THE COURT OF APPEAL

Neutral Citation No. [2020] IECA 249
Appeal No. 2019/237

Whelan J.
Haughton J.
Murray J.

BETWEEN/

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

APPELLANT

-AND-

THE DIRECTOR OF OBERSTOWN CHILDREN DETENTION CENTRE
THE MINISTER FOR CHILDREN AND YOUTH AFFAIRS
AND
IRELAND

RESPONDENTS

Judgment of Ms. Justice Máire Whelan delivered on the 18th day of September 2020

Background

1. This is an appeal against the order of Simons J. of 3 May 2019 refusing the appellant's application for judicial review. At the time of the application the appellant, then aged fifteen years and a "child" within the meaning of the Children Act 2001, as amended ("the 2001 Act"), was being detained at Oberstown Children Detention Centre ("Oberstown") pursuant to detention orders made by the District Court following his conviction for various offences. The principal relief sought was an order of *certiorari* in respect of certain separation measures applied to the appellant, particularly over a six-day period between 18 to 24 September 2018.

2. In the course of this appeal, an order was made prohibiting the publication or broadcast of anything that would, or would be likely to, identify the appellant.

3. The grounding affidavit of the application for judicial review was sworn by the appellant's solicitor, Mr. Matthew Kenny, and filed on 20 September 2018 and its averments warrant consideration. At para. 10 Mr. Kenny asserted that the appellant was subject "to an *ad hoc* punishment regime" and was being denied "any procedural rights in respect of the punishments he [was] subjected to." At paras. 12 and 13 he averred that following "a disturbance in the gym" on 16 September 2018, the appellant was "detained in solitude", "prevented from interacting with the other boys", "prevented from attending school" and "denied access to all social activities and communal meal times."

4. He deposed to a lack of procedural safeguards surrounding the separation measures:-

> "…The Applicant has not been provided with any formal written decision containing adequate reasons regarding the imposition and continuation of this punishment regime. …was denied an opportunity to make representations in respect of this punishment regime. …was denied an opportunity to appeal the decision to subject him to this punishment regime. …has not been informed of the proposed duration of the punishment and is consequently subject to an indefinite period of segregation." (para. 15)

5. Mr. Kenny exhibited email correspondence of 18 September 2018 between himself and Mr. Pat Bergin, the Director of Oberstown, relating to the separation measures in question in which the Director explained that the appellant was not being punished but rather was being assisted with the management of his behaviour. Mr. Kenny also referred to earlier email exchanges with the Director in relation to separation measures imposed on the appellant previously in July and August 2018.

6. At para. 17 Mr. Kenny characterised the July and August 2018 separation measures applied by Oberstown to the appellant as his having been "subjected to this *ad hoc* punishment while in detention."

Statement of Opposition

7. The statement of opposition denied that the appellant was subject to an *ad hoc* punishment regime or was placed on separation as a punishment. It stated at para. 4 that:-

> "Following his involvement in serious disturbances, the Applicant was placed on separation, in accordance with Oberstown's Single Separation Policy. The decision to place him on separation was taken in the interests of his own safety, the safety of other residents and staff on the unit and in the interests of good order and security on the Oberstown campus as a whole and was not a punishment."

Affidavit of the Director

8. The affidavit of Pat Bergin, Director of Oberstown, is of some importance, not least because it is very comprehensive but also because nowhere does the appellant either dispute or contradict its key averments. Neither did the appellant seek to cross-examine the Director at the substantive hearing in regard to it which, in light of the arguments being pursued in this appeal, warranted some explanation. None was forthcoming. The Director described the manner in which the challenging behaviour of a detainee is managed in Oberstown, including by way of a rating system with corresponding benefits for meeting required behavioural goals and the implementation of a relationship model of interaction between detainees and staff informed by on-site research and international best practice.

9. The Director gave details of three incidents in July, August and September 2018 in which the appellant had displayed "challenging behaviour". Significantly, nowhere does the appellant dispute these details.

6 July 2018 incident

10. The Director averred that the appellant and another boy forced their way into the residential care worker's staff office. They began vandalising it and when an attempt was made to stop them, a staff member was struck on the head with a tennis racket. The appellant was physically restrained. He was brought to his bedroom and staff members attempted to contact his mother to inform her of the incident. Over the following days, he was allowed to make phone calls to his mother, father and girlfriend. He was given time in the yard and in the unit's multi-purpose room which contains a television and video games. He received a visit from his solicitor on 11 July 2018. That evening two staff members had a lengthy discussion with him about his behaviour. He accepted that the intervention had been made in his best interests.

15 August 2018 incident

11. The Director averred that the appellant was verbally abusive to staff members and made an attempt to physically hurt an individual care worker. He was physically restrained and brought to his bedroom and kept on separation for the following two days. He was allowed time in the multi-purpose room and yard and made phone calls to his father and girlfriend. He refused to engage in a reading programme with support staff. He was put on a structured, supportive programme when taken off separation.

16 September 2018 incident

12. The relevant extracts of the Director's affidavit describing the incident on 16 September 2018 are set out as an appendix to the High Court judgment. To summarise, it was averred that the appellant and two other young people engaged in an "8 hour stand-off" with staff members and refused to leave the campus sports hall; that the appellant directed verbally abusive slurs of a highly sexualised nature and threatening language towards staff members; and, that he only agreed to return to the residential unit at 1.30 a.m. He also threatened to hurt staff members and fellow residents at various points on 17 and 18 September 2018. The Director described the measures imposed on the appellant over the two days following the incident, noting that an attempt was made to reintegrate him into the unit's routines on 17 September 2018 with which he did not cooperate. The following features of that regime are of particular note:

    i. the appellant was allowed to reside in his bedroom;

    ii. his mother and father were informed of the incident and that he had been placed on separation;

    iii. education materials were brought to the appellant in his bedroom;

    iv. the appellant was given access to the multi-purpose room and yard;

    v. the appellant was allowed to make telephone calls to his mother, father, girlfriend and solicitor; and,

    vi. the appellant had a consultation with his solicitor on 18 September 2018.

A six day plan was then put in place by the management, running up to 24 September 2018, which allowed the appellant to have limited interaction with fellow residents and provided for regular observation and review by staff members.

Oberstown *Single Separation Policy*

13. The Director's affidavit described in detail the *Oberstown Single Separation Policy* (May 2017) and the procedures for the use and recording of separation measures. The Director deposed that these procedures were informed by the High Court decision *in S.F. (a minor) v. Director of Oberstown Children Detention Centre* [2017] IEHC 829, [2018] 3 I.R. 466.

14. He identified key elements of the operation of the policy in practice:

    i. separation of a young person beyond fifteen minutes is to be authorised by a Unit/On Call Manager;

    ii. such authorisation is to be based on facts received from staff dealing directly with the young person following risk assessment;

    iii. a review of all relevant documents is to be conducted and if continued separation is authorised, there is a requirement that the incident form be signed after each period of two hours;

    iv. the young person's needs for food, drink, medical services, reading materials and fresh air all must be met; and,

    v. the Deputy Director must be consulted where there is a request to authorise separation beyond an eight-hour period. The attempts made to resolve the issues/behaviour and the need for separation to continue beyond the eight-hour period must be explained in accordance with the records maintained and other relevant paperwork. A review of the authorised separation must be undertaken each morning by the Deputy Director.

15. The Director reiterated that the appellant was placed on separation in accordance with the policy to ensure his own safety, the safety of other residents and the general security on the campus.

High Court judgment

16. In a comprehensive written judgment delivered on 3 May 2019, [2019] IEHC 275, Simons J. dismissed the appellant's application for judicial review. After outlining the factual and procedural background of the case, the trial judge turned to consider the evidence adduced on behalf of the appellant, observing at para. 20 that following *S.F. (a minor) v. Director of Oberstown Children Detention Centre*, "the determination of whether separation measures represent a breach of a child's constitutional rights necessitates a fact-specific inquiry as to the precise nature of the separation."

17. Simons J. noted that aside from the grounding affidavit of the appellant's solicitor, no further substantive affidavits had been filed. Short affidavits were sworn by the appellant and his mother, who acts as his next friend, which merely served to confirm the

statement of grounds. This resulted in what the trial judge considered to be "the unsatisfactory position whereby there is no direct evidence before the court which provides a detailed description of the separation measures" (para. 22) of which the appellant complained. The trial judge further noted that the more detailed description of the measures provided by the Director in his affidavit had not been formally challenged by the appellant and so that evidence fell to be regarded as uncontroverted. He observed that there was no affidavit evidence addressing the appellant's understanding of why the separation measures had been imposed and, as a result, the Director's assertion that the appellant was fully aware of the reasons why he was separated had been left unanswered.

18. Simons J., in considering the appellant's claim that his right to dignity and bodily autonomy had been breached, noted that the appellant sought to rely on the judgment of Ní Raifeartaigh J. in *S.F. (a minor) v. Director of Oberstown Children Detention Centre*, in which she held that solitary confinement should only be imposed on a young person where it is strictly necessary. The trial judge distinguished that decision on its facts from the instant case, noting that the nature of the separation regime imposed on the appellant was far less harsh than that at issue in *S.F.* In particular, two features which were of considerable concern to Ní Raifeartaigh J. in *S.F.*, namely a complete lack of exercise or contact with family members, were absent in this case.

19. The trial judge gave detailed consideration to the role of the courts and the separation of powers in the context of prison management, noting the dictum from the Court of Appeal in *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216, [2015] 2 I.L.R.M. 361 which emphasised at p. 385 that:-

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

20. Simons J. considered that the threshold for a finding of a breach of a substantive constitutional right had not been met and this aspect of the appellant's claim was rejected.

21. The trial judge then considered the procedural safeguards to which the appellant contended he was entitled, being:-

    i. a formal written decision containing adequate reasons for the separation;

    ii. notice of the terms of the separation, including its duration;

    iii. an opportunity to make representations; and,

    iv. an opportunity to appeal the decision.

22. Simons J. considered the appellant's submission that the separation measures operated at Oberstown represented a form of punishment. He distinguished the instant case from *Kenny v. Governor of Portlaoise Prison* [2017] IEHC 581 which the appellant sought to rely upon. In *Kenny*, which concerned an adult, at issue was Rule 67 of the Prison Rules 2007, as amended in 2013, which concerns the holding of an inquiry into an allegation of a breach of prison discipline. Simons J. found that the appellant's position in September 2018 was not analogous to the facts in *Kenny* since the Prison Rules 2007 do not apply to Oberstown. He noted that the appellant had failed to make a specific plea that the lack of an equivalent safeguard to that provided for adult prisoners by Rule 67 was a breach of the appellant's constitutional guarantee of equality before the law, as had been asserted in relation to Rule 62.

23. Simons J. concluded that there was no plausible basis for contending that the separation measures represented a form of punishment in circumstances where the Director's evidence, that they were imposed for the management of the appellant's behaviour rather than as a punishment, remained uncontroverted. By a parity of reasoning, he concluded that even if the Prison Rules 2007 did apply, a Rule 67 inquiry would not have been required on the facts. The trial judge further noted that s. 13(6) of the Prisons Act 2007 expressly provides that nothing in that section prevents the governor taking immediate provisional or protective measures to maintain order and discipline or prison security.

24. Additionally, Simons J. found that the separation measures applied to the appellant were limited and fell well short of the sanctions imposed on the prisoner in *Kenny*. As such, their operation did not trigger any requirement for a hearing.

25. The trial judge then addressed the appellant's alternative submission that if the measures did not represent a form of punishment, the appellant was nevertheless entitled to fair procedures in order to ensure that proportionality was observed. Simons J. distinguished the instant case from *S.F.*, noting the severity of the separation measures at issue in *S.F.* and held that a minimum threshold of severity must be achieved before an entitlement could be triggered to the particular procedural safeguards claimed by the appellant. He observed that even then fair procedures may have to be delayed in urgent cases, especially where the need for urgent action arises from the conduct of the detainee. He cited by analogy *Dellway Investments Ltd. v. NAMA* [2011] IESC 14, [2011] 4 I.R. 1 at p. 291:-

> "[344] In a number of cases countervailing factors have successfully been invoked to justify a failure to observe *audi alteram partem*. The dominant countervailing factor in these cases is extreme urgency: a need for immediate action in the circumstances of the case, sometimes caused by the person seeking to be heard."

26. Simons J. identified at para. 50 the salient features of the separation measures at issue which served to distinguish this case from the facts in *S.F.*:-

> "…the Applicant had been provided with access to exercise, and to telephone contact with his family, at all times. The Applicant was also allowed to reside in his

own room, and had access to educational and recreational materials. Moreover, the separation measures only applied for a period of six days, with the restrictions being reduced over the course of the six days."

The trial judge concluded that the appellant was not entitled to the specific procedural safeguards contended for.

27. Notwithstanding his finding that the appellant was not entitled to the specific procedural safeguards contended for, the trial judge then considered whether the evidence before the court established that the operative procedural safeguards were not complied with. Simons J. found that the *Single Separation Procedures* (updated July 2018), as outlined in the affidavit of the Director, had the effect of putting the procedural safeguards identified in *S.F.* on a more formal footing.

28. The trial judge concluded that no evidence had been put before the court that the *Single Separation Procedures* had not been complied with or that the appellant did not have the benefit of same. As such, the appellant had failed to discharge the onus on him as the moving party in the judicial review proceedings.

29. Simons J. then proceeded to consider the appellant's claim that there had been a breach of his constitutional guarantee of equality before the law arising from the disparity in treatment between adult prisoners and juvenile prisoners. Reliance was placed by the appellant on *Byrne (a minor) v. Director of Oberstown School* [2013] IEHC 562, [2014] 1 I.L.R.M. 346, in which it had been held that there was no objective justification for treating juvenile offenders differently in the context of eligibility for remission simply by reference to their place of detention. The appellant submitted that by analogy the appropriate comparators for Oberstown were adult prisons and that it was illogical to draw a distinction between adult offenders and juvenile offenders in terms of procedural safeguards applicable to punishment and segregation. The judge noted the respondents' argument that *Byrne* was limited to a comparison as between juvenile offenders in different places of detention and did not involve a comparison between adult and juvenile offenders.

30. Simons J. noted that the guarantee of equality before the law means that a statutory right may have to be extended to a wider class of individuals than that defined under the relevant legislation. He considered that by employing an equality argument, an appellant does not need to establish a constitutional entitlement to such statutory rights but rather has to establish that the omission to extend a statutory right to a comparable class of citizens represents unjustified discrimination. Since the distinction in treatment between juvenile and adult prisoners represents a deliberate legislative choice, the trial judge noted at para. 77 that the appellant's position involves a direct challenge to the current legislative scheme.

31. The test for breach of the equality guarantee was then set out. The appellant would have to identify two similarly situated individuals or classes of individuals (*i.e.* "the appropriate comparator") and then establish that the difference in treatment is not justifiable.

32. The trial judge concluded at para. 81 that the appellant's proposed comparison between a juvenile and adult prisoner was "inapt" for several reasons. First, the circumstances in which the appellant found himself in mid-September 2018 were not the same as those catered for in Rule 62 of the Prison Rules 2007. The trial judge determined that the appellant was not subject to punishment and no *a priori* decision had been taken to the effect that he was to be subject to separation measures for any specified period of time. He concluded that the separation measures imposed on the appellant were in "stark contrast" to those at issue in *Dundon v. Governor of Clover Hill Prison* [2013] IEHC 608, in which it was held that where a prisoner's situation is *de facto* akin to a Rule 62 regime, then consideration must be given to formalising the regime. The trial judge noted that the appellant's circumstances more closely resembled what was provided for in Rule 64 of the Prison Rules 2007, which applies where a prisoner is separated to prevent them from causing injury to themselves or others. He noted that there is no provision for a hearing or representations where Rule 64 is engaged.

33. The further reason identified at para. 87 of the judgment as rendering the appellant's proposed comparison inapt was the "vastly different" legislative regimes applying respectively to child detainees and adult prisoners. The features of the statutory regime applying to child detainees which he identified to illustrate the difference included:

    (i) the principles relating to the exercise of criminal jurisdiction over children (s. 96 of the 2001 Act);
    (ii) the prohibition on a court passing a sentence of imprisonment on a child or committing a child to prison (s. 156 of the 2001 Act);
    (iii) the ability instead to impose on a child a period of detention in a children detention school (s. 142 of the 2001 Act);
    (iv) the principal objects of such schools (s. 158 of the 2001 Act); and,
    (v) the nature of the relationship between a child detainee and the director of a children detention school (s. 180(8) of the 2001 Act).

34. The trial judge rejected the appellant's equality argument concluding at para. 93:-

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

35. In relation to the appellant's equality arguments, the trial judge was satisfied that the difference in treatment under consideration as between adult and child offenders serves a legitimate legislative purpose (*i.e.* the rehabilitation of young offenders and the need to reflect the special physical, psychological, emotional and educational needs of children), is

relevant to that purpose and treats both classes fairly. He further concluded that same is consistent with Article 42A of the Constitution.

36. Simons J. cited with approval the decision in *J.D. v. Residential Institutions Redress Review Committee* [2009] IESC 59, [2010] 2 I.L.R.M. 181 where it was held that age, as a ground of alleged discrimination, does not raise the sort of concerns that are posed by "invidious categories" (i.e. sex, race, language, religious or political opinions) and so it would be for an applicant to demonstrate a *prima facie* basis for the claim that different classifications based on age are discriminatory. He found that the appellant had failed to demonstrate this in the instant case, concluding that the legislative classification reflects a distinction in capacity as between adults and children and as such is authorised by the second paragraph of Article 40.1.

37. The trial judge then considered whether the difference in capacity was relevant to that legislative purpose. Having regard to the relevant jurisprudence including *Brennan v. Attorney General* [1983] I.L.R.M. 449, at para. 107 he considered that the requirement of relevance to the legislative purpose pursued is "intended to ensure that there is a reasonable relationship or proportionality between (i) the differential criteria, and (ii) the difference in treatment."

38. Simons J. was satisfied that the difference in capacity which informs the difference in treatment accorded to young persons under the Children Act 2001 is "relevant" to the legislative purpose as it reflected the "special physical, psychological, emotional and educational needs of children" (para. 108) and "the specific educational and emotional needs of a child as compared to an adult" (para. 109). In addition, the trial judge was satisfied that that difference in capacity would also be relevant to the legislative choice that the nature of the relationship between a director of a child detention school and detainee be more paternalistic than that between a prison governor and an adult prisoner. This paternalistic relationship justified measures being taken in the interests of the health and safety of a child detainee without the necessity for the procedural safeguards provided by the Prison Rules 2007.

39. The appellant had contended that a differentiation on the grounds of age would only be justified where the legislation does not put a child in an inferior position, relying on a line of authorities including *Landers v. Attorney General* (1975) 109 I.L.T.R. 1 and *X.Y. (a minor) v. Health Service Executive* [2013] IEHC 490, [2013] 1 I.R. 592. The trial judge rejected this submission, noting that the principal question for the courts is whether the difference in treatment is justified by reference to the criteria by which the classification is made, as set out in the test in *Brennan*.

40. Simons J. concluded at para. 114 that the Children Act 2001 does not put a child in an inferior position noting that it provides a number of "benefits" to a young person (see: ss. 96 and 156 of the 2001 Act) which "outweigh any alleged omission of procedural rights".

41. He concluded on the alleged breach of the guarantee of equality at para. 115:-

"…First, the comparison between an adult prisoner and a child detainee is inapt in circumstances where the two are not similarly situated. Secondly, and in any event, Article 40.1 expressly allows for the enactment of legislation which has due regard to differences of capacity. The difference in treatment of offenders based on age serves a legitimate legislative purpose, is relevant to that purpose and treats both classes fairly."

42. The trial judge then considered the appellant's claim for mandatory relief against the Minister for Children and Youth Affairs, noting that it had not been pressed at the hearing. The appellant had sought an order compelling the Minister "to enact rules governing the control and management of children detention schools and the maintenance of discipline and good order generally in them." For the sake of completeness, the court noted that the terms of s. 221 of the 2001 Act, which empowers the Minister to make regulations, are permissive rather than mandatory. The trial judge relied on *The State (Sheehan) v. The Government of Ireland* [1987] I.R. 550 at p. 561 and *Rooney v. Minister for Agriculture and Food* [1991] 2 I.R. 539 at p. 546 as examples of courts declining to compel ministers to exercise their discretionary powers.

43. The appellant also asserted but did not press his claim that the measures imposed on him violated his rights under articles 3 and 6 of the European Convention on Human Rights ("ECHR") but again the trial judge addressed this for the sake of completeness. The court concluded that the minimal separation measures imposed on the appellant did not reach the threshold to engage article 3 ECHR. Moreover, the trial judge noted that the ECHR is not directly applicable in the state and the appellant had failed to make a claim of incompatibility pursuant to the European Convention on Human Rights Act 2003 or join the Irish Human Rights and Equality Commission to the proceedings. In any event, the trial judge was satisfied that it was unnecessary to consider any alleged breach of ECHR rights where the constitutional protection is at least equal to, if not greater than, the protection offered by the ECHR.

Grounds of Appeal

44. The appellant's grounds of appeal contend that the trial judge erred in law and in fact in determining that:

    i. a child detainee can be treated less favourably than an adult;

    ii. adult prisoners and child detainees are not comparators for the purposes of the guarantee of equality pursuant to Article 40.1 of the Constitution;

    iii. the differential treatment of adult prisoners and child detainees is fair to both and serves a relevant, legitimate legislative purpose;

    iv. had an adult prisoner been subject to the separation measures applied to the appellant in mid-September 2018, they would not have been entitled to the procedural safeguards under Rule 62 of the Prison Rules;

v. the appellant failed to demonstrate a *prima facie* basis for claiming that classifying children differently from adults for the purpose of post-conviction detention involves discrimination;

vi. the appellant had not been subject to punishment in mid-September 2018 and no *a priori* decision had been taken to the effect that the appellant was to be subjected to separation measures for a specified time period;

vii. the separation regime imposed on the appellant did not exhibit any of the features which had been of concern in *S.F. (a minor) v. Director of Oberstown Children Detention Centre*;

viii. the regime in Oberstown to which the appellant was subjected did not reach a threshold of requiring procedural rights to be engaged;

ix. there was no obligation upon the Director to provide procedural safeguards of the specific type contended for by the appellant;

x. Oberstown had complied with its own single separation policy; and,

xi. s. 221 of the Children's Act 2001 does not require the Minister to implement rules regarding the control and management of schools.

45. The respondents oppose the appeal in its entirety.

Submissions of the Appellant

46. The appellant's written submissions identified five issues to be decided in this appeal:

i. Did the segregation of the appellant constitute a punishment?

ii. Was the threshold requiring procedural rights reached?

iii. If the threshold was reached, was the appellant afforded sufficient procedural safeguards?

iv. Are child detainees and adult prisoners appropriate comparators for the purpose of Article 40.1?

v. Does the differential treatment of adult prisoners and child detainees serve a legitimate legislative purpose? Is the differential treatment relevant to that purpose and does it treat both classes fairly?

47. The appellant submitted that during the course of his detention in Oberstown he was continuously subjected to an *ad hoc* punishment regime which included periods of segregation. He relied on an extract from *Prison Law* (1st edn., Round Hall, 2000) in which McDermott lists factors relevant to the question of whether a decision constitutes a disciplinary punishment or an administrative decision:-

"1. What is the purpose of the measure? Is it to punish or is it designed to regulate and improve further conduct?

2. Is the measure imposed on the general prison population or only on a limited category of inmates, for example, those that were involved in a particular incident?

3. Is the measure being imposed in response to a particular incident?

4. Is the measure one typically imposed for disciplinary offences?" (p. 193)

48. The appellant submitted that the purpose of the measures imposed was to punish the appellant and in the course of the appeal sought without leave to place reliance on a call manager's log records in this regard. This point had not been argued in the High Court. Secondly, the appellant contended that the measures were only imposed on the appellant and others who were involved in the incidents. Thirdly, the appellant argued that the measures were clearly imposed in response to the specific incidents in question. Finally, he relied on the decision in *S.F.* as an example of where separation measures were imposed for a number of different objectives, one of which was punishment. Without prejudice, the appellant maintained that he was entitled to the procedural safeguards delineated in *S.F.* even if the separation measures imposed were not found to constitute punishment.

49. The appellant argued that he had been subjected to an *ad hoc* regime and had been constantly at risk of being subjected to a further indefinite period of segregation, without any entitlement to make representations or appeal findings and this breached fair procedures and natural justice. It was claimed that there was an ongoing breach of the appellant's constitutional rights, not merely on the three specific instances referred to in the statement of grounds.

50. The appellant invoked various authorities which established that prisoners continue to enjoy constitutional protection while serving sentences and any restriction on their rights must be necessary and proportionate. These included *Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269, [2013] 4 I.R. 1; *Murray v. Ireland* [1985] I.R. 532; *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573; *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334; and, *S.F. (a minor) v. Director of Oberstown Children Detention Centre*. He submitted that the trial judge erred in holding that the measures imposed on him were not so severe as to engage his constitutional right to fair procedures and natural justice. While conceding that the measures imposed were not as severe as those in *S.F.*, the appellant maintained that, given the duration of the separation regime to which he was subject and his particular vulnerabilities as a child detainee, his right to fair procedures and natural justice were engaged.

51. The appellant submitted that the decision to impose sanctions on the appellant involved a determination of his rights thereby attracting the protections of natural justice. A number of authorities were relied on to support the contention that discretionary powers granted by statute, including powers to discipline prisoners, must be exercised in accordance with

natural justice, including *The State (Murphy) v. Kielt* [1984] I.R. 458; *R. v. Home Secretary, Ex p. Pierson* [1998] A.C. 539; and, *R. v. Hull Visitors, Ex p. St. Germain* [1979] 1 W.L.R. 1401.

52. The appellant also relied on *Kenny v. Governor of Portlaoise Prison* to demonstrate what the requirements of natural justice mean in a particular case. In her decision in *Kenny*, Ní Raifeartaigh J. had held that what is necessary in terms of fair procedures in one situation may not be necessary in another. She found in that case that a full adversarial hearing was not required but that the prisoner ought to have been shown the basic evidence against him and given the opportunity to comment on it. She further observed that the substance of fair procedures should not be dictated, in a particular case or generally, by a view as to whether it would have made any difference to the outcome of the decision.

53. The appellant submitted that he was provided with no procedural safeguards when the separation measures were imposed: he was not provided with any formal written decision containing adequate reasons for the imposition and continuation of the measures; he was denied the opportunity to make any representations or an opportunity to appeal the decision; and, was not informed of the proposed duration of the measures. The appellant asserted that he was entitled to a hearing as if he were an adult prisoner, to a finite punishment, to be informed of the terms of the punishment including its duration, and to a review or appeal of the finding that he had breached campus discipline. The appellant submitted that the trial judge erred in holding that there was no obligation on the Director to provide such procedural safeguards.

54. The appellant placed particular reliance on an extract from *S.F.* in which Ní Raifeartaigh J. stated at p. 522:-

> "[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."

55. While the trial judge had found that the measures imposed in the instant case were not as severe as those in *S.F.*, the appellant submitted that the cases were nonetheless similar

in terms of the denial of procedural safeguards and argued that there was an absence of the minimum requirements (1) to (4) as set out by Ní Raifeartaigh J. above.

56. In addition to the claims of breach of constitutional rights, the appellant submitted that the failure to provide procedural safeguards was in violation of the appellant's rights under article 6 ECHR (right to a fair trial) and relied on an extract from *De Tommaso v. Italy* (App. No. 43395/09) (2017) 65 E.H.R.R. 19, para. 147 to 151, which considered the applicability of the civil limb of article 6 to prison discipline decisions. The appellant cited Rules 91 and 93 of the Council of Europe recommendation on rules for juvenile offenders (CM/Rec (2008)11), which provide that separation measures should be used only in exceptional cases and where certain procedures have been complied with, together with a 2011 report of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which also emphasised the need for certain minimum procedural safeguards when decisions are taken to impose solitary confinement.

57. The appellant's submission on the alleged breach of the constitutional guarantee of equality asserted that there are no rules which govern the punishment of juvenile prisoners, in contrast to the position that pertains to adult prisoners by virtue of the Prison Rules 2007, as amended.

58. The appellant pointed out that no rules have been introduced pursuant to s. 179(1)(a) of the 2001 Act, which empowers the boards of management of children detention schools to enact rules for the management of the schools and the maintenance of discipline and good order generally. In addition, s. 201 of the 2001 Act, as amended, which provides the manner in which the Director of Oberstown may hold an inquiry into a disciplinary breach, has not yet been commenced.

59. The appellant noted that the Minister has failed to make rules governing *inter alia* the control and management of children detention schools and the maintenance of discipline and good order generally in them, as empowered to do so by s. 221 of the 2001 Act. The appellant contrasted this position to that which pertains to adult prisoners under Rule 62 of the Prison Rules 2007 which provides a detailed procedure for imposing punishment.

60. To support the assertion that the differing operative legislative position between child detainees and adult prisoners amounts to a breach of the constitutional guarantee of equality before the law, the appellant first submitted that child detainees and adult prisoners are comparators for the purposes of the test set out at para. 241 of *M.R. and D.R. (minors) v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533. The appellant asserted that the core aspects of both regimes are sufficiently similar so as to render child and adult detainees appropriate comparators (the appellant's submissions were filed before the Supreme Court decision in *B. (a minor) v. Director of Oberstown Children Detention School* [2020] IESC 18, [2020] 1 I.L.R.M. 469).

61. The appellant asserted that it is apparent that the lack of formalised rules governing the punishment of juvenile prisoners constitutes differential treatment to their adult

counterparts and relied on *McCabe v. Governor of Mountjoy Prison* [2014] IEHC 435, [2015] 3 I.R. 95 to support the principle that "[t]he equal treatment of similarly situated persons within the criminal justice system is at the heart of the concept of equality before the law" (p. 111).

62. The appellant's submissions then turned to the issue of whether this differential treatment serves a legitimate legislative purpose, whether it is relevant to that purpose and whether it treats both classes fairly, as required by the test set out in *Brennan v. Attorney General* and endorsed by the Supreme Court in *In re Article 26 and the Employment Equality Bill* 1996 [1997] 2 I.R. 321. The appellant referred to *Landers v. Attorney General* and asserted that, in contrast to that case, the differential treatment here does not pursue a legitimate social policy capable of objective justification and results in lesser protection being afforded to children than their adult comparators.

63. The appellant also relied on *Byrne (a minor) v. Director of Oberstown School* and the remarks of Hogan J. (para. 36), contending that any social policy which might be offered to support the differential treatment to which juvenile prisoners and adult prisoners are subject cannot be objectively justified given that such sharply different treatment in terms of punishment while in custody impacts significantly on the core constitutional right of personal liberty as protected by Article 40.4.1°.

Submissions of the Respondents

64. The respondents submitted that the appellant's case is premised on the erroneous foundation that he was placed on single separation as a punishment.

65. They disputed the appellant's contention that on the grounds of equality before the law child detainees and adult prisoners ought to receive the same treatment, arguing that this position is misconceived.

66. The respondents relied on Ní Raifeartaigh J.'s determination in *S.F.* that the Director of Oberstown does have authority, subject to constitutional restraints, 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. They contended that otherwise the facts in *S.F.* are materially distinguishable from the instant case.

67. They argued that the management of prisons is a matter for the executive and the courts should be slow to intervene out of respect for the separation of powers.

68. They contended that s. 179 of the 2001 Act gives a discretion to a board of management to create rules but by its terms and in light of the separation of powers, the court cannot direct a board to make such rules.

69. The respondents argued that the appellant could only claim a breach of fair procedures if it is found that the separation measures amounted to a punishment because:

    i. that is the case as pleaded and he cannot now argue a wider case;

ii. the measures are not justiciable and/or amenable to review unless they are a punishment; and,

iii. in the absence of a punishment, there is no prejudice and no rights are engaged.

70. The respondents objected to the appellant's reliance on article 6 ECHR on the grounds that such argument had not been pursued in the High Court; that the Convention is not directly applicable in the State and there had been a failure to plead the European Convention on Human Rights Act 2003.

71. They addressed the alleged breach of the constitutional right to equality pursuant to Article 40.1, asserting that since the measures imposed were not a punishment, the appellant's argument that an absence of rules constitutes invidious discrimination is "wholly misconceived".

72. The respondents contended that any difference in treatment is neither discrimination nor invidious, rather it reflects the distinction in capacity between children and adults.

73. The respondents submitted that the substantive rights of child detainees (as described in *S.F.*) inhere in them automatically and so the absence of rules has no effect. The respondents also submitted that separation measures in themselves do not amount to a breach of constitutional rights.

DISCUSSION

The legislative intent

74. The 2001 Act, being legislation providing for the governance and management of Oberstown, as its long title makes clear, is "an Act to make further provision in relation to the care, protection and control of children…". All children serving sentences of detention in the State are now accommodated at Oberstown, the only children detention school in the State established under Part 10 of the Act by virtue of the Children Act 2001 (Amalgamation of Children Detention Schools) Order 2016 (S.I. No. 273 of 2016), which amalgamated Oberstown Boys' School, Oberstown Girls' School and Trinity House School in 2016.

75. It will be recalled that s. 158 of the 2001 Act, as amended, identifies the clear legislative intent underpinning the establishment of children detention schools such as Oberstown in the following terms: -

> "It shall be the principal object of children detention schools to provide appropriate educational, training and other programmes and facilities for children referred to them by a court and, by –
>
> (a) having regard to their health, safety, welfare and interests, including their physical, psychological and emotional wellbeing,
> (b) providing proper care, guidance and supervision for them,
> (c) preserving and developing satisfactory relationships between them and their families,

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

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

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

In essence, those objectives encompass the aims of developing personal resilience in the detained young person and assisting each individual to gain insights into his or her personal issues and challenges which led to their detention in the first place. The ultimate goal is to empower each young person to reach their personal potential so that on release each has the best prospect of avoiding recidivism.

76. The issues in this case fall to be framed against the backdrop of the objectives of detention under the Children Acts 2001 to 2015, having regard to the central fact that the appellant was at all material times "a child" within the meaning of the statutory regime. Oberstown, as the sole detention school operating under the Acts, is charged with providing appropriate educational and training programmes and facilities for the appellant.

77. As s. 158 makes clear, the ambit of the programmes and facilities to be operated by the Director must have regard to the appellant's safety, welfare and interests, including his physical, psychological and emotional wellbeing. Furthermore, the achievement of the legislation's principal objectives necessitates the provision of guidance and supervision as is clear from s. 158(b) of the Act. There is an obligation to exercise "proper moral and disciplinary influences" and this is to be done for the purposes of promoting the appellant's reintegration into society and preparing him to take his place in the community as a person who observes the law and is "capable of making a positive and productive contribution to society".

78. Therefore, critical to evaluating whether the threshold has been reached so as to give rise to engagement of procedural rights pursuant to the Constitution in the exercise of discipline is a consideration, not only the nature and extent of the principal objectives of Oberstown, the comprehensive regime for oversight by a board of management and in particular the campus' own board of management as provided for by ss. 165 to 179 of the 2001 Act, but also the position and status accorded to the Director by the legislature pursuant to s. 180(8) that:-

"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."

In loco parentis

79. At the date of the events in question the appellant was a young person aged fifteen years and was due for release in August 2019. The role of the Director of Oberstown is informed by s. 180 of the 2001 Act which envisages the Director being responsible for the immediate control and supervision of the detention school. It will be recalled that s. 180(8) provides that the Director will have control over a child detainee as if he or she were the child's parent or guardian and shall do what is reasonable to safeguard or promote the child's education, health, development and welfare.

80. Thus, any evaluation of the conduct of the Director of Oberstown must take as its starting point that the incumbent is *in loco parentis* to each child detained at the campus.

Operative policies and procedures in Oberstown

81. In its Mission Statement, Oberstown identifies its key aim as:-

> "To ensure that young people detained in Oberstown Children Detention Campus are supported to move away from offending behaviour to make a more positive contribution to society."

Its vision is expressed to be:-

> "To provide safe, secure and appropriate care for young people to meet their health and education needs to support them to address their offending behaviour and prepare them to return to their families and communities following release from detention."

Oberstown's values are stated to be:

> "Respect
>
> Learning and reflection
>
> Working Together
>
> Honesty and Integrity
>
> Commitment to quality care and support."

82. In the context of the legal framework it is noteworthy that the operative *Single Separation Policy*, exhibited in the affidavit of the Director, provided at Clause 4: -

> "The fundamental guiding principles underlying this policy are that the best interests of the young person are taken into account, and that the safety, dignity and privacy of children being placed in single separation are maintained. Due regard should also be given to the interests of others who may be at risk of harm if

separation does not take place. In this respect, it should be noted that staff are protected by health and safety legislation, namely the Safety, Health and Welfare at Work Act 2005. Under the Act, employers are obliged to managing (*sic*) and conducting all work activities so as to ensure the safety, health and welfare of people at work."

It is clear that the policy is framed with due regard to international human rights standards including the United Nations Convention on the Rights of the Child, to which Ireland is a party.

83. Single separation is defined as: -

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

The definition is expressly devised by reference to the Department of Children and Youth Affairs National Policy on Single Separation Use as of November 2016.

Safeguards for a child detainee

84. The argument was pursued on appeal that the separation of a child detainee from his or her peers represents an interference with the child's constitutional right to dignity and bodily integrity, and that such interference triggers a concomitant requirement for certain procedural safeguards. The appellant placed much emphasis in this regard on the judgment in *S.F. (a minor) v. Director of Oberstown Children Detention Centre*.

85. A guiding principle in evaluating any legislative regime concerning children must be Article 42A.1 of the Constitution which was passed by referendum in November 2012 and eventually became law on 28 April 2015 and provides: -

> "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

It orients the priorities of those in charge of the detention of a child towards the rights and welfare of the child in question.

86. The appellant contended that, as a child detainee, before he could be separated from his peers even on a temporary basis, the Director was obliged to comply with certain procedural requirements. The appellant contended that he was entitled to:

- a formal written decision containing adequate reasons for the separation;

- notice of the terms of the separation, including its duration;
- an opportunity to make representations; and
- an opportunity to appeal the decision.

87. There is force in the respondents' contention that a judge ought to have regard to the jurisprudence whereby the courts have signalled reluctance to interfere with the executive function in the day to day administration of children detention schools unless, as was acknowledged by Ní Raifeartaigh J. in *S.F.* para 129:-

> "…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."

88. In general, the courts should exercise restraint in interfering in the day to day running and operation of a detention centre for young persons unless a clear and cogent basis for such intervention is demonstrated and nonesuch has been shown in the instant case. The judgment of Ní Raifeartaigh J. in *S.F.* is worthy of note where she observes at p. 471: -

> "2. …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."

89. Notwithstanding the margin of appreciation afforded to the Director there are constitutional limits and safeguards on the treatment of young people in detention, as Ní Raifeartaigh J. correctly emphasised at p. 520:-

> "113. …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 Oberstown Separation 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."

90. As the Supreme Court (O'Malley J.) noted, in the subsequent decision of *B. (a minor) v. Director of Oberstown Children Detention Centre* at p. 481:-

> "49. …It was accepted by Ní Raifeartaigh J. that the educational focus of the school, and the quasi-parental role and power of the director, did not mean that a young person

in Oberstown had fewer constitutional safeguards in relation to such measures than an adult in prison."

91. The *obiter* comments of Hogan J. in *Connolly v. Governor of Wheatfield Prison* are also worthy of note insofar as they suggest that indefinite detention of a prisoner for 23 hours a day would at a certain point infringe a prisoner's right to protection of his person and the safeguarding of his dignity. It will be recalled that in *Attorney General v. Damache* [2015] IEHC 339 Donnelly J. observed that even partial and relative solitary confinement for a period of months was constitutionally prohibited. However, as even a cursory consideration of the operation of the *Single Separation Policy* in this case demonstrates, the procedures applied to the appellant bear no relationship to the nature, purpose or severity of the measures under consideration in either *Connolly* or *Damache*.

92. The High Court judgment under appeal comprehensively distinguished the facts of the instant case from those of *S.F.* When one considers the manner and application of the policy to the appellant in the actual circumstances obtaining, including the fact that he was permitted to engage in physical activity on occasion in the company of a peer whilst at all times also being permitted to continue to remain in the familiar environment of his own bedroom, it is clear that what occurred is not fairly characterised as a punishment, but rather circumstance-, conduct- and age-appropriate supervision which was on any fair analysis of the undisputed facts, objectively warranted, proportionate and reasonable in the context of the quasi-parental relationship that subsisted.

93. It is significant that at no time was the Director, Mr. Bergin, cross-examined as to any matter contained in his affidavit and hence the evidence is not consistent with the appellant having been continuously subjected to an *ad hoc* punishment regime of the kind contended for. Section 18 of the Children (Amendment) Act 2015, which provides for a substitute s. 201 of the 2001 Act, has not yet been commenced. It will be recalled that s. 201 of the 2001 Act in its current iteration envisages the maintenance of discipline by the Director. It provides: –

> "(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…"

94. The measures taken by the Director were warranted in the appellant's own interests and bear no relationship to the materially different response adopted in *S.F.* which rightly warranted judicial criticism. Indeed it is significant that the single separation procedure operated by the Director represented a significant modification brought about directly as a

result of the Director, in conjunction with the board, considering and taking into account the decision of Ní Raifeartaigh J. in that case. The *Single Separation Policy* as applied in the case of the appellant has not been shown to have breached any relevant constitutional safeguard.

Equality guarantee in Article 40.1

95. The equality guarantee is expressed in Article 40.1 of the Constitution in the following terms: -

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

In *In re Article 26 and the Employment Equality Bill 1996* the Supreme Court observed at p. 346 that Article 40.1: -

> "…does not require the State to treat all citizens equally in all circumstances. Even in the absence of the qualification contained in the second sentence, to interpret the Article in that manner would defeat its objectives."

96. The key argument in the context of equality appears to be that the appellant, by reason of his minority, was treated less favourably than an adult prisoner in like circumstances would have been under the relevant Prison Rules such as gave rise to a breach of the constitutional guarantee of equality under Article 40.1 of the Constitution.

97. The trial judge noted that the test for identifying an appropriate comparator has been set out in *M.R. and D.R. (minors) v. An tArd Chláraitheoir* at p. 611 as follows:-

> "241. …Any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement " (emphasis added)

As is observed in *Kelly: Irish Constitution* (5th edn., Bloomsbury Professional, 2018) at para. 7.2.76: -

> "Failure to comply with this requirement accounts for a number of recent unsuccessful invocations of Article 40.1"

98. With regard to a consideration of the principle of equality before the law in the context of detention, it is noteworthy that Ó Dálaigh C.J. when considering distinct regimes as between adults whose extradition was sought to the United Kingdom and those to another

country in *The State (Hartley) v. Governor of Mountjoy Prison* (Unreported, Supreme Court, 21 December 1967) observed: -

> "A diversity of arrangements does not effect discrimination between citizens in their legal rights. Their legal rights are the same in the same circumstances. This in fact is equality before the law and not inequality…"

This view was reiterated by Ó Dálaigh C.J. in *O'Brien v. Keogh* [1972] I.R. 144 at p. 156 wherein he noted that "Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances."

99. The Supreme Court judgment in *B. (a minor) v. Director of Oberstown Children Detention School* of O'Malley J. was delivered after the hearing of this appeal. The primary issue was whether a child serving sentences of detention under the 2001 Act is entitled, on the basis of the equality guarantee in Article 40.1 of the Constitution, to be treated in the same manner as adult prisoners in respect of all aspects of the rules regarding remission of sentences.

100. As in this appeal, in the case of *B.* reliance was placed by the appellant on the decision of Hogan J. in the High Court in *Byrne (a minor) v. Director of Oberstown School*. Concerning that decision, O'Malley J. observed at pp. 475 to 476:-

> "23. It must be emphasised at the start… that the legal and factual context differed from that of the instant case…
>
> 28. …Hogan J. accepted that a good deal of latitude must be granted where the Oireachtas differentiates between classes of persons for reasons of social policy, provided that the differentiation was 'intrinsically proportionate and reasonable'."

101. She noted that Hogan J. had accepted at para. 28 of *Byrne* that the confinement of young persons or children:-

> "…could not realistically be equated with ordinary prison conditions. …it might be plausibly contended that the rationale for the operation of remission within the prison regime (namely, a reward for good behaviour) would not necessarily translate into the special context of a compulsory educational regime for young offenders which was fundamentally different from prison itself."

102. O'Malley J. in *B.* further observed at p. 480: -

> "47. It is of course accepted that Art. 40.1 does not require the State to treat all citizens equally in all circumstances, and that Hogan J. was correct in stating that much latitude had to be allowed where the Oireachtas differentiates between classes of persons for reasons of social policy. However, the case made is that, having regard to the provisions of the Act of 2001, detention in Oberstown is not seen by the Oireachtas as essentially different to detention elsewhere in the juvenile or indeed the general criminal justice system."

Equality and classifications based on age

103. Classifications based on age could not be regarded as, of themselves, constitutionally invalid. However, they must be capable of justification on the grounds set out by Barrington J. in *Brennan v. Attorney General* at p. 480: -

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

104. In *B.* O'Malley J. concluded at p. 484 that the appellant's claim that he had not been treated equally *vis-à-vis* adult prisoners was not well founded: -

> "67. …It could be successfully maintained only if the rationale of the Children Act 2001, which distinguishes clearly between children and adults, were to be challenged and undermined."

105. In the earlier decision of *G. v. DPP* [2014] IEHC 33 O'Malley J. stated, in the context of a case concerning expeditious trials of young persons: -

> "92. Children differ from adults, not just in their physical development and lesser experience of the world, but in their intellectual, social and emotional understanding. It is for this reason that it has long been recognised that it is unfair to hold a child to account for his or her behaviour to the extent that would be appropriate when dealing with an adult. Further, it has been accepted since, at least, the enactment of the Children Act of 1908, that the fact that these aspects of personality are still developing means that intervention at an early stage, rather a purely punitive approach, may assist in a positive outcome as the child reaches adulthood.
>
> 93. This is not to say that the law regards adults as incapable of development or change - the principle of rehabilitation is a cornerstone of sentencing and penal policy. It is an acknowledgment of the fact that a child is in the process of development. It is the policy of both the legislature and the courts, therefore, to assist in that process in a positive way where practicable. This policy is one that respects both the rights of the child as an individual and the public interest in steering a child offender into a more law-abiding path.
>
> 94. It is for these reasons that the Children Act, 2001 provides the range of protections that it does. For example, the provisions in relation to anonymity do not just protect children, guilty or innocent, from what might for them be the intolerable burden of publicity. They also ease the process of rehabilitation in the case of a guilty child, permitting him or her to grow to adulthood without having to deal with that burden.
>
> 95. The other significant aspect of childhood is that it is, by definition, a transient status. The law does not attempt to measure personal maturity with a view to deciding whether a person should be treated as a child or not, but provides that, in law, childhood ends at the age of eighteen." (emphasis in original)

106. O'Malley J. in *B.* reiterated her earlier decision in *G.*, observing at p. 484: -

> "69. …the Oireachtas has determined that the seventeen-year-old should be treated differently because of his age. In so doing, it has clearly acted on the basis of a perceived difference, that is seen as relevant in the context of the criminal justice system, in the capacity and social function of adults and children. There is undoubtedly a constitutional imperative to protect children. Since the Constitution leaves it to the Oireachtas to decide when the status of childhood ends, this differential treatment can only be challenged on the basis that it is, in principle, unconstitutionally invidious. That argument has not been made in this case."

107. At pp. 485 to 486 she observed: -

> "71. When one compares those penal regimes, it will be seen that the incentives to engage in positive behaviour while in custody differs significantly…
>
> 72. Under the regime created by the Children Act, on the other hand, certain goals will be achievable far more swiftly. …The scheme of incentives is incremental, and geared towards relatively short-term steps, according to the planned management of the individual child's sentence…
>
> …
>
> 75. My analysis thus far is based on what appears to be the statutory policy in relation to custodial sentences for children. No evidence has been adduced that might tend to undermine the rationale of that policy…
>
> 76. I do not consider that the analysis in *Byrne* is in any way inconsistent with the foregoing. It is entirely clear that in that case Hogan J. was dealing with an unjustified distinction between two categories of young offenders, within the context of the juvenile criminal justice system. …In the instant case, however, the court has been asked to accept that the penal regime that applies to all children should be compared with that established for adults. The presumption of the legislature, that the differences between children and adults calls for different regimes, has not been shown to have been factually incorrect or unfair in principle."

108. As the decision of the Supreme Court in *B.* confirms, the detention regime which applies to all children should not be compared with the penal regime established for adults. The presumption of the legislature that the differences between children and adults calls for different regimes has not been shown to be factually incorrect or unfair in principle. Hence, the earlier decision of *Byrne (a minor) v. Director of Oberstown School* is clearly distinguishable, as *B.* confirms.

109. The equality argument contended for by the appellant is, at best, an example of the misguided analysis referred to in *Murphy v. Ireland* [2014] IESC 19, [2014] 1 I.R. 198 where O'Donnell J. commented at p. 229:-

"36. Notwithstanding the power and importance of equality analysis, this is but one further example of a case where the plaintiff's complaint is not, in truth, grounded in any impermissible differentiation, and where analysing the case in terms of equality rather than substantive rights only adds a further redundant, and possibly confusing, stage to the analysis."

110. Although the Supreme Court judgment in *B.* was delivered after the hearing of this appeal, as it confirmed O'Malley J.'s decision in *G.* and noted the acceptance by Hogan J. at para. 28 of *Byrne* that the comparison between child detainees and adult prisoners is inapt, it was not necessary to reconvene to hear further submissions.

Is the Minister obliged to make regulations or require the board to make rules?

111. Section 179 of the 2001 Act, as amended, provides: -

> "The board of management of a children detention school or schools may at any time with the consent of the Minister, and shall whenever so required by the Minister, make rules –
>
> (a) for the management of the school or schools under its management and the maintenance of discipline and good order generally therein…"

112. At p. 473 of her judgment in *B.* O'Malley J. noted: -

> "12. The Act provides for the setting up of boards of management for the schools. A board may, and must if required by the Minister, make rules for management of the school (s. 179). …The rules must be consistent with any regulations made by the Minister, or any criteria so laid down, or general directions given by him or her for the management of the school."

113. Section 179 does not give rise to a mandatory obligation to enact rules as the appellant contends. Having due regard to the separation of powers, a court should be slow to intervene in matters concerning the day to day running and management of detention centres. Such intervention risks undermining the capacity of the Director to effectively fulfil the statutory objectives of the 2001 Act. There is force in the respondents' argument that the substantive rights of child detainees (as described in *S.F.*) inhere in them automatically and so the absence of rules does not have the material effect the appellant contended for.

114. Similarly, pursuant to the terms of s. 221 of the 2001 Act, the Minister may make regulations for the control and management of children detention schools but is not obliged to do so. I am satisfied that the trial judge correctly concluded that the Minister had in effect a discretionary power pursuant to s. 221 of the 2001 Act, as amended. There was no valid basis identified by the appellant for the contention that the absence of rules constituted invidious discrimination.

CONCLUSIONS

115. From a factual perspective the repeated contention on behalf of the appellant that he was "continuously subjected to an *ad hoc* punishment regime" is not supported by the

evidence. On each of the occasions in question specific, serious incidents occurred involving the appellant. Such acts by a fifteen year old young person such as the appellant in any circumstance warranted a response. On each occasion, as the uncontested evidence of the Director demonstrates, the appellant was placed in single separation first and foremost in the interests of his own welfare and safety.

116. Whereas the appellant seeks to categorise particular actions taken by the Director as either constituting a punishment or as an administrative measure, such characterisations fail to have due regard to the nuanced, child-oriented remit of the Children Acts 2001 to 2015 and in particular the objectives identified in s. 158 of the 2001 Act. The process adopted was proportionate, appropriate and involved direct personal engagement aimed at addressing serious negative behavioural issues and incentivising personal improvements.

117. Section 5 of the Children Act 2001 provided for the repeal of, *inter alia*, the Children Act 1908 and s. 156 provides that no court shall commit a child to prison as distinct from a children detention school or centre. This underscores the wholly distinct nature of the children detention regime from a prison regime in all material respects.

118. The use of segregation in the instant case cannot fairly be characterised as a sanction or punishment having regard to all the surrounding circumstances and the events that confronted the Director, a person in *loco parentis*, in September 2018. The evidence demonstrated that there were clear grounds for the Director believing that such segregation was necessary in the interests of the welfare of the appellant and having due regard to the appellant's own best interests, including his psychological and emotional wellbeing. It represented no more than a reasonable and proportionate exercise of appropriate supervision over the appellant in circumstances where his behaviour represented a risk to his mental and moral development and his welfare and undermined the process of his reintegration into society upon his release.

119. It follows from that conclusion that the separation measures did not amount to punishment, and the claim that there was a breach of fair procedures is not maintainable. Furthermore the trial judge's analysis, which concluded that even if the appellant had established an entitlement to fair procedures there had been no breach of same, was a sound conclusion in light of the facts, including the gravity of the acts of the appellant; the exigencies and urgency brought about by the appellant's personal agency and conduct in the course of the various incidents relied on; and, the risks arising to his own safety, those of others and the damage to property.

120. I am satisfied that there was cogent evidence which demonstrated to the satisfaction of the High Court that there were reasonable grounds for the Director to believe that segregation was necessary and that same was a proportionate response in all the circumstances having regard to the welfare of the appellant and the interests of other affected persons such as those against whom threats had been made by the appellant, including staff. It is in the interests of the welfare of all detainees – as well as of the appellant - that threatening behaviour not go unchecked. The requirements of security

and stability in the day to day environment is a necessary prerequisite for the delivery of the principal objectives of Oberstown as specified in s. 158 of the 2001 Act. The segregation operated was tailored to the circumstances of the appellant including that it took place in his own room, an environment with which he was clearly familiar, and was for a limited duration. It was on balance indicative of a minimum, necessary measure warranted to ensure the safety of the appellant himself, other inmates and staff and was, in all the circumstances, proportionate.

121. The Director maintained at all material times appropriate and comprehensive oversight of the process and he in turn, in the discharge of his duties of care and control, was subject to oversight by the board of management.

122. The mission statement of Oberstown, referred to above, wholly accords with its statutory remit and includes the objectives as part of the custodial service of reducing risk to the individual and others; providing a safe, secure and caring environment; and, preparing the young detainee for their return to the community and to their family with a reduced risk of reoffending.

123. It is clear from the terms of the operative *Single Separation Policy* that it had been carefully developed with due regard to the relevant jurisprudence and legislation and it readily acknowledges that "separation from their peers has the potential to negatively impact young people".

124. To insist, as the appellant contends, that the operation of the *Single Separation Procedures*, particularly in September 2018, was such as to trigger the panoply of safeguards contended for is disproportionate, unrealistic and would significantly undermine the capacity of the Director to discharge his statutory functions and obligations with due regard to s. 180(8) and achieve the primary objectives specified in s. 158 of the 2001 Act. It would be significantly counterproductive insofar as it would escalate relatively routine issues as might be encountered, particularly amongst teenagers and young persons, into a formalised process and hinder quick, targeted responses calculated to address the immediate state of affairs identified as posing a risk to the detainee, peers, staff or property. In the context of young persons in detention it would significantly undermine the capacity of Oberstown's Board and its Director to provide guidance and to exercise proper moral influences on the young person in question and risks impeding the promotion of their reintegration into society following the detention period.

125. The threats the appellant was making towards staff were serious and had to be responded to by the Director in a manner which balanced a series of competing interests including the welfare of the appellant himself as a young person who was clearly engaging in wholly inappropriate behaviour which warranted being checked; the safety, health and welfare of staff at the centre who were entitled to work in an environment where they are not subjected to sexual harassment and threats; and, the impact on other inmates of such behaviour and the importance of ensuring that such conduct was not endorsed or acquiesced in or treated as normative given the objectives of the detention centre and the statutory regime under which it operated.

126. The measures taken by the Director in respect of the appellant were welfare oriented, reasonable and proportionate in all the circumstances and in light of the risks that were unfolding. The Director at all times acted in *loco parentis* and that is an important prism through which his actions and the measures taken in the circumstances must be viewed with due regard to the statutory remit and the express provisions of s. 180 of the 2001 Act.

127. As the trial judge correctly observed at para. 6:-

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

128. The reliance by the appellant on the decision of Ní Raifeartaigh J. in *S.F.* was, as the trial judge correctly concluded, "misplaced". It ought to have been apparent to the appellant's solicitor, Mr. Kenny, upon receipt of the email from the Director on 18 September 2018 that the separation measures operated in relation to the appellant were entirely distinguishable in all material respects and, as Simons J. correctly concluded, did "not exhibit any of the features which had been of considerable concern to the High Court in *S.F.*" Critical distinguishing elements included that the measure was of the short duration of six days with restrictions being gradually reduced over ensuing days. The appellant was allowed throughout the period the continued use of his own room. He had regular telephone contact with his mother, father, girlfriend and solicitor. He had a consultation with his solicitor and had access to exercise and fresh air. His educational welfare was also being addressed by means of access to an educational pack provided in his room.

129. Even a cursory perusal of Oberstown's *Single Separation Policy* (May 2017) and *Single Separation Procedures* (July 2018) could have left little doubt but that the findings and conclusions of the trial judge in *S.F.* had been taken on board by the Director and earlier practices criticised in that judgment had been discontinued or significantly modified.

130. The contention that there had been a breach of the constitutional guarantee of equality before the law under Article 40.1 was correctly demonstrated by the trial judge to have been unfounded. Article 40.1 expressly allows for the enactment of legislation which has due regard to differences of capacity. As the mission statement of Oberstown and affidavit of Mr. Bergin demonstrated, there are fundamentally different challenges and objectives arising in a child detention centre such as render comparisons with the rules and regimes in adult prisons of the kind being raised in this case wholly misplaced.

131. The comparisons offered between the position of an adult prisoner under the relevant Prison Rules and the appellant as a child detainee under the 2001 Act were "inapt" as the trial judge correctly concluded. Differences in treatment of the appellant to that obtaining

in an adult prison setting reflect the material distinction in capacity between a child and an adult detainee. Such a conclusion is supported by the jurisprudence, including *J. v. District Justice Delap* [1989] I.R. 167 at pp. 169 to 170 per Barr J. and *S.F. (a minor) v Director of Oberstown Children Detention Centre* at paras. 60 to 61. The appellant failed to demonstrate that their respective circumstances were comparable.

132. Whilst article 6 ECHR was invoked during the appeal, it is noteworthy that the European Convention on Human Rights Act 2003 was not pleaded or properly invoked by the appellant. Furthermore the jurisprudence sought to be relied on, particularly the case of *De Tommaso v. Italy* is wholly distinguishable insofar as it concerned an adult prisoner. Whilst reports and recommendations of international bodies, including the United Nations and the Council of Europe, are of general interest their proposals or recommendations are clearly not justiciable. Reports of international bodies do not have the force of law in this jurisdiction.

133. I am satisfied that this appeal ought to be dismissed. The findings, reasoning and conclusions of the trial judge are unimpeachable. No ground of appeal has been made out.

134. With regard to costs, the appellant is granted liberty to file written submissions on the appropriate form of costs order within 21 days of delivery of this judgment and the respondents will have a like period within which to furnish a submission in response; such submissions not to exceed 1,500 words in length. Should this court deem it necessary and so inform the parties, the appellant may file further submissions addressing the respondents' costs submissions within 21 days of their filing.

135. Haughton and Murray JJ. have confirmed that they are in agreement with the above judgment.