THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 712 J.R.]

BETWEEN

S.F. (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND, M.B.C.)

APPLICANT

AND

DIRECTOR OF OBERSTOWN CHILDREN DETENTION CENTRE, COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR CHILDREN AND YOUTH AFFAIRS, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

[2016 No. 721 J.R.]

BETWEEN

L.C. (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND)

APPLICANT

AND

THE DIRECTOR OF OBERSTOWN AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

[2016 No. 711 J.R.]

BETWEEN

T. G. (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND J. G.)

APPLICANT

AND

THE DIRECTOR OF OBERSTOWN CHILDREN DETENTION CENTRE, COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR CHILDREN AND YOUTH AFFAIRS, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENT

[2016 No. 714 J.R.]

BETWEEN

P. M.C.C. (A MINOR) AT THE SUIT OF HIS MOTHER AND NEXT FRIEND TINE MCCABE

APPLICANT

AND

THE DIRECTOR OF OBERSTOWN CHILDREN DETENTION CAMPUS AND THE MINISTER FOR CHILDREN AND YOUNG AFFAIRS

RESPONDENT

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 6th day of November 2017

Introduction

1. This case is unusual because it raises issues relating to the constitutional rights of young persons in a detention school. The courts frequently deal with issues relating to the rights of adult prisoners in Irish prisons, but much rarer are the cases raising issues concerning the rights of non-adult detainees. The particular issues in this case arise out of the solitary confinement or separation of four young persons for a period of approximately three weeks after their involvement in a serious disturbance at Oberstown campus on the 29th August, 2016.

2. In cases involving the rights of prisoners or detainees, whether adult or minor, the Court must always tread a careful path between two important imperatives; on the one hand, the duty of the Court to uphold the Constitution and to protect the rights there enshrined, without fear or favour or concern as to the popularity of the cause or person invoking the right; on the other, the duty of the Court not to overstep its role in the careful balance struck by the Constitution between the role of the courts and that of the Executive. In its attempt to find the correct route through these competing considerations, the Court, while it has the assistance of many authorities concerning adult prisoners, but unfortunately has little jurisprudential guidance with regard to the constitutional parameters of what measures are permitted to the Executive in the face of highly challenging behaviour from young persons in a detention setting. Young persons in detention, particularly those around the 16 and 17-year old mark, present unusual challenges; developmentally and psychologically, they are not fully mature, and this is undoubtedly the reason for the special recognition of their non-adult status by the law. But physically they may be as large and strong as adults, leading to risks of a physical kind often associated with adults rather than children. For example, one of the applicants in this case was described in contemporaneous records as 6'2" in height and 12 stone in weight. The Director of a detention school faces unusual challenges in dealing with the young people in his care, who may be both vulnerable and dangerous at the same time.

3. The overall context to this case is as follows. On the 29th August, 2016, there was a serious disturbance at the campus, involving approximately 8 young persons, including the four applicants, who took control of a unit within the campus, gained access to the roof and caused considerable damage. Considerable numbers of An Garda Síochána and the Fire Services attended the incident which

lasted some 8 hours before negotiations resulted in the young persons coming down from the roof. Following the incident, the four applicants were placed on what the respondent describes as "separation" for a period of time. This involved their being separated from each other and their peers, and placed in locked bedrooms for a number of weeks. At the outset of this separated detention, they were deprived of many of the normal features of detention at Oberstown, such as access to running water, normal bedding, communication with their families, access to any form of entertainment, access to exercise and so on. As time went on, some of these deprivations were removed or ameliorated, as will be discussed in detail below.

4. It is important to record that a criminal investigation was launched by An Garda Síochána into the events of the 29th August, 2016, but that this criminal investigation has no connection whatsoever to the present proceedings. In the present proceedings, the applicants seek certain reliefs on the basis that, during the relevant period of detention, their constitutional rights, in particular their rights to bodily integrity and dignity, were violated by reason of the measures taken during the period of separation, including the separation itself. The reliefs sought include claims for declarations of breach of constitutional right and damages for the said breaches. Claims relating to rights under the European Convention on Human Rights were also advanced.

5. It is also important to note that it was part of the respondent's defence to suggest that the measures imposed upon the applicants were imposed as a form of discipline or punishment in relation to the incident on the 29th August, 2016. Rather, the respondent's case was that all the measures taken were temporarily necessary to ensure the safety and security of the detention school, and that the constitutional test of proportionality was adhered to.

The Reliefs Sought on behalf of the applicants

6. The reliefs sought by S.F. and T.G., who were represented by the same legal team, were in identical terms. They sought a number of declarations and damages. They also sought a stay on the regime of separation to which they were subject at the time of the commencement of proceedings, but that aspect of matters has become moot. The declarations sought were as follows:

> (i) A declaration that the respondents had breached the applicant's rights under Article 3 of the European Convention on Human Rights;
>
> (ii) A declaration that the respondents had breached the applicant's constitutional rights to dignity and bodily integrity;
>
> (iii) A declaration that the imposition of solitary confinement on the applicant was unlawful;
>
> (iv) A declaration that the refusal of the respondents to allow the applicant's family to visit him was a violation of his right to private and family life under Article 8 of the European Convention on Human Rights;
>
> (v) A declaration that the respondents had violated the applicant's rights pursuant to Article 6 of the European Convention on Human Rights;
>
> (vi) A declaration that the respondents had violated the applicant's right to fair procedures and natural justice.

7. The applicant P.McC. sought a number of declarations as well as damages. The declarations sought included:

> (i) A declaration that the respondents had breached his constitutional rights to dignity and bodily integrity;
>
> (ii) A declaration the respondents had breached his rights under Article 3 of the European Convention on Human Rights;
>
> (iii) A declaration that the respondents had breached his constitutional right to fair procedures;
>
> (iv) A declaration that the respondents had breached his rights under Article 6 of the European Convention on Human Rights;
>
> (v) A declaration that the refusal to allow visits by the applicant's family was a breach of his right to private and family life under Article 8 of the European Convention on Human Rights.

He also sought prohibition and a stay on the regime, both of which are now moot.

8. The applicant L.C. sought a number of declarations and damages including exemplary damages. The declarations sought were as follows:

> (i) A declaration that the conditions in which the applicant was detained amounted to a violation of his constitutional right to bodily integrity;
>
> (ii) A declaration that his right to family visits was a minimum right which could not be removed save in the most exceptional of circumstances as permitted under the Prison Rules 2007;
>
> (iii) A declaration that the detention of the applicant in solitary confinement for a period of 10 days at a minimum was unlawful;
>
> (iv) A declaration that the respondents had breached the applicant's rights under Article 3 of the ECHR;

9. This applicant also pleaded breaches of the Prison Rules but it was accepted at the oral hearing that the Prison Rules do not apply to the young persons detained at Oberstown. Reliefs directed at ceasing the regime were also sought, but were also moot by the time the matter on for hearing.

Terminology

10. The parties before me disagreed as to whether the measure to which the applicants were subject could be described as "solitary confinement". The respondent disputed that this phrase could be applied to the situation, and used the term "separation". The applicants employed the phrase "solitary confinement" and drew attention to various international definitions of solitary confinement which defined the concept as confinement in a cell alone for more than 22 hours per day.

11. I do not think that the terminology necessarily matters, provided the substance of the regime to which the applicants were subject is kept firmly in view. The phrase "solitary confinement" comes with certain pejorative associations derived from its use

historically and in other contexts. Taking a neutral and literal approach to the matter, it seems to me that solitary confinement simply means the confinement of a prisoner or detainee alone. "Segregation" may involve a prisoner being confined on his own, but it may also involve a number of prisoners being confined together but separately from other prisoners (as was the situation in *Killeen and Dundon v. Governor of Portlaoise Prison* [2014] IEHC 77). Oberstown's own policy documents use the term "separation" rather than isolation, but it is clear from the documents that what is envisaged is an individual being separated from his peers and therefore, in practical terms in this context, means the same thing as solitary confinement. In this judgment, I will use the phrase "solitary confinement" and the term "separation" as interchangeable terms, without any intention that this be understood as anything other than a neutral description of the state of being held alone in a room separately from one's peers.

Variations within cases of Solitary Confinement or Separation

12. A prisoner or detainee may find himself in solitary confinement or separation for one or more of a number of different reasons, such as, for example; (i) to protect him from other individuals (as with a prisoner placed "on protection"); (ii) to protect other individuals from him; (iii) to protect him from self-harm; or (iv) as a disciplinary measure as a result of some misconduct. Further, although solitary confinement or separation is usually imposed upon the individual, it may sometimes be requested by the individual himself, as for example where a prisoner seeks protection from other prisoners. It is clear from the Irish authorities, discussed below, that the Court should be alive to the particular context in which the measure has been introduced, namely as to the purpose of the measure and the intent with which it was imposed.

13. Solitary confinement or separation of an individual necessarily means that the person is deprived of social contact with his peers. This social deprivation may or may not be accompanied by additional deprivations which occasion physical hardship or further sensory deprivations, and the Irish authorities on adult prisoners illustrate the wide range of variation in this regard. For example, where there is a concern that property may be damaged or where there is a risk of self-harm by the prisoner, the place in which the detainee is confined may be stripped of physical materials with which damage might be done or physical injury caused. The absence of some of the usual physical items such as bedding or recreational materials will increase the harshness of the situation as the person will experience physical discomforts and be deprived of materials with which to distract himself, such as radio, television, music-player, books, writing materials and so on. Of particular concern is the additional element of sensory deprivation which may increase the risk of harmful psychological consequences. On the other hand, if there is no perceived risk of damage or injury, the person kept separately from his peers may be provided with devices of entertainment, access to exercise, and opportunities for interaction with persons other than their peers.

14. Bearing this in mind, it is important perhaps to remember that while the phrase 'solitary confinement' may evoke extreme images of an individual in a bare dark cell with little or no human contact for days, weeks or months on end, the phrase can in reality refer to a multitude of different situations with many variables as to factors such as: (a) the physical conditions, including bedding and sanitation facilities within the room or cell of confinement; (b) whether or not there is access to sensory stimulation of various kinds (books, writing materials, television, radio, music players and so on); (c) whether the period of separation from peers is finite or indefinite; (d) whether the detainee's own behaviour during the period of solitary confinement can influence the duration of the period; (e) whether there are forms of human interaction other than association with fellow detainees from whom the individual has been separated, such as interaction with staff, doctors, nurses, other professionals, and family (whether by face-to-face interaction or by telephone); and (f) whether there is access to forms of physical exercise and/or fresh air.

Oberstown Detention School - the Physical Setting

15. The campus at Oberstown was described on affidavit by Mr. Pat Bergin, the Director. The Oberstown campus is located at Lusk, Co. Dublin and contains three separate children's detention facilities. The Oberstown Boys School caters for boys in custody up to 17 years of age. The Oberstown Girls School caters for girls up to the age of 18. The campus also contains Trinity House, a self-contained secure facility which is also for boys up to 17 years of age. There is an education facility on campus catering for all the children being detained, which comes under the remit of the Dublin/Dún Laoghaire Education Training Board. A total of 250 staff are employed at the campus, of which the largest group of staff are the residential social care workers, approximately 128 posts. The number of children who may currently be detained in Oberstown Children Detention Campus is 54 (Maximum 48 boys and maximum of 6 girls).

16. The accommodation is divided into residential "units". In 9 of the residential units, 8 young people can be accommodated. Each of these units have 15 residential social care workers allocated to the unit to work mainly with this group of young people. Within each of the units there are "multipurpose rooms", in the nature of a sitting room where young people can view television and computer games. Each unit has its own enclosed external yard where young people can play football and other sports or to sit out in. Table tennis tables are available in units.

17. The campus has one all-weather five-a-side soccer pitch and an outdoor football field. It has two indoor gyms which can facilitate indoor soccer, basketball or other net games. There is a full-size fitness gym on the education block and a mini-gym in one of the residential units. There are two outdoor tennis courts and two outdoor garden areas.

18. There is an education block which contains more than 20 classrooms with the capacity to provide education for three young people at a time. Teachers are employed by the Education Training Board. There are classrooms for practical subjects including cookery, arts and crafts, woodwork, car mechanics, pottery and metal work. Education is provided between 10am and 3:15pm daily in line with the school academic year. There are evening classes in various educational and recreational subjects, including music.

19. The campus has three nurses on-site to address ongoing medical and health related issues. A visiting doctor is on-site three mornings per week to meet young people and to provide medical treatment as required. Where necessary, young people are taken off campus as needed for more specialised medical services.

20. The Director, Mr. Pat Bergin, was anxious to stress that the free movement of young people around the campus does not occur. All doors on the campus remain locked at all times, including internal and external doors. The young people move in the areas in the company of residential care workers and night supervising officers. Normally, no more than groups of two/three young people congregate together. Larger groups are brought together for team sports like football and these activities are managed according to the specific risks associated with the young people involved. The bedrooms are not described as cells, and the young persons are not referred to as prisoners, as the language of prisons and criminality is avoided.

21. The legal status of Oberstown and other relevant parameters are discussed below.

The evidence in the proceedings

The evidence on behalf of the respondents

22. The evidence placed before the Court appears to have been influenced by the litigation history and the fact that it was originally envisaged that the hearing would take place within a very short time of leave being granted. Leave to grant judicial review proceedings was granted on the 13th September, 2016 to S.F. and T.G., to P.McC. on the 15th September, 2016 and to L.C. on the 19th September, 2016. Short deadlines were fixed for the service of opposition papers and the matter was fixed for hearing on the 20th September, 2016. No judge was available on that date, however, and the Court (O'Regan J.) listed the cases for mention on the 26th September in the hope of a judge becoming available, and also directed that the cases be heard together. As matters transpired, no judge was available to hear the cases during the vacation and on the 4th October, 2016, a hearing date was fixed for the 17th January, 2017. The respondent in those circumstances had been required to assemble documentation relating to each of the applicants and Oberstown generally at short notice. At the oral hearing before me, there was a dispute between the parties as to whether it had been indicated by the Court that the Director could swear an affidavit even though it would necessarily contain a considerable amount of hearsay, or whether the deponent was to be the head of the relevant unit in which the applicants were detained. In the event, it was the Director, Mr. Bergin, who swore the affidavits and exhibited the documentation. There was no affidavit from any of the frontline staff dealing with the applicants on a day-to-day basis or from the authors of the handwritten records discussed below. There was therefore a hearsay objection on behalf of at least some of the applicants, which was, in effect, reduced to the Court being urged to view the records with considerable caution on the basis that it was not clear that all of them were contemporaneous, given the amount of duplication involved in them which suggested a degree of transposition from one record source to another, and that the authors could not be cross-examined in relation to their contents. Counsel on behalf of the applicants criticised the respondent for failing to improve the quality of the evidence in the months leading to the oral hearing by having staff members swear further affidavits. Counsel on behalf of the respondent pointed to its clear understanding that Mr. Bergin had been permitted by the Court to file the relevant affidavits and that the applicants had not served notice of intention to cross-examine.

23. I have spent a considerable amount of time examining the documentation exhibited to the Director's affidavits. A number of different types of document were exhibited. Some of these were general policy documents relevant to Oberstown generally. Others consisted of entries in records relating to the four applicants during the relevant period. These included documents described or headed as follows: (a) Individual Crisis Management Plans; (b) Incident Forms; (c) Daily Reports; (d) Daily Unit Records; (e) Records of Separation; (f) Medical/Nursing Sheets. There were also some typed documents, including one entitled CCTV analysis, which appeared to be a typed summary of events from Mr. Bergin's viewing of CCTV footage of movements in and out of L.C.'s bedroom for some of the period. There were also some typed documents relating to phone calls and visits, which also appear to be second-hand sources extracted from some kind of original log. Quite apart from the fact that some of the documents appeared to be second-hand transpositions of earlier records, some of the handwritten entries were illegible, and some of the records were contradictory of each other.

The evidence on behalf of the applicants

24. No affidavits were sworn by two of the applicants, (P.McC. and L.C.). The solicitor on behalf of L.C. averred that his client's affidavit was not accepted by the Central Office because he was a minor and that accordingly he swore the affidavit based on his client's instructions. The mothers of P.McC. and L.C. swore affidavits, setting out events as they experienced them during the period. The affidavit of L.C.'s lawyer exhibited a written "diary" in which he recorded events during the separation period after he was provided with paper and pencil.

25. There was no evidence on affidavit from any psychologist, doctor or other health professional to the effect that the applicant had suffered any psychological harm during or as a result of the separation regime. There was an affidavit from Professor Ian O'Donnell describing the harmful effects of solitary confinement in general and the risks for young offenders in particular. This was broadly identical to the evidence summarised by Donnelly J. in the *Damache* case at pp. 232-237 with the sole difference being that Prof. O'Donnell in the present case discussed how children react to solitary confinement. He stated that the effects in this respect are not well known, but that there are good reasons to believe they are at least as intense as those found in adults.

26. None of the applicants' solicitors swore that their clients had instructed them that they had in fact suffered any actual psychological harm as a result of the regime in question, nor did any of the applicants themselves swear anything of that kind. I note that paragraph 15 of P.McC.'s Statement of Grounds, verified by his solicitor's affidavit, claimed that he was "depressed" , and referred to his being "out of his mind staring at the walls 24/7". Interestingly, a report from Professor Harry Kennedy, executive clinical director and consultant forensic psychiatrist for the National Forensic Mental Health Service at the Central Mental Hospital, was exhibited to the Director, Mr Bergin's affidavit. Prof. Kennedy examined P.McC. on the 13th September 2016 for the purpose of preparing a sentencing report on his behalf an upcoming sentence hearing. Notwithstanding that assessing the applicant in terms of his reaction to the separation regime was not his purpose, I think it is noteworthy that Professor Kennedy, an extremely experienced psychiatrist who frequently gives evidence to the courts, expressed no misgivings about the applicant's psychological presentation at that stage. Prof. Kennedy described P.McC.'s then presentation (some 14 days into the separation regime complained of) in the following terms:

> "During a long interview P.McC. sustained concentration well. He maintained good eye contact and made good rapport. [His] speech was normal in rate and form. Concerning mood he said that falls asleep at 9 in the evenings at present because he is bored and wakens at 9 or 10 in the mornings. Sometimes he also has naps during the day. [He] described normal appetite and said that he enjoys food. He described his subjective mood as 'steady, but can be up and down'. He denied feelings of sadness, tearfulness, anxiety or panic. He said that he sometimes feels annoyed or angry but 'it depends on the reaction I get from others'."

Later in his report, Professor Kennedy said that he could find no evidence of, inter alia, depression, anxiety, mental illness or mental disorder on the part of P.McC.

The Court's approach to the evidence as to the evidence generally

27. Having regard to the nature of the evidence in the case, as described above, and in particular the absence of oral evidence from either front-line staff or the applicants themselves, and the limitations of the written records, the Court is reluctant to draw definitive factual conclusions about certain matters. It is impossible for the Court to reach firm conclusions on certain details, such as, for example, the particular time and date when a first phone call was made by a particular applicant, the day on which a music-player was given to another, on what particular day specific items of bedding were given, or the size of the food portions or items of clothing given to L.C.. Accordingly and necessarily, the Court is forced to decide the case on the basis of what might be termed relatively broad-brush conclusions on the facts. These conclusions are summarised in the ensuing paragraphs.

Summary of the Court's conclusions on the Evidence

The Incident on the 29th August, 2016

28. The Director of Oberstown Detention Centre, Mr. Pat Bergin, swore an affidavit in the course of which he described the incident

on the 29th August, 2016 as follows: he said that on that date, the campus had 28 young people on committal orders and thirteen young people on remand orders. The Impact and SIPTU trade unions had notified the campus of industrial action which came into effect at 8am on that date. This took the form of work stoppage by residential social care workers and night supervising officers between 8am and 4pm. Emergency cover during the work stoppage was provided by the unions in the amount of two residential care workers per unit. Normally each unit would have four staff to each unit in the morning and six in the afternoon/evening. As a result, it was deemed necessary to keep all young people in their bedrooms for the duration of the work stoppage on that date. He averred that it was believed that a young person took keys from a staff member and opened the bedroom door of three other young people in unit 2 within Trinity House and then the four young people took control of the unit. Two residential care workers sought assistance by activating personal alarms and then withdrew to unit 1 for their own safety. Some of the young people who were involved engaged in damage to a door in the gym at the campus which resulted in physical harm to a residential social care worker. Eight young people accessed the roof of the building of Trinity House. One of the persons has escaped from detention three times previously and another had attempted to escape by taking keys from care staff. Throughout the day, significant damage was caused to the property resulting in a fire on the roof of unit 3. Tiles and fire extinguishers were thrown towards staff from the roof of Trinity House. Up to 100 emergency service personnel, involving Gardaí, ambulance services and fire services, were on-site between 3pm on that date and 3am on 31st August, 2016. Between 9:45pm and 11pm, all 8 young persons came down from the roof of Trinity House following negotiations by Gardaí and residential social care workers.

29. Mr. Bergin says that the applicants were among those who were taken down from the roof and were searched to see if they had any items concealed upon them. The applicants were subjected to a towel search (i.e. a personal search conducted while the young person is wearing a towel). Prior to the use of the bedrooms, each of them was checked to make sure there were no items that could be used to hurt or harm themselves or others. He says that due to concerns that they might have a lighter or matches, all flammable items were removed from the bedrooms. Fresh clothes were given to each of them but bed linen was not given due to the concern that they could be used to set a fire. The water in the shower was also switched off as there were concerns that the bedrooms could be flooded. If they had damaged the bedrooms they were placed in, on unit 4, there would not have been for capacity on the campus to accommodate them as the result of the damage to the three units consisting of 24 beds. Mr. Bergin says that significant fear was evident amongst the majority of staff across the campus following these events and that specific concerns related to the aggressive demeanour of the young people and the level of damage they had caused to the campus. Mr. Bergin says that these events were the most serious incidents on the Oberstown/Trinity House Campus since 1998, in which year four young people had set fire in unit 1, got access to the roof of the gym and did significant damage and set fire to the gym roof.

30. It is important to note that a Garda investigation took place in respect of this incident and the question of a criminal prosecution is a matter for the DPP, and is an entirely separate matter from the issues in the present proceedings.

31. The above description of events is not disputed by the solicitors who swore affidavits on behalf of the applicants, nor is the applicants' involvement in the events, although there are no explicit admissions and terms such as "alleged involvement" are used on their behalf. For the purposes of the present proceedings, I find on the balance of probabilities that events occurred as described above.

The conditions at the commencement of the period of 'separated detention'
32. It is clear that in the immediate aftermath of the incident on the 29th August 2016, each of the applicants was searched and then placed in a locked bedroom in one of the units. Each bedroom had a mattress but no bed linen. Mr. Bergin averred this was because of concerns that the applicants might use bedding to start a fire. The water was switched off in the shower attached to the bedroom and Mr. Bergin averred this was because of concerns about the potential for deliberate flooding by the applicants. There was a toilet attached to each bedroom.

33. The intention was that each of the applicants would be isolated from others by remaining in the locked bedrooms. In fact, it appears that there was a considerable degree of communication between them through the vents or grilles in the bedrooms. There are numerous references in the handwritten records to their talking through the vents, being at the grille, and what is referred to as 'cross talk' and shouting between them. This included, at times, bravado discussions of the incident on the 29th August, and further threats of violence, damage and escape being discussed and made. The situation could not in reality, therefore, be described as one of complete social or sensory isolation or solitude in that regard.

34. At the beginning of the period of separated detention, the following were the additional features of deprivation, all of which are sought to be justified by the respondents on the basis of safety and security concerns:

(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 a music-playing device, a television, writing materials, reading materials or anything of that kind;

(e) No access to any location other than the locked bedroom, such as the multi-purpose room on the Unit;

(f) Contact with staff through the hatch only.

35. As time went on, these deprivations were gradually removed or ameliorated, as discussed further below. Before addressing the details of the steps taken in this regard, it is necessary, in my view, to place the measures taken and their amelioration in the context of the applicants' own behaviour, as recorded in the handwritten notes. This is because the stated purpose of the separation and associated deprivations, according to the Director Mr. Bergin, was to ensure the safety and security of the premises and persons within them. The respondent's position is that it was only when these concerns eased because the applicants' behaviour had calmed down, that forms of entertainment, association, family contact and other such matters could be re-introduced.

The applicants' behaviour in the days and weeks following the incident
36. The following observations were recorded in the handwritten notes by staff on the unit. This account does not purport to be a comprehensive account of all relevant entries but seeks to highlight some important matters.

The applicant S..

37. On Day 1 (30th August), S.F. was recorded as making serious threats to staff and inciting another peer to damage property and attempt a breakout. There was no positive engagement with staff and he was banging on door and abusive at one point. On Day 2 (31st August), he was described as still not engaging fully and involved in extremely negative conversations with peers. The record for 1st September the (Day 3) recorded that he continued to show no interest in developing a relationship with staff and continued to be involved in making threats. The record of separation also notes threats heard in the corridor about killing staff. On Day 4 (2nd September), he was involved in making threats against another peer in unit, was still presenting as "unsettled" and had no interest in engaging positively with staff, although staff were still attempting to verbally engage. Entries for subsequent days refer to his history of making threats, the threat of his possibly having a concealed weapon and his failure to engage with staff. By Day 8 (6th September), he was beginning to build some rapport with staff. By Day 9, he was allowed to call his mother and is to have time in the yard the next day. Thereafter, the regime started to be gradually relaxed.

The applicant T.G.

38. The Individual Crisis Management Plan for every day until the 13th September appears to repeat the same entry that he was inciting a peer to damage property and break out of the unit and was involved in making serious threats to staff. The incident form for Day 2 (31st August) says that he was being abusive towards staff and the words 'cutting staff up' are used; also, that he was shouting and encouraging a break-out towards the end of the night. A discussion involving the killing of staff is noted for Day 3 (1st September). While Day 4 (2nd September) records him as having conversation with staff and following his programme, it also says he was glorifying his involvement in the incident of 29th August and was considered to be at high risk of absconding. Similarly, on Day 5 (3rd September), he is recorded as engaging with staff and following his programme but also shouting and talking to others until 1am. On Day 6 (4th September) he is recorded as glorifying his part in the incident of 29th August and discussing absconding at his next court appearance. From Day 7 onwards, his behaviour seems to have become somewhat better and he received a music-playing device, the first of the ameliorations introduced.

The applicant P.McC.

39. In the records, P.McC. was described as being distant, impulsive, unpredictable, with a history of stealing on the unit and attempted absconding. The records contain repeated concerns about his ability to steal keys from staff. P.McC. was heard on Day 2 (31st August) being very threatening towards staff and making sexualised threats in respect of a female staff member; he was also heard shouting through the vents and that there was a lot of chat between him and another boy. On Day 3, he was heard issuing threats to staff and peers, and refusing to engage with staff in a positive way. On Day 5, he and another boy were shouting to each other until 1am. Again, there were references to a female member staff, and he said he had got her keys, phone, and bag and would catch her in the office and 'do her'. He was also heard talking about breaking an iPhone and that he would have a riot if he got the staff on the corridor. On Day 6, he continued to be abusive to staff. It was explained to him that moving forward in his programme depended on his behaviour. His behaviour was described as unpredictable and impulsive, he was not engaging with staff positively; he was glorifying his part in the incident, and stating that he wished he had killed young people from another unit and would like to kill staff. On Day 7, he threatened to throw urine over the Gardai when then they came the next day for his court appearance and said he would bite their faces off. He was still glorifying his role in the incident. He removed a socket from the wall in his bedroom and used it to damage the wall. On Day 8 he was taken to court. From this date onwards, his behaviour seems to have improved and changes started to be introduced into the regime. Even by Day 16, however, the weekly review was saying that he should be accompanied by 3 staff members at all times.

40. On the 20th September, he was involved in a further incident causing significant damage to the unit, including televisions. Mr. Bergin averred that he saw him taking mood-altering substances during the night and that he threated Mr. Bergin with a screwdriver. The applicant does not respond to these averments at all and therefore does not appear to dispute them.

The applicant L.C.

41. In the records, L.C. is described as verbally and physically aggressive, slow to take direction and a capable of escalating his behaviour very quickly. The records also state that he had assaulted staff and there were concerns that he was manipulating staff. From the earliest record available, there were suspicions that L.C. had contraband in his room and on his person and that he "uses items to exert control" and "incites others to get involved." On Day 8 (6th September), the records indicate that a suspicion that L.C. had been keeping a weapon was confirmed amongst staff: a handwritten entry warns that L.C. had a sharp implement and had carved graffiti into a bench. According to the entry, when he was questioned about this, he stated that the graffiti was caused by the top of an aerial, though the entry records that the aerial was too smooth to carve the graffiti, it also notes that when he was asked to hand the weapon up, he refused. The entry for the following day states that L.C. admitted he had defaced the bench with the jack of his headphones. He was also spoken to regarding the fact that he had not handed back his toothbrush the previous day. On Day 10 (8th September), his room was searched by the gardaí. On day 13, the suspicion that he had a weapon continued and he was given a chance to hand any weapon he may have had up; he is recorded as adamantly denying that he had possession. The Director's affidavit and the records state the applicant handed up "a screw" after the search and said that it was with this item that he had marked the bench. The applicant's solicitor in his affidavit states that the suspicions of a weapon on the applicant's person are groundless and are a false account put forward to support the respondent's case, that he did not have in his possession the top of an aerial, and that the staff were well aware he did not have a weapon concealed. The Director stated in his affidavit that L.C. was later involved in two serious incidents on the campus. The first on Day 19 (the 17th September) when L.C. attempted to stab a member of staff with a plastic knife. The second incident was on Day 22 (the 20th September) when, the Director alleges, the applicant was involved in another serious disturbance at a unit. Neither the applicant, the applicant's mother or his solicitor deny this allegation in any of the affidavits put before the Court.

The conditions of the applicants' detention during the period of separation

42. *Location of separation* – Each applicant was placed in a locked bedroom in a unit within the campus. This was, according to the Director, Mr. Bergin, the only secure place in which they could be held following the damage caused during the incident of the 29th August, 2016.

43. *Staff Checks*-The applicants appear to have been checked by staff every 30 minutes for the most part, although at times this stretched to 60 minutes. The Oberstown Separation Policy indicates that checks should be made every 15 minutes.

44. *Bedding* – It is clear that at the beginning of the period, the applicants were given nothing in terms of bed and bedding other than a mattress. It is also clear that during the first few days, the applicants were given items of bedding such as sheet, blanket and pillow. It is not possible for me to establish definitively, on the evidence before me, what precisely was given when. Mr. Bergin averred that the reason for withholding the bedding at the beginning was because of the risk that the applicants might set fire to it. The Director, says that L.C. damaged the mattress he was given, whereas the applicant L.C. complains that he had to break open the

rubber on his mattress and sleep inside it because of the absence of bed linen. It is not possible for me to resolve factual conflicts such as this. One point of which I take note in relation to the bedding is the fact that the records contain references to the applicants having to "earn" items of bedding. This approach may not be entirely consistent with the suggestion that the purpose in withholding the bedlinen was solely for safety and security reasons.

45. *Sanitation* – Each of the bedrooms into which the applicants were locked had a toilet. The water supply was switched off for the showers and sinks. Mr. Bergin averred that this was because of a concern that there would be acts of deliberate flooding. It is clear from the records that the applicants were given showers on numerous occasions after the first few days. It does appear, however, that no showers were allowed in the first two days.

46. *Food and drink* – The only person who made a substantial complaint in this regard was the applicant L.C., who alleged through his solicitor that portions of food were very meagre and insubstantial and that he did not receive sufficient fluids. This is disputed by the Director Mr. Bergin, and the written records indicate food and drink being furnished to the applicants. None of the other applicants have made any significant complaint in this regard. This type of complaint cannot be resolved by the Court on the evidence adduced.

47. *Clothing* – The only complaint made regarding clothing is by the applicant P.McC. Mr. Bergin averred that the applicants' clothes were taken from them following the incident as part of the investigation, and that they received appropriate substitute clothing. P.McC. complains that he did not have his own clothing for a considerable period of time. His solicitor avers that his client was wearing only shorts and shoes when he visited him on the 8th September. Again, this is not the type of matter upon which the Court can reach definitive conclusions on the evidence adduced.

48. *Exercise* – It is clear that for a considerable part of the period of separation, the applicants were not allowed any access to exercise in fresh air. S.F. was first allowed outdoors on Day 10 (8th September) and was allowed 30 minutes exercise alone outdoors daily thereafter. T.G. was also allowed outside on Day 10 (8th September) and was allowed daily exercise thereafter. PMcC was allowed into the yard for the first time on Day 11 (9th September), and seems to have been allowed to do this many days thereafter, although perhaps not every day, unless the records are incomplete. L.C. was allowed into the yard on Day 10 (8th September). Oberstown's own Separation Policy suggests that a separated young person should receive one hour of exercise, ideally in the fresh air, for each day of the separation.

49. *Medical attention* -There were some complaints about access to medical attention. The Director, Mr. Bergin stated in his affidavit that all the boys were medically assessed once the incident on the night of the 29th August was under control. Thereafter, the records say that in the first few days, medical staff arrived but were not allowed access to the applicants due to security and safety concerns. S.F. received medical visits from Day 6 onwards, and antibiotics for a cut knee. He was also brought for an X-ray in hospital on Day 21 (19th September). T.G. complains that he suffered on Day 1 from asthma symptoms and that his efforts to obtain an inhaler by ringing the bell were ignored. One record says that an inhaler was provided that day, but it is not clear when. If a young person in detention were deprived of something as basic as an inhaler when he suffers from asthma, this would be entirely inexcusable. He was seen on Day 2 (31st August) by a doctor and clinical nurse manager according to the Daily Report. He complained of mild right ear pain. The record of separation indicates that he was given an inhaler and told to hand it back in the morning. On Day 3 (1st September) it is recorded that it was not possible for a doctor and nurse to see him because of safety concerns. On Day 9 (7th September), TG was visited by a doctor and nurse and the record says that antibiotics and ear drops were to be given to him that day, and that he was using an inhaler and nasal spray. Medical advice relating to his ear appears to have been given over the phone on Day 14 (12th September).

50. The records for Day 6 indicate that L.C. told a staff member that he was suicidal on Day 5 and that a more senior member of staff was informed. On Day 8 (the 6th September), the Director's affidavit and the records indicate the applicant was seen by a nurse and complained of ear pain, which was consistent with his medical history of ENT problems. He asked about an x-ray and was told this could be done on an outpatient basis, as this was not urgent. On Day 9 a scheduled visit did not go ahead due to security concerns. On Day 11, records indicate that the applicant was treated by a doctor and that an arrangement was made for his ear to be syringed on the 30th September, 2016. Subsequent entries show that he was given drops for softening ear wax but that, perhaps because of an interruption in supply, no syringing ultimately took place on the 30th September. No evidence was placed before the Court in these proceedings with reference to any suicidal tendencies during the period of separation in August/September 2016. This, of course, would be a matter of the utmost seriousness were it to be found to have any substance.

51. In relation to P.McC., the records indicate that he was seen by a nurse and doctor on Day 2 (31st of August). Mr. Bergin states he could not be examined by a nurse and GP due to safety concerns but was observed through the hatch. Again, on Day 3, medical personnel were refused access on the basis of security concerns. On Day 7 (5th September) the clinical nurse manager visited the Unit and asked if the applicant had any concerns, but none were reported. On Day 9, Professor Harry Kennedy called to see applicant, but it was not possible to see him due to safety concerns. Records indicate on Day 11 (9th September) he was seen by a doctor and a nurse. On Day 14 (Day 12) the applicant was seen by Professor Harry Kennedy for a psychological/psychiatric assessment. A summary of Professor Kennedy's observations of the applicant P.McC. on this date have been set out above.

52. *Distraction/Entertainment*- As time went on, certain aids to distraction were introduced. SF was provided with a music-playing device on Day 7 (5th September); TG on Day 7 (5th September); P.McC. on Day 9 (7th September) date and L.C. on the Day 5 or 6 (the 3rd or 4th September). Televisions (without satellite connection) were introduced at a particular date, on which the applicants could watch DVDs; for SF on the Day 10 or 11 (8th or 9th September); for TG on Day 10 or 11; for P.McC. on Day 11 (9th September) and for L.C. on the same date. Gradually, the applicants were allowed to spend time in the multi-purpose room and engage in activities such as playing on a computer; for SF from Day 10 (8th September); for TG from Day 10; for PMcC from Day 10 and for L.C. from Day 10.

53. Complaint is made, particularly on behalf of L.C., with regard to the absence of writing materials until Day 8 (6th September). As late as Day 20 (18th September), L.C. is recorded as having assaulted a member of staff with a plastic knife; earlier, he is reported as having engaged in carving graffiti with (he said) the jack of his earphones. He was eventually given pencil and paper and wrote an account of the separation period from Day 8 (6th September) onwards.

54. *Contact with family*- The issue of when precisely the applicants made phone calls to family members was in dispute and was not capable of precise verification from the records. As best I can ascertain, the contact was as follows. In relation to S.F., records indicate that he had his first call on Day 6 (the 4th September). The applicant disputes this and says he was not allowed calls until Day 9 (the 7th September), and the records confirm that the applicant was allowed to make a call to his mother at this date. He certainly had a number of other calls after Day 9, although the records are difficult to follow and not always consistent with each other. In relation to T.G., although there is a record of a call to his mother on Day 5 (the 3rd September) according to a log provided by the director, it is not clear whether the applicant or staff made this call and there are no mentions of this call in any of the

handwritten records. Further calls alleged to have been made on Days 6,7, and 8 by the applicant are similarly inconsistent as between the different records. Records indicate on Day 9, he called his girlfriend and there may also have been a call to his mother (again some records suggest this, others do not mention it). There are a considerable number of calls after Day 10, but it is difficult to be definitive about when and to whom, given inconsistencies between the records. P.McC. complained that calls were withheld from him until Day 10 (8th September). There is a considerable degree of confusion as to what phone calls he made and when precisely he made them. It does appear that the first phone call was on this date, but there is considerable contradiction in the records as to what calls took place on subsequent dates. In relation to L.C., it appears the first and second phone calls he was allowed were also on Day 10 (the 8th September) and that they were to his mother. The records also state that he had been refused a phone call on the previous day, despite it being his birthday, because of his behaviour the day before his birthday. There appear to have been regular calls after Day 10.

55. As appears from the foregoing rather unsatisfactory summary, the records concerning phone calls to family were in a state of some disarray. In general terms, the respondent's position was that there was no evidence that the applicants were refused calls they had asked for. Counsel on behalf of one of the applicants said his client was told they would not be getting any phone calls, which would explain why there are no references in the records to requests for phone calls. It seems to me, on the balance of probabilities, that the four applicants were given to understand calls would not be permitted until express permission was given for those calls. Insofar as it is possible to reach conclusions on the basis of the records, it appears that telephone calls started to be permitted in or about Day 10, and this appears to have been across the board in respect of all the applicants.

56. The situation concerning family visits appear to have been as follows. S.F. first received a visit on Day 28 (26th September); T. G. received no family visits during the period; P.McC. first received a visit his grandfather on Day 15 (13th September), and L.C. received no visits during the period.

57. *Interactions with staff* – Counsel on behalf of the applicants complained that there was little attempt by the staff to engage meaningfully with the applicants, particularly in circumstances where initial contact (in particular the first week) was limited to such conversation as could be had through the hatch. My understanding is that contact was limited to the hatch initially because of concerns about physical aggression towards the staff. This restricted form of interaction seems reasonable to me, particularly in light of the ongoing conversation between the young persons, in which they repeatedly made extremely serious threats in respect of staff, as described above. The records also contain many references to the applicants being told that they should try to engage with their programme and that it was explained to them that their deprivations would diminish if their behaviour was modified. It does not seem to me that blame for lack of meaningful interaction can realistically be laid at the door of the staff rather than the applicants themselves.

58. *Interactions with others* – it appears from the records that representative from the Children's Ombudsman Office visited on the Days 4 and 19 (the 2nd September and 17th September). a representative from ACTS visited on Days 16 and 19 (the 14th and 17th September); and Dr. Harry Kennedy visited PMcC on Day 14 (12th September) for the purpose of preparing a pre-sentence report in respect of an upcoming court appearance.

59. There is no complaint that the applicants were denied access to solicitor. As a matter of fact, the records note the visits of solicitors during the second and third weeks. S.F. was the first to receive a solicitor's visit and this was on Day 8 (6th September).

Legislative and other parameters concerning Oberstown Detention Centre

General parameters

60. The detention of minors was introduced in Ireland by the Reformatory Schools Act 1858, which introduced a system of reformatory and industrial schools. The system was overhauled by the Children Act 1908 which remained in force with regard to the detention of minors on criminal charges until the introduction of the Children Act 2001.

61. In *J. v. District Judge Delap* [1989] I.R. 167, Barr J. described Trinity House, then a 'reformatory school', as follows (at pp. 169 – 170):-

> "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 *The State (Sheerin) v. Kennedy* [1966] I.R. 379. 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."

62. The Children Act, 2001 replaced "reformatory schools" with "children's detention schools". Responsibility for detention schools established under the Children Act 2001 was transferred from the Minister for Justice and Equality to the Minister for Children and Youth Affairs on 1st of January, 2012

63. The detention schools operate under a board of management appointed by the Minister for Children and Youth Affairs under s. 164 of the Children Act 2001. There are twelve members on the board and they serve for a period not exceeding four years. The board is empowered to implement review policies in relation to the management of the detention schools. The schools are also subject to an annual inspection from the Health Information and Quality Authority (HIQA).

64. Section 158 of the Children Act 2001as amended sets out the principal objects of a children detention school as follows:-

> "It shall be the principal object of children detention schools to provide appropriate educational and training 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."

65. The published mission statement in respect of Oberstown Campus is as follows:

"At Oberstown our principal objectives are to provide appropriate residential care, educational and training programmes and facilities for young people referred to us by a court having regard to their health, safety, welfare and interests, including their physical, psychological and emotional wellbeing.

Our framework for providing these objectives is through CEHOP which focus on providing Care, Education, Health and well-being interventions, Offending behaviour programmes and Preparation for Leaving. We aim to deliver best practice in custodial services by:

- Providing a safe, secure and caring environment;

- Tackling offending by delivering anti-offending programmes and raising victim awareness;

- Addressing care, education & health needs;

- Reducing risk to self and others;-

- Preparing young people for their return to families and communities with a reduced risk of offending;-

- Having staff who are enthusiastic and committed in their belief that they can help young people make life-changing choices."

66. Mr Pat Bergin was appointed by the board of management as the Director of Oberstown Children Detention Campus under s.180 of the Children Act 2001 with effect from 1st of June 2016. The rights and duties of the director or governed by rules and policies laid down from time to time. An important provision of the Act is s.180(8) which provides as follows:

"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."

67. Section 221 of the Children Act 2001 provides for the making of Ministerial Regulations and provides as follows:

"(1) The Minister may make regulations, not inconsistent with this Part and any relevant international instruments to which the State is a party, for or with respect to any matter that is required or permitted by this Part to be prescribed or that is necessary or expedient to be prescribed for giving effect to this Part and, in particular, with respect to -

(a) the promotion of the educational and social development of children detained in children detention schools,

(b) the maintenance of the physical, psychological and emotional wellbeing of such children,

(c) the provision of adequate and suitable accommodation for them, the control and management of such schools and the maintenance of discipline and good order generally in them,

(e) the inspection and investigation of such schools by the Inspector,

(f) the conduct and functions of the Director and other members of the staff of such schools,

(g) visits and other communications between children detained in such schools and their families, relatives and friends."

68. Mr. Bergin averred that behaviour management is approached through a number of strands. A rating system operates whereby the behaviours of young people are rated daily by staff which is then transferred into a numerical outcome which places the young person on one of five levels. These levels relate to certain benefits including extra phone calls, later time going to bed, extra pocket money and other such options. The rating is based on the interaction between young people and staff, their ability to take direction and adhere to boundaries and limitations. Where there is failure to meet the required behaviour, the ratings are affected and this reduces the level of benefits to the young person. Any young person's regime is subject to change as a result of regular review through the application of the rating system.

Discipline and Segregation

69. The director is allowed to discipline children pursuant to s. 201 of the Children Act 2001. Mr. Bergin did not, however, justify the separation of the applicants on the basis of this power. I set it out here merely for completeness and to show the statutory limits, in that particular context, to the measures that may be imposed by way of punishment:-

"(1) Any child who breaches the rules of a children detention school may be disciplined on the instructions of the Director

of the school in a way that is both reasonable and within the prescribed limits.

(2) Without prejudice to the power of the Minister to prescribe limits for the disciplining of children detained in children detention schools, the following forms of discipline shall be prohibited-

(a) corporal punishment or any other form of physical violence,

(b) deprivation of food or drink,

(c) treatment that could reasonably be expected to be detrimental to physical, psychological or emotional wellbeing, or

(d) treatment that is cruel, inhuman or degrading."

70. Reference was made throughout the hearing to a policy document entitled "CPI Behaviour Management Policy and Procedures for Children Detention Schools". This document, *inter alia*, sets out provision for a document known as an ICMP or individual crisis management plan. In this regard, the policy (as reviewed December 2012) provides as follows:

> "Individual Crisis Management Plans (ICMPs) are in place for each young person detained in a Children Detention School. The ICMP is a written, individualised plan which identifies any potential difficulties and crises and outlines the most appropriate course of action staff and managers should take to reduce harm. The aim of the ICMP is to draw up guidelines regarding the best approach in managing a young person's behaviour. These plans are designed to avoid the use of physical restraint. The plans are systemic and benefit from multi-disciplinary input. The ICMP should reference the Placement Plan."

The Oberstown Separation Policy Document

71. In a number of Irish authorities dealing with the removal of adult prisoners from association with other prisoners, discussed below, rule 62 of the Prison Rules 2007 plays a central role. It is important to note that the Prison Rules 2007 do not apply to Oberstown Detention Centre, and that, most surprisingly, no similar or equivalent Rule in respect of Oberstown currently exists.

72. Rule 62(1) provides that 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, or (c) associate with other prisoners, where the Governor so directs. Subparagraph (2) provides that 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. Subparagraph (2) provides that a period specified in a direction under subparagraph (1) shall not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody. Under subparagraph (4), the Governor is obliged to review the direction not less than once in every 7 days, for the purpose of determining whether the direction might be revoked. Subparagraph (5) provides that the prisoner shall be informed in writing of the reasons either before or immediately after the direction, and of the outcome of any review as soon as may be after the Governor has made a decision in that regard. The Governor must keep a record of any direction, the period it remains in force, the grounds upon which it was given, the views of the prisoner, and any decision in relation to review. Under subparagraph 7, the Governor shall, as soon as may be after giving a direction, 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. A similar obligation exists in relation to informing a chaplain. Finally, under subparagraph 9, the Governor must also 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 where the period of such removal will exceed 21 days. Thereafter, any continuation of the extension of the period of removal must be authorised, in writing, by the Director General. Thus, r. 62 consists of a simple, succinct system of safeguards, with features such as written records of the decisions made, periodic review by the Governor at least once every 7 days, outside authorisation required after 21 days, an opportunity for the prisoner to be heard in relation to the decision, and medical supervision. The system also puts beyond any doubt what the justification for the segregation must be, namely a significant threat to the maintenance of good order or safe or secure custody. It also makes clear that this justification must be maintained throughout the duration of the measure.

73. The position in England regarding young detainees and solitary confinement or separation may also be noted by way of contrast to the absence of any formal rules governing the isolation of a young person in Oberstown. The English regime in respect of the solitary confinement of young persons in detention is regulated by statutory instrument (SI 2000/3371, Young Offender Institution Rules) and is as follows. A Governor of a youthful offender institution may arrange for the juvenile's removal from association for up to 72 hours, where it appears desirable, for the maintenance of good order or discipline or in his own interest, that an inmate should not associate with other inmates, either generally or for particular purposes. Removal for more than 72 hours may be authorised by the Governor in writing, and a further period of removal could be authorised for up to 14 days. That can be renewed for subsequent periods of up to 14 days. The Governor must obtain leave from the Secretary of State in writing to authorise removal where the period in total amounts to more than 42 days. The Secretary of State can grant leave for a maximum period of 42 days, but the leave can be renewed of subsequent periods of up to 42 days by the Secretary of State. According to the judgment in the A.B. case, discussed below, stricter requirements are imposed for persons between the age of 15 and 17 years by the Prison Service Order, PSO 1700, as amended in September 2015. This provides that removal from association for longer than 72 hours, and after each period of 14 days, requires a review by the Segregation Review Board. Once a person is removed from association for a continuous period of 21 days, and at 21-day intervals thereafter, the authorisation must be given by the Deputy Director of Custody at the National Offender Management Service under the Minister of Justice, who are external to the Youth Offender Institution. A Director of the National Offender Management Service must also review continuous segregation after 90 days.

74. Although there are no Rules governing separation or solitary confinement in Oberstown, there is however a detailed policy document in existence. This is the Policy on Separation (January 2016) (hereinafter referred to as "the Oberstown Separation Policy"). It is a detailed policy document, clearly developed with close attention to domestic and international materials concerning the issue. It provides, inter alia, as follows:-

> "It is recognised that young people who are placed in detention by the courts are often the most damaged and vulnerable young people within our society, and sometimes have difficulty with accepting the boundaries and controls imposed by the adults caring for them. Separation 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 necessary, do to one of both of the following reasons:

(a) Where a young person is likely to cause significant harm to her/himself or others,

(b) Where a young person is likely to cause significant damage to property that would comprise security and would impact on the safety of others."

It goes on to provide:-

"Young people can only be separated from their peers when they are considered to be at risk of causing significant harm to others and/or others and/or property. The decision to separate a young person can only therefore be made on the basis of risk management due to the risks involved and it is not centred on the behaviour of the young person. The decision to separate a young person must be a proportionate response to the risk posed by the young person.

Separation is the final stage in a continuum of interventions which include all behaviour management techniques...Separation is only to be used as a last resort, when all other interventions have failed. It shall be used for the shortest period required...

... Separation is not to be used

-for punishment

-for disciplinary purposes

-as a primary tool to manage challenging behaviour or

-to deal with staff shortages.

75. The policy acknowledges the potentially negative consequences for the young person:

"It is recognised that young people in detention are inherently vulnerable. Separating young people from their peers and from their normal location to either a separation room or other room can be traumatic for young people, can increase their vulnerability, and may compromise their physical health and/or mental health…it is for these reasons that separation is only to be used as a last resort when all other crises intervention approaches have been exhausted and:

(i) where a young person is likely to cause significant harm to him/herself or others; and/or

(ii) where a young person is likely to cause significant damage to property that would compromise security and impact on the safety of others.

Solitary confinement is regarded as 'the physical isolation of individuals who are confined to their cell for 22 – 24 hours a day'. [The policy at this point footnotes that this definition stems from the Istanbul Statement, discussed below]. Separation, therefore, has the potential to amount to solitary confinement. It is well recognised that young people are particularly vulnerable to the negative effects of solitary confinement. The European Court of Human Rights has held that States owe a higher standard of care to persons who are deprived of their liberty and are detained in solitary confinement. In this context, Articles 2 and 3 of the European Convention on Human Rights are informative, and are binding in Irish law by virtue of the European Convention on Human Rights Act 2003. Staff in Oberstown must carry out their functions in accordance with their obligations under the European Convention on Human Rights Act 2003."

The document then goes on to refer to certain pronouncements of the European Court of Human Rights concerning solitary confinement and proportionality. It refers to the European Committee for the Prevention of Torture and its various views about the exceptional nature of the measure and the need for certain safeguards. It discusses the European Rules for Juvenile Offenders subject to Sanctions and Measures (2008), and the Irish Youth Justice Service Standards.

76. The policy document on separation then sets out a lengthy list of procedures to follow when separation is used. It envisages the use of a Separation Log with details being entered such as the name of the authorising personnel, the time of authorisation and the reason for separation. The young person is to be checked at least every 15 minutes. No young person is to remain in separation for longer than 24 hours without the authorisation of the Director, which must be recorded in the Separation Log. It also provides: "A young person shall be entitled to a minimum of one hour's exercise outdoor (weather permitting, or indoors if inclement weather) for every 24 hours that they are separated". Also, "Young people shall have access to books/magazines/television whilst in separation". Significantly, it provides that "A young person must never be separated for longer than 3 days" and "A young person must never be separated as punishment". I also note that it provides that a young person shall be informed at the start of separation that they have access to an independent advocate, and if requested, this should be granted as soon as practicable.

International Materials concerning the solitary confinement and juveniles

77. In the course of her judgment in *Attorney General v. Damache* [2015] IEHC 339, Donnelly J. considered how international instruments can be considered by the Irish courts and said:-

"11.10.47. … it is well-established that I may have regard to decisions of international courts or decision-making bodies, the jurisprudence of other superior courts, as well as international legal instruments, in the interpretation and understanding of the constitutional provisions regarding fundamental rights. Those other instruments and decisions do not in any sense create rights. Instead, they provide the Court with an understanding of contemporary concepts of those rights in order truly to fulfil the constitutional guarantees of protection of those rights."

Following this approach, it seems to me that the Court is entitled to take cognisance of the following international instruments, while recognising that they do not bind the Court in any formal way.

The Istanbul Statement (2007)

78. In 2007, the Statement on the use and effects of solitary confinement, adopted by an international group of experts on 9th December, 2007 at the International Psychological Trauma Symposium, Istanbul, annexed to the 2008 Interim Report of the United Nations Special Rapporteur on Torture to the General Assembly, defined solitary confinement as follows:-

> "Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic."

The Istanbul Statement also says as follows at p. 2:-

> "It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90 per cent of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.
>
> Individuals may react to solitary confinement differently. Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place, and regardless of pre-existing personal factors. The central harmful feature of solitary confinement is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well being."

The Istanbul Statement recommends that the use of solitary confinement should be absolutely prohibited with respect to persons under the age of 18.

The Council of Europe Rules for Juvenile Offenders (2008)
79. Rule 93 provides that if in exceptional cases, a juvenile needs to be separated from others, for safety or security reasons, this shall be decided by a competent authority on the basis of fair procedures laid down in national law, specifying the nature of the separation, its maximum duration and the grounds on which it may be imposed. Rule 91 provides that it should only be used for a few hours, as a calming down mechanism, and should not exceed 24 hours, while separation for disciplinary purposes shall only be imposed in exceptional cases where other sanctions would not be effective.

The UN Special Rapporteur's Report on Solitary Confinement (2011)

80. In 2011, a report of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment referred to the effects of social isolation on brain activity and human personality and said that the practice should be used only in very exceptional circumstances, as a last resort, for as short a time as possible (para. 89). It also emphasised "the need for minimum procedural safeguards, internal and external, to ensure that all persons deprived of their liberty are treated with humanity and respect for the inherent dignity of the human person".

81. The Special Rapporteur recommended at para. 93 as follows:-

> "All assessments and decisions taken with respect to the imposition of solitary confinement must be clearly documented and readily available to the detained persons and their legal counsel. This includes the identity and title of the authority imposing solitary confinement, the source of his or her legal attributes to impose it, a statement of underlying justification for its imposition, its duration, the reasons for which solitary confinement is determined to be appropriate in accordance with the detained person's mental and physical health, the reasons for which solitary confinement is determined to be proportional to the infraction, reports from regular review of the justification for solitary confinement, and medical assessments of the detained person's mental and physical health."

82. The Special Rapporteur was of the view that confinement beyond a period of fifteen days in respect of adult constituted torture or cruel and inhuman treatment and called for an absolute international prohibition on solitary confinement for any period beyond fifteen days.

83. The Special Rapporteur also took the view that the use of solitary confinement in respect of children constituted cruel, inhuman and degrading treatment. He said:-

> "…the Special Rapporteur holds the view that the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture." (emphasis added)

The Committee on the Rights of the Child Convention on the Rights of the Child
84. The Committee on the rights of the child, the body tasked with monitoring, enforcing and interpreting the Convention on the Rights of the Child, stated in a 2007 General Comment on childrens' rights in juvenile justice the view that the use of solitary confinement violates Article 37 of the CRC which provides that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment and that every child deprived of liberty shall be treated with humanity and respect of the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age (at p. 24).

Report of the European Committee for the Prevention of Torture on Oberstown 2015
85. The European Committee for the Prevention of Torture visited Oberstown and reported a report in 2015. The respondent notes that the committee considered the Oberstown Separation Policy 2012 and did not criticise it, although it did say that it should be used as a last resort once other interventions have proved unsuccessful to help the young person regain control or to prevent disruptive actions or dangerous behaviour which threatens the safety, security and welfare of others. (p. 73)

86. It was submitted on behalf of the respondent that the Committee appeared to envisage the isolation for a period of weeks, insofar as it stated, at para. 43, as follows:

> "In addition, conditions akin to solitary confinement can have an extremely damaging effect on the mental, somatic and social health of the prisoner. The damaging effect can be immediate and increases the longer the measure lasts and the

more indeterminate it is. The Committee wishes to stress that, while pursuing their goal of ensuring that all prisoners can serve their sentences under safe conditions, the authorities should strive to minimise the deleterious effects of such segregation. For those prisoners placed on protection (i.e. 21-hour to 23-hour lock-up) for more than a few weeks, additional measures should be taken in order to provide them with appropriate conditions and treatment; access to activities, educational courses and sport should be feasible."

The Mandela Rules (2015)
87. The United Nations Standard Minimum Rules for the Treatment of Prisoners, also known as the Mandela Rules, were adopted by the General Assembly of the United Nations in December 2015. Rule 44 says solitary confinement shall refer to the confinement of prisoners of 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of fifteen consecutive days:-

"Rule 45

1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice continues to apply."

Summary of Submissions of the Parties
88. I will be dealing in detail with the authorities relied upon by the parties later in this judgment and at this point wish only to present an outline of the submissions made. I hope I do not do any injustice to the careful and nuanced submissions of the parties by summarising them in broad terms as follows. The applicants contended that the regime of separation imposed upon them breached their rights under the Constitution by reason of a number of matters combined; the duration of the separation, the totality of the deprivations imposed in addition to the separation *simpliciter*, and the absence of procedural due process concerning the continuation of the separation. Regarding the duration, it was pointed out that Oberstown's own Separation Policy placed an upper limit of three days upon any separation and that the separation in the present case had lasted for a number of weeks. Attention was also drawn to international instruments suggesting that solitary confinement should never be used in respect of children and young persons, or at least should be used extremely sparingly. Regarding the totality of conditions, complaint was made that the element of separation was greatly aggravated by its accompaniment by other deprivations, such as the absence of daily exercise, the absence of familial contact, the absence of any form of recreation/distraction, and the absence of any meaningful interaction with staff, together with some alleged physical deprivations. Regarding procedural fairness, attention was drawn in particular to the absence of any formal documentation recording the fact of, and reasons for, the commencement of separation or for its extension, and the failure to appoint an independent advocate as indicated as a requirement by the Oberstown Separation Policy or to provide any other means for the young person to have a voice in the process. It was also submitted that there was evidence of a non-individualised or blanket policy approach to the deprivations insofar as, while there was indeed some relaxation of the deprivations as time went on, the introduction of certain of them (permitting phone calls, giving a television) on the same day for all four applicants was suggestive not of restrictions generated by necessity but rather of a blanket approach with a punitive dimension.

89. On behalf of the respondent, an issue of mootness was pleaded in relation to two of the applicants. On the merits, it was contended that all of the measures taken arose from the necessity of the situation, having regard to the extreme threat posed by the applicants to the safety and security of the institution. Attention was drawn to the gravity of the incident on the 29th August 2016, the continued aggressive behaviour of the applicants while on separation as indicated by written records maintained by staff on the unit, and the fact that a further violent incident took place on the 20th September 2016 involving two of the four applicants. It was argued that the decision to separate, together with the imposition of the additional deprivations, was taken as a last resort in the best interests of the young persons concerned, the other detainees and staff, because of the highly exceptional nature of the situation. It was specifically denied that the measures had been taken by way of punishment in respect of the incident on the 29th August, 2016. It was argued that the severity of the deprivations was ameliorated as soon as was possible having regard to safety and security considerations. The Court was also reminded of the margin of appreciation which is afforded by the courts to the Executive in the administration of prisons and places of detention and it was urged upon the Court that it should not seek to second-guess the Director nor to micro-manage the situation.

90. There was considerable disagreement between the applicants and the respondent as to the effect of the Oberstown Separation Policy, the document discussed above, and the scope of the Director's power concerning the imposition of separation or solitary confinement. The applicants suggested that in the absence of formal rules governing the issue of separation, the Separation Policy should be treated as binding on the Director and that the failure to observe certain of its requirements, especially the 3-day maximum limit for separation, rendered unlawful the separation regime to which the applicants were subject. It was argued, in the alternative, that if the Separation Policy did not apply to the situation, the Director had no lawful authority to impose separation at all. The respondent contended that the Separation Policy was a non-binding policy which was directed at less serious threats to the order of the institution and could not fetter the Director's discretion in the face of the exceptional threat posed by the applicants' behaviour. It was argued that the source of the Director's authority was s.180 of the Children Act, 2001.

91. The Irish Human Rights Commission drew the Court's attention in particular to international instruments concerning the use of solitary confinement with regard to young persons. It also emphasised the test of proportionality in Irish law which must be applied to measures of segregation imposed upon a prisoner or detainee. The Commission submitted that *de facto* solitary confinement should never be imposed on children, but that if such a measure were to be imposed, it should at a minimum comply with certain procedural safeguards. The suggested procedural safeguards included the following: that the decision be taken at an appropriate level of seniority; that the reason for the separation be clearly communicated to the child; that it should be explained to the child what is required in order to end the period of separation; that there should be immediate access to medical personnel who can assess the effect of the separation on the child; that the child should have continued access to family and legal representatives and to a complaints procedure; that the child should have access to stimulating and educational materials; that there should be at least one hour of exercise out of cell, outdoors if possible, per day; and that a test of proportionality should be strictly observed throughout the period.

Mootness
92. The respondent obtained leave to amend their opposition papers and to plead the issue of mootness in respect of the applicants,

P. McC and S.F. This was on the basis that P.McC. left Oberstown detention school on 30th September, 2016, and S.F. on the 9th December, 2016. The respondent referred to the legal principles as set out by Denham C.J. in *Lofinmakin v. Minister for Justice and Equality* [2013] 4 I.R. 274, and said that there could not be considered to be any longer a "live controversy" between the parties. It was also submitted that there was nothing exceptional in the cases to warrant the exercise of the court's discretion to hear the proceedings.

93. It was submitted on behalf of P.McC. in the first instance, that the breaches which had occurred entitled the applicant to damages and, therefore the issues were not moot. It was argued, secondly, that even if the matter were moot the court should nonetheless exercise its discretion to hear the case, on the basis of the discretion identified in *PV (a minor) v. Courts Service* [2009] 4 I.R. 264. It was submitted that the question of the regime under which children are held in Oberstown is a matter of fundamental importance and also that since children are detained there for relatively brief periods, the ability of the courts to consider the issue would likely be frustrated if a view were taken that the issue could only be considered on behalf of children detained in Oberstown at the date of the hearing. Similar arguments were made on behalf of S.F. It was additionally argued that the case had originally been listed for hearing in September 2016 and was adjourned at the behest of the respondent, and that the respondent should not be allowed to gain from this.

94. It seems to me that insofar as there is a claim for damages still in existence, the matter is not, strictly speaking moot. Further, in the event that I am wrong with regard to that finding, I would be disposed in any event to exercise discretion in any event on the basis that there is a matter of fundamental public interest in issue and that, by reason of the fact that periods of isolation/solitary confinement are likely to be relatively short, were the court not to hear the matter after the child had left the custodial institution, the matter might potentially evade the reach of judicial review notwithstanding that it would be likely to arise again in the future. The latter has been identified as a basis upon which the discretion can be exercised in favour of hearing a case which may technically be moot.

The Constitution and solitary confinement/segregation/separation

The Irish authorities on solitary confinement, segregation and/or separation insofar as it relates to adult prisoners

95. In *Attorney General v. Damache* [2015] IEHC 339, Donnelly J. engaged in a comprehensive examination of domestic and international materials concerning the solitary confinement of adults. I do not wish to engage in repetitious summary of those cases and I have found her examination and her conclusions, set out below, most helpful. For present purposes, it seems to me that the following may be a useful summary of the analytic framework within which I must examine the events at Oberstown in August/September 2016.

96. In the first instance, it is well established that the imprisonment of an individual does not thereby extinguish all of the prisoner's rights. While imprisonment necessarily affects the right to liberty, and also requires restrictions on other rights necessary to accommodate the serving of the sentence of imprisonment, it is also the case that the restrictions should go no further than what is necessary in restricting those other constitutional rights; *State (Fagan) v. Governor of Mountjoy Prison* [1978] WJSC-HC 1181 *Murray v. Ireland* [1985] IR 532, *Kearney v. Minister for Justice* [1986] IR 116 and *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208.

97. Secondly, when a detainee is separated from the society of his or her fellow detainees, the constitutional rights most likely to be affected are the rights to bodily integrity, dignity (see *Kinsella v. Governor of Mountjoy Prison* [2012] 1 IR 467, *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334) and communication (*Kearney v. Minister for Justice* [1986] IR 116). A constitutional right not to be subjected to inhuman or degrading treatment has also been identified in *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208, and *Mulligan v. Governor of Portlaoise Prison* [2013] 4 IR 1. Association with fellow detainees is not so much a right in itself but a presumption which arises as an aspect of the rights to bodily integrity, dignity and communication. This presumption arises because of the serious risk of psychological harm that may be caused by social isolation; *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288 (in particular at pages 83-4) and *Kinsella v. Governor of Mountjoy Prison* [2012] 1 IR 467, (paragraphs 9-12). Both judgments graphically describe the type of harm that may be caused by solitary confinement).

98. Thirdly, where a measure involving segregation or solitary confinement is imposed upon a detainee, proportionality is required as a matter of constitutional law; *Killeen and Dundon* [2014] IEHC 77; *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208. In *Holland*, McKechnie J. said:

> "Given that the right in issue in this case is constitutionally based, it can I think be taken that any permissible abolition, even for a limited period or any interference, restriction or modification on that right should be strictly construed with the onus of proof being on he who asserts any such curtailment. In addition, the limitation should be no more than what is necessary or essential and must be proportionate to the lawful objective which it is designed to achieve. That a test of proportionality, where relevant, is now applied when considering constitutional rights is beyond doubt. In *Heaney v. Ireland* [1994] 3 IR 593 at p. 607 Costello J. described this principle as follows:-
>
> 'In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportionate to the objective…"

99. Fourthly, the requirement of proportionality means that sufficient justification is required for the initial imposition of the measure and that sufficient justification must be maintained throughout the period of segregation/isolation/solitary confinement,. It also means that the separation or isolation of the detainee should be counterbalanced as far as possible in order to ameliorate the effect of such isolation, for example, by access to exercise outdoors or access to stimulating materials in order to compensate for the loss of human society. The totality of the conditions in which the person is held is relevant to any assessment as to whether the conditions of the

detention have breached constitutional rights; *Devoy; Kinsella; Connolly; Dundon; Killeen and Dundon*; and *McDonnell* supra.

100. Fifthly, certain procedural safeguards are closely linked with ensuring that proportionality is achieved. In the first place, some form of review at appropriate intervals is necessary to ensure that sufficient justification for the measure continues to exist for so long as the measure is in force. In *Dundon v. Governor of Cloverhill Prison* [2013] IEHC 608, the High Court (O'Malley J.) said that Rule 62 of the Prison Rules should be adhered to where a detainee was subject to separation as envisaged by that rule, in part because he would then have the protection of regular review and oversight of the measure. In *McDonnell v. Governor of Wheatfield Prison* [2015] 2 ILRM 361, the Court of Appeal listed the ongoing review of the detainee's segregation as one of the factors leading to the conclusion that the segregation was justified. Secondly, appropriate record-keeping in relation to the imposition and maintenance of such a measure is an essential part of ensuring that it can be objectively justified. Thirdly, appropriate information should be given to the detainee so that he knows why the measure was taken (in cases where it was not requested by the detainee) and how long it will last for.

101. Fourthly, in examining the totality of the conditions in which the detainee was held, the Court should be mindful of where on the spectrum of "sensory deprivation" the case falls. So, for example, in *Devoy*, the prisoner could associate with other prisoners in his unit, had regular interaction with his teacher, chaplain, Governor, medical officers, family members, and had entertainment and exercise. The High Court refused to grant *certiorari* of the decision imposing segregation upon him. In *Kinsella*, the applicant had been placed in a small padded observation cell without sanitation or recreational facilities for 11 days before his application under Article 40.4.2 of the Constitution. While the High Court (Hogan J.) rejected the application for *habeas corpus*, it was held that that there had been a breach of the prisoner's constitutional rights on the basis that there was almost complete sensory deprivation. Hogan J. took a different view of the facts in *Connolly*, where the applicant had a television, access to reading material, and one hour out of his cell each in the course of which he had interaction with other prisoners. In *McDonnell*, the unsuccessful applicant had contact with prisoner officers, listeners and family, legal advisers, medical personnel, psychology and psychiatry services.

102. Finally, and notwithstanding all of the above, the Court must nonetheless be mindful of the separation of powers and the differing roles of the Executive and the Judiciary in cases involving prisoners. The Court must not engage in any attempt to "micro-manage" the running of prisons and places of detention: *Dundon v. Governor of Cloverhill Prison* [2013] IEHC 608. Further, the Court must be careful not to overstep the boundary between the Executive and the judicial function in situations where decisions may have resource implications: *O'Reilly v. Limerick Corporation* [1989] ILMR 181, *Sinnott v Minister for Education* [2001] 2 IR 545, *T.D. v. Minister for Education* [2001] 4 IR 259 and *Doherty v. South Dublin Council* [2007] 2 IR 696. A prisoner case in which this issue arose in stark terms was the seminal decision of *State (C) v. Frawley* [1976] IR 365. The prisoner in that case had a sociopathic personality disorder which manifested itself in aggressive and continuous resistance to authority. During his imprisonment, he engaged in dangerous and reckless climbing of walls and roofs of institutions; repeatedly swallowed metal objects, including batteries and component parts of a radio; and militantly resisted almost all forms of discipline and repeatedly sought to escape. When not in the Central Mental Hospital, to which he was transferred from time to time, he was detained in solitary confinement for most of the time with short periods of exercise, and deprived of most of the usual equipment of a prisoner such as cutlery, a bed with springs, and a radio. The psychiatric evidence was that the only long-term treatment which was suitable for him was a specialised psychiatric unit which was capable of keeping him in custody while being specially equipped to provide harmless outlets for physical capacity and aggression, and which would provide education and intellectual interests and companionship. No such institution existed in Ireland. Finlay P. held that

> "A failure on the part of the Executive to provide for the prosecutor treatment of a very special kind in an institution which does not exist in any part of the State does not, in my view, constitute a failure to protect the health of the prosecutor as well as possible in all the circumstances of the case....no such absolute duty exists".

He added:

> "it is not the function of the Court to recommend to the Executive what is desirable or to fix the priorities of its health and welfare policy. The function of the Court is confined to identifying and, if necessary, enforcing the legal and constitutional duties of the Executiv."

In cases involving prison conditions, there may be a fine line between enforcing the legal and constitutional duties of the Executive under the Constitution and trespassing into the rightful domain of the Executive under the Constitution, but it is a line that must be observed. By way of contrast to the *Frawley* decision, and perhaps at the other end of the spectrum, is the decision in *Whelan v. Governor of Mountjoy Prison* [2015] IEHC 273, where the High Court (Murphy J.) considered the question of providing outdoor exercise for a prisoner on segregation. His solicitor described the area in which the applicant was offered exercise as a cage-like structure which was not open to the sky. Murphy J. in her judgment set out the dimensions of the structure, but said that the photographs portrayed the space much more vividly and showed, in effect, a large lean-to shed, the back wall of which was brick and the remaining three walls of which were constructed of sheet metal. The top portion of the sheet mental walls consisted of steel mesh which allowed in some light and air. She was satisfied that as a matter of fact this exercise area was not in the open air and that the entire area was enclosed, with some light and air admitted through the top meshed part of the structure. She said: "a person is in the open air when he/she can look up and see the sky and have the sun in his eyes or feel the rain on her face. This exercise area meets none of those requirements". Murphy J., granting a declaration that there had been a breach of Rule 32(1) of the Prison Rules, said that while she acknowledged the security concerns expressed by the governor, the court was quite satisfied that it was "not beyond the wit of man to provide open air facilities which are capable of meeting the security requirements and concerns of the first respondent".

103. In *Connolly*, Hogan J. said that

> "in view of the acute difficulties 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."

104. In *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216, the Court of Appeal said:

> "98. It is for prison authorities to decide what measures are necessary for the safety of prisoners...It is not for the High Court to second-guess decisions of fact in that regard, but they are subject to review as administrative decisions in accordance with the principles set out in a series of cases, including *Holland, Walsh, Kinsella* and *Connolly*.

99. A prisoner has a remedy in the courts under Article 40 if his conditions are unlawful, which includes torture or inhuman or degrading treatment, but obviously that only arises in extreme circumstances.

100. A high level of threat or some extreme circumstances may justify severely restrictive conditions of detention on a temporary basis. Justification is a function of the level of threat to life or safety measured against the severity of the temporary conditions. Ultimately, that judgment is one for the Court but a wide margin of appreciation has to be allowed to the Governor and his staff....

102. A prisoner is obliged to co-operated with the management of the prison in protecting his own safety, health and welfare during his detention. He cannot, by his wilful disruption or breach of discipline or refusal to obey rules or cooperate, contrive to bring about a situation in which his conditions are unpleasant or worse, and nevertheless obtain relief from the courts."

105. As noted earlier, the Irish and other authorities have been comprehensively discussed in *Attorney General v. Damache* [2015] IEHC 339, in which Donnelly J. refused to order the extradition of a man to the United States on the basis of her conclusion that the long-term regime of solitary confinement in the ADX high security prison in the United States, to which he risked being sent, was incompatible with the Irish Constitution. In her judgment, Donnelly J. considered in detail the Irish authorities referred to above. She then went on to consider the provisions of certain international legal instruments, including Article 7 of the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and reports of the Special Rapporteur to the United Nations Human Rights Council. She considered the jurisprudence relating to Article 3 of the European Convention on Human Rights and engaged in a comprehensive analysis of the decision in *Babar Ahmad*, in which the European Court of Human Rights considered that there would be no breach of Article 3 in the context of the if the applicants were extradited to the United States where they risked imprisonment in ADX.

106. Following this detailed and comprehensive analysis, Donnelly J. listed a number of conclusions, which I have found to most helpful:

"(a) Article 40.3.2 together with the Preamble to the Constitution forms the bedrock of the protection of the person from violations to his or her bodily or mental integrity, for respect for human dignity and for the prohibition on torture and inhuman and degrading treatment.

(b) In interpreting the meaning and extent of the constitutional protection of rights, the courts are required from time to time to have regard to prevailing norms. To assist in interpretation, it is appropriate for the court to have regard to international human rights instruments, decisions and judgments of international courts or treaty-implementing bodies and superior court decisions from other jurisdictions.

(c) The provisions of the ECHR and, by extension, of other human rights treaties and conventions are minimal standards of human rights protections to which a state party agrees. Ireland, through its Constitution and laws, is entirely free to give greater protection to the individual.

(d) When the Constitution provides for greater protection of a right than is or might be granted under an international human rights treaty or convention, the court is obliged to grant the protection of the constitutional right to a person with the l*ocus standi* to claim it.

(e) In common with other international decision making bodies, the Irish courts have addressed the issue of solitary confinement. The Irish courts define solitary confinement as physical isolation in cells for 22-24 hours per day. That definition coincides with a generally acceptable international standard from which to assess the issue of solitary confinement and inhuman and degrading treatment. The reference to 22-24 hour a day lock up does not exclude more frequent out of cell time from amounting to solitary confinement (see, in particular, *Killeen*).

(f) Indefinite detention in solitary confinement is prohibited under the Constitution. It is similarly prohibited under the ECHR and other international human rights instruments.

(g) The Irish courts have been prepared to accept, even in the absence of expert evidence, that solitary confinement may over time amount to a form of sensory deprivation and be inhumane and abusive of the prisoner's psychological welfare. That position is consistent with the findings of international bodies charged with overseeing the protection of fundamental right. Those findings have been based on a literature analysis of the effects of solitary confinement. There is general agreement that, in the wording of the ECtHR 'partial and relative solitary confinement' is likely, without appropriate mental and physical stimulation in the long-term to have damaging effects which result in a deterioration of mental faculties and social abilities (see *Babar Ahmad*, para. 207).

(h) It is acknowledged that the damaging effects of solitary confinement can be immediate and increase the longer the measure lasts and the more indeterminate it is. If a person is held against his will in solitary confinement there is a greater risk of damage being caused.

(i) The Irish courts have held that a prisoner should not be totally or substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods. No particular length of time has been laid down beyond which detention in solitary confinement is unacceptable. The case law indicates that even partial and relative solitary confinement for a period of months rather than years is prohibited under the Constitution. This particular view fits within the even more strict views on the issue of solitary confinement of the Special Rapporteur on Torture and the UN Committee Against Torture regarding the meaning of the provisions of the Convention Against Torture and the ICCPR. Only the Special Rapporteur on Torture has laid down a maximum period of time for solitary confinement. The Committee against Torture has called for a full ban on supermax security detention facilities in the U.S.A. declaring full isolation of 22 -24 hours a day in an ADX prison unacceptable.

(j) Security measures and effective management of the prisons remain a matter for the executive. Apart from the *Connolly* and *McDonnell* case, the High Court has dealt with prisoners who have been assessed as dangerous or disorderly. When prisoners are not dangerous or disorderly, there is an onus on the court to be particularly attentive to the restrictions which apply.

(k) There must be procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure.

Solitary confinement should only be ordered in exceptional circumstances and after every precaution has been taken. The decision to impose solitary confinement must be based on genuine grounds, both initially and on review. The decisions should be compelling and provide reasons. The reasons must be increasingly detailed and compelling as time goes on. There must be regular monitoring of the prisoner's physical and mental condition. A prisoner must have access to independent judicial review of the merits of and reasons for prolonged imposition of solitary confinement;

(l) Specific attention must be paid to the availability and duration and conditions of outdoor exercise.

(m) All of the conditions of the detention are to be considered to determine if cumulatively they amount to inhuman and degrading treatment.

(n) Where the court finds that there are substantial grounds to believe that a requested person faces a real risk of being subjected to torture or other cruel or inhuman and degrading treatment in the requesting state, the court must refuse the extradition…."

European Convention authorities

107. I do not wish to dwell on the authorities of the European Court of Human Rights as they involve the solitary confinement of adults and have been comprehensively addressed by Donnelly J. in the *Damache* case. I do wish, however, to refer to one particular case, namely *Onoufriou v. Cyprus*, application 24407/04, in which the Court, in the context of solitary confinement imposed upon an adult prisoner for 47 days, discussed the importance of procedural safeguards:

"69. The Court has previously indicated that complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason (see *Öcalan v. Turkey* [GC], no. 46221/99, § 191, ECHR 2005 IV; and *Ila°cu and Others v. Moldova and Russia* [GC], no. 48787/99, § 243, ECHR 2004 VII). While prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned (see *inter alia, X v. the United Kingdom*, cited above; and *Rohde*, cited above, § 93).

70. Finally, in order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure. First, solitary confinement measures should be ordered only exceptionally and after every precaution has been taken, as specified in paragraph 53.1 of the European Prison Rules. Second, the decision imposing solitary confinement must be based on genuine grounds both *ab initio* as well as when its duration is extended. Third, the authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by. Finally, a system of regular monitoring of the prisoner's physical and mental condition should also be put in place in order to ensure that the solitary confinement measures remain appropriate in the circumstances (see *Ramirez Sanchez*, cited above, § 139)."

108. I also wish to make reference to an English case, in which the decision was handed down and to which my attention was drawn after the oral hearing in the present case, and in which the situation of a young person subjected to solitary confinement was addressed. This is the decision in *The Queen (in the application of A.B., a child, by his litigation friend) v. The Secretary of State for Justice*, case no. CO/852/2017, [2017] EWHC 1694 (admin) in which a young person had been separated from his peers for 55 days. The young person, A.B., was serving a twelve-month period of detention in a young offender institution and it was alleged that his removal from association/solitary confinement was a breach of articles 3 and 8 of the European Convention on Human Rights. It was clear that A.B. had experienced a very difficult childhood, had suffered emotional and physical abuse and witnessed violence when he was very young, and had come to the attention of the police from a young age. By the time he came serve the sentence in question, he had a history of violent offences, including assaults on members of staff. There had been several incidents of his displaying inappropriate sexualised behaviour and his risk of causing serious harm was classified as "high". In one previous care home, he had to be restrained eight times within five days. He had refused to engage with mental services in relation to his sexualised behaviour. Even under 24-hour supervision, he had still managed to offend. In one location, 18 incidents were recorded against him in 11 weeks. In one institution, his behaviour including the preparation of a weapon and setting fire had led him to being on segregation for a large part of his time and on "three officers unlock", which required three officers to be present whenever he was removed from his room.

109. The High Court rejected the argument that Article 3 had been breached in circumstances of the case. In the first place, Ouseley J. rejected what he described as a theme underpinning all the applicant's submissions, namely that solitary confinement of a young person for more than 15 days of itself breached Article 3. He took the view that this approach, which he described as "mechanistic", was wholly inconsistent with the jurisprudence with the European Convention on Human Rights and the United Kingdom Courts, referring to the decisions in *Ramirez-Sanchez v France* (2007) 45 EHRR 49, *Ahmad v United Kingdom* (2013) 56 EHRR 1, *Shahid v Scottish Ministers* [2015] UKSC 58, [2016] AC 429, *R (Bourgass and Hussain) v SSJ* [2015] UKSC 54, [2016] AC 384, and *R (Dennehy) v Secretary of State for Justice* [2016] EWHC 1219 (Admin) all of which supported a "fact-sensitive" approach to Article 3. He said that while these decisions concerned adults, he saw no reason to adopt a different approach in respect of a young person. Secondly, he took into account that it was not alleged that anything was done by the staff with the intention of humiliating or degrading A.B. and that this was an important aspect of the jurisprudence of the European Convention on Human Rights. Nor had solitary confinement been used as a punishment; instead, there had been at all times a considered and proper justification for the removal from association. Initially this was to protect officers from A.B., later it was additionally to protect A.B. from inmates whose anger he had aroused by his own shouting of abuse of a sexual, racist and a more general nature. Further, A.B. was not simply left in segregation to serve his period of detention; instead, there had been attempts to re-integrate him in other units, but his own behaviour had interfered with those attempts. Ouseley J. described this a "pattern of justified segregation, a serious of attempts and planned interventions to end it by re-integration, thwarted by AB's own behaviour, which meant segregation, single and three-officer unlock remained reasonable justified, albeit that they created some of the additional problems of segregation; greater isolation for longer periods, often with little activity". It appears that A.B. received proper medical care and attention; that he had contact with a solicitor at an early stage; and that he had a case worker and social worker in addition to assistance received from unit staff over his behaviour. He also generally had a television, sometimes went to the gym, and he had some open air exercise. He had approximately 2-3 hours out of his cell per day. The reports from two doctors did not show any harm actually done to A.B. as a result of the conditions in which he was detained. Ousely J. did accept that there had been some specific failings on the part of the youth offender institution during the first phase of his detention in particular, but decided that while the Young Offender Institution rules on removal from association and on education had been breached, Article 3 of the Convention had not.

110. All the parties in the proceedings have found aspects to the decision in A.B. which support their position. What I take from it primarily is that each case must be decided in relation to its own facts; that the intention of the decision-making authority is relevant; and that efforts to ameliorate the severity of conditions is also relevant. These seems to me relatively non-contentious aspects of the Convention jurisprudence. The view of Ousely J. that the Convention does not impose a particular time-limit in respect of the solitary confinement in respect of young persons is not taken directly from any decision of the European Court itself. Further, I would be inclined to draw greater assistance from international instruments than Ousely J., who was rather dismissive of them on the basis that they did not constitute binding law.

Conclusions

The legal power of the Director to impose separation and related measures
111. In my view, the Director of Oberstown has 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. This power seems to me to be rooted in s.180 of the Children Act, 2001, perhaps not so much from s.180(8) which relates to the parental-type powers to be exercised in respect of a young person under his supervision, but perhaps primarily from s.180(1) which gives him the overall responsibility for the detention school. This is a role which requires him to have overall regard to the safety of all the young persons and staff in the institution, and the physical integrity of the premises.

112. If I am correct in my view that the Director had legal authority to impose separation by virtue of his statutory duties, the next question is whether the Director was legally constrained, both in terms of the duration and other aspects of the separation regime, by the Oberstown Separation Policy. If he was, then the detention would be automatically unlawful insofar as it exceeded 3 days and insofar as other aspects of the Policy were not observed. I am of the view that he was not legally constrained by the Policy and that the Policy cannot have amounted to more than a set of guidelines to be followed as far as possible but did not place limits on his statutory duty to run the school in the same way as would a set of Rules introduced pursuant to Ministerial power, such as Rule 62 of the Prison Rules. A breach of the Policy would not, per se, be unlawful.

113. However, this conclusion does not in my view warrant a further conclusion that the Director was entirely unconstrained in the manner in which he dealt with the challenging situation presented to him. The Constitution itself provided certain limits to what action he could take in relation to the young persons. Discerning what the constitutional limits are may not be an easy task for the Court, but that does not mean that they do not exist. The constitutional requirements might, or might not, be equivalent to the requirements set out in the policy, but their authority would derive not from the fact that they are published in a policy but rather because they stem from the Constitution itself.

114. I agree with the submission on behalf of the applicants that it cannot be that a young person has fewer constitutional safeguards than an adult, when it comes to solitary confinement or separation, simply because of the educational focus of a detention school as against a prison and/or because of the quasi-parental power of the Director under s.180(8) of the Act of 2001. While s.180(8), in providing that a Director has quasi-parental powers and thus placing him a position very different to a prison governor, may confer considerable latitude on the Director in certain areas of his dealings with the young person, it does not seem to me that this allows any action taken to dip below a certain minimum constitutional level when one is dealing with the specific issue of solitary confinement or separation, because of the risks of long-term psychological harm that may result from the imposition of this particular measure.

115. 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.

116. 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.

Procedural Safeguards
117. 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.

118. 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.

119. 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.

120. 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. Further, my overall impression is that there may have been a conflation or eliding of a number of different and not necessarily consistent objectives, namely (1) preventing damage to property and injury to persons i.e. a safety and security objective; (2) punishment for the incident on the 29th August i.e. a punitive objective; and (3) requiring the applicants to earn improvements in their conditions through good behaviour i.e. a behaviour modification objective. Mr. Bergin emphasised in his affidavits that the normal regime in Oberstown involves a system of 'levels', and that detainees can earn more privileges through better behaviour. This of course is a sensible approach generally and I make no criticism of that. However, particular risks are posed by the social isolation of an individual, particularly a young individual, and it must be treated as an exceptional measure subject to, as already emphasised, strict considerations of proportionality. In those circumstances it seems to me that the first objective, the "safety and security" objective, was the only objective that should have been kept firmly in view at all times, uncontaminated by other objectives, because of the exceptional nature of separation and its associated deprivations. Although the punitive objective was expressly disavowed by Mr. Bergin as forming any part of the reason of the regime during the separation period, it is slightly difficult to reconcile certain entries in the records with an individualised behaviour modification or individualised risk security risk approach. A more formal decision-making and review system would assist in keeping the appropriate objectives to the forefront at all times.

121. It also seems to me that, ironically perhaps, the observance of safeguards of the kind described would contribute to the maintenance of the appropriate boundaries of the Executive and the courts, respectively. The more there exists a system on the ground which has built-in safeguards for the individual, the less room there is for the court to intervene. Decisions should be taken by the Executive, who have on-the-ground knowledge of the facts, within a framework which respects the constitutional rights of the detainee.

The duration of the separation

122. With some hesitation, I have reached the conclusion that the Court cannot definitively state that the length of the separation period, albeit that it amounted to some three weeks, was in breach of a constitutional norm. I take into account the following. The incident on the 29th August 2016 was an extremely serious incident and gave rise to safety and security concerns of the highest order. A group of young males had managed to take control of the institution for a considerable length of time and had caused damage to a significant degree. The situation was of such a degree of severity that 100 gardaí and other emergency personnel were required to be in attendance for many hours and it was, the Court was told, the most serious such incident in almost 20 years. This was not a case of a single individual detainee engaging in bad behaviour; this was a situation in which there was a group dynamic at play, and the group contained some highly volatile and aggressive detainees. In my view, this exceptional context is relevant not only to justifying the separation of the applicants in the immediate aftermath of the incident but also on a longer-term basis. It is also evident from the handwritten records of the days and weeks that followed that the applicants continued for a considerable period of time to engage in threatening and aggressive behaviour, including the making of threats of an alarming kind. These have been described above earlier in this judgment. The necessity for the continuation of the measure of separation seems to me to be a matter which should fall within the margin of appreciation afforded to the Executive, because the people in charge of running the detention on the ground are in a much better position to assess the level of risk posed by the applicants. Again, the observance of the procedural safeguards referred to would assist, in the future, to ensuring that the period of separation does not go beyond what is strictly necessary. However, on the evidence presented to the Court in this case, I am not persuaded that the length of separation was disproportionate, having regard to the threat posed.

123. Finally, it is also of some relevance that on the 20th September, 2016, there was a further serious incident of damage and violence, involving two of the applicants. This suggests that the assessment of the severity of the threat posed by the applicants on an ongoing basis was not an exaggerated one, although it does, strictly speaking, apply only to the two applicants, P.McC. and L.C. and suffers perhaps, from a touch of hindsight vision, and I place only limited weight upon that.

The totality of the conditions

124. There is no doubt that conditions were harsh at the commencement of the detention. However, it does not seem unreasonable to me that the Director was concerned about the threat of fire and flooding, having regard to the seriousness of the incident on the 29th August, nor that any property given to the applicants might be either damaged or used as a weapon. Conditions were varied as time went on; bed linen was provided during the first week (although there is dispute as to what was provided and precisely when); doctors and nurses were allowed in after it was considered safe to allow access; music-playing devices were provided; phone calls to family members were permitted; access was allowed to the multi-purpose room; exercise was allowed; some peer mingling was eventually permitted, and so on. Although the Court might be tempted to conclude that, for example, steps could have been taken earlier with regard to matters such as the provision of reading materials, or education, and that the restrictions overall may have been maintained longer than was strictly necessary, again this would in my view involve the Court overstepping its role into the margin of appreciation given by the Constitution to the Executive. Further, any such view by the Court would necessarily be based on a paper-based review of events, at a considerable remove from the atmosphere on the ground at the time. I am satisfied to draw the more general inference that, because the above-mentioned variations were introduced at different points in time, there was an underlying desire on the part of the respondent to ameliorate the detention conditions, and that consideration was being given to what could safely be done each day in this regard. In other words, there was ongoing review of an informal nature, even if not supplemented by a more formal, periodic review. With two exceptions discussed below (exercise and familial contact), I am not prepared to second-guess decisions such as when exactly it was safe to hand L.C. a sharp instrument such as a pen or pencil; or when it was considered safe for a staff member to enter the bedrooms of the applicants rather than talk to them through the hatch; or when the risk of damage to equipment to music-playing devices or televisions had sufficiently subsided to allow for such items being given to the applicants. I have hesitated somewhat over the issue of education, given the importance of education within the overall aims of the detention school, but again an assessment would have to be made as to the applicants' frame of mind at particular times and the practicality of providing educational materials to them, and this also seems to me to fall within the margin of appreciation afforded to

the Executive.

125. I am satisfied from the evidence that there was no evidence of an intent to humiliate or debase the applicants. This factor was referred to in *State (C) v. Frawley* [1976] IR 365, and in *Mulligan v. Governor of Portlaoise Prison* [2013] 4 IR 1. White J. in his recent decision in *Simpson v Governor of Mountjoy Prison* [2017] IEHC 561 commented on those *dicta* as follows:

> "There were concerns that these dicta implied that there had to be intention to inflict inhuman or degrading treatment before the court could come to the conclusion that Irish constitutional principles had been breached. Reading the Mulligan judgment as a whole that is clearly not the case. The Defendants accept that intent is not determinative of the breach but submitted it is a material matter to be taken into consideration in determining if there has been inhuman and degrading treatment".

126. I agree with White J in this regard, and in the present case, the absence of an intent to humiliate is a factor, although one of many, to be taken into account.

127. A factor of considerable importance is that, I am satisfied on the evidence, the young persons knew that they could have an impact on the conditions of their detention by modifying their behaviour. They may not have been formally notified of this, but I have little doubt that this was made plain to them from their daily interactions with staff. Thus, they had much more control over the situation than other persons who have found themselves in other times and places in a situation of solitary confinement. In this regard, I think it is worth repeating the comment made by the Court of Appeal in the *McDonnell* case:-

> " A prisoner is obliged to cooperate with the management of the prison in protecting his own safety, health and welfare during his detention. He cannot, by his wilful disruption or breach of discipline or refusal to obey rules or cooperate, contrive to bring about a situation in which his conditions are unpleasant or worse, and nevertheless obtain relief from the courts..."

128. In considering the totality of the conditions, I am also of the view that I am entitled to take into account that there was neither any evidence from any expert indicating that the period of separation had inflicted actual mental harm upon any of the applicants, nor any evidence from the applicants themselves (via their instructions to the solicitors who swore the affidavits or in such affidavits as some of them swore) claiming that they had in fact suffered harm. The Court is cognisant of the many statements about the *potential* harm to persons, particularly young persons, posed by solitary confinement, including the evidence of Dr. O'Donnell in these proceedings. However, while this is undoubtedly a factor relevant to the ensuring at a general level that a strict proportionality test is observed, it does not seem to me that it necessarily leads to the conclusion that harm was *in fact* caused to these particular applicants. I am not suggesting that the absence of any such evidence is determinative in any assessment of the totality of the conditions of detention, but it does seem to me to be a factor which can go into the overall mix in assessing how severe the experience of being separated was for these particular applicants during this period.

Exercise and Family Contact

129. 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.

130. 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.

Declarations to be granted

131. In all of the circumstances, it seems to me that the Court should grant the following declarations only:

> (1) that the constitutional rights of the applicants were breached insofar and for so long as they were deprived of daily exercise during the period of separation;
>
> (2) that the constitutional rights of the applicants were breached insofar and for so long as they were deprived of any contact with their families during the period of separation;
>
> (3) that the constitutional rights of the applicants were breached insofar as there were no procedural safeguards relating to the imposition of separation and associated deprivations, in particular, the formal written recording of decisions and reasons regarding the imposition and continuation of the regime; and the failure to provide the applicants with some form of opportunity to make representations in relation to the deprivations, such as, for example, through an independent advocate as envisaged by Oberstown's own policy.

132. As indicated, I am of the view, however, that the duration of the separation was not unconstitutional, and for the avoidance of doubt, I wish to state that it does not seem to me that the conditions of detention during the separation period in their totality amounted to inhuman or degrading treatment.

The issue of Damages

133. The applicants also pleaded a claim for damages, and in the case of L.C., for exemplary damages. The matter was not addressed in any detail at the oral hearings and I was referred by the respondent to a number of texts, including McMahon & Binchy, Law of Torts, 4th edition (2013) (pp 19-50). I am of the view that there is no basis for exemplary damages in the present case in view of the circumstances of the case. The conduct of the Executive in this case was far from a wilful and malicious violation of the applicants' rights. On the contrary, it was a response to a risk-fraught situation of the applicants' own making, and while it may have gone too far in certain respects, and failed to observed procedural safeguards, the overall context was one of trying to make safe an institution

which had just been through a major upheaval.

134. As regards compensatory damages, it seems to me that in circumstances where the Court has found that there were limited breaches of constitutional rights, and where no evidence of actual psychological harm has been laid before the Court, the most appropriate approach is for the Court to follow the approach of the High Court (Costello J.) in *Kearney v. Minister for Justice* [1986] IR 116 and award nominal damages. I therefore award damages of €100.00 each to each of the applicants in respect of the breaches of constitutional rights I have identified above.

Alleged breaches of the European Convention on Human Rights
135. In *Simpson*, the High Court (White J.) said:

> "Irish constitutional law on protection from torture or inhuman or degrading treatment or punishment is at least equal to or greater than the protection afforded by the Convention".

A similar view was taken by O'Donnell J. in *Damache*, as seen above.

136. The Supreme Court in *McD v. L* [2009] IESC 81 cautioned against over interpretation of the Convention. This is important in the present context, where it appears that there is no decision of the European Court of Human Rights directly dealing with the question of the solitary confinement of a young person. The only decision cited to the Court in this regard was the English decision in *A.B.*, discussed above, which was of limited assistance.

137. Having regard to these considerations, together with the Court's above-stated conclusions in respect of breach of constitutional rights, I am of the view that it is not necessary to express any further views in respect of alleged breaches of the Convention. It follows that it is not necessary for me to deal with an application to amend the pleadings, which was made on behalf of some of the applicants, and which had arisen in connection with the Court’s query as to the manner in which the Convention had been pleaded on their behalf in their Statements of Grounds.