policy was undertaken in the circumstances set out above, solely to ensure the personal safety of the Applicant, as well as other residents of the unit, and the general security on the campus. At no time was the Applicant placed on separation as a punishment for his involvement in the events of the 16th

September 2018.

62. On 19 May 2017, the Board of Management approved a Single Separation Policy for the Oberstown campus. This policy was informed by the High Court decision in, *S.F. v. Director of Oberstown Children Detention Centre and others* [2017] IEHC 829. In accordance with the Single Separation Policy, '*Young people should only be separated from their peers in the following circumstances:*

> • *The young person is likely to cause significant harm to her/himself or others, or the young person is likely to cause significant damage to property that would compromise security and impact on the safety of others,*
>
> • *Single separation must be used only after all other interventions have failed*
>
> • *As a last resort, for the shortest time possible and must be recorded, monitored and reviewed.*

[Documentation Exhibited]

63. The Board of Management extended the review date for this Policy in October 2018 until March 2019 pending the development of Rules for the Campus. The Board are in the process of developing these rules under s.179 in association with the Second Named Respondent. As part of its continuing commitment to improve standards on the Campus, the First Respondent has installed an electronic recording system to be used by staff in the collation of information on all aspects of the care of young people in Oberstown. This Case Management System is currently being introduced across the campus and will be fully operational by end of 2018. This new system will greatly improve the recording system which occurs when a young person has to be placed on separation in appropriate circumstances.

64. The revised procedures for the use and recording of single separation by the Respondent came into effect in July 2018. Again, these procedures were influenced by the High Court decision in *S.F. v. Director of Oberstown Children Detention Centre, Commissioner of An Garda Síochána, Minister for Children and Youth Affairs, Minister for Justice and Equality, Ireland and the Attorney General* [2017] IEHC 829. In accordance with the Procedures:

> • Authorised separation of a young person beyond 15 minutes is to be made by a Unit/On-Call Manager.
>
> • Authorisation of separation is based on facts received from staff dealing directly with the young person following risk assessment. All facts related to that young person's presenting behaviour(s) are recorded in the Incident Form/Continued Separation Form.
>
> • Conduct a review of all relevant documents, and if continued separation is to [be] authorised, there is a requirement that the Incident Form/Continued Separation Form be signed after each period of 2 hours.
>
> • The young person's needs must at all times be met including access to food, drinks, medical services, reading materials, fresh air etc.
>
> • The Deputy Director must be consulted where there is a request to authorise separation beyond an 8-hour period. The attempts made to resolve the issue/behaviour and the need for separation to continue beyond the 8-hour period must be explained in accordance with the records maintained and other relevant paperwork.
>
> • A review of the authorised separation must be undertaken each morning by Deputy Director. Again this requirement is in line with the findings contained in the High Court judgment.

[Documentation exhibited]

65. The First Named Respondent is also fully involved where circumstances require a young person to be placed on separation in accordance with the Policy. Since the 14th July 2018, the First Named Respondent receives daily notifications between 1.00 p.m. and 2.00 p.m. via text message in relation to any young person who may be placed on separation on the campus at that time. In a further move in line with the strategy of openness and transparency, the First Named Respondent has published figures on the use of single separation in 2018, and this shows a significant reduction in the use of single separation during this period. Furthermore, the First Named Respondent, following consultation with young people, published an information booklet for all young people advising of their rights and routines and expectations of the campus.

[A copy of the published figures and information booklet are exhibited].

APPENDIX II

EXTRACT FROM PRISON RULES 2007 (AS AMENDED)
Rule 27

27. (1) Subject to any restrictions imposed under and in accordance with Part 3 of the Prisons Act 2007 and Part 4 of these Rules, each prisoner shall be allowed to—

> (a) subject to paragraph (1A), spend a minimum period of 2 hours out of his or her cell or room with an opportunity during that time for meaningful human contact, including, at the discretion of the Governor, contact with other prisoners, and
>
> (b) subject to paragraph (a), spend as much time each day out of his or her cell or room as is practicable and, at the discretion of the Governor, to associate with other prisoners in the prison.

(1A) A period of time spent by a prisoner out of his or her cell or room engaging in any activity authorised by these Rules which provides an opportunity for meaningful human contact shall count towards the period referred to in paragraph (1)(a).",

(2) Subject to Rule 72 (Authorised structured activity), each prisoner may, while in prison, engage or participate in such structured activity as may be authorised by the Governor (in these Rules referred to as 'authorised structured activity')

including work, vocational training, education, or programmes intended to increase the likelihood that a prisoner, when released from prison, will be less likely to re-offend or better able to re-integrate into the community."

(3) In so far as is practicable, each convicted prisoner should be engaged in authorised structured activity for a period of not less than five hours on each of five days in each week.

(4) In this Rule, 'meaningful human contact' means interaction between a prisoner and another person of sufficient proximity so as to allow both to communicate by way of conversation.

Rule 62

62. (1) Subject to Rule 32 (Exercise) a prisoner shall not, for such period as is specified in a direction under this paragraph, be permitted to –

(a) engage in authorised structured activities generally or particular authorised structured activities,

(b) participate in communal recreation,

(c) associate with other prisoners,

where the Governor so directs.

(2) The Governor shall not give a direction under paragraph (1) unless information has been supplied to the Governor, or the prisoner's behaviour has been such as to cause the Governor to believe, upon reasonable grounds, that to permit the prisoner to so engage, participate or associate would result in there being a significant threat to the maintenance of good order or safe or secure custody.

(3) A period specified in a direction under paragraph (1) shall not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody.

(4) Where the direction under paragraph (1) is still in force, the Governor shall review not less than once in every seven days a direction under paragraph (1) for the purposes of determining whether, having regard to all the circumstances, the direction might be revoked.

(5) A prisoner in respect of whom a direction under this Rule is given shall be informed in writing of the reasons therefor either before the direction is given or immediately upon its being given, and shall further be informed of the outcome of any review as soon as may be after the Governor has made a decision in relation thereto.

(6) The Governor shall make and keep a record of -

(a) any direction given under this Rule,

(b) the period in respect of which the direction remains in force,

(c) the grounds upon which the direction is given,

(d) the views, if any, of the prisoner, and

(e) the decision made in relation to any review under paragraph (4).

(7) The Governor shall, as soon as may be after giving a direction under paragraph (1) (c), inform the prison doctor, and the prison doctor shall, as soon as may be, visit the prisoner and, thereafter, keep under regular review, and keep the Governor advised of, any medical condition of the prisoner relevant to the direction.

(8) The Governor shall, as soon as may be after giving a direction under paragraph (1) (c), inform a chaplain of the religious denomination, if any, to which the prisoner belongs of such a direction and a chaplain may, subject to any restrictions under a local order, visit the prisoner at any time.

(9) The Governor shall, as soon as may be, submit a report to the Director General including the views of the prisoner, if any, explaining the need for the continued removal of the prisoner from structured activity or association under this Rule on grounds of order where the period of such removal will exceed 21 days under paragraph (4). Thereafter, any continuation of the extension of the period of removal must be authorised, in writing, by the Director General.