[2019] IEHC 635

THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 219 JR]

IN THE MATTER OF N.K., A MINOR BORN ON THE [DATE REDACTED] AND IN THE MATTER OF ARTICLE 40.3 AND ARTICLE 41, 42 AND 42A OF THE CONSTITUTION AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 (AS AMENDED) AND IN THE MATTER OF THE CHILD CARE ACT 1991 (AS AMENDED) AND THE INHERENT JURSIDCTION OF THE HIGH COURT

BETWEEN

C.K.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

AND

COLIN HALL, GUARDIAN AD LITEM

NOTICE PARTY

Judgment of Mr. Justice MacGrath delivered on the 1st day of May, 2019.

1. By order of the 10th April, 2019, Simons J. granted the applicant, who is the mother of the child at the centre of this application, N.K., liberty to apply by way of application for judicial review seeking, *inter alia*, an order of *certiorari* quashing the decision of the Child and Family Agency Special Care Referral Committee ("*the Committee*") of the 29th March, 2019 refusing an application of the social work department of the respondent to seek to place the child in special care. The applicant also seeks a declaration that, what is pleaded as the *written rationale* for the refusal to place N.K. in special care, were irrational, unreasonable, without foundation and in breach of N.K.'s constitutional right to have his welfare protected. The applicant's initial challenge was to a decision taken by the Committee and recorded in a letter of the 29th March, 2019. The relief sought was expanded upon subsequently, by consent of the parties, to include an order of certiorari challenging the decision of the Committee of the 16th April, 2019, "*that the behaviour of [N.K] did not reach the threshold for special care as required under s. 23F(2) because "there is no therapeutic benefit in a readmission to special care*" and that N.K. "*needed consequences to his behaviour once all efforts were exhausted to engage him*".

2. Thus, the challenge is now maintained against both decisions, individually and in combination. A further ground of challenge, intimated in correspondence, that the decisions of the Committee were not determinations within the meaning of s. 23F of the Child Care 1991, as amended, ("*the Act of 1991*") because the function of making the requisite determination under s. 23F had been devolved by the respondents to the service director for residential care. This was not pursued at the hearing.

3. The application was supported by the Guardian ad Litem, who is a notice party.

Background

4. N.K. was born on the [date redacted]. He was placed in voluntary care in November, 2013 when he was aged 11. He remained in foster care between 2013 and June, 2016. In February, 2017 he returned home and a plan for reunification of N.K. with the applicant

was put in place. Unfortunately, this was unsuccessful. N.K. was made the subject of various interim care orders which have been renewed from time to time.

5. On the 8th January, 2018, N.K. was placed in secure care in [location redacted], pursuant to an order made under the inherent jurisdiction of the High Court. On 1st June, 2018 he was made the subject of a special care order application pursuant to an application under the new procedures outlined in Part IVA of the Act of 1991 (which came into force on the 31st December, 2017 having been commenced by S.I. No. 637 of 2017, Childcare (Amendment) Act 2011 (Commencement) Order, 2017). Prior to the commencement of Part IVA, and for the preceding two decades, such cases were considered by the High Court pursuant its inherent jurisdiction. An extension to the special care order was granted on 31st August, 2018.

6. N.K. remained in special care in a centre known as [location redacted] until discharge by order of the High Court on the 31st January, 2019. The application for discharge was made by the respondent, who, at that time, was satisfied that N.K. no longer met the criteria for special care. The applicant opposed that application, but it was not opposed by the Guardian ad Litem. While in [location redacted], the child was the subject of a number of psychological assessments, including an assessment by Dr Kevin Lambe, Clinical Psychologist (his conclusions are contained in a report of 17th April, 2018) and a further assessment by Dr Peter Misch, Consultant Adolescent Forensic Psychologist (his conclusions are contained in a report of 30th July, 2018).

7. Subsequent to his discharge from special care N.K. was brought into the care of the respondent by way of interim care order made under s. 17 of the Act of 1991. That order has been extended from time to time. Prior to the making of that order, in December, 2018, N.K. had been transitioned to a step down placement at a another facility. On 31st January, 2019, that centre advised the respondent that it was seeking to end the placement because of N.K.'s stated lack of engagement and use of illicit substances. N.K. did not wish to remain in that placement and wanted to be closer to Dublin. On the 25th March, 2019 the placement came to an end. Following his discharge from this placement, N.K. has been living in a hostel for the homeless, known as [redacted]. This is described as a registered childcare centre and the respondent has informed this court that N.K.'s social work team continue to liaise with the national private placement team in order to assist in the identification of a short to medium term placement for him.

8. A number of incidents have occurred since January, 2019 which have raised concerns in relation to N.K.'s safety, health and welfare. These incidents include alleged contact with drugs, assaults, theft, public order offences, and a suggested access to weapons. Certain of these incidents occurred during the period that the child was in placement, between December, 2018 and 25th March, 2019. Other incidents are alleged to have occurred since that time, including assault, theft of a bike, exposure to alcohol and concerns regarding self-harm.

9. Thus, there is a long history of social work involvement with the child and it is common case that he has a high level of needs. The respondent accepts that the child presents a

challenge to all professionals and service providers concerned with advancing his best interests, safeguarding his rights and seeking to care for him.

10. In the light of these concerns, his allocated social work team considered the option of a special care referral at a conference on 6th March, 2019. It was decided that approval should be sought from senior managers regarding such referral. A further conference was held on 14th March, 2019 and service director approval was given to proceed with the special care application. This application was completed by the social work team leader, Ms. Shirley Finnegan, and was submitted for approval on 19th March, 2019. In Ms. Finnegan's letter of referral, which is dated 14th March, 2019, she provided background information and outlined concerns regarding N.K.'s behaviour including involvement in illicit substance abuse and assaults/fight activity. She advised that N.K. required to be discharged from the stepdown facility no later than the 25th March, 2019. She expressed the social work team's concerns regarding the high risk nature of N.K. which resulted in the special care application. Ms. Finnegan relayed the concerns of the team and management of the centre regarding the level of risk that N.K. posed to himself and to others. Attached to the application were several documents and reports. These included a psychological progress report prepared by a psychologist in [location redacted], Ms. Cumiskey. She worked with N.K. since 16th January, 2019 and stated that she had faced grave challenges in terms of N.K.'s availability to engage in meaningful and direct therapeutic work. Ms. Cumiskey recommended that any future therapy should focus on examining N.K.'s core beliefs particularly in relation to violence and criminality; and that he would benefit from continuing to examine how his patterns of learned behaviour were contributing to his poor decision making.

11. A *statutory child in care review*, based on a review on 30th January, 2019 and *a child in care record care plan* of the same date were also attached to the application. Considerable information is contained in this documentation, particularly in relation to N.K.'s family background, his education, his progress while in care, his views (that while he was happy in his placement, he wished to be nearer Dublin), diagnoses of his condition of ADHD and details of his prescribed medication. It was recorded in the care plan review that the placement at that time (he was in care when assessed) was meeting all of his needs. Also attached were medical records concerning injuries sustained in a fight on 12th March, 2019, and a letter from an Garda Síochána dated 11th March, 2019 recording that while N.K. had no previous convictions and no pending charges, he had at that time an outstanding summons for theft which occurred on 24th June, 2018; and a youth referral for an assault which occurred on 22nd February, 2019, in his previous placement facility.

The National Special Care Referral Committee ("*the Committee*")

12. The Child and Family Agency ("*CFA*") established the Committee as an expert body which consists of an independent chairperson, members of senior social work management and special care management, and the manager of the national private placement team. The stated reason for such a Committee is to ensure, inter alia, that the decision as to whether a child satisfies the criteria for special care, ultimately depriving the child of his or her liberty for a protracted period of time, are made by an experienced, expert and

objective group of professionals with particular experience in the area. As in this case, when a social work team is of the view that the child may require special care, they may refer the case to the Committee. Once the Committee is satisfied that it has all the relevant and necessary information, it assesses whether the child satisfies the statutory criteria. The statutory criteria are outlined below.

13. This is described as a sensitive and difficult process for the Committee and by definition, the children who are referred for special care are in the most challenging category of children being dealt with by the CFA.

The Impugned Decisions

14. By letter dated 29th March, 2019, Ms. Suzanne Phelan, independent chairperson of the Committee, informed Ms. Finnegan that, having considered the special care referral form, supporting documentation, the interim guidelines for referrals to special care, and acknowledging that there had been some deterioration in the child's behaviour since his discharge, the Committee did not consider that the child's behaviour met the threshold for admission to special care under s. 23F(2). The letter stated, *inter alia*, as follows:-

"The Committee noted the referral and the most recent updates provided by the Social Work Department. The Committee do not think the referral meets the requirements for an admission to Special Care in that while they acknowledge the concern of the social work department in relation to [N.K.] the issue currently is lack of placement other than the [location redacted].

The Committee noted the child was most recently in Special Care for just under a year from 09.01.18, and that his Special Care Order was discharged eight weeks ago on the 31. 01. 19.

The Committee noted [N.K.] was not advised of the latest referral due to a fear that he has threatened to abscond, the Committee were concerned at his not being consulted due to the requirements in relation to same, under the revised legislation and because of his positive relationships in Special Care which have been continued since his discharge.

The Committee noted the SENs from [location redacted] but did not see that the level of risk indicated a requirement of readmission to Special Care.

The committee acknowledged that there has been some deterioration in [N.K.'s] behaviour since his discharge but do not consider that the referral information evidenced that [N.K.'s] behaviour at this juncture meets the threshold for admission to Special Care under s. 23F(2) which states: (a) Where the Child and Family Agency is satisfied that there is a reasonable cause to believe that the behaviour of the child poses a risk of harm to his or her life, health, safety, development or welfare.

The Committee understands there are concerns in relation to criminal elements of N.K's behaviour which may according to Dr. Misch's assessment last July require addressing through consequences in the criminal justice system.

The letter from An Garda Siochána advised that the outstanding charges are that of the theft of a pair of glasses, and the recent assault of care staff in [location redacted]…"

15. Following the communication of this decision, a number of things occurred. The Guardian ad Litem who was clearly dissatisfied by the decision, prepared a detailed report on 30th March, 2019 and an application was made by him to the District Court on the 4th April, 2019 for an order pursuant to s. 47 of the Act of 1991 seeking directions as to whether that section empowered the District Court to refer for the consideration of the High Court the issue of whether the child should be placed in special care. This application was based upon previous reports which had been filed in court, and also included the report of Dr Misch and the report prepared by Mr. Hall on the 30th March, 2019. In his affidavit sworn on 1st April, 2019, grounding that application, Mr. Hall exhibited the report of Dr Lambe and that of N.K.'s social worker, Ms. Finnegan. He described how Dr Lambe had seen N.K. on three occasions and how N.K. had been threatening towards him. He expressed worry at the Committee's decision because it recorded that N.K.'s behaviour may have to be addressed through the criminal justice system. He thought it difficult to see how this could be regarded as an appropriate consideration given the respondent's statutory obligations to N.K. His expressed opinion was that the Committee's decision was deeply wrong, was without objective justification and was not in the child's best interests. He described the child's behaviour as extremely worrying and stated that N.K. could "*at almost any minute … engage in violent or criminal behaviour which would be extremely damaging to himself and/or others."* Mr. Hall averred that the current placement, or any placement other than special care, was insufficient to meet N.K.'s needs, and expressed the opinion that he had never come across a child with such special needs. He reiterated that there was reasonable cause to believe that N.K.'s behaviour posed a real and substantial risk of harm to his life, health, safety, development and welfare.

16. Mr. Hall's report is very detailed and recounts the many applications for interim care orders extending back several years (and concerning several members of the family), child protection concerns, the child's risk behaviour concerns and the background to the making and discharging of the secure/special care orders. He listed the many consultations which he had with N.K., his mother, social work team leaders and relevant individuals in [location redacted] between December, 2017 and 29th March, 2019. Recent events suggested to him that N.K. was spiralling out of control and that his current mood presented as that of a young person who was at risk of harm to himself or the public. He believed N.K. capable of extreme violence when under the influence of drugs or alcohol; and described a disturbing past incident involving his sister. Mr. Hall reported his concerns of what he described as N.K.'s glorification of violence and gangland crime. He described how N.K. had settled well in [location redacted]. While many of the incidents addressed in this report relate to developments, progress and incidents which occurred

during 2018 when N.K. was in [location redacted], Mr. Hall also described more recent incidents, since N.K.'s discharge from care, and where difficulties arose in his stepdown placement. Mr. Hall also records that since he was placed in the new hostel accommodation, N.K. had gone missing at night and had not returned to the hostel until the early hours of the morning. He reiterated his concerns that N.K. was taking drugs and was involved in criminal activity. Referring to the ascertainable wishes of N.K. to move to a semi- independent placement in Dublin, Mr. Hall's view is that no facility would consider such placement due to the risks N.K. presents to himself and others. He also described N.K. as a person who still glorifies and justifies violence and stated that "*without sounding pessimistic the reality is that this has not gone away after 12 months in special care*". While the respondent had worked tirelessly to give N.K. every opportunity to succeed as he moves into adulthood, Mr. Hall also observed that he "*can't be wrapped in cotton wool forever and he will ultimately have to make his own choices in the future*" but that "*when the red mist comes down and he loses control he is capable of anything*". The incidents with staff workers in February, 2019 showed that he enjoyed hurting people and that he lacked compassion or empathy. Such incident did not surprise the applicant, Ms. Finnegan or Mr. Hall who stated that *"[N.K.] will attack people and there are no triggers for this level of violence*"; there would be huge risks wherever he goes. Mr. Hall expressed his shock to hear of the Committee's decision, one which did not make sense to him. N.K. requires to be in a safe and secure environment with specialist and therapeutic services on site. He did not agree with the Committee's view or understanding that N.K. had a placement at this time given that he was effectively living in a hostel for the homeless and this did not meet his needs. Mr. Hall believed that N.K. is vulnerable, will continue to take drugs and become involved in violent and offending behaviour and "*he is a prime target for gangland figures*" with the potential to do some serious harm to others. It is only a matter of time, according to Mr. Hall's report, before something serious happens to him or others. He concluded by stating that:-

> *"it beggars belief that the Special Care Committee feel that [N.K.] does not meet the threshold for a Special Care Placement… This is a tragedy waiting to happen unless [N.K.] is placed in Special Care as a matter of urgency."*

17. On 25th March, 2019, Ms. Finnegan prepared a report for the District Court for an application on the 26th March, 2019, seeking an extension of the interim care order. This report was prepared on the day that N.K. left [location redacted] and prior to the decision of the Committee on 29th March, 2019. She outlined many incidents of N.K.'s contact with illicit drugs and risk behaviour and reported that he had been missing from care on occasions, particularly during the month of March, 2019, which ultimately led persons in [location redacted] to seek his discharge from their care.

18. Mr. Hall's application came before the District Court on the 3rd April, 2019. The District Judge enquired as to whether the Committee was aware of the professional view of the Guardian ad Litem. The matter was adjourned and Mr. Hall's report of the 30th March, 2019 was furnished to the Committee on 5th April, 2019, in the form of a submission on whether the criteria under the statutory regime governing secure care had been met.

19. On the 8th April, 2019, the District Court ruled that the making of the special care order was within the remit of the High Court.

20. In the meantime, the Committee received and considered Mr. Hall's report. By letter dated 9th April, 2019 from Ms. Phelan to the applicant's solicitor, she acknowledged Mr. Hall's views. It was observed that the information contained in his report was historical and was already known to the Committee. The letter also noted that in his assessment Mr. Hall referred to the external expert opinion on N.K.'s risk of violence, that he had never come across anyone as dangerous as N.K. and that he has a number of outstanding criminal matters including vicious assaults on staff. The letter continued:-

> *"This young person is [redacted] years old and despite the fact that he had spent 12 months in special care, upon his discharge he has re-engaged in the behavior as described by the GAL which raises the question as to the therapeutic benefit of detention for this young person. We have also been informed that the young person is unaware of the referral for special care and this was of concern to the Committee as given his age, his view must be considered."*

21. It was noted in the letter that the DPP had decided to prosecute N.K. on assault charges and the Gardaí advised that there were outstanding charges for theft and assault. The Committee thought it helpful to have these matters clarified. It advised that it was open to the social work department to make a new referral to special care or to appeal the decision of the committee but that *"…we wish to assure the Court that the Committee have given full consideration to all the information contained in the referral for special care."*

22. On 10th April 2019, application was made for leave to apply for judicial review. On 11th April, 2019 Mr. Gerard Brophy, a chief social worker, was requested by the service director of the respondent, Ms. Finlay, to review N.K.'s file, including the materials submitted to the Committee, Dr Misch's report, Ms. Cumiskey's report, Mr. Hall's report of 3rd April, 2019, Ms. Finnegan's report of 3rd April, 2019, Mr. Hall's report of 9th April, 2019 and Ms. Finnegan's report of 9th April, 2019. Mr. Brophy noted that when Dr Misch prepared his report, N.K. was only half way through his placement. He described Dr Misch's opinion as recognising N.K.'s potential but also "*that there needs to be limit setting including elements of the criminal justice system*". In Mr. Brophy's view, there were two significant issues - being the therapeutic value of placement for N.K. and the level of his violent behavior. He commented that there appeared to be no consequences for such behaviour other than placement breakdown:-

> *"and to end the placement may have been part of the motivation for the behaviour. It appears that [N.K.] has experienced no direct consequence from any of these serious incidents. For a therapeutic approach to succeed it also needs support for the criminal justice system".*

23. Mr. Brophy stated in his review:-

"If [N.K.] is placed in a special care unit and there is no consequence for his continued and escalating violence we can predict that this violence will continue. Special care alone is not a response to this violence and is not equipped to respond."

Mr. Brophy concluded that if the purpose of the special care placement and to detain N.K. is simply to prevent him from harming others or himself then detention could be effective. If the purpose of special care is to have therapeutic value or to provide opportunities for growth and development then, in his opinion, N.K. will not benefit from special care alone. His one year spent in special care thus far illustrates this. What was required was a safety plan for N.K. in the community which must include an element of consequences including the involvement of the criminal justice system, as had been identified by Dr Misch.

24. A further referral for special care was considered by the Committee. The Committee met by teleconference to reconsider the special care referral in the light of the additional information. The documentation which was taken into consideration on this occasion by the Committee included:-

(a) Social work report for the Committee dated 13th April, 2019;

(b) Letter from Mr. Brophy, chief social worker and Mr. Finlay, service director, dated 12th April, 2019;

(c) Submission by Mr. Hall, Guardian ad Litem, to the Committee dated 30th March, 2019;

(d) Submissions by Mr. Hall, Guardian ad Litem, for the District Court in relation to the extension of the interim care order dated 6th April, 2019;

(e) Social work report for the District Court dated 27th February, 2019;

(f) Social work report for the District Court dated 2nd April, 2019,

(g) Social work report for the District Court dated 7th April, 2019.

The Committee, having considered the situation, communicated its decision by way of letter from Ms. Phelan to Ms. Finnegan on the 16th April, 2019. The Committee also took into account the interim guidelines for referrals to special care, April 2018. The letter advised as follows:-

"The Committee noted they had previously reviewed the referral in relation to [N.K.] at their meeting 29.03.19. The Committee acknowledged the new information in relation to [N.K.'s] criminal activities that he was involved in stealing a bicycle from another young person, that he was charged with aggravated robbery of another person, that he appeared before the Dublin District Court in relation to some of these activities and was given bail against the recommendation of An Garda Siochána. That these bail conditions include signing on at a Garda station 3 times per week, and maintaining a curfew of 9 pm. The Committee noted that since the

imposition of bail conditions, [N.K.] has been engaging actively with the wraparound service with E Plus. The Committee were also made aware by the Special Care manager that [N.K.] is to be charged with 3 assaults on staff which occurred while he was in Special Care. The Committee was informed that arrangements have been made for [N.K.] to return to his work experience programme this week with the housing maintenance company with which he was previously associated".

The letter continued as follows:-

"The Committee were clear in their discussion that [N.K.] did well in Special Care, that at the time of his discharge [N.K.] was consistently scoring 5/6 on the Welltree Model of care. While [N.K.] did not maintain this level of progress on discharge, it is the view of the Committee that there is no therapeutic benefit in a readmission to Special Care. Previously while in Special Care, [N.K.] engaged with therapeutic services and adhered to his medication regime. As part of the process [N.K.] was assessed by Dr. Misch who made clear to management in Special Care that [N.K.] needed consequences to his behaviour once all efforts were exhausted to engage him.

The committee are unchanged in their view that there has been a deterioration in [N.K.'s] behaviour since his discharge from special care, they do not consider that the new information provided sufficient evidence that [N.K.'s] behaviour meets the threshold for admission to Special Care under s. 23F(2) which states:- (a) the Child and Family Agency is satisfied that there is a substantial cause to believe that the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare"

The Applicant's affidavit

25. This application for judicial review is grounded on the affidavit of the applicant sworn on 9th April, 2019. She is the mother and sole guardian of N.K. She avers that since N.K. has left his special care placement, the improvements which he had made during that time have not continued and his anti-social behaviours had returned, and in most instances have escalated to "*alarming levels*" thus placing his life and health at serious risk. In her affidavit she avers that:-

"…I am both alarmed that the special care committee believe that it would be in the best interest of my son to wait for him to commit a criminal act and then be dealt with through the criminal justice system rather than protecting his statutory and constitutional rights now, and admitting him to special care in order to provide for his care and protection."

26. By letter dated 2nd April, 2019 her solicitors wrote to the solicitors for the respondent seeking information on appealing the decision of the Committee and further seeking clarification as to whether the social worker was appealing that decision. In her affidavit she describes and refers to N.K.'s recent anti-social behaviours and also refers to the

report of Ms. Finnegan of 7th April, 2019. Such behaviour includes alleged assault and robbery of a 14 year old boy, possession of drugs, alcohol and drug abuse and self-harm which caused medical professionals to believe he was a danger to himself and others. On 8th April, 2019, N.K. was charged in the District Court and was granted bail. He returned to the homeless hostel. She states that since the discharge of the special care order, N.K.'s behaviour has deteriorated greatly and he is a danger to himself and others. Although he is staying in a homeless hostel, she expresses concerns that N.K.'s whereabouts for large portions of the day and night are unknown.

The challenge summarised

27. In *Child and Family Agency v. ML* (unreported, Court of Appeal, Whelan J., 12th April 2019), Whelan J. described the statutory process by which a child might be subjected to a special care order as being triggered by the making by the respondent of a determination under s. 23F. It is a detailed process which identifies the prerequisites which are to be met by the respondent in reaching such determination.

28. In truth, the challenge as advanced at hearing may be summarised as an allegation that the Committee in reaching its determinations did not discharge its statutory function under s. 23F which identifies the prerequisites which are to be met by the respondent when making such determination and, in particular, it is contended that no reasonable decision maker could have arrived at the conclusion that the requirements of s. 23F(2)(a) were not satisfied. It is argued that no decision maker could reasonably conclude there was no reasonable cause to believe that the behaviour of the child did not pose a real and substantial risk of harm to his or her life, health, safety development or welfare. Having come to such conclusion in respect of the requirements of s. 23F(2)(a), it is contended that the respondent did not enter upon the statutory exercise which it ought to have done in all of the circumstances including the assessment of the all matters required to be considered under the relevant section of the Act of 1991, as amended.

29. Therefore, it is claimed that the process of the respondent became fatally flawed when it decided that the behaviour of the child did not pose a real and substantial risk of harm to his life, health, safety development or welfare and that such decision was irrational in law, was disproportionate, and in essence flies in the face of the evidence and common sense.

The Respondent's affidavit

30. In an affidavit sworn on the 23rd April, 2019, Mr. Donal McCormack, the national service director of residential childcare services for the respondent, refers to the material that was before the Committee when it came to its decision. He makes a number of points. First, he states that at the core of the special care regime is the deprivation of liberty consequent upon the detention of a child in a secure unit. The statutory regime provides that special care should be a last resort when no other form of care is sufficient to meet the needs of the child. There must be a therapeutic benefit to the child from being placed in special care and that such care is capable of addressing his or her behaviour and the risk of harm. Such care requirements include medical and psychiatric assessment, examination and treatment and educational supervision. The deprivation of a child's liberty by reason of a special care order is described by Mr. McCormack as being of last

resort and can only be done in exceptional circumstances where the strict criteria provided for under the Act of 1991 are met.

31. Mr. McCormack states that the special care system is entirely separate and distinct from the criminal justice system. He refers to the qualifications of the members of the committee and that it is chaired by an independent chairperson. This committee has the benefit of specialist knowledge and experience. He states that the courts are particularly ill – suited with the task of assessing the respective levels of need of children who have been assessed as requiring detention and special care, but where there is no placement yet available particularly in the absence of information about the needs of other children. He states that the value of the committee is that it ensures flexibility and constant and consistent review by an expert body.

Section 23F and section 23H

32. The court is not here concerned with the exercise of its jurisdiction under s. 23H. The court is concerned with the legality of the process followed by the respondent under s. 23F by which the determinations were made by the Committee not to trigger the statutory application process. It should be recorded however, that at the hearing of this application, no great distinction was drawn between the approach to the matters which ought to be taken into account under s. 23H, as outlined in *ML* and those which must be considered by respondent under s. 23F, at least in so far as the test for real and substantial risk under ss. 23F(2)(a) and 23H(2)(a) is concerned.

33. Section 23F provides:-

> *"(1) The [Child and Family Agency] shall not apply for a special care order in respect of a child unless it is satisfied that the child has attained the age of 11 years and it has made a determination, in accordance with this section, that the child requires special care.*
>
> *(2) Where—*
>
> *(a) the [Child and Family Agency] is satisfied that there is reasonable cause to believe that the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare,*
>
> *(b) having regard to that behaviour and risk of harm, the [Child and Family Agency] has assessed the care requirements of the child, and is satisfied that there is reasonable cause to believe that—*
>
> *(i) the provision, or the continuation of the provision, by the [Child and Family Agency] to the child of care, other than special care, and*
> *(ii) treatment and mental health services, under, and within the meaning of, the Mental Health Act 2001, will not adequately address that behaviour and risk of harm and those care requirements, and*

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

(i) that behaviour and risk of harm, and

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

(3) The [Child and Family Agency]—

(a) shall, subject to subsection (4), consult with—

(i) the child,

(ii) the parent having custody of the child, unless the parent is dead, missing or cannot be found, and

(iii) a guardian, if any, or a person, if any, acting in loco parentis, unless that guardian or person is missing or cannot be found,

and

(b) may, having regard to all the circumstances of the child, consult with—

(i) a relative of the child, or

(ii) a person who, in the opinion of the [Child and Family Agency], has knowledge of that child and his or her family or other circumstances, in relation to the behaviour and risk of harm referred to in subsection (2)(a), the care requirements referred to in subsection (2)(b), the proposal to provide special care to the child and the detention of the child in a special care unit for that purpose.

(4) Where the [Child and Family Agency], having regard to the protection of the life, health, safety, development or welfare of the child, is satisfied that there is reasonable cause to believe it is not in the best interests of the child to consult with all or any of the following persons, it shall not consult with that person:

(a) the child;

(b) a parent having custody of the child;

(c) the guardian;

(d) a person acting in loco parentis.

(5) The [Child and Family Agency] shall, subject to subsection (6), convene a family welfare conference in accordance with section 7 (as amended by the Child Care (Amendment) Act 2011) of the Act of 2001 if it is satisfied that there is reasonable cause to believe that the child requires special care, after having carried out the

consultations in accordance with subsection (3) or not carried them out in accordance with subsection (4).

(6) Notwithstanding subsection (5), where the [Child and Family Agency] is satisfied that, having regard to the protection of the life, health, safety, development or welfare of the child, there is reasonable cause to believe that it is not in the best interests of the child to convene the family welfare conference referred to in subsection (5), it may decide not to convene that conference.

(7) Where a family welfare conference—

(a) has been convened in accordance with subsection (5) and the [Child and Family Agency] has had regard to the recommendations, if any, notified under section 12 of the Act of 2001, or

(b) has not been convened in accordance with subsection (6), and the [Child and Family Agency] is satisfied that there is reasonable cause to believe that the child requires special care it shall make a determination as to whether the child requires special care.

(8) Where the [Child and Family Agency] determines that there is reasonable cause to believe that for the purposes of protecting the life, health, safety, development or welfare of the child, the child requires special care the [Child and Family Agency] shall apply to the High Court for a special care order.

(9) Where the [Child and Family Agency] applies for a special care order and, in accordance with subsection (4), it did not carry out the consultation referred to in subsection (3), it shall inform the High Court that the consultation was not carried out and of the grounds for not carrying out that consultation.

(10) Where the [Child and Family Agency] applies for a special care order and it did not convene a family welfare conference in accordance with subsection (6), it shall inform the High Court that it did not convene that conference and of the grounds for not convening that conference.

(11) The [Child and Family Agency] shall prepare and publish guidelines relating to the procedures for—

(a) carrying out a consultation for the purposes of this section, and

(b) convening a family welfare conference for the purposes of this section.]

(12) Where the Health Service Executive convened a family welfare conference in respect of a child pursuant to subsection (5) and a determination was not made by the Health Service Executive pursuant to subsection (7) before the establishment of the Child and Family Agency, that Agency shall be deemed for the purposes of this section to have convened the conference."

Applicant's Submission

34. The applicant submits, without prejudice to the assertion that there was no material on which the Committee could base its decision, that where fundamental rights of an individual are materially affected by an administrative decision, the court in reviewing such decision must ensure that the substance of the Constitutional rights engaged are protected. It is submitted that the decision of the respondent must be proportionate. Given the nature and gravity of the fundamental rights engaged and the great prejudice to those rights arising from the decision, it is submitted that there must be substantive countervailing considerations to justify the decisions. Reliance is placed in this regard on the decision of the Supreme Court in *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701 where Murray C.J. stated:-

> *"In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues. ... The principle requires that the effects on or prejudice to an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision".*

35. In his judgment, Fennelly J. stated at para. 446:-

> *"Where decisions encroach upon fundamental rights guaranteed by the Constitution, it is the duty of the decision-maker to take account of and to give due consideration to those rights".*

36. Reliance is also placed by the applicant on the decision in Efe v. Minister for Justice, Equality & Law Reform [2011] 2 I.R. 798, where Hogan J., in the context of a challenge to a deportation order, stated:-

> *"... it is clear that, post- Meadows at any rate, it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a Meadows-style proportionality analysis".*

37. It is not disputed that the respondent has the exclusive right, pursuant to the Act of 1991, to make a determination as to whether a child requires special care. The CFA, however, it is submitted, in making a determination must act lawfully by applying the test set out in the legislation, as interpreted by the Court of Appeal in *ML* , and having regard to the Constitutional rights of the child and the protective and welfare oriented character of the legislation. It is submitted that the respondent failed to do this in the case of N.K.

38. Ms. O'Toole S.C. on behalf of the applicant points to the fact that the appellants in *ML* argued that the trial judge had erred in concluding that therapeutic objectives in that case, which included diverting G from violent tendencies towards others, achieved a

relevant welfare benefit within the meaning of the statutory test. They argued that such behaviour concerned risks to other persons, and not the minor concerned, and thus did not come within the test. The Court of Appeal rejected this contention. The Court found that the medical and psychological assessments of the minor's conduct in being physically and sexually violent towards staff and others was "*an expression of profound psychological trauma and injury suffered as a result of the sadomasochistic behaviour experienced by her within her family during her early childhood.*" It is argued by the applicant that similar findings have been made by the expert psychologists who assessed N.K. Dr Misch stated:-

> *"[N.K.] is exceptionally vulnerable and traumatised young person. In my opinion his current presentation needs to be considered within the context of his childhood history of chronic parental neglect and abuse. This adversity has undoubtedly affected both [N.K.] and his siblings. It is likely that the impact of this neglect and abuse on [N.K.'s] older siblings will have caused further negative modelling for [N.K.]"*

Reliance is also placed on dicta of Whelan J. that:-

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

Whelan J. concluded that because violence, including sexual violence, perpetrates great injury upon others does not detract from the fact that, especially in the case of a young person, such behaviour invariably poses a real and substantial risk of harm to his or her own life, health, safety, development or welfare.

39. It is contended that the respondent's reasoning, that as N.K. did not sustain the progress made while in special care and that there is no therapeutic benefit to his readmission to special care, does not in any way address the central tenet of the test, which is to ascertain whether there is reasonable cause to believe that the behaviour of the child poses a real and substantive risk of harm to the child. The behaviour of N.K. is undisputed. Ms. Finnegan in her report of 13th April, 2019 describes N.K.'s recent violent criminal activity as alleged against him, including assault of a 14 year old boy and theft of his bicycle. It is alleged that in the course of robbery on 6th April, 2019, a stabbing took place after the victim had handed over his rucksack. She further describes a conversation she had with N.K. immediately after his appearance in the District Court on foot of charges resulting from this criminal activity. She reports that N.K. spent time speaking of the criminal behaviour he had engaged in. He described assaulting a man and how the man's chin "*was hanging off*". He showed Ms. Finnegan the injuries to his hands, and how

they were healing. She described how he indicated intentions to harm people, including a member of the Gardaí and of him appearing enthralled by acts of a criminal nature. Dr Lambe and Dr Misch, the forensic psychologists who assessed N.K. while in special care, also refer in detail to N.K.'s relationship with violence; his violent fantasies, his wish to kill his father, and to his belief that violence is justified, and that violence is a part of N.K.'s identity.

40. The applicant contends that these factual matters and conclusions are not disputed by the respondent, rather it appears to take the view that regardless of the manifest real and substantial risk to the life and health of N.K. that this behaviour poses, these risks are to be regarded as falling short of the criteria for special care, because the Committee conclude that N.K. will receive no therapeutic benefit in being readmitted to secure care. It is argued that this is a wholly unreasonable and irrational view and an unlawful application of the statutory test, particularly in light of the judgment in *ML*. It is not possible to reconcile the Committee's decision with the wording of the test, where the legislature have provided that one of the grounds upon which special care can be granted is that there is reasonable cause to believe that the "*safety*" of the child is at real and substantial risk because of the behaviour of the child. It is submitted that meeting the child's requirement for safety, provides a therapeutic benefit to the child, and that follows from the test itself. Providing safety also vindicates the constitutional rights of the child, where the level of risk to the child is such that detention is required to provide such safety and to abate or obviate the risk to the child's life health and safety. All of the material before the Committee suggested that N.K. was at real and substantive risk of harm. It is argued that they have thus failed in their duty to vindicate N.K.'s constitutional rights and that there is no evidence that they considered those rights. It is argued that the Court of Appeal in *ML* found that diverting a child from violent tendencies in the context of therapeutic intervention is necessary in the best interests of the child for the purpose of protecting the child's life, health, safety, development or welfare and for the purpose of adjusting the child's behaviour to obviate or abate those real and substantial risks. It is submitted that the Court of Appeal interpret the test in the light of the legislative intention to protect the constitutional rights of the child. Where a child has a propensity to violence of the order of that found in young persons such as G and N.K., then therapeutic intervention to abate or obviate that behaviour in the context of secure care is required to protect their welfare. It is submitted that by virtue of the use of the word "*development*" in the test`, that the fact that a child may be unwilling to engage in therapy is not a basis for a finding that the criteria for special care is not met. In this case N.K. has in the past co-operated with therapy while in special care. More fundamentally, it is submitted, *ML* is authority for the view that violence and a tendency to violence at the level experienced by young persons such as N.K., in and of itself, meets the threshold for special care, giving rise as the Court of Appeal found, to real and substantive risk of harm to the child's life, health safety development or welfare. On that basis alone, the decision of the respondent is wrong in law and fundamentally misapplies the statutory test.

41. It is accepted that there may be consequences for N.K. who is now subject to the criminal process before the District Court. However, it is argued that the Act of 1991 Act

specifically provides for circumstances where a child is subject to criminal charges while the subject of an application for special care. S. 23D states that:-

"Where a child is charged with an offence and the proceedings in respect of that charge have not been determined, subject to subsection (6) and section 23E, nothing in this Act shall be construed as preventing the Child and Family Agency from providing special care to such child in accordance with a special care order or an interim special care order."

It is contended that the test for special care must be applied to determine the level of risk of harm to the child concerned, without regard to any criminal charges as yet undetermined. The Committee decided that it was desirable that N.K. be subject to criminal sanction, effectively as an alternative to special care. This is an impermissible application or interpretation of the statutory test, is contrary to the Act of 1991 and fails to address the central tenet of the test. In so far as it may be asserted that the Committee were acting on the recommendations of Dr Misch as to what is in N.K.'s best interests, it is argued that this is manifestly incorrect and irrational and that the Committee's interpretation of Dr Misch's recommendation does not render it permissible for the respondent to interpret the statutory test as meaning that they can disregard objective evidence of substantial risk of harm to N.K., and treat that evidence as effectively negated for the purpose of the test, by considerations of possible and desirable consequences for N.K. through the criminal justice system. It is argued that none of the material before the Committee denied the extent of the risk to N.K. or disputed his circumstances.

42. Regarding the application of a *Meadows* type test, it is argued that in circumstances where N.K.'s fundamental rights are in issue, and where the decision of the Committee materially affects the fundamental rights of N.K., they did not give any or any due consideration to those rights. Its decision was based on irrational considerations and was wholly disproportionate in its effects.

Notice Party Submissions

43. Mr. Durcan S.C. on behalf of the notice party highlights the contents of Mr. Hall's report and states that certain of his observations were prescient as they came only a matter of days before N.K. is alleged to have committed a number of serious and violent offences. Reliance is placed on *ML* and also on *dicta* of Faherty J. in *AF v. Child and Family Agency & Ors* (unreported, High Court, Faherty J., 29th January, 2019) which concerns the interpretation of s. 23F. It is submitted that while the case involves the interpretation of s. 23F, *ML* is of assistance as the wording of s. 23H is similar to that of s. 23F. In *AF*, Faherty J. outlined the appropriate overall approach to interpretation in the following passage:-

"The central issue in the within proceedings is what is the correct interpretation of Part IV A of the 1991 Act, in particular s.23F. On the issue of statutory interpretation, there is no great discrepancy between the parties as to the interpretative tools to be applied to Part IV A. It is not disputed that the starting point for the purposes of

statutory interpretation is the natural and ordinary meaning of the words used in the relevant provisions of Part IV A of the 1991 Act. It is accepted that in interpreting a remedial social statute, the Court can construe the provisions thereof as widely and liberally as can fairly be done (see Western Health Board v. K.M. [2002] 2 IR 493).

The fundamental rule is that the Court is to give the words used in the relevant statutory provisions their ordinary and natural meaning. It is only if the intent of the Oireachtas is not discernible from the ordinary and natural meaning of the words that the Court should embark on other interpretative tools, for example a purposive or teleological approach. This principle applies to remedial social statutes as equally as to other statutes."

Faherty J. concluded that:-

"In interpreting the CFA's obligations pursuant to s.23F, one cannot lose sight of the provisions of s.23F(2)(a)-(c), which states, effectively, that where there is reasonable cause to believe that a child's behaviour poses "a real and substantial risk" (emphasis added) to his or her life, health, safety, development or welfare, the CFA is obliged to invoke the special care mechanism provided in Part IV A of the 1991 Act once it is satisfied that care other than special care and treatment under Mental Health Services would not adequately address the child's behaviour and risk of harm."

It is submitted that the respondent's statutory obligation to apply for a special care order is engaged once it is satisfied that there is "a real and substantial risk" to the child's life, health, safety, development or welfare in accordance with s. 23F(a) and that no other form of care other than special care can adequately address such risk, and the behaviour giving rise to it.

44. Applying the approach adopted by Whelan J. in *ML*, one cannot but conclude that N.K. by his behaviour and actions places himself at real and substantial risk of harm to his life, health, safety, development or welfare.

45. The respondent, it is contended, did not apply itself to a consideration of the other matters outlined in the section having come to an irrational conclusion on the consideration applicable to s. 23F(2)(a).

The Respondent's Submissions

46. Regarding the test applicable on this application, the respondent relies on the oft cited passage from *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39 that:-

" ... it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision".

Reference is also made to the decision of Humphreys J. in *DS (Zimbabwe) v. Minister for Justice and Equality & Ors* [2019] IEHC 78 where he observed that the impugned decision in *Meadows* was extremely stark and amounted to a blanket statement rejecting the applicants refoulement claim rather than a case where the decision maker had weighed competing considerations before reaching his conclusion. Reliance is also placed on the decision of the Supreme Court in *Donegan v. Dublin City Council* [2012] IESC 18, where having referred to *dicta* of Murray C.J. in *Meadows*, the court observed at para. 131 as follows:-

> *"It is clear from this statement, that although some extension of judicial review for reasonableness is envisaged so as to take account of the proportionality of the action, it is to be done on the basis of Keegan and O'Keeffe, rather than as an entirely novel criterion."*

Later, the court stated:-

> *"Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact".*

At para. 132, the court continued:-

> *"In light of the comments already made as to the adequacy of judicial review, I would not find that Meadows has substantially altered that position in this regard."*

47. Fundamental to the case of the respondent is that it is a requirement for the lawful use of special care that the detention of the child must have a therapeutic rationale or will have a therapeutic benefit. Reliance is placed in this regard on dicta of Whelan J. at para. 110 of her decision where she stated:-

> *"Since that decision (referring to DG v. Ireland), it is generally accepted that the rationale of any detention order must be educational or therapeutic and with no punitive element in order to vindicate the Convention rights of the minor".*

48. Mr. Dignam S.C. places specific reliance on the wording of s. 23F which expressly prohibits the respondent from making an application for a special care order unless and until it has made a determination that the child requires special care. It is submitted that it is apparent from the express provisions of s. 23F that the Oireachtas has delegated to the respondent the task of running and operating a special care service and the jurisdictional discretion to make the determination to place a child in special care lies solely with the respondent. It is further submitted that there is a manifest public interest in permitting the respondent, as a specialised body created by statute with a specific remit to make the decisions, responsibility for which has been assigned to it by statute. The risk of managing special care should lie with the responsible statutory body and should not be passed on to the court. To do otherwise, it is submitted, would infringe the separation of powers. Reliance is placed in this regard on *dicta* of Barrett J. in *KW v. Child and Family Agency* [2018] IEHC 23, at para. 19 where he observed:-

"What is sought in this regard is that the court in effect undo what the Oireachtas has done, withdrawing powers of action that the legislature has bestowed, through statute, on the CFA. That (a) would be an improper usurpation by the court of the powers of the legislative branch of government and (b) is not a power that the court enjoys."

49. Counsel submits that the applicant is effectively asking the court to become the decision maker and to substitute its view for that of the body which has been assigned that exclusive role by the Oireachtas. It is contended that if the applicant were to succeed in obtaining the reliefs sought, it would involve the court substituting its view for those of an expert committee based on complex professional assessments and judgments. What this application is inviting the court to do, it is submitted, is to become enmeshed in the decision making of the respondent in order to vindicate a purported right of a child to be provided with a particular service which would transfer from the executive to the judiciary the ultimate power and obligation to manage, effectively on a case by case basis, the provision of special care by the respondent.

50. In this regard, and in the context of the *O'Keeffe* test, the respondent submits that it is clear from the decision of the 29th March, 2019, that it was made with reference to all relevant information and that there was relevant material before the Committee which supported its decision. Particular emphasis is placed on the correspondence and reports which the Committee had before it when arriving at its conclusions. Mr. Dignam S.C. refers to letters which were exchanged post the decision of the 29th March, 2019 and before the decision of the 16th April, 2019. The chief social worker had stated that for a therapeutic approach to succeed, it required support from the criminal justice system. Reference was made to the recommendations from Dr Misch including the need for a response from the criminal justice system which appeared to be absent. Although this was not specifically referred to in the reason for the decision of the 16th April, nevertheless it was material which was before the Committee. A therapeutic approach was referred to in the material which was before the committee. Mr. Dignam S.C. refers to the considerable body of material that was before the Committee when arriving at this decision. It is submitted that there was ample material upon which the decision was made and that it is not irrational or unreasonable or without foundation. It is highlighted that the applicant does not contend that the committee has failed to take relevant material into account or that it took into account irrelevant considerations. The fact that it might disagree with the decision of the committee was not a ground upon which judicial review ought to be granted.

51. The respondent also submits that the applicant's reliance on *ML* is misplaced. The decision of the Court of Appeal is in fact rooted in curial deference to the professional assessments on behalf of the respondent in respect of the child in that case. There, Whelan J. concluded that there was no professional expert evidence put before the High Court to contradict the evidence of the respondent's experts that the provision of special care was in the child's best interests. In this case, the reports of Dr Misch and the chief social worker were taken into account by the committee in its consideration of whether the child

met the criteria for special care at this time. The committee is a specialist body tasked with weighing complex and competing factors in deciding whether to recommend a young person to special care. Insofar as the applicant purports to rely on the report of Dr Misch, Mr. Dignam S.C. observes that the report recommends that the child be moved from special care to an unsecure albeit highly structured and staffed residential unit. Again, considerable emphasis is placed on what the respondent considers to be the fundamental nature of the criterion that the detention of the child must be underpinned by a therapeutic rationale. This is something, it is submitted, which was identified by the Court of Appeal in *ML*.

52. It is also submitted that this is not a case where the court is faced with inaction or a blanket refusal to provide any resources or services on the part of the respondent. The contrary is the position. Substantial services and resources have been deployed and continue to be deployed by the respondent to meet the child's needs over a significant period of time. This is acknowledged by the Guardian ad Litem in his report of the 30th March, 2019 where he stated that the respondent had worked tirelessly to give the child every opportunity to succeed as he moves into adulthood and that the child could not be wrapped in cotton wool forever. And "*he will ultimately have to make choices in the future….*".

53. The respondent also points to the fact that at this time there is a regime of clear and therapeutic interventions in place that have been recommended by appropriately trained professionals. Therefore, it is submitted that the respondent has already fulfilled any statutory and/or constitutional obligations it has towards the child. These services/actions include the following:-

    (i) The provision of all appropriate social care services including a designated social work team;

    (ii) The provision of numerous placements;

    (iii) The provision of a wrap around service provided by E Plus;

    (iv) The provision of a Guardian ad Litem;

    (v) The convening of child in care reviews, regular safety planning and strategy meetings to discuss and implement care planning;

    (vi) Preparation and operation of a safety plan and day programme.

54. Finally, it is submitted by the respondent that while the separation of powers will not protect it where it acts in clear disregard of its statutory powers and duties, such disregard would mean a conscious and deliberate decision of the State to act in breach of constitutional rights and obligations or in this case it would require the respondent to act in deliberate and conscious breach of its obligations towards the child, something which has not occurred.

Decision

55. This is an application for judicial review. What is challenged is the process by which the Committee arrived at its decision not to apply to court for a special care order and, in particular, its reasons therefor. The court is confined, on this application, to a consideration of the legality of the decision taken.

56. The framework of the legislation and in particular Part IVA is such that its proper application is designed to ensure that the exercise of the powers under s. 23 is restrained and proportionate, and that the court and the respondent when exercising their respective functions must act carefully and proportionately, respecting the constitutional rights of the child to his or her liberty, while at the same time respecting his or her constitutional rights in respect of welfare, safety and health. That is not to say that these rights will necessarily be in conflict. The protection of one may ultimately result in the vindication of the other. A balance has to be achieved. Therefore, the task of the respondent in deciding whether to trigger the mechanism for an application for a special care order is not an easy one.

57. As to the test to be applied on this judicial review, a debate arises as to whether the appropriate test is that which was enunciated in O'Keefe or whether, in the context of an application such as this, where fundamental and constitutional rights of the child are in issue, a more nuanced approach is required where the proportionality of the decision or determination forms part of the consideration.

58. The court is urged to take into account the fundamental requirements of the Act of 1991 which is to provide for the care and protection of children and also the statutory mandate of the respondent which is to promote the welfare of children who are not receiving adequate care and protection. In *AF*, Faherty J. considered the statutory obligations of the respondent under s. 23 and paid particular attention to the overall purpose of the Act of 1991, which was to make provision for the care and protection of children. Although the challenge in that case related to a breach of a statutory obligation rather than one based on irrationality, it was observed that the purpose of Part IV A was to provide a mechanism of special care for children who satisfy the risk criteria set out in s. 23F(2).

59. Developed jurisprudence suggests that the test of irrationality or unreasonableness set out in *O'Keeffe* remains largely unaltered. Where fundamental rights are at stake, it may be that it is legitimate to consider the nature of the rights alleged to be affected and the nature of the duties and obligations being performed or discharged by the decision making body. Thus in *Donegan*, McKechnie J. expressed the view, at para. 131 that:-

> *"although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact."*

While it may be more appropriate to apply the O'Keefe test viewed through the prism of a Meadows type proportionality analysis, in accordance with the observations of members of the Supreme Court, nevertheless, on the facts of this case and in the events which

have transpired. no significant practical difference has been suggested to arise between the application of the O'Keefe test and that test as viewed in the light of Meadows.

60. While curial deference as strictly understood was not strongly advanced, nevertheless, I accept counsel for the respondent's submission that due regard ought to be had for the role which has been delegated to the respondent under the Act of 1991, particularly its function under s. 23 and to the specialist role played by the Committee in arriving at its decision. The Committee consists of persons who have been appointed because of experience and skill not possessed by the court. It is not disputed, therefore, that the respondent has the exclusive right under the Act of 1991 to make a determination as to whether a child requires special care and to make the appropriate application to the court. In arriving at such determination, however, the respondent must act lawfully in the assessment and application of the criteria; and in particular in its assessment of the requirements of s. 23F(2).

61. Section 23H(2)(a) was considered and interpreted by the Court of Appeal in *ML* where Whelan J. observed at para. 105 of her judgment:-

> *"The first limb of s. 23H requires a determination that G's behaviour constitutes a real and substantial risk to her life, health, safety, development or welfare. The words "real and substantial" in s. 23H imposes a burden on the CFA to demonstrate to the satisfaction of the High Court by probative evidence the existence of a real risk on substantial grounds arising from her own behaviour to G's life, health, safety, development or welfare."*

62. It is clear from that decision that in the assessment of what constitutes a real and substantial risk to life, health, safety, development or welfare the assessment must take into account behaviour of the child which poses a risk to others. I see no reason why a similar meaning should not be afforded to the provisions of s. 23F(2)(a), which enjoys similar wording to s. 23H(2)(a); and no such difference was advanced or suggested at hearing.

63. It seems to me that regard must also be had to the manner in which s. 23 is phrased. It prohibits the making of an application for a special care order unless the respondent is satisfied of the various matters outlined in the section. As the courts in *ML* and *AF* pointed out, a special care order involves civil detention and therefore impacts upon a child's constitutional right to liberty. It is for the purpose of the protection of the child in respect of whom there is a reasonable cause to believe that his or her behaviour poses a real and substantial risk of harm to his or her life, health, safety, development or welfare. The special care procedure is to be used as a last resort when other forms of care would not adequately address the risk posed by the behaviour in issue.

64. While it is appreciated that the function of the respondent under s.23 F is different to the function of the court under s. 23H, there is considerable similarity in wording and it would therefore seem appropriate to bear in mind the principles that the court must have regard to when considering applications under s. 23H. Without providing an exhaustive list of the

matters referred to by Whelan J. in ML, and bearing in mind that a purposive approach to the interpretation to s. 23 is warranted, such matters include:-

(i) The statutory mandate of the respondent is to promote the welfare of children who are not receiving adequate care and protection;

(ii) The legislative scheme establishes overarching duties of child protection and the Act of 1991 imposes on the respondent a duty to take into its care any child who requires care or protection which he or she is unlikely to receive, unless that child is taken into care;

(iii) The statutory framework relating to special care orders for children, which involves intervention to provide secure therapeutic care reflects the intention of the legislature to give substantive effect to certain of the rights enshrined in Article 42A. This imposes an obligation on the State to recognise the natural and imprescriptible rights of all children and insofar as practicable to protect and vindicate those rights. It is an explicit acknowledgment that each child has vested in him or her natural and imprescriptible rights to which regard must be had when a court enters upon an exercise of making a determination concerning a child which falls within the ambit of any of the subsections of Article 42A.

(iv) Special care is to be construed in accordance with s. 23C and "*signals that the intervention proposed must be shown by the CFA to be suitable and likely to be effective and required to address the risk of harm to the child which is posed by her own behaviour*" (per Whelan J. at para. 104)

(v) The Act enjoys the presumption of constitutionality and must be considered in light of the relevant provisions and with due regard to the provisions of the European Convention on Human Rights and the United Nations Convention on the Rights of the Child. Since the decision in *DG. v. Ireland* [2002] 35 EHRR 153, it is generally accepted that the rationale of any detention order must be educational or therapeutic and with no punitive element in order to vindicate the Convention rights of the child (see per Whelan J. at para. 110).

(vi) In the consideration of the application of s. 23H(1), the behaviour which consists of that which poses a risk to another person, is behaviour which is demonstrably harmful to the person/assailant him or herself as well as being harmful to his or her victim. In this regard, medical evidence and assessment of conduct as being physically violent towards others may be an expression of the profound psychological trauma and injury suffered as a result of the child's experiences during early childhood.

65. In *ML*, the court concluded on the evidence, that the child's detention on foot of a special care order did not amount to a deprivation of liberty so as to engage the provisions of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in light of the statutory safeguards attendant upon the making of the order

and the clear statutory regime of supervision and review provided for under the Act. The special care order that was made in that case by the judge at first instance was described by the Court of Appeal as being both necessary and proportionate.

66. By virtue of the provisions of s. 23F(2)(a) the Committee must be satisfied that there is reasonable cause to believe that the behaviour of the child poses a real and substantial risk of harm to his or her life, health safety development or welfare. If it is not so satisfied, then that is the end of the matter. It seems to me that it must be so satisfied before it is obliged to consider the other statutory criteria and ultimately the making of a determination to apply, or not to apply, to the High Court for a special care order. That it may decide that there is reasonable cause to believe that the behaviour of the child poses a risk as defined in s. 23F(2)(a), however, does not necessarily result in the incurring of an obligation to make application to court. It is but one stage in the process. Therefore, the challenge made by the applicant in this case must be seen in that narrow light. This is not an application by the applicant to require the respondent to apply to court. Indeed, even if the applicant is successful on this application it by no means necessarily follows that the respondent is, or ever will be, obliged to make application to court for a special care order.

67. The respondent strongly submits that it was entitled to take the decision it did in the context of the evidence of the lack of potential therapeutic effect that a special care order may have on the development and protection of the child's health, safety and welfare. It is clear from the decision of Whelan J. in *ML* that the rationale of any detention order must be educational or therapeutic with no punitive element, in order to vindicate the Convention rights of the child. The Court of Appeal held that the report relied upon by the respondent, in that case, showed that the primary purpose of the order was to effect therapeutic interventions to assist in enabling the child to gain insights into her own issues and difficulties, and to provide her with support and assistance in addressing the challenges traumatic life experiences had caused her. The evidence of the impact on the child's welfare and development was overwhelming and supported the argument that she required the special care proposed for and further that there was every chance that the welfare and development would benefit from the therapeutic care that was proposed in that case.

68. While the issue of therapeutic care is not something that was specifically referred to in either of the letters/determinations of the Committee as being the reason for its decisions, nevertheless the Committee did have before it in particular the observations of Mr. Gerard Brophy, who was tasked with conducting a review of the case file and the preparation of a report which was before the Committee when it re-considered the matter. He reported, *inter alia*, that if the purpose of the special care was to have a therapeutic value then N.K. would not benefit from special care alone. His one year thus far spent in special care illustrated this. Mr. Brophy referenced the necessity of support from the criminal justice system. This view was in fact expressed in the letter of the 16th April, but was not described as a reason for the decision.

69. I have considered the contents of the reports and information stated to have been before the Committee on both occasions. I do not glean from those reports the expression of a view which is contrary to that expressed by the Guardian ad Litem in relation to the risk of harm. He is firmly of the view that there is reasonable cause to believe that N.K.'s behaviour poses a real and substantial risk of harm to his life, health, safety, development or welfare. Mr. Hall described N.K. as being vulnerable, and opined that he would continue to take drugs and become involved in violent and offending behaviour with the potential to do serious harm to others. In his report of 30th March, 2019 he concluded that it is only a matter of time before something really serious happens to the child or to others.

70. The applicant, in her affidavit, outlines a series of incidents which have occurred since the preparation of Mr. Hall's report, including N.K.'s alleged involvement in assaults, robbery, possession of drugs, alcohol and drug abuse and other activities which she believes can only lead one to the conclusion that N.K.'s health, safety and welfare are at risk.

71. While the decision of the Committee appointed by the respondent is under challenge, it is instructive to note that the respondent's social worker, Ms. Finnegan, in her report of 29th March, 2019 describes N.K. as continuing to present with a high level of threatening, intimidating and risk taking behaviour. In a further report prepared by her on 7th April, 2019 she states that it appeared from all of the reports that drug use and criminal behaviour had been a feature of his presentation.

72. The basis of the challenge in this case is that there was no material before the Committee upon which it could reasonably arrive at its decision for the reason it gave, or as described in the pleadings, its *written rationale*. In my view, there is nothing in the reports which were before the Committee that express a view other than that N.K.'s behaviours poses a real and substantial risk of harm as that term has been interpreted by the Court of Appeal. In fact, the Committee accepted that there had been a deterioration in N.K.'s behaviour since his discharge from special care. To that extent, therefore, it appears to me that the expressed decision of the Committee that there was insufficient evidence that N.K.'s *behaviour* (emphasis added) did not meet the threshold under s. 23F(2), with particular reference to para. (a), is unsupported by the contents of the reports which were before it. Therefore, in my view, the *expressed* reason for the decision not to apply to have N.K. admitted to special care is unreasonable in that it is not only against the evidence but is a conclusion arrived at without evidence in support.

73. Reference was made by the Committee to Dr Misch's report which was prepared while N.K. was in special care. While this report was directed to the overall management and assessment of the special care requirements and needs of N.K., I do not believe that it contains anything to suggest that the behaviour of N.K. as at the time of its preparation in 2018, was other than that which gave rise to reasonable cause for belief that his behaviours posed a real and substantial risk of harm, as that test is understood and has been applied in the subsequent Court of Appeal decision in *ML*. Thus, Dr Misch concluded:-

"Whilst NK does not voice thoughts of self – harm or suicide, it is important that those caring for him mindful (sic) that NK will remain at increased risk of self- harm as a consequence of his high levels of impulsivity, risk taking and history of substance misuse".

That report speaks to the time of its preparation and in truth, nothing therein could be said to contradict the assessment or conclusions arrived in respect the risks posed by N.K.'s behaviour, and more particularly as reported on in March and April, 2019.

74. This is not necessarily the end of the matter, however. It is quite clear from the authorities to which I have referred that a special care order should not be granted merely to prevent a child from harming himself or herself, or of engaging in criminal activity or from posing a risk to the health and wellbeing of others. It is necessary that there be a therapeutic element to any such order, and this ensures that it is not being deployed for the purposes of preventative detention. In my view, there is nothing in *ML* which might suggest that the considerations applicable when a court is considering an application under s. 23H should not also apply to the respondent in its consideration and fulfilment of its statutory obligations under s. 23F.

75. While the letter of the 16th April makes reference to a view of the Committee of the absence of therapeutic benefit, having considered the arguments of the parties, however, I accept the submission of the notice party that by coming to the conclusion which it did, for the reason expressed regarding satisfaction of the requirements of subpara. (a), the committee came to a fundamental conclusion which in the court's view was legally flawed. Had it not done so, it would necessarily have been required to address all other matters and thus it effectively negated its obligations to consider appropriately those matters which must be taken into account when arriving at a determination as to whether N.K. requires special care under s. 23F. These matters include the assessment of care requirements, other than special care, the involvement of mental health services and that such special care is required to adequately address behaviours and care requirement. The respondent also has obligations in respect of consultation with interested parties and the convening of family welfare conferences. All of these steps are preconditions to the respondent making a determination that the circumstances require, or does not require, an application to be made for a special care order.

76. I am conscious of, and accept the submission of the respondent, that care should be taken by the court to refrain from adopting an unduly narrow and restrictive interpretation or view of the decision. The remit and task of the Committee was much broader than simply deciding whether the relevant risk existed. I accept that the decisions of the Committee should not be construed or interpreted as if thought they are akin to formal court judgments or tribunal determinations, but they are, nevertheless, determinations which have consequences for the manner in which matters proceed thereafter, consequences in respect of the future care proposals for the child and potential consequences for his or her constitutional rights.

77. There may have been information before the Committee of the absence of therapeutic benefit. This does not, however, seem to me to detract from the plain reading of the reason given for decision that the Committee did not consider that the information provided sufficient evidence that N.K.'s behaviour meets the threshold for admission to special care under s. 23F(2), with reference being made to s. 23F(2)(a). While the court should afford great latitude in the reading and interpretation of the decision of the Committee and the reasons expressed for its decisions, in my view, the decisions admit of only one reasonable interpretation being that the Committee decided that the child was not a suitable candidate for a special care order because he did not fulfil the criteria specified in s. 23F(2)(a). That it may have intended something different is quite possible but for the court to imply into the decision of the Committee reasons which are not only unexpressed, but contrary to, or inconsistent with, the clearly expressed reason for its decisions, would be speculative at best.

78. The court accepts the respondent's submission that it is the function of the respondent to make decisions and determinations required under s. 23F, and the function of the court to make any necessary order under s. 23H. The court also accepts that due deference should be afforded to the decision of the Committee, but in all the circumstances I do not believe that there is any improper transgression of the boundaries of the separation of powers in holding that there was no legally rational or reasonable basis for the Committee to conclude that the child's behaviour did not pose relevant risk or that there was reasonable cause to believe that such a risk existed. The basis of the challenge in this case, which I accept, is that there was no material before the Committee upon which it could reasonably arrive at its decision for the reason it gave.

79. In the circumstances, the applicant is entitled to the relief sought and the form of such relief is to be discussed with counsel.