Neutral Citation [2015] IEHC 335

THE HIGH COURT

JUDICIAL REVIEW

[Record No.2014/295 JR]

BETWEEN/

C.M.

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REDRESS REVIEW COMMITTEE

RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 19th day of May 2015.

Introduction

1. Under the provisions of the Residential Institutions Redress Act, 2002 ("the Act"), the Residential Institutions Redress Board ("the Board") has the function of making awards to persons who were resident in a relevant institution during their childhood and who prove to the satisfaction of the Board that they were injured while so resident, and that the injury is consistent with any abuse alleged to have occurred while they were so resident. Where the Board decides that any matter specified by the Act has not been established to its satisfaction, and therefore declines to make an award, the applicant for redress may submit that decision to the respondent Committee for review.

2. In this case the Board decided that the applicant had not been subjected to abuse within the meaning of the Act. The respondent upheld that view, and the applicant now seeks judicial review reliefs quashing that decision and remitting the matter for rehearing or, in the alternative, an order directing the respondent to pay to the applicant damages in lieu of the statutory remedy.

Background facts - the application to the Board

3. The applicant was born in 1982. It appears that, when she was fifteen, she was for some months in a residential treatment centre which was run by the local health board. She was admitted voluntarily, following a case conference held in June, 1997. It appears that at the time she suffered from depression; an eating disorder/weight loss; episodes of self harm (by eating plastic); and aggressive behaviour. She had attempted suicide by overdose on two occasions and had made reports, considered very credible, of suffering child sexual abuse. The purpose of her admission, as presented to her, was the investigation of possible depression and help with anger and behaviours.

4. The treatment centre, or unit, was a psychiatric service for children aged under sixteen years. It is a scheduled institution for the purposes of the Act.

5. When the applicant entered the unit her father signed an "Admission Consent Form". It is relevant to note the following matters referred to in the form.

> *"While we have a tolerance for children's problems, we consider some behaviours unacceptable. We work on a system of rewards and penalties with each child to encourage more acceptable behaviour. Physical restraint and time out (sometimes in a time out room) may be used by Staff in some circumstances…*
>
> *…Physical Examination is part of the Admission routine and may be repeated, as necessary, during the Admission. Clinical investigations/tests may also be done…"*

6. The applicant's parents also consented to her being permitted to smoke, in the limited and supervised manner allowed in the unit.

7. On the 14th December, 2005, the applicant submitted an application form to the Board. In a statement submitted with the application, she said that as a result of certain personal difficulties in her life she was referred to the Child and Adolescent Service of her local health board in 1996. At a certain stage it was recommended that she be admitted to the unit in question. She agreed to this, as she understood that she would receive intensive help, support and counselling there. However, she found the regime to be very strict and felt that some members of staff imposed arbitrary and nonsensical rules.

8. The applicant said that on one occasion she was assaulted by a member of staff. This occurred when she was on the phone to her father. There were strict time limits on phone calls and, although she was very upset at the time, she was told that her time was up and to hang up. The staff member grabbed the phone from her and hung it up. According to the statement:

> *"An argument developed between myself and this member of staff during which I was physically restrained and then locked in the dining room for over an hour."*

9. Complaint was made of restricted times for smoking, which the applicant said caused tensions and rows.

10. The applicant recalled an occasion on which a girl in her room attempted suicide by tying a shoelace around her neck. The applicant managed to stop her and called for help. Subsequently nobody told her how the girl was, which she saw as a reflection of the uncaring attitude of staff.

11. The practice of "bed limits" was described as follows:

> *"The staff would impose what they termed 'bed limits' for the most minor breaches of regulations. This involved being*

confined to a bedroom for a set period of time up to 7 hours during which time I was not allowed sleep. If you went to sleep during this time then the 'bed limit' had to start again. The only activity you were allowed during this 'bed limit' was to read. These kind of incidents only added to my depression and certainly could not have been seen as a positive treatment."

12. The applicant recalled an occasion when she returned to the unit from a weekend at home. She said that she was subjected to a "strip search" by a female staff member, for which she had to remove all of her clothing. She found this degrading.

13. After Christmas 1997 the applicant chose not return to the unit and she was formally discharged the following February. She left home shortly after this, moving into supportive lodgings. She became involved in an abusive relationship with an older man and became pregnant by him. Her relationship with her parents deteriorated during this period.

14. The applicant said that she had suffered greatly because of what she saw as a betrayal of her by the staff of the unit. She continued to suffer from an eating disorder and developed a drink problem. In concluding her statement she said:

"There are some things which happened at [the unit] which I cannot at this time recall in detail and I have tried to block some things out of my mind. I feel however that upon receipt of further documentation pursuant to a Freedom of information Request which I have made that I may recall other incidents. In summary however I feel that my time [there], rather than assisting with my treatment, had exactly the reverse effect and after my time there my problems were multiplied and I felt unable to trust the counselling and other services who should have been there for me."

15. The applicant's case was not finally ready for hearing until 2011. Settlement negotiations later that year were unsuccessful and the hearing took place before the Redress board on the 15th July, 2013.

16. At the hearing the applicant said that she had gone into the unit for therapeutic help but that was not what she got.

17. She said that she was allowed home at weekends because she was well behaved, but that after the first two or three weekends she was "strip searched" every weekend. She described this as being required to go into the bathroom, strip off completely and hand her towel to the female staff member outside. That person would then come in, walk around her a couple of times and then give the towel back.

18. The applicant said that "bed limits" meant sitting on a bed for seven hours with her hands by her sides, staring at a door. If she fell asleep they would wake her up and the seven hours would start over again the next day.

19. Two incidents were described by the applicant as having a major effect on her. The first was when a young boy tried to hang himself with his belt in the bathroom. She said that she was trying to get into the bathroom but he had wedged a bed against the door.

20. The second incident was when the girl in her room tied a shoelace around her neck, as described in her application statement.

21. The incident in relation to the row about the telephone call was said to have arisen in circumstances where the applicant was pleading with her father to take her home. The applicant said:

"And she whipped the phone from me and shouted that I had hit her with the phone. And at that she grabbed my arms behind my back, pinned me to the floor, put her knee against my back and there was two or three other staff members around me at that stage."

22. The applicant said that her life subsequently went off the rails.

23. In cross-examination it was put to the applicant that, according to the records, she had received

"Milieu therapy, individual psychotherapy, family therapy meetings and attendance at Unit's special school".

24. She said that the only counselling she had received had been from a staff member that she knew prior to going to the unit.

25. It was put to her that she had received several "limits" for "unacceptable behaviour". She was asked if she accepted that her behaviour had been challenging and she said that there was a big difference between discipline and what had happened to her. She said that it was "absolute torture" to sit on a bed and try and keep her eyes open and stare at a door for seven hours.

26. The applicant was asked about notes in the records indicating that her views about the unit changed on occasion – sometimes she said that she wanted to go home, other times she was worried about home and wanted to stay in the unit. She said that she never wanted to stay there but that she went out of her way to get on with people so as to avoid bed limits.

27. Asked whether it was not right, given her history of self-harm, to supervise her and ensure that she had nothing dangerous on her person, the applicant said that she was humiliated by the strip searches. Further, she said that she did not know of it happening to anyone else in the unit.

28. A psychiatric report on the applicant was submitted to the Board, in which the consultant psychiatrist stated that, in her opinion,

"being searched in this fashion was inappropriate and a very stressful experience for a young girl with body image issues".

29. The psychiatrist noted that the applicant was a very troubled, vulnerable, disturbed child when she was placed in the unit. The applicant believed she was not helped there and had found many experiences stressful and distressing. Having regard to the many difficulties in the applicant's life, the report concluded:

"It would be unreasonable to attribute her subsequent problems solely or even largely to events that occurred in [the unit]. However her account of certain events, particularly the "strip searching', is a cause for concern and in my opinion had damaging consequences."

30. At the conclusion of the hearing the applicant's counsel referred to a 2008 report from the Inspector of Mental Health Services

which was said to show that even as late as that year the unit was not "complying with seclusion and privacy". It was submitted that the "strip searching" of a 15-year old girl was in breach of the constitutional rights of bodily integrity and privacy, and probably in breach of the European Convention on Human Rights. This practice, and that of compelling her to stay awake in the room for seven hours, were said to amount to abuse within the meaning of the Act.

31. In a determination communicated by letter dated the 25th September, 2013, the Redress Board declined to make an award on the basis that abuse had not been proved *"even to the limited extent"* envisaged by the Act.

> *"Notwithstanding the low threshold that Applicants are required to meet in Applications for redress the Board concludes that the Applicant was not subjected to any abuses within the meaning of Section 1 of the Residential Institutions Redress Act, and consequently pursuant to Section 13(9) of the Act the Board declines to make an award in this case."*

32. The Board referred in its determination to the applicant's history prior to her admission to the unit, and to records relating to her from the unit which noted that she was at risk of suicide. It was considered that, given this risk, it was not unreasonable for the female staff to search her in the manner described on her return from weekend leave. Reference was made to the description of the searches given by the applicant to the psychiatrist who had assessed her for the purposes of the application – she had told him that it involved wearing a towel and *"[showing] to a staff member that I didn't have anything hidden"*.

33. The records also showed that the applicant had received several "limits" for unacceptable behaviour which included verbal threats to younger peers, breach of smoking rules and absconding. On one occasion she was given extended home leave *"in order to review her commitment to being in [the unit] and co-operating with her treatment programme."* This followed a classroom incident for which she had incurred a "limit", which caused her to become disruptive and threatening. Following the extended leave she returned voluntarily and agreed to comply with the limit.

34. The Board accepted that the incident involving the girl who tried to strangle herself must have been distressing for the applicant but did not consider that it could be seen as abuse of the applicant.

The Appeal to the Respondent

35. The applicant appealed the determination of the Board to the respondent on the basis that in declining to make an award the Board *"was wrong in fact and law and did not reflect the gravity or extent of the abuse suffered by the Applicant, the gravity of the medically verified sequelae, the gravity of the psychosocial sequelae and/or the consequential loss of opportunity suffered by the Applicant"*

36. The appeal to the respondent was heard on the 26th February, 2014. The hearing, at which the applicant was represented by senior and junior counsel, was conducted on the basis of the transcript of the hearing before the Board.

37. In written submissions to the respondent, it was argued on behalf of the applicant that she had been subjected to five kinds of abuse:

- Strip searching on her return from weekends at home
- Discipline by means of seclusion or "bed limit"
- Psychological abuse by witnessing another resident "hanging himself"
- Psychological abuse by witnessing another resident "choking" herself
- Physical abuse by the staff member involved in the telephone incident.

38. On the issue of the searches, it was pointed out that counsel for the Board had not challenged the veracity of the applicant's account and the Board had not found that strip searching did not take place. It was submitted that strip searching is in itself an abuse but also, without prejudice to this contention, that the applicant was an infant at the time and that there was no evidence of parental consent to such searches.

39. It was submitted that there had been a breach of the applicant's constitutionally protected rights to bodily integrity and privacy, with reliance being placed on the dictum of Keane CJ in *The People (DPP) v McFadden* [2003] 2 I.R. 105 that strip searching is *"intrusive or demeaning".*

40. Having regard to the judgment of Finlay P in *The State (C.) v Frawley* [1976] 1 I.R. 365, where the learned President held that Art.40.3.1 encompasses a right to freedom from torture and from inhuman or degrading treatment, it was submitted that seclusion or "bed limits" was a form of torture and/or inhuman or degrading treatment and thus a breach of constitutional rights and the rights of the applicant under the European Convention on Human Rights. Similarly, it was said that strip searching was unlawful and an invasion of privacy if carried out without requisite permission and/or lawful authority.

41. The submissions referred to rules applicable to mental treatment centres which prohibit the placing of a patient in seclusion unless it has been determined, in accordance with prescribed rules, that such is necessary for the purposes of treatment or to prevent the patient from injuring himself or herself or others.

42. It was submitted that the "seclusion" to which the applicant was subjected was not for the purpose of treatment or the prevention of injury but was solely by reason of punishment, and that it amounted to abuse.

43. The regulations made under the Mental Health Act 2001, also require an approved centre to have written policies and procedures for carrying out searches of a patient, with or in the absence of consent. Consent must always be sought, the person concerned must be informed of what is happening and why, records must be kept of searches and they must be undertaken with due regard to the person's dignity, privacy and gender.

44. It was submitted that the searches carried out in the unit did not comply with these requirements and constituted abuse.

45. In relation to the consequences, reference was also made to the report submitted on behalf of the applicant from the consultant psychiatrist, which stated that

"It would be unreasonable to attribute her subsequent problems solely or even largely to events that occurred in [the unit]. However, her account of certain events, particularly the 'strip searching' is a cause for concern and in my opinion had damaging consequences."

46. At the commencement of the hearing before the respondent, the Chairman of the Committee told counsel that all that was required was for her to succeed on any one of the five issues listed in paragraph 37 above.

47. In relation to the issue of strip searching, counsel submitted that, while the applicant had been assessed as a suicide risk at the time of her admission and was therefore under "assigned supervision" for some time, this had been discontinued and replaced by "general supervision" at an early stage of her stay in the unit. Even if strip searching were to be considered justifiable in the context of suicidal ideation (which was not accepted), it could not be considered to be necessary when the applicant was only under "general supervision". It was pointed out that the admission consent form signed by the applicant's father did refer to the potential need for physical restraint and "time out" but there was no suggestion of strip searching. It could not be included as part of the concept of physical examination, which was a matter that had to be understood as relating to a health check.

48. The chairman suggested to counsel that what had happened to the applicant was no different to supervised showers of a sort that was common in boarding schools. Counsel said that for an adult to watch while children have showers should require parental consent. She suggested that, since the applicant's parents brought her back to the unit after weekend leave, her mother could have been asked to be present.

49. The point was made that this applicant was a very vulnerable girl who had suffered from anorexia and was very conscious of her body and self-image. She had found the experience degrading and intimidating.

50. It was accepted on behalf of the applicant that the unit was entitled to put time limits on phone calls, but the submission was made that the adult staff member should not have resorted to physical force to bring the call to an end, and that to do so amounted to an assault and was abuse. It was also submitted that what had happened was an attempt to prevent her from telling her father what was going on.

51. Bed limits were described as an *"excessive form of discipline"*, because of the length of time involved, and therefore as abuse.

52. The complaint in relation to the two incidents observed by the applicant was put as being abuse in that the applicant was not offered counselling to deal with what she had seen and the psychological effects upon her. However, counsel said that she would rank the strip searching, the bed limits and the alleged assault ahead of this issue in terms of abuse.

53. A written decision was delivered on the 12th March, 2014, upholding the Board's original determination.

54. On the search issue, the respondent said

"The Committee considers that the non-intrusive physical examination of the Applicant on her return to the institution was reasonable in view of the risk of suicide and it could possibly be considered negligent of the institution not to check for the presence of dangerous substances or implements.

The Applicant's father signed the permission for her admission to the institution. It is not clear to the Committee that parental consent was then required for each and every action taken within the institution."

55. The respondent found that the imposition of "bed limits" was a form of discipline contemplated by the consent form signed by the applicant's father, and that such discipline was appropriate and necessary for the proper running of the unit. The practice did not constitute "seclusion" within the meaning of the Mental Treatment Regulations.

56. The limitation of time spent on phone calls was considered to be reasonable, while the applicant's response to the limitation was inappropriate. The subsequent physical altercation between the applicant and the staff member did not constitute physical abuse within the meaning of the Act.

57. There was no doubt on the part of the respondent that the incidents of attempted suicide seen by the applicant were extremely traumatic and distressing, but the respondent could not agree that there was any abuse of the applicant involved.

58. The respondent concluded that:

"The Applicant was a very troubled young person when she was admitted to the institution. The Committee considers that the institution tried to assist her to address her problems. There is no evidence that anything done by the institution was for purposes other than the treatment of the Applicant and the preservation of her safety and that of others in the institution.

Accordingly, the Committee upholds the decision of the Board that there was no abuse within the meaning of the Act."

59. Leave to seek judicial review proceedings was granted by Peart J. on the 29th May, 2014.

Statutory framework

60. The Residential Institutions Redress Act, 2002 is, according to the long title,

"An act to provide for the making of financial awards to assist in the recovery of certain persons who as children were resident in certain institutions in the State and who have or have had injuries that are consistent with abuse received while so resident and for that purpose to establish the Residential Institutions Redress Board to make such awards and to provide for the review of such awards by the Residential Institutions Review Committee and to provide for related matters."

61. The term "abuse " in relation to a child is defined in s.1 of the Act as follows:

"(a) the wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child,

(b) the use of the child by a person for sexual arousal or sexual gratification of that person or another person,

(c) failure to care for the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare, or

(d) any other act or omission towards the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare, and cognate words shall be construed accordingly."

62. The entitlement of an applicant to an award under the Act is governed by s. 7, which provides that:

"1) Where a person who makes an application (an "applicant") for an award to the Board establishes to the satisfaction of the Board

a) Proof of his or her identity,

b) That her or she was resident in an institution during his or her childhood, and

c) That her or she was injured while so resident and that injury is consistent with any abuse that is alleged to have occurred while so resident,

The Board shall make an award to that person in accordance with section 13(1)."

63. Regulation 6(1) of the Mental Treatment Regulations, 1961 (S.I. 261/1961) defines "seclusion" as follows:

"(a) seclusion of a patient in a mental institution means the placing of a patient (except during the hours fixed generally for the patients in the institution to retire for sleep) in any room alone and with the door or exit locked or fastened or held in such a way as to prevent the egress of the patient;…"

[…]

6(2) Seclusion or bodily restraint shall not be used except where it is essential for the safety of the patient, or the safety of others, and is certified as so essential by a medical officer."

Applicant's submissions

64. The principal grounds upon which relief is sought are summarised as follows:

i. The finding by the respondent that the applicant did not suffer "abuse" is unreasonable and irrational and could only have been reached as a result of the respondent misdirecting itself as to the statutory definition of "abuse". This represents an error of law going to jurisdiction.

ii. The oral evidence of the applicant at the hearing before the Board was not challenged by way of cross-examination on behalf of the Board. In the circumstances, the respondent was not entitled to disregard that evidence. The disregarding of such evidence represented a breach of fair procedures by way of the making of a finding on credibility without notice to the applicant that her testimony was being challenged.

iii. Furthermore, the respondent's decision that the applicant was not subjected to "abuse" was not supported by the evidence and was made in breach of the provisions of the Act of 2002.

65. The applicant says, in reliance on the description of the Act in *A.G. v Residential Institutions Redress Board* [2012] IEHC 492, as a remedial statute, that it must be construed *"widely and liberally"*, with a very low threshold for interpretation of the word "abuse".

66. The applicant complains that the respondent appears to have taken the view that, because she was in the unit for her own good, therefore any methods adopted by the staff were justifiable and could not be considered to be abuse. It is submitted that the respondent and the Board, in their respective determinations, appear to have concentrated on the behavioural difficulties of the applicant. It is said that, by implication, the respondent's decision suggests that the actions complained of by the applicant were necessitated by reason of the applicant's need for treatment; in other words, that the staff were justified in dealing with the applicant in the manner complained of irrespective of whether such treatment constituted "abuse" within the meaning of the Act of 2002. She emphasises the opinion of the consultant psychiatrist that the applicant's account was *"a cause for concern"* and that there had been *"damaging consequences"*. The applicant says that the respondent cannot choose to ignore expert evidence of this nature.

67. It is argued that the strip-searching is unlawful and an invasion of privacy and should not be carried out without the requisite specific permission and/or lawful authority. It is contended that the strip-searching of an adolescent was a breach of the applicant's rights under the Constitution and the European Convention on Human Rights, and that it also amounts to "abuse" within the meaning of s.1 of the Act of 2002. The findings of the respondent to the effect that the searching was necessitated because of the applicant's suicidal tendencies, and that it was covered by the consent signed by her father, are said to have been illogical.

68. The applicant relies on the cases of *Kennedy & Ors. v Ireland and the AG* [1987] 1 I.R. 587, *Ryan v AG* [1965] 1 I.R. 294 and *The State (C) v. Frawley* [1976] 1 I.R. 365 in relation to the unenumerated personal rights to privacy and bodily integrity. The reference of Keane CJ in *The People (DPP) v McFadden* [2003] 2 I.R. 105, describing strip-searching as being "intrusive or demeaning" is highlighted.

69. Reliance is also placed on the judgment of the European Court of Human Rights in *Wiktorko v Poland* (2013) 56 E.H.R.R. 30. In that case, the applicant had, after refusing to pay a taxi fare, been taken to a "sobering up centre". On arrival there she was forcibly undressed by two men and a woman and then placed in restraining belts for a period of some ten hours. The Court found a violation of Article 3 (the prohibition on inhuman and degrading treatment) on the basis that searches of this nature must be conducted in an appropriate manner with due respect to human dignity and for a legitimate purpose.

70. At paragraph 53 of the judgment the Court said:

> *"Although this is not a case where a strip search was carried out, the Court nevertheless considers that its case-law in that area is of relevance as it also relates to situations in which the applicants were ordered to undress. In this respect the Court reiterates that it has held that whilst strip searches may be necessary on occasion to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner and must be justified. They should be carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose (Yankov v Bulgaria (2005) 40 E.H.R.R. 36 at [166]–[176] (extracts); Wainwright v United Kingdom (2007) 44 E.H.R.R. 40 at [42].). Even single instances of strip-searching have been found to amount to degrading treatment in view of the manner in which the strip search was carried out, the possibility that its aim was to humiliate and debase and the lack of justification (See Valašinas v Lithuania (44558/98) July 24, 2001 at [117].). The Court has also held that where an order to undress with a view to a search had no established connection with the preservation of security and prevention of crime or disorder, art. 3 may be engaged.(Wainwright (2007) 44 E.H.R.R. 40 at [42]; Wieser v Austria (2007) 45 E.H.R.R. 44 at [40], where the applicant was undressed by police officers.)"*

71. The Court noted that a strip search of a person by persons of the opposite sex shows a clear lack of respect and diminishes the human dignity of the person being searched.

72. The applicant also refers to the Mental Health Act 2001 (Approved Centres) Regulations 2006 (S.I. 551/2006). These, obviously, were not in force at the relevant time but are pointed to as an example of a template for lawful searches. They provide that searches are only to be carried out for the purpose of creating and maintaining a safe and therapeutic environment for the residents and staff of a centre which is subject to the regulations, that the consent of the resident should always be sought, that there should be a minimum of two staff members present and that a search should be undertaken with due regard to the resident's dignity, privacy and gender. The resident is to be informed of what is happening and why, and written records of searches should be maintained.

73. It is submitted that subjecting the applicant to seclusions or "bed limits" for the time period complained of was a form of torture and/or inhuman or degrading treatment and punishment, a breach or abuse of the applicant's constitutional rights and "abuse" within the meaning of the Act. In this regard the applicant relies on the Mental Treatment Regulations.

74. In relation to the telephone incident, it is submitted that for the respondent not to consider such physical assault as constituting "abuse" is wrong in fact and in law. It is said that it *"flies in the face of reason"* to hold that this was a case of the staff member reacting appropriately to the inappropriate behaviour of the applicant. She could simply have disconnected the phone.

75. Counsel says that the applicant was young and vulnerable and that she should have been *"treated with kid gloves"* while she was in the care of the unit.

The respondent's submissions
76. The respondent denies the claims made and submits that this judicial review is effectively a request for a review of the merits of the decision, which the court has no jurisdiction to conduct. It is said that the applicant argues simply that the incidents complained of should be categorised as abuse, and that, therefore, the respondent misdirected itself in not holding them to be such.

77. In relation to the complaint of strip searching, the respondent submits that no statutory basis for the claim of unlawfulness was identified during the course of the hearing before the respondent, nor in the affidavit grounding the present proceedings. The respondent's conclusion was that the searching was justified on grounds of the risk of suicide. While it was true that the applicant had been taken off suicide watch, it could not be said that she did not continue to have difficulties. There had been no evidence before the respondent that the method of search was in itself inappropriate. The authorities relied upon by the applicant are said to have no bearing on the facts of the case.

78. It is contended that it was reasonable for the respondent to find that the searching was covered by the parental consent to physical examination. However, it is submitted that consent is beside the point, in that the procedure either constituted abuse or it did not. The primary finding of the respondent was that it did not, because it was justified on clinical grounds.

79. The respondent submits that its decision in relation to the telephone incident was reasonable, and that the applicant's analysis ignores the practicalities of dealing with problematic teenagers. It can be necessary in this context to use forms of restraint.

80. The respondent stands over its finding that the practice of imposing "bed limits" for the types of misbehaviour identified in its decision was both appropriate and necessary for the proper running of the unit, and was covered by the consent form.

81. The respondent argues that the applicant has failed to identify any unreasonableness or irrationality in the manner in which the respondent reached its decision and that, applying the test of reasonableness laid down by Denham J. in *Meadows v The Minister for Justice, Equality and Law Reform & Ors.* [2010] 2 I.R. 701, to the respondent's decision, the conclusions drawn by the respondent could in no sense be described as fundamentally at variance with reason and common sense.

The test for unreasonableness
82. In *State (Keegan) v The Stardust Victims Compensation Tribunal* [1986] I.R. 642, Henchy J outlined the test for unreasonableness at 658:

> *"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires; for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."*

83. In *O'Keefe v An Bord Pleanála & Ors*. [1993] 1 I.R. 39 Finlay CJ. held at pp.71-72 that:

> *"The circumstances under which the court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in The State (Keegan) v. The Stardust Victims Compensation Tribunal the circumstances under which the court can and should intervene, but also… the circumstances under which the court cannot intervene.*
>
> *The Court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.*

[…]

I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."

84. In *Meadows v Minister for Justice, Equality and Law Reform & Ors.* [2010] 2 I.R. 701 Denham J, commented at p. 738 that:

"the application of the strict nature of the test in O'Keefe v An Bord Pleanála [1993] 1 IR 39 is limited to decisions of skilled or otherwise technically competent decision makers. I am satisfied that O'Keefe v An Bord Pleanála has been construed too narrowly and in that manner applied too broadly. The decision in O'Keefe v An Bord Pleanála related to a specialised area of decision making where the decision maker has special technical or professional skill. A court should be slow to intervene in a decision made with special competence in an area of special knowledge. The O'Keefe v An Bord Pleanála decision is relevant to areas of special skill and knowledge, such as planning and development."

85. Denham J. went on to summarise the principles to be applied in a judicial review application to determine if the decision was reasonable or irrational in the following terms (at pp.743 to 744):

"The relevant factors in the general test are as follows:-

i. In judicial review the decision making process is reviewed;

ii. It is not an appeal on the merits;

iii. The onus of proof rests on the applicant at all times;

iv. In considering the test for reasonableness, the basic issue to determine is whether the decision was fundamentally at variance with reason and common sense;

v. The nature of the decision and decision maker being reviewed is relevant to the application of the test;

vi. Where the legislature has placed decisions requiring special knowledge, skill, or competence for example, as under the Planning Acts, with a skilled decision maker, the courts should be slow to intervene in the technical area;

vii. The courts should have regard to what Henchy J. in the State (Keegan) v Stardust Compensation Tribunal referred to as 'the implied constitutional limitation of jurisdiction' in all decision making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the Court setting aside the decision."

86. In the context of the Act now under consideration, it was stressed in *J. McE. v The Residential Institutions Redress Board* [2014] IEHC 315 that the same principles apply:

"[…] since this matter is one of Judicial Review, no question arises of this Court substituting its own view as to what Determination might preferably have been arrived at by the Respondent, and it is confined under long-settled authorities to considering whether or not what was done by the Respondent was tainted by failures or infirmities of reasoning or procedure such as to warrant remitting the matter back to the Respondent for further consideration […]"

Discussion and conclusions

87. In my view, having regard to the definition of abuse in the Act, the applicant has not met the established criteria for a finding that the respondent's decision was unreasonable or otherwise legally flawed.

88. It is clear that the applicant has strong feelings about her treatment in the unit. In particular, it is clear that she feels that she did not get the help that she undoubtedly needed there. Having regard to what happened in her life in later years, one can see why she might think that. However, that is an entirely different matter to the proposition that she was abused by the staff.

89. The issue that has given me most concern in the case is the searches on her return from weekends at home.

90. I think that it is an error to argue that the respondent was incorrect in considering this practice in the context of the applicant's personal situation. It is clear, not least from the judgment of the Court of Human Rights in *Wiktorko*, that the context and purpose of an intrusive search can be crucial. In this instance, the staff were working with troubled children, at least some of whom were liable to commit acts of self-harm. The applicant herself came into this category, notwithstanding that she had been taken off "suicide watch" levels of supervision. It was in my view part of the duty of care owed to the applicant and other children in the unit to ensure that she did not bring in items that could be used to cause harm.

91. I accept that for an adolescent, particularly one with issues about her body such as those troubling the applicant, to be looked at by an adult while in a state of undress was unpleasant and could be perceived by her as demeaning. I further accept that she had rights to privacy while resident in the unit. However, the right to privacy is not absolute and, in the context of the efforts to treat her in the unit, had in my view to be balanced against the obligation of the staff to protect her and the other children.

92. Seen in this light, the procedure adopted was not a violation of her rights in that it had a legitimate objective, was proportionate to that objective, did not involve any invasive element such as physical contact by the staff member, and was lacking in any aggravating or unnecessary feature such as the presence of a male staff member. The rules set out in the current regulations, referred to above, may be seen as representing current best practice but that does not mean that previously-followed procedures constituted abuse of children. It may well be that it would have been preferable to have had the applicant's mother present. However, that submission was not made before the respondent, to whom the argument put was that the search was in itself a breach of her rights amounting to abuse. In any event, I consider that the practice cannot be seen as so disproportionate to the objective as to warrant being described as abuse, and that the finding by the respondent that it was not abuse cannot be interfered with by this court.

93. I should perhaps note that if I am wrong in this, I would be inclined to agree with the observation made on behalf of the respondent that the issue of the consent form could not be conclusive – if the applicant had a personal right not to be subjected in any circumstances to a search of this nature, I do not think that her parents would necessarily be able to consent on her behalf.

94. As far as the bed limits are concerned, I cannot see that there was anything to qualify under the definition of abuse. The "time out" concept is one that has become well established as a means of disciplining difficult teenagers in residential centres without the resort to corporal punishment. To refer to it as "torture" or "inhuman and degrading treatment" is, quite simply, hyperbole. It is not "seclusion" within the meaning of the Mental Treatment Regulations, which is something that comes rather closer to concepts of solitary confinement and punishment cells.

95. Finally, there is the incident about the telephone. On the applicant's account, the incident developed because she was refusing to comply with the time limit on phone calls. It may well be that a different adult could have found a different way of resolving the issue but the fact that it culminated in the physical restraint of the applicant does not bring it into the category of abuse. In any event, there is no evidence that the restraint caused any injury to the applicant within the meaning of the Act.

96. In the circumstances I refuse the relief sought.