THE HIGH COURT

[2021] IEHC 803

[2021 No. 814 JR]

BETWEEN:

MS Y AND MISS X (SUING THROUGH HER MOTHER AND NEXT FRIEND, MS Y)

APPLICANTS

-AND-

THE HEALTH AND SAFETY EXECUTIVE['HSE']

RESPONDENT

-AND-

THE CHILD AND FAMIY AGENCY ['CFA']

NOTICE PARTY

-AND-

DR DAVID FOLEY

GUARDIAN AD LITEM

Following receipt of the further report from the guardian ad litem *and the further hearing thereafter of J Sh March 2023 this judgment is now being published An order prohibiting the identification of the subject of the judgment or the details of the ailment of same (such as might enable her to be identified) remains in place.*

JUDGMENT of Mr Justice Max Barrett delivered on 18th October. 2021.

SUMMARY

Miss Xis an adolescent child and a person with a disability. The HSE has known since February 2019 that her case was 'bubbling up' through the system and it has known since spring/summer 2020 that it was most likely (it later became entirely elem) that Miss X would and will require residential treatment for her ailments. Yet despite this knowledge, the HSE allowed a situation to arise in which on 25th August 2021, with no residential place arranged for her, Miss X was placed in a room off a busy emergency department ward in a regional hospital. Miss X has now been left to languish in that hospital room for close on 60 days. She and her mother have come seeking certain declarations as to the unlawfulness presenting in her situation. The court will make various declarations in this regard. Though this has never been a case about money, Miss X's statement of claim also seeks an award of damages. This was not the subject of argument at hearing and it is not entirely clear to the court whether this relief continues to be sought. The court proposes to hear further from the parties in this regard, both as to whether the pre-conditions to an award of damages identified in 0.84, r.25 of the Rules of the Superior Courts 1986, as amended, are satisfied in the case at hand, and also as to the appropriate scale of any (if any) general damages that might fall to be awarded on the very particular and egregious facts of this case.

I
Overview

1. Miss X is an adolescent child and a person with a disability. The HSE has known since February 2019 that her case was 'bubbling up' through the system and it has known since spring/summer 2020 that it was most likely (it later became entirely clear) that Miss X would and will require residential treatment for her ailments. Yet despite this knowledge, the HSE allowed a situation to arise in which on 25th August 2021, with no residential place arranged for her, Miss X was placed in a room off a busy emergency department ward in a regional hospital. Miss X has now been left to languish in that hospital room for close on 60 days.

2. Miss X's containment at the hospital (the court hesitates to use the word 'placement' because that falsely suggests her stay at the hospital to have been the outcome of some sort of programmatic arrangement) is not at all suitable for her and, unsurprisingly, is having a detrimental effect upon her. Rather shockingly, she has not been outside in the fresh air for the entirety of her time in the hospital. By way of diversion, she has belatedly been provided with a television and with internet access, neither of which, of course, are especially healthy diversions.

3. The HSE has come to court indicating that it is doing lots of things now to try and sort out matters. However, it had over a year to get things so1ied out and just did not - and no good explanation has been offered as to why it did not. So when it says that it needs now to get HIQA approval of its presently intended placement of Miss X (it is slightly wrong in this, as will be seen), it would have known in 2019 and in 2020 and in early-2021 that approval of any placement would be needed. Consequently, it is no excuse now to say that it would love to place Miss X in a placement straightaway but that in reality its doing so will just take time. The groundwork which is causing the present time problem should have taken place in 2019 or in 2020 or in early-2021 and patently was not. No excuse has been offered for this lamentable delay - and its present expressions of regret, to use a colloquialism, simply do not 'cut the mustard' when one is dealing with so serious a situation as a child who is in need ofresidential care and who, thanks exclusively to the HSE's ineptitude, is now being left to languish in long-term semi-isolation, in a room off an emergency department ward, in a hospital that is simply not geared to meet her complex needs.

4. At the behest of a clearly desperate family, two members of the Oireachtas - perfectly properly and in the lawful performance of their duties as public representatives - approached the HSE at different times to ask what progress was being made in Miss X's case. The two members are the Tanaiste, Dr Leo Varadkar, TD, and the Minister of State for Disability, Ms Anne Rabbitte, TD. Doctor Varadkar (then Taoiseach) was told in March 2020 that a placement or some form of intensive home support was planned for Miss X. Yet by August 2021, no placement had been arranged (the possibility of intensive home support was no longer a feasible option by that time). With Ms Rabbitte, unless there was some form of innocent mis-communication (and there is no evidence to suggest that there was some mis-communication nor has this even been claimed) her officials appear to have been told by the HSE in June 2021 that Miss X would be in a placement by mid-August 2021. This was then relayed to the parents. Yet, at the time of writing (17th October 2021), Miss X is not in a placement, she is confined in an unsuitable hospital room, and there is no sign of a placement until sometime in 2022. The court does not understand, and no adequate explanation has been given, as to how Minister of State Rabbitte could have been told what she was told in June 2021.

5. Miss X has come to court seeking various declarations as to the lawfulness of how she has been treated by the HSE. The comi will grant the declarations sought. However, none of these

declarations will achieve what Miss X really needs, which is to be transferred out of the hospital room as soon as possible and placed in an appropriate placement. Additionally, though this has never been a case about money, in her statement of claim Miss X has also sought damages. This was not the subject of argument at **hearing** and it is not entirely clear to the court whether this relief continues to be sought. The court proposes to hear further from the parties in this regard, both as to whether the pre-conditions to an award of damages identified in 0.84, r.25 of the Rules of the Superior Courts 1986, as amended, are satisfied in the case at hand, and also as to the appropriate scale of any (if any) general damages that might fall to be awarded on the very particular and egregious facts of this case.

II
Summary Chronology

6. Miss Xis an adolescent child and a person with a disability. She has received the diagnoses identified at para. f(ii) of the statement of grounds. Out of respect for her privacy, the court does not propose to discuss Miss X's medical history in detail. Her medical history is well known to all involved. Instead, the court identifies hereafter certain pertinent elements of Miss X's personal history, so far as is relevant to these proceedings, by way of a suitably anonymised summary chronology:

2018.	Inpatient stay required in mental health unit.
April 2019.	Admitted to hospital after particular event. While in the hospital Miss X began to show signs of physical aggression towards the staff and they found it difficult to manage her. She was subsequently discharged.
End-April 2019.	Miss X was admitted by way of emergency admission to a mental hospital.
End-May 2019.	Miss X was discharged from mental hospital. While there Miss X was physically aggressive to staff and had to be placed in an isolation room.
July-November 2019.	CFA became involved with family due to perceived risks posed to siblings by Miss X.

	These supports broke down in November 2019 because of the worsening behaviour of Miss X and also because she became unhappy with some aspects of her care.
October 2019.	HSE contact NUA Healthcare with a view to arranging care for Miss X. Although these care arrangements did not proceed, a behaviour report provided by NUA identified various challenging behaviours which it described (Statement of Grounds, p.7) as including "[intra-familial] *physical assaults, the use of weapons, assaultive behaviours towards animals and threats of suicide".* A risk assessment was not carried out /,lt this time by either the HSE or the CFA. Additionally, no offer of a residential placement or respite placement was made by either agency.
December 2019- January 2020.	Miss X appears to have been in a quite agitated state around this time, culminating in a distressing episode on New Year's Eve. The Gardai had to be called to the family home on a number of occasions as a result of her threatening behaviour. The arrival of the Gardai and the necessary restraint of Miss X by them was, of course, upsetting for Miss X, a vulnerable minor. (It was also, as it happens, very upsetting for the Gardai, one garda later indicating to Miss X's mother that following one of these call-outs she went home and cried. If that was how a professional, and clearly empathetic, police officer responded to the events, one can only imagine how much more upsetting they must have been for Miss X and her family).

February 2020.

Since in or around this date the HSE has acknowledged that Miss X needed to be placed in a residential setting or that more intensive in-home support needed to be provided. Yet the HSE nonetheless allowed a situation to arise in which the current 'placement' *(sic)* was effected on 25th August 2020. All the current talk by the HSE that it is doing all it can but that things just take time to put in place unfortunately rings hollow when one has regard to the extraordinarily long lead-in to the 'placement' *(sic)* of 25th August 2021.

2nd March 2020.

Sometime in the spring of 2020, Miss X's worried family wrote to the then Taoiseach, Dr Leo Varadkar, TD, asking for his help. Dr Varadkar, perfectly properly, made enquiries as to what was happening and on 2nd March 2020 received a letter from a senior HSE official indicating, amongst other matters, that:

> *"It is the view of Miss X's treating CAMHS* [Child and Mental Health Services] *Consultant that Miss X requires either a residential placement staffed by people who understand* [a stated condition]*...or for* [a stated type of] *therapists to be in the home on a much more frequent basis"*

Dr Varadkar then relayed this information to the family. It is notable that in its letter to Dr Varadkar, the HSE acknowledges that a placement or intensive home support are

	acknowledged to be required. Yet the HSE still allowed events to unfold in such a way as to lead to the 'placement' (sic) of 25th August 2021. Again, all the current talk by the HSE that it is doing all it can but that things just take time to put in place unfortunately rings hollow when one has regard to the extraordinarily long lead-in to the 'placement' (sic) of 25th August 2021.
Easter 2020.	Miss X engaged in threatening behaviours that resulted in a sibling locking himself into a room and calling the Gardaf out of fear.
May 2020	Studio III conducted a multi-disciplinary assessment of Ms A and made several observations/recommendations, including the following: (i) Miss X posed a significant risk to herself and to family members, (ii) if appropriate supports were not but in place there were significant concerns as to the potential harm Miss X might cause to herself or others; (iii) a risk assessment in respect of Miss X living in the family home on a full-time basis was recommended; (iv) the possibility of Miss X receiving support through an outreach service, day service, *etc.* were all pointed to as needing to be explored. Again, all the current talk by the HSE that it is doing all it can but that things just take time to put in place unfortunately rings hollow when one has regard to the extraordinarily long lead-in to the 'placement' *(sic)* of 25th August 2021 and the fact that the comprehensive Studio III report issued in May 2020.
20th May 2020.	Teleconference meeting attended by HSE, CFA, *etc.* was held.

March 2021.	Following the May 2020 assessment, Miss X's parents continually engaged with the HSE Disability Services and also with the CFA with a view to a risk assessment being carried out on Miss X and to bring home to those State agencies the risk that presented both for Miss X and her family if she remained at home. Yet these behaviours went largely unaddressed. It is not at all clear why this is so and a question must arise whether the events of this summer might have been avoided if the HSE had been more active around this time: the answer cannot now be known. By March 2021, Miss X's parents, concerned by Miss X's continuing behaviours and the risk she posed to family members sought an urgent residential placement from the HSE.
29th March 2021.	Studio III sent an email to the HSE indicating, amongst other matters, as follows:

> *"[T]he current situation is very concerning. Miss X has been home for a* [stated period] *with family trying to support her. Miss X is presenting a significant risk of harm to herself and members of her family, including young children. There are huge safeguarding concerns. In my opinion based on the information presented today this young woman needs a place of safety to allow her to* [be] *stabilised for at least 6 weeks. In addition, I do note that Miss X needs input in*

terms of her [stated condition]... *which is going to be a lengthy task. I understand that Miss X has a complex presentation and that any emergency placement may require practical advice and support".*

Notably, at this point an out-of-home placement was being recommended for Miss X. This recommendation of March 2021 cannot have come as a surprise. After all, it came more than a year after Dr Varadkar was advised by the HSE *"that Miss X requires either a residential placement staffed by people who understand* [a stated condition]... or *for* [a stated type of] *therapists to be in the home on a much more frequent basis".* Again, all the current talk by the HSE that it is doing all it can but that things just take time to put in place unfortunately rings hollow when one has regard to the extraordinarily long lead-in to the 'placement' *(sic)* of 25th August 2021.

30th March 2021.

A senior HSE official acknowledged that a residential placement is necessary. It is difficult to understand how such an acknowledgment could have come in March 2021 but the HSE still allowed events to unfold in such a way as to lead to the 'placement' *(sic)* of 25th August 2021. And again, all the current talk by the HSE that it is doing all it can but that things just take time to put in place unfortunately rings hollow when one has regard to the extraordinarily long

lead-in to the 'placement' (sic) of 25th August 2021.

15th June 2021. A clearly worried family continued to engage with public representatives to see if anything could be done for Miss X. This yielded a letter of 15th June 2021 in which the private secretary to Ms Anne Rabbitte, the Minister of State for Disability, indicated, amongst other matters, as follows:

> *"Officials in the Department of Health have made enquiries of the HSE in relation to the issues raised in your emails ....As she* [the Minister of State] *understands it, Miss X previously had a residential place in County [-] ... and an alternative place has now been located with* [stated service provider]....*The HSE has advised that this may take up to eight weeks to put in place given the complexity of support needs for Miss X'.*

The court is typing up this judgment on the weekend of 15th-17th October, so exactly four months after this letter was sent and after the above assurances appear to have been given by the HSE to the Minister of State (unless there was a complete misunderstanding as to what was communicated, and there is nothing in the evidence to suggest that there was). Yet, at the time of writing, no residential place has been made available to Miss X and the timeline

before the court indicates that something may be available in early-2022. The court does not understand (not at all) - nor has any good explanation been provided - as to how the officials of the Minister of State with specific responsibility for people with disabilities, could seemingly be told by the HSE in mid-June that a placement would be effected by mid-August and yet in mid-October there has been no placement and there is only lately the promise of such a placement in 2022.

26th July 2021. Following the May 2020 assessment, Miss X's parents continually engaged with the HSE Disability Services and also with the CFA with a view to a risk assessment being carried out on Miss X and to bring home to those State agencies the risk that presented both for Miss X and her family if she remained at home. Yet these behaviours went largely unaddressed until a most serious crisis situation in the family home led to Miss X's further hospital admission on 26th July 2021.

30th July 2021. At a HSE-family meeting, it was agreed that respite accommodation would be provided for Miss X and there was general agreement that Miss X could not return to the family home at the end of the respite period. While the court accepts that the form signed by Miss X's mother authorising her daughter's move into respite accommodation indicated that what was being provided was a temporary arrangement, the fact of the existence of such general agreement rings true, not least because when one reads, as the court has read, the details of

	all that had happened in the family home to this time, any notion that Miss X would have been able to return home without positing a considerable threat to herself and others was and would have been patently absurd.
2nd August 2021.	Miss X moved from hospital to the respite accommodation.
13th August 2021.	In a move that was most strange, given all the circumstances presenting (and given the meeting of 30th July), Miss X's parents were contacted on 13th August by the HSE and told that they would need to collect Miss X from the respite placement on 16th August and bring her home. Miss X's mother, who must have been at her wit's end following this communication and knowing all that had gone before, indicated that she would not be able to maintain Miss X in the family home. That is a very sad message for any good mother to have to relay.
16th August 2021.	Mr Gareth Noble, a partner in KOD Lyons (the law firm acting for the applicants in these proceedings) called on the HSE to confirm that Miss X would be maintained in the respite placement pending the outcome of certain assessments being carried out by the HSE. In response, the HSE offered to extend the respite placement by two weeks.
23rd August 2021.	Bizarrely (there is no other word for it), on 23rd August (so one week after Mr Noble's interactions with the HSE), the HSE contacted Miss X's parents and required that they collect Miss X from the respite placement on that very day. Mr Noble brought this correspondence to the attention of the HSE but received no reply.

	The court admits to very considerable astonishment at the manner in which the HSE sought to welch on what had been agreed with Mr Noble, and also at the dreadful predicament in which the HSE's actions placed Miss X's parents. The day of 23rd August must have been most troubling and distressing for them.
24th August 2021.	On the 24th, Miss X's parents were contacted by the HSE and told that they would need to collect Miss X from the respite placement by 17:00 on that day. Miss X's mother indicated that this was in breach of the additional two-week timeline agreed with Mr Noble and also indicated (as if the HSE did not already know this) that it would not be possible for Miss X to come back to the family home because of the risks she posed. Again, the court admits to very considerable astonishment at the manner in which the HSE sought to welch on what had been agreed with Mr Noble, and also at the dreadful predicament in which the HSE's actions placed Miss X's parents. The day of 24th August must have been most troubling and distressing for them. The court does not know what Miss X was being told around this time and can only hope that she was not repeatedly being told 'You're going home'/'You're not going home'.
25th August 2021.	Miss X was placed in a general hospital that is not equipped to deal with her complex needs. At the time of writing this judgment, over the weekend of 15th- 17th October 2021, Miss X continues to be in that hospital, living an isolated existence in a room off a busy A&E

department, with a couple of staff stationed outside the door to make sure that she does not escape. The court considers in some detail later below the bleak nature of Miss X's existence at the hospital. It would but note at this juncture that the manner in which she has been accommodated is simply appalling: counsel for Miss X used the word 'abominable' in his submissions and the court would not demur from his use of that word. It is no way to treat any human being in need of the type of structured relief that the HSE's own advisors have identified and it is so much worse that it has happened in respect of a child, and more, a child with a disability. What makes all this so perplexing (and, for Miss X and her **parents,** doubtless so vexing) is that the HSE, for example, (i) knew from February 2020 that a placement or intensive home support would be needed, (ii) communicated in June 2021 to the Department of Health and ultimately the Minister of State for Disability that a placement would be in place by mid-August 2021, yet still (iii) allowed a situation to unfold in which a child with a disability was placed on her own in an off-emergency department room on 25th August 2021, where she has languished ever since, not once going out for fresh air and only lately being provided with television and wi-fi (as if those were boons for an adolescent child who should be up and about and engaged in suitable therapies, not watching TV and looking at the internet all the time). All the current talk by the HSE that it is doing all it can but that

things just take time to put in place unfortunately rings hollow when one has regard to the extraordinarily long lead-in to the 'placement' *(sic)* of 25th August 2021. It had all the time in the world to get things right; instead, through its own ineptitude, it has got them hopelessly wrong and Miss X is considerably the worse off for this failure. Nor was the court at all impressed by the efforts (the surreal efforts when one has regard to the abundance of contrary evidence) that the HSE at times appeared to engage in during these proceedings to convey the notion that it was almost taken by surprise by what has happened in Miss X's case, as if hers was a problem that arose *de nova* and without warning in the summer of 2021, with the HSE thereafter doing its best to craft a solution. The HSE just cannot have been surprised. There was a long lead-in to Miss X's placement in the general hospital. The idea that the placement of 25th August 2021 rolled up without warning and landed unexpectedly in the lap of an unwitting HSE in the summer of this year is not correct.

27th August 2021. The general hospital manager indicated that Miss X is medically fit for discharge, doubtless heaping pressure on Miss X's already **burdened** parents as to what was going to happen next.

30th August 2021. Mr Noble in a letter of 30th August called on the HSE to identify a placement to which Miss X could be transferred in order that she might safely be discharged from hospital. Mr Noble also contended that Miss X's placement in a hospital setting involved violations of her rights

as a minor and as a disabled person. A later-received reply from the HSE indicated that multi-disciplinary assessments of Miss X were ongoing and had not yet been completed; no indication was given as to when these assessments would be completed and no indication was given. It is very difficult to square the sudden undertaking of such assessments with, for example, the assurances that were relayed to the Minister of State in June 2021 that a placement would be done by mid-August, those assurances thereafter being relayed by the Minister of State's private secretary to Miss X's family.

In an email of 30th August, the general manager of the hospital where Miss X to this day continues to be accommodated indicated to Miss X's mother that he was not receiving adequate support from the HSE's Disability Services in order to care for Miss X. He indicated that he intended to ask the Gardaf to invoke s.12 of the Child Care Act in respect of Miss X. As it happens the Gardai, perfectly properly, declined to invoke s.12. As will be seen later below in the consideration of the perfectly reasonable and legally correct position of the CFA, this is not a case for a care order and s.12 essentially provides for emergency removal of a child to safety where there is just not the time to obtain an emergency care order (if such an order is eventually sought), so its invocation would have been entirely inappropriate.

31st August 2021.	In a letter of the 31st, Mr Noble indicated to the HSE that the HSE had previously accepted that Miss X required a residential placement and that there could be no reasonable or rational basis to resile from that position at this point. He called upon the HSE to facilitate Miss X's discharge from hospital to a safe residential setting and warned that if this did not occur Miss X's mother would institute legal proceedings to protect her daughter's position, vindicate her rights and challenge the actions taken by the HSE.
3rd September 2021.	An agent of the HSE responded to Mr Noble's correspondence of the 30th but did not give any indication as to when Miss X would be discharged from hospital to a safe and suitable residential setting. The letter could have been worded better and the court is not surprised that Miss X's family appear to have taken umbrage at what seems to be the suggestion in the letter that there was some failing on their part as parents. It may be that the wording was simply infelicitous. The court would just note that the HSE is possessed of great power, and that, in a democratic society, for those to whom power is entrusted humility of action and expression is ever required as a matter of propriety.

III

Some Key Evidence of Dr Foley

7. The evidence of Dr Foley, the guardian *ad !item,* makes for bleak reading. It is not possible to quote it in its entirety, so some key paragraphs from his affidavit evidence are quoted below.

8. In passing, the court notes that in quoting from Dr Foley's affidavit evidence and also other affidavit evidence throughout this judgment it has (i) amended all references to Miss X's full name so that reference is made instead to Miss X, (ii) amended any references to the Health and Safety Executive to 'HSE', and (iii) amended any references to the Child and Family Agency to 'CFA'.

9. Dr Foley has averred, *inter alia,* as follows.

> *"6.* [Dr Foley at this point is describing a visit to Miss X on 8th September 2021]. *I say that I was most concerned* [about]*...the starkness of her room and the lack of any physical exercise or other stimuli available to her. There was no television or access to Wi-Fi. I was concerned that her social and educational needs were not being met. Staff were not instructed to engage in her activities and I was concerned that Miss X's isolation was being reinforced and facilitated by her circumstances. She was not in education notwithstanding Studio Ill's previous finding that she was 'a very intelligent young woman' and her lack of integration to the outside world was impacting on her ability to engage in social learning.*
>
> *7. I say that I was of the view at that point, some nineteen days after the admission, that the professional systems around Miss X had disintegrated and there existed a lack of a coherent or coordinated response from the State agencies. I noted that it was unfortunate that the joint working arrangements in existence between the various State agencies had not been effectively engaged as yet ....*
>
> *8. I say that Miss X had now* [this was following a further visit and a report of 1st October 2021] *had now understandably become more and more frustrated by her circumstances and this had led to her refusing to engage with staff. She expressed a wish to be heard and to be listened to. She worried that she would be 'locked up in some psychiatric hospital' and reasoned that this was what the professionals and her mother wanted ....*

11. *Ultimately* [in his report of pt *October] ...I...noted that despite discussions and meetings 'little or no progress had been made in creating appropriate circumstances where Miss X can leave hospital'. I noted that since the matter was last in court, Miss X continued to have 'minimum social interaction and stimuli other than that provided by professionals' and that she had 'also not had the opportunity to engage with any formal education '. I repeated my view that at 37 days without any significant change in her circumstances, the placement was detrimental to her welfare and her health and her presentation appeared to be 'negatively impacted by the failure to meet her psychological needs'.*

12. *I say that 11 days later, I prepared a further short report (dated the 12th of October 2021) in advance of the full hearing of the issues in the within proceedings ....*

13. *In said report, I detailed my meeting the previous day with Miss X and the various case discussion meetings held between the stakeholders. Though Miss X had been provided with access to wi-fi and a television, she remained without access to education, physical exercise, social contact with peers or excursions to the community. This had been the situation since she entered* [Stated Name] *Hospital 47 days earlier.*

14. *I say and recall that as Miss X was in somewhat of an agitated state and stated that she did not want to meet with me (or indeed anyone), I resolved to leave her be and indicated that I would talk to her again. The situation was remarkable in its bleakness as when I talked to care staff in the corridor outside, she sat in her room in total darkness at a mere 6.45pm. Care staff had indicated to me that she is very frustrated and this was the sense I took.from her presentation ....*

15. *I say and recall that the date of the first date of hearing in the within judicial review will coincide with Miss X being resident in the bare and stark room in* [Stated Name] *Hospital for a period of **50 days*** [emphasis in original]. *I noted in my most recent report*

that her current lived experience is one of isolation. The deprivation of her basic freedoms and the lack of exposure for Miss X to her 'social system' results in her being avoidably hampered in terms of achieving biological maturity, the development of her sense of identity and her sense of self, adding to her understanding of intimate relationships and her establishment of degrees of independence and autonomy. She is missing out on a vital period of her adolescence and her opportunity to accomplish necessary adolescent tasks.

16. *I say and believe that the care planning from the respondent currently revolves around a placement with Positive Futures. This progress is of course to be welcomes in the absence of any alternative option, however the lengthy lead-in period of 12-16 weeks does not meet Miss X's fundamental need for a ...placement far earlier than that - be it by way of an interim stepping stone placement until the longer term opinion is finalised, or by way of Positive Futures and the Respondent engaging with each other around a temporary interim resolution from that service, or from an entirely different service altogether that may be available (bespoke or otherwise) in an altogether earlier timeframe.*

17. *I continue to be very concerned that there is no clarity on the length of time Miss X will remain in this entirely inappropriate current living situation. I continue to hold the very certain view that the situation which has developed for this vulnerable young girl is markedly detrimental to Miss X and that her health, development and welfare continues to be avoidably impaired.*

18. *I say and believe in the strongest possible terms that the presenting situation needs to be resolved as soon as possible and that Miss X should not have to reside in her room in* [Stated Name] *Hospital for any further period of time. I recommend to the court that it is imperative, irrespective of whose statutory responsibility it is, that the respondent HSE and the notice party CFA engage in constructive and effective inter-agency dialogue and cooperation to bring about an immediate interim resolution*

that results in Miss X's exit from [Stated Name] *Hospital. Both agencies necessarily form part of the State's care infrastructure and Miss X's constitutional rights dictate that the State is required to meet her health, development, and welfare needs.* "

IV

Some Averments of Miss X's Mother

10. In her affidavit of 13th September, 2021 (so not as recent as the evidence of the guardian *ad !item* evidence but of interest nonetheless) Ms X's mother avers as follows under the heading *"THE CHILD'S VOICE AND THE IMPACT OF A HOSPITAL SETTING":*

"55. Miss X's current and prolonged hospital admission should be viewed in light of the severe and detrimental impact that Professor McDonnell [of Studio III] *described hospital stays as having on her, at page 19 of the assessment that he compiled in May 2020 he stated:*

'Miss X's experiences in hospital settings have been very distressing for her. Both of her parents have described how this setting was very unsuitable for Miss X She was placed on medications that had adverse effects on her. She was also restrained and placed in seclusion while in hospital environments. While in [Stated Name] *Hospital earlier this year she was regularly restrained and was also placed in isolation rooms. Miss X's mum noticed several bruises on her daughter's body when visiting her in hospital. When we consider Miss X's sensory difficulties and her hypersensitivity to being touched, we can gain a greater understanding of the distress felt by her when she is restrained by others. Her mum details that simply brushing past Miss Xis extremely alerting and alarming for Miss X'.*

56. *Many of the events described by Professor McDonnell have also been features of Miss X's current stay in hospital, for example, due to the risk that the hospital setting poses and because staff are not adequately trained to address Miss X's behaviours and needs, security guards are frequently in her vicinity and the Gardai have been repeatedly called to respond to her escalating behaviours. In light of the views of Professor McDonnell outlined above, it is clear that such an environment and such responses to significant events would be extremely destabilising and distressing for Miss X*

57. *For a child with disabilities who already finds it difficult to accept her diagnosis and who feels ostracised, the impact of a prolonged hospital admission such as that which has occurred over the past number of weeks will have had and will continue to have a very negative impact on Miss X's health and well-being.*

58. *As a result of her current predicament in a hospital setting, Miss Xis also being denied access to education, something from which she gleans great benefit and that is necessary to stabilise her.*

59. *If my husband and I could safely maintain Miss X at home we would desire nothing more However, past experience, and even the circumstances in which Miss X was admitted to* [Stated Name] *Hospital on 26th July 2021, demonstrate that placing her in the family home would pose a grave danger to her and to other members of my family, including Miss X's minor siblings.*

60. *The Health Service Executive has been repeatedly alerted to Miss X's needs and the fact that she would require a residential placement. Many professionals engaged with her have recognised this fact. Yet, despite this and having been called upon to provide a more appropriate setting for Miss X so that she can safely be discharged from hospital, the Health Service Executive has failed to provide same ....*

61. In my respectfitl view, the current situation is having and will continue to have a severe and detrimental impact on her health and welfare and is not in her best interests as a disabled child."

V

The Reliefs Now Sought

11. Arising from the foregoing, the applicants have come to court and *at this time* seek the following reliefs (the notice of motion also mentions relief by way of *mandamus* and while the request for that relief is not resiled from, the applicants have essentially reserved their position as regards seeking that relief for now):

"iii. A Declaration by way of judicial review that the Second Named Applicant's current and/or continued placement in a hospital setting ...is not in her best interests and/or is detrimental to her welfare;

iv. A Declaration that the Respondent has a duty towards the Second Names Applicant, the subject of the within proceedings, arising from the provisions of, inter alia, the Health Act 2004, in particular section 7 thereof, and/or the Constitution, in particular Articles 40.3.1° and/or 42A.l thereof, to ensure that it takes all necessary steps to promote, protect and/or vindicate the life dignity, autonomy, personal and bodily integrity, and/or safety, health and welfare of the Second Named Applicant.

v. A Declaration by way of judicial review that in placing the Second Named Applicant in a hospital setting, namely in [Stated Name] *Hospital and/or by failing to prevent her placement in the said hospital and/or by failing to facilitate her discharge to a safe and suitable residential placement, the Respondent has failed to exercise its statutory functions and/or fulfil its statutory duties pursuant to the Health Act 2004, in particular section 7 thereof, in a reasonable, rational and/or proportionate manner and in so failing, has acted unlav1fully.*

vi. *A Declaration by way of judicial review that the Applicant's current and/or continued placement in a hospital setting, namely in* [Stated Name] *Hospital has resulted and/or is resulting in a disproportionate and unlawful interference with the constitutional and/or human rights enjoyed by the second-named applicant as a minor and a disabled person, namely a. her right to have decisions made in her best interests, b. her right to dignity, c. her right to autonomy, d. her right to personal and bodily integrity, and/or e. her right to privacy.*

vii. *A Declaration by way of judicial review that in placing the second-named applicant in a hospital setting, namely in* [Stated Name] *Hospital and/or by failing to prevent her placement in the said hospital and/or by failing to facilitate her discharge to a safe and suitable residential placement, the Respondent has disproportionately and unlawfully interfered with the Second Named Applicant's constitutional and human rights, namely: a. her right to have decisions made in her best interests; b. her right to dignity; c. her right to autonomy; d. her right to personal and bodily integrity; and/or e. her right to privacy.*

viii. *A Declaration that it is in the best interests of the Second Named Applicant and/or necessary in order to promote and protect her health and welfare that a residential placement be immediately identified for her in order to vindicate her rights pursuant to the Constitution and/or the European Convention on Human Rights....*

x. *Damages ".*

12. The verifying affidavit sworn for the HSE requires to be mentioned in some detail. In it a Head of Disability Services avers, *inter alia,* as follows:

"Introduction

2. The Respondent herein, opposes the application for judicial review and in particular the granting of the reliefs sought on

behalf of the Applicant on the grounds set out in the statement of opposition filed herein ....

3. *I say and believe that it is important to underline from the outset that the HSE remains fully committed to providing services to the Second Named Applicant, hereinafter referred to as Miss X However, while a broad spectrum of services have been and continue to be available to her family, it is not within the gift of disability services to provide a child residential service within the immediate timeframe that is required.*

4 *.... [T]he HSE refutes any suggestion that it has failed to provide assistance or supports to Miss X or her family ....*

Miss X's Current Position

5. *The HSE fully recognises the unsuitability of Miss X's current stay in an acute hospital setting and is utilising all available resources to try and remedy the situation as soon as possible. Pending a resolution, the HSE personnel who are involved in Miss X's case attend daily teleconferences with the Hospital, and on occasion with the CFA, in order to receive updates regarding Miss X's care and welfare and discuss what steps can be taken to improve her situation.*

6. *I say and believe that it has been reported to the Respondent by the hospital that over the last few weeks Miss X is safe, is relatively settled and has displayed minimal aggressive outbursts or unmanageable behaviour while in the emergency department at the hospital. Miss X has access to a television and internet services. Although evidently not a solution, the Respondent has also advocated for Miss X to be admitted to the hospital as a social admission in the immediate term so that she could be moved to a more comfortable setting within the hospital.*

7. *In addition to the foregoing, Positive Futures commenced their twice weekly engagement with Miss Xfor 2½ hours on 7th October 2021. Although Miss X was not initially receptive, in the end they*

had a positive meeting and good interaction and Miss X engaged in a positive way. Given that Positive Futures is the identified provider of the planned placement, the provision of these in-reach services is very important as they have enabled Positive Futures to begin their work and care planning with Miss X and this will inevitably shorten the transition process in the planned placement with Positive Futures once same is ready. This in-reach service can be provided to Miss X in any temporary placement that may be provided away from the hospital setting.

8. *In addition to the foregoing, Positive Futures have Joined the multidisciplinary team meetings together with Dr Foley, the guardian ad !item. The HSE is working collaboratively with the parents, the guardian and the multidisciplinary team on the implementation of an in-reach specialist support services plan into the hospital which will include possible trips out of hospital. This will form part of Positive Futures' engagement with Miss X based obviously on Miss X and her parents' consent and also clinical assessment.*

Engagement with Miss X's Family to Date

9. *The HSE has been engaged with Miss X's family since August 2017 when Miss X was first referred to the* [Stated Place] *Child Development Team Miss X and her family have been offered a range of supports and services over the years....*
10. *Throughout this period of time ...there was ongoing engagement between the [HSE] ... and Miss X's family ....*
11. *More recent supports have been financed Jointly by the Respondent and the CFA and there are regular ongoing teleconferences involving all parties striving to find a solution. In addition to the foregoing, the Respondent made referrals to multiple placement providers outlined in detail belovv, none of which were in a position to offer a placement ....*

Holiday Placement with Stride ....

17. *The most recent short term holiday stay with Stride was merely a support offered to the family in terms of a holiday break, due to the expressed levels of stress communicated by Miss X's parents. Stride, as an unregistered Hf QA service provider, was only ever in a position to provide a short-term holiday break as evidenced by the consent form signed by Miss X's mother ....Accordingly it was always envisaged by the Respondent that Miss X would return home following the said holiday break period.*

[It is unclear how one is to reconcile this evidence with that concerning the impression of Miss X's family as to what was agreed at the meeting of 30th July].

Decision-making regarding residential care

[The court finds paras.19-20 of the HSE affidavit very difficult to reconcile with the assurances given to Minister of State Rabbitte in June 2021. It will be recalled that the private secretary to the Minister of State advised Miss X's family, in a letter of 15th June, that *"As* [the Minister of *State] ... understands it, Miss X previously had a residential place in County* [-] *...and an alternative place has now been located with* [stated service provider]. ... *The HSE has advised that this may take up to eight weeks to put in place"* Yet, as will be seen below, the HSE in the affidavit placed before this Court avers to *"serious concerns as to whether a residential placement was necessary, or indeed clinically appropriate for Miss* .x"].

18 *....As the Court is aware from the submissions made to it on behalf of the notice party, the CFA at all material times maintained, and continues to maintain, that there are no child*

protection concerns within the Applicants' home in respect of Miss X or her siblings.

19. *In the absence of any child protection concerns, which as this Court is aware are matters solely for the CFA, the Respondent understandably had serious concerns as to whether a residential placement was necessary, or indeed clinically appropriate for MissX*

[If so, at the very least it must have failed completely to communicate these concerns to Minister of State Rabbitte prior to the issuance of the letter of 15th June from her private office].

20 *....Miss X engaged in mainstream school and sporting activities until recently. Although there was evidently challenging behaviour from time to time, Miss X also excelled in many areas whilst living in her family environment. In such circumstances, the HSE was at all times and remains strongly of the view that transitioning a young person to a residential placement can and should only be a last resort. It was in light of this that support services were offered to the family ....Therefore, the expressed view of Miss X's parents that she needed a long-term residential placement required independent clinical assessment and verification of how her assessed needs may best be met.*

[Again, there is no such caveating in Minister of State Rabbitte's letter even though her private secretary must have considered himself to be stating the HSE position]....

Placement Options Explored to Date

23. *Both prior to and after the completion of the above assessments, the Respondent has explored a range of placement options ....*

24. As appears from the foregoing, the Respondent has been trying to identify a suitable placement for Miss X for several months now and prior to the initiation of these proceedings

[Although the case does not turn on this, and the court did not see a need to hold up its judgment on the point following on an end-of-hearing offer from counsel for the HSE to seek to procure an affidavit from his client on this issue, it was not clear from the evidence before the court at the hearing whether any consideration has been given to placing Miss X abroad, pending the ability to make the requisite placement in Ireland.

In passing the court notes that when it asked at the hearing whether consideration had been given to making a foreign placement, it was suggested by counsel for the HSE that the court could take judicial notice of the fact that there is a pan-European shortage of care staff. That is not in fact something of which the court can take judicial notice; frankly it has no idea whether there is such a shortage. In fact, because we live in an Information Age one seems to encounter (even in the few years that I have been on the Bench) an ever-greater number of instances in which counsel suggest that the court can take judicial notice of this or that or the other, usually because it has featured in the saturation of news and commentary with which we are all confronted each day. So it is perhaps worth recalling what judicial notice is and how limited the scope of judicial notice actually is - and there is good reason why the scope of the concept of judicial notice is so narrow, for the effect of judicial notice is to dispense with the need to introduce evidence proving the facts judicially noticed, and the norm, obviously, is that courts must and do proceed on evidence. What then is judicial notice? Briefly put, it involves a court Qudge) taking cognisance of matters of common knowledge of every person of ordinary understanding and intelligence. And the current state of the pan-European employment availability of

carers is not, and a great deal else besides also is not, such a matter.]....

Placement Identified

25. *Following the receipt of the updated multi-disciplinary reports as outlined above, the Respondent identified a placement with Positive Futures ....*

Inability to Provide an Immediate Interim Placement

31. *I say and believe that although a placement has now been identified it unfortunately will take between 12-16 weeks to be ready for Miss X This time.frame is outside the control of the Respondent for various reasons. Firstly, all residential services accessed or commissioned by the Respondent must be registered with the Health and Information Authority (HIQA) as per the Health Act 2007 ....*

32. *It is regrettably the position that no children's disability registered designated residential service is available that rests under the direct auspices of the Respondent, and therefore they must be contracted in. This inevitably involves a process to ensure suitability, service capability, and legal compliance. As Miss Xis a child it is necessary to obtain a HIQA registered service for the placement with Positive Futures in accordance with the provisions of the Health Act 2007, without which such placement would not be legally compliant. The Respondent will of course make all efforts to expedite such registration but the timing of this process is outside of its direct control.*

[HIQA has been introduced by the HSE into the mix of matters before the court, to borrow from counsel for Miss X, *"almost like a character from a Greek chorus, kind of standing there, chanting away quietly but nobody is quite sure what they are saying".* And

in point of fact (and in law), it does not seem that HIQA actually has the role contended for by the HSE. Rather, the functions in question attach to the Chief Inspector of Social Services, being the statutory officer charged with the registration and supervision of service provision. When it comes to any registration process with the Chief Inspector, there will always be (and the HSE cannot but know this) a lead-in time because of the statutory process that has to be undertaken pursuant to Part 8 of the Health Act 2007. The HSE's knowledge in this regard goes to the question of reasonable practicability. Miss X and her mother have not come to court claiming that the HSE is somehow a guarantor of Miss X's well-being; however, she does claim (and rightly) that the HSE must protect those rights *"as far as practicable"* (to borrow from the language of Article 42A). Whether the HSE has done so is an objective test, *i.e.* the question presenting here is has the HSE here done all that was reasonably practicable in all the circumstances presenting in Miss X's case? (One can see a similar test being brought to bear in *O'Donnell).* The court is obviously not possessed of the competence to identify all the things that the HSE ought to have done. However, it can see, in the face of the fact that the HSE knew for such a long time as to the need for a placement for Miss X (to the point, it seems, of advising the Minister of State for people with disabilities, through the Department of Health, that a placement would be ready by mid-August 2021) that it did not do all that was reasonably practicable for it to do so as to avoid the 'placement' *(sic)* of 25th August 2020. (And the court cannot but again make the point that, again, all the current talk by the HSE that it is doing all it can but that things just take time to put in place unfortunately rings hollow when one has regard to the extraordinarily long lead-in to the 'placement' *(sic)* of 25th August 2021)].

33. I say and believe that there is also a necessity to hire sufficient staff and to ensure that they are sufficiently qualified to meet the

specific specialist requirements of this residential care placement based on clinical assessed needs. It is vital that siifjicient time is given to this task in order to ensure that the allocated staff are competent to deal with Miss X's care needs to ensure, in so far as possible, that the placement is a successful one. Unfortunately, the challenges in identifying such staff are compounded by the chronic staff shortages in the health and social care services nationwide at this time.

34 ....It is imperative that the placement has appropriate specialist reports in order to give Miss X the best opportunity to engage with and success in this placement based on assessed clinical needs. For all of the above reasons, despite the best endeavours of the HSE it is simply not possible to expedite this placement. For the same reasons, regrettably, nor is it within the power of the HSE to provide an alternative interim placement. The HSE will continue to identify and engage with other service providers in efforts to secure a temporary service while Positive Futures progress service development."

VI
Some Legal Issues Presenting

i. The Health Act 2007

13. Section 7 of the Health Act 2004 provides, *inter alia,* as follows:

"(I) The object of the Executive is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public.

(2) Subject to this Act, the Executive shall to the extent practicable, further its object.

(3) Without limiting the Executive's responsibilities under subsection (2) or (4), it has (a) the functions transferred to it by section 59

or by an order under section 70, and (b) such other fimctions as are assigned to it by this Act or any other enactment.

(4) The Executive shall manage and shall deliver, or arrange to be delivered on its behalf, health and personal social services in accordance with this Act ... ".

14. To the extent that Miss X has sought (and she has sought) to rely on s.7 as establishing specific duties/on the obligations on the part of the HSE towards her (or indeed to any specific individual), this proposition is respectfully rejected by the court . As can be seen, s.7(1) but establishes the object of the HSE in terms of the promotion and protection of the health and welfare of *"the public".* It neither seeks to achieve nor does it achieve the establishment of duties/obligations between the HSE and individual members of the public. Even if one were to take the Act of 2004 as a remedial statute, that status would not require that the court confer upon the words and provisions of s.7 a meaning that they were never intended to bear.

ii. Unreasonableness/Irrationality of HSE Behaviour?

15. The HSE has a duty to perform its functions and exercise its powers lawfully and in a rational and reasonable manner. Focusing for a moment on rationality and reasonableness, the court considers that the HSE has repeatedly acted in a manner that is unreasonable and at points crosses the line into irrationality. For example:

(a) despite having considerable professional opinion before it that Miss X could not safely return home, the HSE nonetheless sought to have Miss X return home (some of the stress it visited on Miss X's family in this regard over the summer was, frankly, deplorable: calling up parents and telling them to pick up a child by 5pm, as happened on 24th August, when that child simply could not return safely home and when separate agreement had already been reached between the HSE and Mr Noble that the HSE would continue accommodating the child for an agreed period is neither reasonable nor rational - how on earth (and by what bizarre logic) could a State agency reasonably and rationally conclude in the face of considerable professional opinion that a child could *not* safely return home that child *must* nonetheless return home? There is neither sound reason nor rationality in that.

(b) no explanation has at any point been provided (one suspects for the reason that there is no good explanation) for the radically opposing positions which appear to have been taken by the HSE in what it appears to have communicated to Minister of State Rabbitte in June 2021 and the stance taken by it thereafter. It will be recalled that the private secretary to the Minister communicated as follows in his letter of 15th June 2021 to the parents of Miss X:

> *"Officials in the Department of Health have made enquiries of the HSE in relation to the issues raised in your emails .....As she* [the Minister of State] *understands it, Miss X previously had a residential place in County[-]..... and an alternative place has now been located with* [stated service provider]..... The *HSE has advised that this may take up to eight weeks to put in place given the complexity of support needs for Miss X".*

16. The private secretary to the Minister of State presumably was but relaying to the family what the HSE had separately relayed to the Department of Health. Why would he do anything else? So, as of sometime before the issuance of the letter of 15th June, the HSE appears to have been of the view (absent some miscommunication to which nothing in the evidence points and which was not claimed at the hearing) that Miss X required a placement, even indicating to the Minister of State that it was on the verge of providing such a placement. Yet the HSE now comes to court and argues that meeting Miss X's short-term needs is not its responsibility but that of the CFA. As the court indi_cates later below, this argument is completely wrong in law, and there is no lacuna or nuance in the applicable statutory framework. It is but the HSE aiming to offload onto another agency some of the blame for its failures, but they are its failures alone. As a matter of law, the legal responsibility for Miss X's short-term needs rests most definitely and most clearly with the HSE; and the HSE cannot shuffle off the blame for its failings by pointing to CFA and saying in effect 'Look at them. They are as much to blame for the ongoing problem'. As will be seen later below, the court has looked to the legal position of the CFA and there is not a scintilla of doubt but that the CFA is not to blame (not in any way) for the mess that the HSE has allowed to arise in its dealings with Miss X. The court does not see that the HSE acted reasonably (and one might contend that it did not act rationally) in taking the contrary stances that it has assumed in its dealings with the Minister and in its dealings with Miss X and her family (and its submissions to this court) concerning its role and responsibility as regards arranging for Miss X's short-term needs and long-term placement.

17. Two additional factors present in this case which seem to the court to point to the unreasonableness, if not irrationality, of the HSE's actions. First, there is nothing in the evidence before the court to suggest that Miss X's continued 'placement' *(sic)* in a room off an emergency department floor in a busy hospital during the course of a continuing Covid pandemic has any medical justification. On the contrary, the evidence before the court indicates most clearly that the 'placement' *(sic)* is having a significant and detrimental impact on Miss X. In this regard, the court notes and respectfully adopts the following submissions made by counsel for Miss X at the hearing:

> *"One of the ...submissions that my friend has made is that Miss X wasn't being harmed by the circumstances of her, for want of a better expression, her 'placement'. The case he is making is ...insofar as she is stressed ...and anxious ...this is caused by an antecedent condition and not really caused by the circumstances of her placement. To characterise that as Jesuitical, Judge, would be generous. I think it is an extraordinary proposition. It is almost akin to saying that had she been admitted to hospital with a broken leg which wasn't treated because the orthopaedic surgeon was off doing something else or couldn't be found or whatever, that the pain and the stress and everything else she was suffering was attributable not to what the hospital were doing or not doing but it was simply attributable to the fact that she broke her leg before she came in. Insofar as he* [counsel for the HSE] *says ...that her* [Miss X's] *material needs are being met, I don 't think it can be disputed but that her needs for food and water and for warmth and for a bed and I presume sanitation facilities and so on - we are taking about the basic incidents of human existence - are being met* ...[but] *there is more to material human needs than that, Judge [E]verybody needs a certain amount of emotional security and emotional peace of mind and also spiritual security as well. It is well known that if you have a very young child and you feed that child and water that child ...and do everything else, but deprive that child of emotional warmth and security, that child will not thrive. Is my friend really suggesting that in those circumstances that that in fact is not harmfitl? It is also worth bearing in mind, Judge ...the language of*

Art.42A.2 which deals with the threshold for State intervention ...the threshold is in relation to prejudicial effect on the child's welfare. Can it really be contended, Judge? - I think it is utterly artificial to suggest - that what has happened here is not - I say it is patently harmfitl and I think that is what must be clear from Dr Foley's reports - but even if one were to apply a different threshold, it is certainly affecting her or prejudicing her adversely, and I don't think there can be absolutely any doubt about that at all."

18. A second additional factor is that the hospital in which Miss X has been placed is not a centre which has been adapted to meet the needs of juveniles and where an array of educational/recreational facilities are available to her. (The provision of a TV and wi-fi have been touted by the HSE as a boon to Miss X and they doubtless offer some level of entertainment to Miss X. However, the court considers that it *can* take judicial notice of the fact that planting an adolescent child with a disability on a bed for weeks on end, in a room where no-one else is present, and where she has little to do except watch TV programmes and trawl the internet for days on end and with no imminent end to that existence in sight is not healthy for that child).

iii. Proportionality

19. Miss X's parents and the professionals involved in Miss X's case are all in agreement that Miss X should be accommodated in an appropriate placement managed by the statutory agency responsible for providing for Miss X's health care needs. There is no legal basis for an intervention under the Child Care Act 1991 (and any such intervention would not comply with the requirements of Arts. 41.1 and 42A of the Constitution, or indeed Art.8 ECHR). The HSE's failure to this time to make suitable provision for Miss X's immediate needs does not make this any the less so (see in this regard the judgment of the European Court of Human Rights in *Wal/ova and Walla* v. *Czech Republic,* Application No. 23848/04, 2nd October, 2006). The interference with Miss X's personal rights (the substance of which is considered later below) through the HSE's failure to identify a safe place for her to transition pending accommodation in a long-term placement is not proportionate and fails to impair her rights as little as possible and thus is inconsistent with *Meadows* v. *MJE* [2010] 2 LR. 71 (see esp. paras. 57-59 and 180), and in matters of the importance of the application here presenting, where constitutional rights

of the kind presenting are in play, it is the *Meadows* standard of scrutiny that falls to be brought to bear (infused also by proportionality). Given the long lead-in to the 'placement' *(sic)* of 25th August 2021 in the general hospital, given all that was known to the HSE throughout that long lead-in period, did the HSE conduct itself in such a manner as to impair Miss X's rights as little as possible? The short and unequivocal answer to that question, on the evidence presenting, must be and is 'no'.

iv. Miss X's Personal Rights

20. There has been a failure on the part of the HSE to vindicate the personal rights that Miss X enjoys under the *Bunreacht.* In this regard, the court cannot better, and respectfully adopts, the following portion of the written submissions of counsel for Miss X:

> *"22. The Supreme Court in* O'Donnell *v.* South Dublin City Council *[2015] IESC 28, dismissed the respondent council's assertion that its legal duty under the Housing Act 1988 sections 10 and 13, as amended, was no more than to provide a halting site to the family and that it asked had in fact exceeded this duty. MacMenamin J, for a unanimous Supreme Court (at para.67) if the duty to the minor disabled child ended with the offers made. He held (at para.68):*
>
> > 'The preamble to the Constitution outlines the values of promoting the common good with due observance of prudence, justice and charity, so that 'the dignity and freedom of the individual may be assured'. It is clear that constitutional values established by our jurisprudence, specifically those of autonomy, bodily integrity and privacy are engaged here The position of [the disabled minor applicant] is distinct by virtue of the evidence. Of course, in every family situation, and in all forms of accommodation, the constitutional values just identified are compromised by the inevitable activities of other family members, or

economics, or lack of space. But because of the exceptional overcrowding, and the destruction of the sanitation facilities, and in light of [her] disability, her capacity to live to an acceptable human standard of dignity was gravely compromised. Her integrity as a person was undermined. Her rights to autonomy, bodily integrity and privacy were substantially diminished (references omitted).

23. *As in Miss X's case, the respondent council* [in O'*Donnel[] - as with the HSE here - knew of the child's exceptional circumstances and this was (at para.69) 'sufficient as to impose a special duty' upon it towards the child. Although the child's situation was (unlike here), partially, at least, the responsibility of the parents, MacMenamin J ·was clear (at para.70):*

> " insofar as [the child] is concerned, this is not only a case about parental choices, rights and duties (though these arise), but also about the duty of the Council, when faced with clear evidence of inhuman and degrading conditions, to ensure that it carried on its statutory duty. This was to vindicate, insofar as was practicable, in the words of Article 40.3 of the Constitution, the rights of one young woman with incapacities to whom, by virtue of the evidence, the Council owed a discrete and special duty under Article 40 of the Constitution. That statutory duty is to be informed with due regard to [her] capacity as a human person (Article 40.1...)"....

24. *Significantly, in a passage that applies a fortiori in the context of the chronology in Miss X's case, MacMenamin J also held (at para.71):*

> ' ... Is there a difference in principle between a council being fixed with knowledge and therefore a duty, in the context of a defectively repaired pavement creating a hazard to pedestrians, and the knowledge which it had in this case insofar as [the minor disabled child] is concerned? I am not persuaded there is. Of course, the extent of a duty, (if it exists), must be gauged against the degree of incursion into the constitutional and statutory rights engaged. A mere letter will not fix an authority with liability. It was the truly exceptional nature of what was in the letter, and its acceptance, which viewed in the circumstances, gave rise to the duty to interpret and apply 'may' as 'must'.

> *25. The* 'exceptional evidence, and the acknowledgement of its truth' *was sufficient to fix the respondent council with a duty to take practicable steps on foot of a request for accommodation which was made to it: para.73. The evidence did not show it performed its statutory duty* 'insofar as it was practicable, as the Constitution provides': *para.74. The cognate provision in the Health Act 2004 section 7(2)* is 'to the extent practicable'".

21. Reference was made in the course of the proceedings to the decision of the High Court in *Kinsella* v. *Mountjoy Prison* [2012] 1 I.R. 467. Although the facts of that case are quite extreme - the applicant there appears to have been kept in a situation of near-sensory deprivation (albeit for reasons of his own protection) - there is still a parallel to be drawn between the position of the applicant in *Kinsella* and the situation in which Miss X finds herself in this case: she, like the applicant in *Kinsella,* is being kept in a conditions which (and this is not disputed) are unsatisfactory and for which there is no clinical reason, but simply because of a lack of available alternatives. Without wishing in any sense to diminish the suffering of the applicant in *Kinsella*, it seems to the court that a further aggravating factor in this case is that Miss X is a child with a disability (and both as a child and as a child with a disability is being treated in a shameful manner that shows scant regard to these additional layers of vulnerability). One cannot but, in

this regard, recall the following observations of the Supreme Court in *O'Donnell* and of the European Court of Human Rights in *Selmouni* v. *France* (No. 25803/94, 28th July 1999), where the heightened attention to the particular circumstances presenting was flagged as a relevant factor:

> *"69.* ***The situation, as known to the County Council in 2005, was truly, exceptional. That situation was, to my mind, sufficient as to impose a special duty upon the County Council towards Ellen O'Donnell.*** *The County Council says in this appeal that it complied with its duties to her. Insofar as privacy rights might arise under Article 8 of the Convention, the Council assessed her long term accommodation needs,· provided temporary accommodation in 2003; upgraded and specially adapted the service unit and facilities on the bay; provided a wheelchair accessible caravan; offered a loan to the first and second named applicants for the purchase of a second-hand caravan to alleviate overcrowding, and made provision in its Traveller Accommodation Programme for the provision of a purpose built specially adapted group house designed to meet Ellen O'Donnell's long term accommodation needs, having regard to her disability. There is considerable strength in each submission"* (0 *'Donnell,* para. 69; emphasis added),·
>
> *"I 00.* ...[I]t *remains to establish in the instant case whether the 'pain or suffering' inflicted on Mr Selmouni can be defined as 'severe' within the meaning of art I of the UN Convention. The court considers that this 'severity' is, like the 'minimum severity' required for the application of art 3, in the nature of things, relative,· it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the _victim,* etc. " *(Selmouni,* para. I 00).

22. The court accepts that the facts of *Selmouni* are far removed from those at play here. M. Selmouni concerned ill-treatment of a prisoner at the hands of the French police. Nonetheless the general point made would seem to hold good.

23. One other aspect of *Kinsella* has a resonance in these proceedings. In *Kinsella,* Hogan J. was satisfied in the absence of medical evidence of detriment to conclude that there was a seriously negative impact on the prisoner. In this case, there is an abundance of such evidence, meaning that for the court to reach like conclusion (and it does) does not require the creative leap that Hogan J.'s sensible conclusion in this regard involved. Additionally, the court cannot but note that Miss X's period in the hospital conditions in which she finds herself now placed is a multiple of the 11 days in issue in *Kinsella* (a multiple of five by the time this judgment is delivered).

24. Ineffective efforts to remedy the situation in which Miss X found herself placed cannot prevent a finding that there was an objective breach of her personal rights. On a related note, it was contended by the HSE that the disability services of which Miss X stands in need are not provided by the HSE directly but have to be 'bought in' from outside service providers. That is neither here nor there in terms of the HSE's duties and liabilities, but if that is how the HSE elects to arrange the provision of services then it ought to know (and cannot be surprised) that there will be lead-in periods and difficulties associated with that which will and do require to be addressed. (And returning to reasonableness and rationality for a moment, it is neither reasonable nor rational for the HSE to contend that avoidable delay somehow becomes justifiable delay when its failure to act promptly results in the previously avoidable later becoming unavoidable. 'I'm not to blame for the inevitable and previously avoidable consequences of what I knew I could have done, and what was clear to me I should have done, but through my own ineptitude I simply did not do' is not a line of contention that finds favour with the court).

v. Privacy

25. As is clear from the decisions of the European Court of Human Rights in cases such as *X and* Yv. *The Netherlands* (Application No. 8978/80, 26th March 1985) and *Pretty* v. *United Kingdom* (Application No. 2346/02, 29th April 2002), a right to privacy such as exists under Art.8 ECHR (and as protected by the *Bunreacht)* embraces the physical and psychological

integrity of the individual and also her personal autonomy. Returning to the case at hand, these are aspects of Miss X's existence that are clearly engaged on the facts of this case. When an interference with a person's right to privacy occurs on the part of a public authority it must, to be lawful, meet the criteria that one finds in Art.8(2) ECHR, *i.e.* it must be prescribed by law and be necessary in a democratic society. The European Court of Human Rights has emphasised that the obligation under Art. 8 ECHR of ensuring that respect for human rights is central in all care decisions (see *McDonald* v. *United Kingdom,* Application No. 4241/12, 20th May, 2014). In *O'Donnell* v. *South County Dublin Council* [2007] IEHC 2014, Laffoy J. found a breach of Art. 8 ECHR to present and pointed to the need for the general interest of ensuring the economic well-being of the State to be balanced against the effect on an individual child of having to love in inappropriate conditions. Here, the court would but note that no good legal basis has been offered by the HSE that would justify the nature of the interference with Miss X's right to privacy that has transpired on the facts of this case.

VII

Separation of Powers

26. In something of an attempted reformulation of Montesquian doctrine, the HSE contends that were the court to accede in any way to the within application and grant the declarations sought in respect of the actions of the HSE the court would be acting in breach of the separation of powers. A number of difficulties arise with this contention. First, the court in making those declarations would not be exercising any authority that in any way engages the separation of powers that exists between the three great branches of government. Second, the court is not concerned in this case with the execution of policy in a way that would have general ramifications. Third, the court is not engaged in assuming a role exclusively assigned to the Oireachtas such as raising revenue or distributing public resources. Fourth, in terms of the orders that will fall now to be made, no direction in respect of the allocation of funds or even how allocated funds should be expended will be made. Fifth, 'all' that presents here is a situation in which the HSE has undertaken to exercise its statutory powers in relation to Miss X; having done so, it must proceed (and it has not proceeded) in a manner that (i) conforms with the *Bunreacht!European* Convention on Human Rights, (ii) pays appropriate regard to Miss X's constitutional/Convention rights, and (iii) is rational and reasonable. Sixth, in proceeding as it will proceed in this case, the court is but proceeding in the manner contemplated in *DG* v. *Eastern Health Board* [1997] 3 LR. 511, 522, where Hamilton CJ held

that *"It is part of the courts' function to vindicate and defend the rights guaranteed by Article 40, section 3",* and where Denham J., as she then was, memorably observed in her customarily sensible manner, at p,537 (in a dissenting judgment, but there is no suggestion that the majority took issue with the point), "[A] *trial judge cannot conjure up a secure accommodation unit* [or the like]. *That responsibility does not lie with the courts. However, the courts must protect and vindicate the constitutional rights of the child'.* So in proceeding as it will proceed (and as is outlined in the concluding section of this judgment later below), this Court is not acting in breach of the separation of powers. On the contrary, it is discharging precisely that function which we the People, in order to establish justice, have contemplated for our courts in our Basic Law, the *Bunreacht.*

27. By way of *obiter* observation, the court cannot but also note, that if one wishes to make an argument in court by reference to the separation of powers, one is fighting on inherently difficult ground. To quote but a few of the problems presenting, as identified by Dr Carolan in his enlightening article, *"The Problems with the Theory of the Separation of Powers"* (see *httvs://pavers.ssrn.com/sol3/vapers.cfm?abstract id=1889304):*

> *"A preliminary problem for any purported analysis of the separation of powers is the absence of an agreed understanding of the theory The most obvious instantiation of the theory - a pure Montesquian model of three distinct organs independently exercising power - has not been wholly reproduced in the institutional architecture of any modern state ....*
>
> *The separation of powers is, put simply, an institutional vision in search of an ideal. This poses a number of practical problems. In the first place, the courts have failed to adequately define the nature and characteristics of the theory which they so regularly employ. This has generated considerable uncertainty over what the doctrine actually entails - an unacceptable situation for a theory apparently concerned with practical matters of power ordering and distribution. The theory, it would seem, is functionally ineffective.*
>
> *In addition, however, the courts have relied on an underdeveloped version of the tripartite theory as a rhetorical device*

which provides an ex post facto explanation of a decision reached on alternative grounds ....

Furthermore, its indeterminacy can result in the courts adopting and enforcing principles which fail to reflect either the public's particular normative views, or their perception of what the doctrine actually entails....

Similarly, the Irish and American courts have, in practice, cut the doctrine adrift of its libertarian moorings. The courts have enforced an imprecise tripartite model as an end in itself rather than as an institutional attempt to serve a particular conception of the public good."

28. In short, *caveat litigator.* The theory of the separation of powers may not be all that it seems, and sometimes may seem to be what in truth it is not.

VIII
The Suggested Easy Solution

29. There has been an attempt by the HSE in these proceedings to suggest that a short-term route to remedying the predicament in which Miss X currently finds herself would be for the CFA to seek an emergency care order. In this regard, the Head of Disability Services who swore the verifying affidavit for the HSE has averred, amongst other matters, as follows:

*"**The Role of the CFA***

35 ....[I]t *is important to remember that Miss Xis still a child and accordingly the notice party must play a vital role in her care. The CFA is the statutory authority with responsibility for the care and protection of children. In the circumstances of the case, though no fault is to be inferred to the parents of Miss X, they have found themselves unable to care for their daughter in the family home. As such, at the current time Miss X who is a minor is not in the care of her parents, and they maintain that they are not in a position to provide such care to her.*

36. *The powers of the CFA as expressly provided under the Child Care Act 1991 are extensive and allow it to intervene in an emergency situation such as this. The powers of the Agency include the power to take a child into care and/or otherwise provide for a child's protection and/or accommodation in circumstances where a child's parents are unable or unwilling to do so, regardless for the reason of same. Placing a child in the voluntary care of the CFA is also an option provided for under the 1991 Act where parents find themselves unable to cope with the child's behaviour.*

37. *The Respondent has been engaging with the CFA to try and bring about an immediate solution to the difficulties faced in this case. It is evident from these discussions that...the CFA does not believe that there is a basis for them to intervene in this case. This is fundamentally different from the view of the HSE by reason of the significant child welfare concerns raised both in the affidavits grounding the application and also in our dealings with Miss X's family ....*

38. *Evidently it is not for the Respondent to direct the CFA to intervene in any case, nor would they have any right to do so. It is entirely up to the CFA to determine as and when they feel it appropriate to intervene in any given case. However, it does remain the practical position that the Respondent simply does not have any powers equivalent to the CFA and therefore cannot intervene to provide for Miss X's needs on an emergency basis.*

39. *...In circumstances where the Respondent simply does not have any residential units available to it in the context of a child requiring immediate care, it cannot lawfully provide forthwith an interim or immediate placement to Miss X As such the Respondent is reliant on the cooperation and assistance of the CFA in addressing any immediate interim solution."*

30. A number of points might be made concerning the CFA and its part in these proceedings and more generally as regards its role *vis-a-vis* Miss X. First, the CFA was before the court in

this case as a notice party and no reliefs have been sought against the CFA. Second, it is clear from the evidence that the CFA has worked strenuously to try and seek a solution to Miss X's current plight: the court does not accept the contention that the CFA has adopted a 'stand-offish' approach to the matter at hand; indeed, it has indicated its intention to work collaboratively with the HSE, within the ambit of the powers of the CFA, to help resolve Miss X's current predicament. Third, notably, it is the CFA that stepped in and negotiated an extension of the placement when the HSE sought so abruptly to end it last August. Fourth, the CFA has provided and continues to provide various support services to the family and has offered to co-fund a residential placement. Fifth, and the court cannot over-emphasise this, *the provision of disability services and mental health services are matters for the HSE.* In this regard the court recalls that the CFA is not responsible for the provision of certain services, as identified in s.8(4) of the Child and Family Agency Act 2013 (the reason being that provision of these services is for the HSE). Section 8 identifies the functions of the CFA, s.8(3) identifies in more detail the type of assistance that the CFA may provide, and s.8(4) then states as follows:

> *"(4) The services referred to in subsection (3)(c) do not include-*
> *(a) psychological services associated with the provision of specialist mental health services to children,*
> *(b) adult psychological services other than services which relate' to the effective functioning of families and the improvement of relationships between parents and children, including effective parenting,*
> *(c) psychological services to a child in respect of a disability, or*
> *(d) psychological assessments in accordance with section 8 of the Disability Act 2005 or with section 4 of the Education for Persons with Special Educational Needs Act 2004."*

31. Continuing with its identification of a number of points that might be made concerning the CFA and its part in these proceedings and more generally as regards its role *vis-a-vis* Miss X, the court notes that, fifth, as to the suggestion by the HSE that the CFA should seek interim/special care orders in respect of Miss X, the court respectfully agrees with the conclusion of the CFA that there are no grounds for a care order in this case. As Hogan J. makes clear in *JG.* v. *Judge Kevin Staunton* [2014] 4 LR. 390, paras.[13]-[14]:

> **"[13]** *There is no doubt but that the loss of parental rights - whether on a temporary or permanent basis - is...a serious matter which the organs of the State should not undertake lightly ....Yet Article 42.5* [this was a pre-Art.42A case] *envisages that there will be cases where this step is objectively necessary to safeguard the child's own constitutional rights...*
>
> ***[14]*** *It is accordingly impossible to catalogue* ex ante *the precise nature of the parental failure which might justify the removal of the child from the custody of its parents. It is sufficient to say that while weighty reasons for this step must always be established ...such a step must also be taken in such circumstances of failure where it is clear that the best interests of the child so require."*

32. The CFA is satisfied that there has been no parental failure in this case. The CFA has also looked to see are there any child protection issues as regards the other children of the family and sees none. So the high threshold for State intervention is not met. Nor would such intervention conform with Art.42A.2.1° of the *Bunreacht* in terms of representing *"proportionate means"*. Just, for example, to take the prospect of a special care order which was mooted by the HSE at the hearing of this application. A special care order would give the CFA the authority to detain Miss X in a special care unit. Such a special care unit is not at all like the type of unit which is being recommended in this case by the HSE's own advisors (they recommend a particular form of residential placement that has a multi-disciplinary disability service available to it; that is just not what a special care unit is). In truth the suggestion that Miss X would be detained in a special care unit pursuant to a special care order would not just be disproportionate but at the extreme end of disproportionate. As a matter of practice, the court notes in any event that the CFA provides mainstream residential placements for children who come into the care of the CFA, *i.e.* it does not just have residential placements 'out there' and if the necessity arises a child is placed in it. So even leaving the law aside (and one cannot leave the law aside) even in practical terms the HSE-mooted idea of an interim/special care order arrangement, even in the short term, is not practicable.

33. In passing, the court notes that counsel for the CFA indicated to the court at the hearing that if a care order was made - and there is no question of such an order lawfully being made in this case at this time - there are now 100 children who are waiting for a residential unit, so the making of such an order would, regrettably, get Miss X nowhere. (The court cannot but note in passing that while the CFA is presumably doing the best that it can with the resources it has, to have 100 children waiting so is a sorry state of affairs).

34. Counsel for the CFA also referred the court to a CF A-HSE *"Joint Protocol for Interagency Collaboration Between the Health Service Executive and Tusla-Child and Family Agency to Promote the Best Interests of Children and Families",* a Protocol that appears to have been agreed between the two agencies in March 2017, it provides, amongst other matters, as follows, under the heading *"Overarching Principles",* at p11:

> "* *No child or young person with a mental health and/or disability issue should be taken into state care as a consequence of insufficient disability/mental health services or support.*
> * *While receiving a child formally into state care should be seen as a measure of last resort, if parents have effectively abandoned parental duties, the best interests of the child must be the guiding principle to ensure their interests and welfare are being appropriately protected.*
> * *Children with a disability or mental health issue in state care should access disability, mental health or specialist services in the same way as other children. The person who is carrying out parental duties should have no bearing on a child's eligibility or access to services. In other words, Tusla is not responsible for funding required disability services generally provided by other agencies any more than any parent."*

35. It follows from the foregoing that there can be no question of simply deciding that because a child has a disability s/he should be brought into care. (And it is very clear from the just-quoted text that there is agreement between the two agencies in respect of this elementary principle). Additionally, there is here no abandonment of parental duties (the parents are doing all they can in very challenging circumstances). And as to the last bullet-point in the just-quoted

text, it is quite clear that in the extreme situation that a child came into care (and there is no prospect of this happening in this case at this time for the various reasons already stated) it would still remain the responsibility of the HSE to provide such a child (Miss X, if it were her) with disability and mental health services, *i.e.* bringing Miss X into care would not in any way advance her cause. Bringing Miss X into care is not what is required in this case. What is required, when the within proceedings are distilled to their essence is the need for the provision of disability services to a child - and such provision, without a shadow of legal doubt, is the legal responsibility of the HSE. The CFA can support the HSE in the provision of that service (and have been a consistent presence in this regard when it comes to the case at hand). However, it is not within the CFA's responsibility or power or function to provide disability services: that is entirely for the HSE - and all of the reports from the HSE's own assessors have indicated what is required of the HSE when it comes to Miss X and that is the provision by the HSE of a suitable disability service to Miss X.

IX
Some Further Case-Law

36. Some reliance was placed by counsel for the HSE on the judgment of Charleton J. in *E.T.* v. *Clinical Director, Central Mental Hospital* [2010] 4 LR. 403. The observations which it was sought to pray in aid were obiter; however, the problem with seeking to rely on that case flounders at a more basic level in that, as with *Clarke* v. *HSE* [2014] IEHC 419, another case on which counsel for the HSE sought to place reliance, the facts are so far removed from those in play in this case as to render those judgments of no interest/application on the facts of this case.

X
Conclusion

37. Before proceeding to indicate what orders I intend to make, and also addressing some further matters, I would respectfully reiterate what I said at the end of the hearing. I am very sorry that Miss X is as unwell as she is and I hope that in time her situation will improve. I am also genuinely sorry for Mum, Dad, and Miss X's siblings- and for Miss X's wider family (I suspect that there are likely some very worried grandparents 'out there') - all of whom are doubtless greatly concerned about Miss X and wanting the best for her. If it is any comfort to

Mum and Dad it seems to me from the evidence before me, and for what my view is worth, that they are doing all that they can do to 'do right' by Miss X at this time.

38. For the various reasons stated above, the court will grant the following declarations:

(i) a declaration that Miss X's current and/or continued placement in [Stated Name] Hospital is not in her best interests and is detrimental to her welfare;

(ii) a declaration that Miss X's current and/or continued placement in a hospital setting, namely in [Stated Name] Hospital has resulted and is resulting in a disproportionate and unlawful interference with the constitutional and human rights enjoyed by Miss X as a minor and a person with one or more disabilities, namely (a) her right to have decisions made in her best interests, and/or (b) her right to dignity, and/or (c) her right to personal and bodily integrity, and/or (e) her right to privacy.

(iii) a declaration that in placing Miss X in a hospital setting, namely in [Stated Name] Hospital and/or by failing to prevent her placement in the said hospital and/or by failing to facilitate her discharge to a safe and suitable residential placement, the HSE has disproportionately and unlawfully interfered with Miss X's constitutional and human rights, namely (a) her right to have decisions made in her best interests, and/or (b) her right to dignity, and/or (c) her right to autonomy, and/or (d) her right to personal and bodily integrity, and/or (e) her right to privacy.

(iv) a declaration that it is in the best interests of Miss X and necessary in order to promote her health and welfare that a residential placement be immediately identified for her in order to vindicate her rights pursuant to the *Bunreacht.*

39. The court will retain in force the order that it made under s.27(1) of the Civil Law (Miscellaneous Provisions) Act 2008 prohibiting the publication or broadcast of any matter relating to the within proceedings which would, or would be likely to, identify Miss X, the minor who is the subject of these proceedings.

40. Although this has never been a case about money, in her statement of claim Miss X has also sought an award of damages. This was not the subject of argument at hearing and it is

not

entirely clear to the court whether this relief continues to be sought. If it is, the comi proposes to hear further from the parties in this regard, both as to whether the pre-conditions to an award of damages identified in 0.84, r.25 of the Rules of the Superior Courts 1986, as amended, are satisfied in the case at hand, and also as to the appropriate scale of any (if any) damages that might fall to be awarded on the very particular and egregious facts of this case.

41. It became the practice during the various Covid-related lockdowns for the court to give a preliminary indication in each of its judgments as to where it sees costs to lie. As Miss X has succeeded in her application, and as the court has rejected the HSE's contentions as regards the CFA, it seems to the court that the cost of the proceedings should be borne by the HSE and that orders for costs should be made in favour of each of the applicants, the CFA and the guardian *ad !item.* In the event that any party disagrees with the court making such an order, the court will schedule a brief costs hearing.

42. This case was heard last Thursday and Friday and judgment is being delivered today (Monday morning). Given the speed at which the judgment was prepared there may be some typographical errors that require correction. Nothing substantive in the judgment will change. The court will apprise the parties if any typographical errors do require to be corrected.

43. In closing, the court recalls the promise, pointed to in the Proclamation of Independence, of a republic that would cherish all the children of the nation. The Proclamation, though a document of considerable political significance, is not a document of legal import. Nonetheless the court cannot but observe that Miss X would fall to be forgiven if she does not feel greatly cherished by the republic at this time.

ToM1ssX:
WHAT DOES THIS JUDGMENT MEAN FOR You?

Dear Miss X

In the previous pages I have written a long judgment about your case. The judgment is full of legal language and you may find it a bit boring to read or, at points, difficult to follow. I am always concerned that applicants in child law proceedings - that's you - should be told in simple language what I have decided in a judgment that affects them. So that is why I have added this note to you. Everyone else in the case will get to read this note but really it is addressed just to you and written for your benefit.

Because lawyers like to argue over things, I should add that this note, though a part of my judgment, is not intended as a substitute for the detailed text of my judgment in the previous pages. It seeks merely to help you understand what I have decided in what is your case. Your lawyers and/or Dr Foley will explain my judgment in more detail to you.

By the way, I have addressed you above, and I refer to you in my judgment, as 'Miss X'. That is because nobody needs to know who you are. So I'm not being rude - I know who you are; I just think it best not to let everyone else know your business.

I am sorry that you are unwell and I hope that you will get better as soon as possible. It will take time but please don't give up. Everything I've read about you tells me that you are an intelligent person with lots of potential for a happy future. So if you do what your doctors tell you to do, my sense (for what it is worth) is that things can only get better for you.

So, what have I decided? Your mother and the lawyers she has engaged, all acting on your behalf came to court complaining that the manner in which you have lately been accommodated in hospital is unlawful. I think that, fundamentally, they are right (though I do not agree with them in absolutely every respect). In short, what all this means is that you have won your case in the High Court. I will now proceed to make certain orders to reflect the fact of your win. Again, your lawyers and/or Dr Foley will explain in more detail what all of this means in real terms. They will also likely want to discuss with you what next steps you might wish to take.

I wish you the very best in what I hope will be a long and happy life.

Yours sincerely

Max Barrett (Judge)