THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 259
2021/901 JR

BETWEEN

L.A. (A MINOR)

APPLICANT

AND

THE DIRECTOR OF THE GARDA JUVENILE DIVERSION PROGRAM AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 31st day of March, 2022.

The Applicant's claim

1. This case concerns an alleged failure to give reasons for a refusal by the First Named Respondent ("the Director") to admit the Applicant to the Juvenile Diversion Programme ("the Programme").

2. By order made on 8 November 2021 (Barr J.), the Applicant was granted leave to apply by way of an application for judicial review as per the Applicant's Statement of Grounds. The Reliefs listed at paragraph D thereof are as follows:

> "1. An order of certiorari by way of application for judicial review quashing the decision of the First Named Respondent to refuse to admit the Applicant to the Garda Youth Diversion Programme.
>
> 2. An order remitting the assessment of the Applicant's suitability for admission to the Garda Youth Diversion Programme to the First Named Respondent for fresh consideration.
>
> 3. An injunction restraining the prosecution of the Applicant in summary proceedings entitled *DPP (Garda Kevin Barry) v LA* [Charge Sheet number and Case number given].
>
> 4. An order pursuant to Order 84 Rule 20(8 of the Rules of the Superior Courts that the grant of leave act as a stay on proceedings entitled *DPP (Garda Kevin Barry) v LA* [Charge Sheet number and Case number given].
>
> 5. Such further or other order as to this Honourable Court shall deem appropriate.
>
> 6. The costs arising from and incidental to these proceedings."

3. With regard to the grounds upon which the relief is sought, paras. E, 1 to 18, inclusive, of the Applicant's Statement of Grounds comprise a setting out certain facts which do not appear to be in dispute. Later in this judgement I will set out, in chronological order, relevant facts which emerge from a careful analysis of the pleadings affidavits and exhibits which were put before the court. Insofar as the legal grounds relied on by the Applicant, these are pleaded from para 19 onwards as follows:

> "Grounds

19. The Applicant's rights to fair procedures under both the Constitution and the European Convention on human rights have been breached insofar as the First Named Respondent has failed to provide the Applicant with any and/or any adequate reasons for the decision to refuse the Applicant's admittance to the programme.

20. The Applicant's rights to fair procedures under both the Constitution and the European Convention on human rights have been breached insofar as the Second Named Respondent has sought to proceed with the prosecution on foot of [charge sheet number] notwithstanding the fact that the Applicant has not been provided with any and/or any adequate reasons for the decision to refuse the Applicant's admittance to the programme.

21. Interim relief in the form of a stay on the prosecution of [charge sheet number] is sought on the ground that failure to stay the prosecution until the determination of these proceedings will render the outcome of these proceedings moot and nugatory in circumstances where the case is next listed before the children court on [X November 2021]."

A 'reasons' case

4. It is clear from the foregoing that the Applicant has not pleaded that the decision challenged was *unreasonable* or *irrational* in the sense in which those terms are employed in judicial review proceedings. In short, this is what might be called a 'reasons' case and it is only the foregoing issue which constitutes the pleaded case.

5. The Applicant will attain her majority in May of this year and, that being so, the court was asked to expedite the delivery of this judgement, which it has done.

Submissions and authorities

6. Before proceeding further, I want to express my thanks to Mr Dwyer SC, for the Applicant, and to Mr Guerin SC, for the First Named Respondent, both of whom made oral submissions with great clarity and skill, supplementing detailed written submissions which were of great assistance to the court. Although I have carefully considered the entirety of the submissions, written and oral, as well as all the authorities to which this court's attention was directed, I will refer in this judgement to the principal submissions made, and to certain of the authorities which featured most in the various submissions.

The position of the DPP

7. At the outset of the hearing, it was made clear by Counsel for the Applicant that no relief is sought as against the Second Named Respondent ("the DPP") other than to adjourn the district court prosecution, pending the determination of the judicial review proceedings. Mr Kelly BL, for the DPP, indicated that, in circumstances where the Director had made a decision to refuse admission to the Programme, the Applicant now stands prosecuted before the Children Court. Both the Applicant and the DPP were in agreement that the charge against the Applicant was at the suit of the DPP in exercise of her independent functions and that it was not necessary for any further participation by the DPP at the hearing. In short, there was no further role for the DPP unless the outcome of the judicial

review proceedings was for the Director's decision to be quashed and the matter remitted for further consideration. In light of the foregoing, the case proceeded as between the Applicant and the First Named Respondent Director, without further participation by the DPP at the hearing.

The Diversion Programme

8. Before looking at the facts in the present case, it is appropriate to look in some detail at the Programme. Although previously on a non-statutory footing, the Programme is now provided for in Part 4 of the Children Act, 2001 ("the 2001 Act").

9. Section 18 of the 2001 Act states the following:

"Principle.

18. Unless the interests of society otherwise require and subject to this Part, any child who —

(a) has committed an offence, or

(b) has behaved anti-socially,

and who accepts responsibility for his or her criminal or anti-social behaviour shall be considered for admission to a diversion programme (in this Part referred to as the Programme) having the objective set out in section 19."

10. The "*objective*" of the programme is stated clearly in s.19 of the 2001 Act, as follows: -

"Objective of Programme.

19. (1) The objective of the Programme is to divert any child who accepts responsibility for his or her criminal or anti-social behaviour from committing further offences or engaging in further anti-social behaviour.

(2) The objective shall be achieved primarily by administering a caution to such a child and, where appropriate, by placing him or her under the supervision of a juvenile liaison officer and by convening a conference to be attended by the child, family members and other concerned persons."

11. Section 20 of the 2001 Act provides that the Programme shall be carried on and managed, under the superintendence and control of the Garda Commissioner, by a member of An Garda Síochána not below the rank of superintendent. They are referred to in Part 4 of the 2001 Act (and in this judgment) as the "Director".

12. Section 22 of the 2001 Act states: -

"Report on child to Director.

22. Where criminal or anti-social behaviour by a child comes to the notice of the Garda Síochána, the member of the Garda Síochána dealing with the child for that

behaviour may prepare a report in the prescribed form as soon as practicable and submit it to the Director with a statement of any action that has been taken in relation to the child and a recommendation as to any further action, including admission to the Programme, that should, in the member's opinion, be taken in the matter.

13. Later in this judgment, I will look at the facts in the present case but, for present purposes, it is appropriate to note that it is a matter of fact that a 'section 22' report was prepared in respect of *inter alia* the Applicant's suitability for admission to the Programme. It is also a fact that same was considered by the Director.

14. Whilst s.18 of the 2001 Act set out principles relating to the *consideration* for admission to the programme, s.23 concerns admission to the Programme and sets out statutory criteria which must be met for *admission*. S.23 states the following: -

"Admission to Programme.

23. (1) Subject to subsection (6) a child may be admitted to the Programme if he or she –

(a) accepts responsibility for his or her criminal or anti-social behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her,

(b) consents to be cautioned and, where appropriate to be supervised by a juvenile liaison officer, and

(c) is 10 years of age or over that age and under 18 years of age,

but paragraph (b) shall not apply where the Director is satisfied that the failure to agree to be cautioned or supervised is attributable to undue pressure being brought to bear on the child by any person and, in that event, the child shall be deemed to have consented for the purposes of that paragraph.

(2) The Director shall be satisfied that the admission of the child to the Programme would be appropriate, in the best interests of the child and not inconsistent with the interests of society and any victim.

(3) The criminal behaviour for which the child has accepted responsibility shall not be behaviour in respect of which admission to the Programme is excluded under any regulations pursuant to section 47, unless the Director of Public Prosecutions directs otherwise in a notification to the Director.

(4) When the admission of a child to the Programme is being considered any views expressed by any victim in relation to the child's criminal or anti-social behaviour shall be given due consideration but the consent of the victim shall not be obligatory for such admission.

(5) For the purposes of subsection (1)(c), the age for admission to the Programme shall be the age of the child on the date on which the criminal or anti-social behaviour took place.

(6) Notwithstanding subsection (1), a child aged 10 or 11 years shall be admitted to the Programme if–

he or she accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her and

Subsections (2) to (5), apply in relation to the child." (emphasis added)

15. The reference to "*section 47*" in s.23(3) is a reference to the power of the Minister for Justice and Equality to make regulations prescribing (per s.47(c)) "*any criminal behaviour of a serious nature in respect of which admission to the Programme shall be excluded*". It appears that, as of the date of the hearing in the present case, the Minister has not made any such regulations. Thus, it appears that admission to the Programme is available even in the case of the most serious of offences.

16. The Director's role, regarding a decision to admit a child to the Programme is set out in s.24, as follows: -

"Decision to admit to Programme.

24. – (1) It shall be a function of the Director to decide whether to admit a child to the Programme and the category of caution to be administered to any child so admitted.

(2) Where the Director decides that a child should be admitted to the Programme, he or she shall direct a Juvenile Liaison Officer to give notice in writing to the parents or guardian of the child specifying the criminal or anti-social behaviour in respect of which a caution is to be administered, whether the caution is to be formal or informal and the time and place where it is to be administered and stating that the parents or guardian are obliged to attend its administration.

…"

17. In analysing Part 4 of the 2001 Act, Mr. Justice Simons observed at para. 17 of his decision in *S* (*Identity Protected*) [2019] IEHC 796 that:

"Part 4 of the Children Act 2001 has put in place a detailed legislative framework which is intended to regulate the diversion of juvenile offenders from the criminal justice system."

Having referred to the purpose and objective of the Diversion Programme (as set out in ss. 18 and 19 of the 2001 Act), Simons J. observed (at para. 18 of his judgment) that the

legislation prescribes certain "*qualifying criteria*" which must be fulfilled before a child is eligible to be considered for admission to the programme. The reference to "*qualifying criteria*" was clearly a reference to the provisions of s.23, which I have quoted, in full, above. As Mr. Justice Simons observed, the principal statutory criteria governing such a decision by the Director are to be found in ss. 23(2) and (4).

18. With regard to the Director's role as provided for in s. 24, Simons J observed that "*once these qualifying criteria have been fulfilled, it is then the 'function' of the Programme Director to decide whether to admit a child to the programme*."

19. As Simons J observed at para. 21 of his judgment in *S*. (*identity protected*), the "*legal effect of admission to the Programme is to bar a prosecution for that offence*". This is clearly provided for in s.49(1) of the 2001 Act which states as follows:

"Bar to proceedings.

> 49. (1) A child shall not be prosecuted for the criminal behaviour, or any related behaviour, in respect of which he or she has been admitted to the programme."

20. As Simons J. also made clear, and is accepted by all parties to the present proceedings, the role of the DPP is entirely separate and distinct from that of the Director. At para. 84 of his judgment in *S* (*identity protected*) Simons J. stated the following with regard to the respective roles of the Director and the DPP in the context of the Programme, its aims, and the admission to same:

> "84. … The Oireachtas has made a policy choice to divert certain juvenile offenders from the criminal justice system. The Programme Director is the person designated to give effect to this legislative intent. The decision as to whether or not to admit any individual offender to the Programme must be made by reference to the statutory criteria prescribed. Whereas Part 4 of the Children Act 2001 does undoubtedly confer a margin of discretion on the Programme Director, this discretion is constrained and he must observe the statutory criteria. The Programme Director is in a very different position than the Director of Public Prosecutions. The latter is entirely independent in the exercise of her functions, and the Prosecution of Offences Act 1974 is not prescriptive as to the criteria to which the Director must have regard in reaching prosecutorial decisions.

A margin of discretion

21. As Simon's J. identified in the foregoing passage, the Director is by no means 'at large' in relation to their decision to admit, or not, a child (as defined) to the Programme. Although the legislation confers what Simon's J. described as "*a margin of discretion*" on the Director, that discretion is constrained by statutory requirements, in that it is exercisable only when specific statutory criteria, including those laid down in ss. 23 (2) and (4), have been satisfied. Simons J. put matters as follows at para. 86 "…*there are certain conditions precedent to the making of a decision to admit a juvenile offender to the*

Programme. It is only where these have been fulfilled that the statutory discretion comes into play."

22. It is plain that the "*conditions precedent*" include the acceptance by a child of responsibility for his or criminal or anti-social behaviour (per s.23(1)(a)). What Simons J. referred to as "*statutory discretion*", was plainly a reference to ss. 23(2) and (4), which subsections require the Director to be "*satisfied*" that the admission of the child to the Programme would be appropriate, in the best interests of the child and not inconsistent with the interests of society and any victim; and when the admission is being considered, any views by any victim in relation to the child's criminal or anti-social behaviour must be given due consideration, although the consent of the victim is not obligatory for admission.

23. It will be recalled that s.19(2) makes clear that the objective of the Programme shall be achieved primarily by administering a "*caution*" and, where appropriate, by placing a child under supervision of a Juvenile Liaison Office and by convening a conference to be attended by the child, family members and other concerned persons. Section 25 of the 2001 Act deals with cautions and provides that a caution to be administered can be formal (*per* s.25(2) and (4)) or informal (*per* s.25(3) and (4)). A formal caution shall be administered in a Garda station, save in exceptional circumstances. As will be referred to later in this judgement, it is a matter of fact that, in the context of her 5 previous admissions to the Programme, the Applicant has received 2 informal and 3 formal cautions.

Relevant facts in chronological order

24. The Applicant was born in *May 2004* and is currently aged 17. The Applicant is subject to a Special Care Order pursuant to section 23 of the Childcare Act 1991. On foot of that Order, the Applicant resides at a particular Special Care Unit in Co. Dublin.

25. A Ms. T.W. is a member of staff, employed by TUSLA, at the Special Care Unit where the Applicant resides. It is alleged that, on 26 December 2020, the Applicant assaulted Ms. T.W.

26. On 8 January 2021, Ms. T.W. made a statement to Garda K.B. at Swords Garda station. A copy of this statement comprises exhibit "NK4" to the affidavit sworn by the Applicant's solicitor, Ms. Kelly, on 28 October 2021.

27. In the aforesaid statement made by T.W., she describes an attempt by herself and a colleague (a Mr. T.K.) to take the Applicant for a walk on the evening of 26 December 2020. She describes the Applicant wanting her coat and becoming abusive when T.W. replied that the Applicant didn't ask her for it. The statement details abusive language allegedly directed by the Applicant at T.W. and goes on to include *inter alia* the following description of the alleged assault:

> "… I asked her to step back because the residents aren't allowed in the office, but she wouldn't and she again said "I told you to get my coat", so I asked [T.K.] "Did

> L ask me to get her coat" and [T.K.] again said no and that's when she lunged at me. She punched me just above my right eye on my forehead. She had a ring ion (sic), a silver Claddagh with a green stone and that left a mark on my forehead."

28. Ms. T.W. goes on to state that the Applicant has previously assaulted her on numerous occasions, in that the final section of the statement includes the following:

> "This is the sixth or seventh (sic) that L has assaulted me. Around Halloween, L said to me "You're the only member of staff I can hit that won't press charges against me", and it's because she said that, that I've decided to make a complaint this time, as I feel that L will assault me again if I don't do something about it."

29. The Applicant was admitted to the Juvenile Diversion Programme on several previous occasions, and has previously received 3 formal cautions and 2 informal cautions, in respect of 5 previous assaults perpetrated on care workers at the same special care unit. The foregoing facts are set out at paragraph 2 of the Statement of Opposition of the Second Named Respondent, dated 10 February 2022, and Garda Kevin Barry swore an affidavit, on 10 February 2022, verifying the contents of the same.

30. The Applicant was charged with an offence set out on [a given charge sheet], as follows:

> "On the 26/12/2020 at [name given] High Support Unit…Dublin in said District Court Area of Dublin Metropolitan District, assaulted [T.W.] contrary to section 2 of the Non-Fatal Offences Against the Person Act, 1997".

31. On *4 June 2021*, the Applicant was charged in the Children Court. The Applicant was present in Court and was represented by Ms. Kelly, a solicitor with Michael J Staines & Co. Solicitors. The District Judge made an order of disclosure in respect of the charge. A certificate in respect of free legal aid was granted and Ms Kelly was assigned. The case was adjourned.

32. On *17 June 2021*, the Applicant sought, in accordance with the rules of disclosure in criminal proceedings, documentation relating to, *inter alia*, the Applicant's consideration for admission to the Juvenile Diversion Programme ("the Programme").

33. On *29 June 2021*, the Applicant's solicitor received disclosure comprising the Statement by the complainant, T.W., taken by Gda. K.B., to which I have referred, as well as CCTV footage.

34. On *30 June 2021*, the Applicant's solicitor emailed the First Named Respondent and sought confirmation as to (i) when the allegation was discussed with the Applicant by a juvenile liaison officer; (ii) on what date a Programme unsuitability letter was issued and communicated to the prosecuting member; and (iii) whether a file was sent to the DPP's office in respect of the charge.

35. On *2 July 2021*, the Applicant's solicitor was informed by the office of the Director that the Applicant had been deemed unsuitable for inclusion in the programme.

36. On *20 August 2021*, the Applicant's solicitor wrote to the Director requesting reasons for the Applicant being denied admittance to the Programme.

37. On *31 August 2021* the Applicant's solicitor wrote to the Director requesting a response and seeking confirmation as to whether it was intended to provide reasons why the Applicant had been deemed ineligible for admission to the Programme.

38. On *1 September 2021*, the Director's office confirmed by telephone to the Applicant's solicitor that the Applicant and the Applicant's parents would be spoken to in relation to the charge.

39. On *6 September 2021*, the Applicant's solicitor emailed the Director and confirmed that the case had been adjourned on 3 September 2021 for a 4-week period to allow the Applicant to be re-assessed for the programme. The Applicant solicitor indicated that she would require an opportunity to make brief submissions.

40. On *23 September 2021*, the assigned Juvenile Liaison Officer met with the Applicant and prepared a report, on the same date, in respect of the Applicant's suitability for admission to the Programme.

41. On *28 September 2021* the Applicant's solicitor submitted written representations on behalf of the Applicant detailing the Applicant's autism spectrum disorder ("ASD") diagnosis, or pre-diagnosis. Those representations referred *inter-alia* to L.A.'s history; needs; behavioural problems including self-harm; supports; and her engagement with "ACTS" (Assessment, Consultation & Therapy Services). The representations included, *inter alia*, quotes from a report compiled by the Applicant's Senior Clinical Psychologist and her Principal Social Worker with ACTS. The said representations concluded in the following terms:

> "In conclusion, [L] is a young person that has accepted responsibility and regrets hurting the victim in this case. Most importantly [L] has been diagnosed with Autism Spectrum Disorder since this incident. L has extremely supportive parents and she continues to work with ACTS to address her aggressive behaviours and we note that these behaviours have reduced significantly since our client was diagnosed with ASD and staff have responded to her in a different manner. Whilst not condoning the behaviour of our client, and the importance of understanding consequences of this type of behaviour, it has been difficult to consider that in a comparable situation of a young person with ASD living in the family home, the likelihood is that An Garda Síochána would have no involvement. Our client has extremely complex needs and a prosecution in respect of this matter cannot be in the public interest. For all of the above reasons we asked the Director to admit our client to the Diversion Programme".

42. On *29 September 2021*, the First Named Respondent Director considered all of the foregoing documentation, (as pleaded in paragraphs 22 to 25, inclusive, of the Director's statement of opposition, the contents of which have been verified by Superintendent John

Finucane, in his affidavit of 17 January 2022). Thus it is a matter of fact that the Director considered *inter alia* all submissions made on behalf of the Applicant before reaching the decision which is challenged in the present proceedings.

43. The decision was recorded by the Director on 29 September 2020 in the following terms:

> "I have reviewed the report including the details of the assault and LA's previous involvement with the diversion programme. I also note the previous referral history documented (2 informal and 3 informal (sic)) for cautions.
>
> However, having considered the required statutory criteria, I am not satisfied that the admission of LA is appropriate - in the best interests of the child or consistent with the interests of society and the victim. I direct UTCO."

44. On *1 October 2021*, the Applicant's solicitor was informed that the Applicant had been deemed ineligible for admission to the Programme. On the same date, the Applicant's solicitor wrote to the Director in the following terms:

> "We now call on you to furnish us with the reasons why our client has been deemed unsuitable for the programme. We are making the request in line with the High Court decision in S v. The Director of the Garda Juvenile Diversion Programme [2019] IEHC 796."

45. On *21 October 2021*, the Director responded to the Applicant's solicitor stating the following:

> "*I have reviewed this incident and note your client has benefited from the Garda Youth Diversion Programme on several previous occasions*.
>
> I have considered the required statutory criteria for inclusion in the Garda Youth Diversion Programme and I am not satisfied that the admission of LA is appropriate, in the best interest of L and consistent with the interest of society and the injured party." (emphasis added)

The aforesaid letter, dated 21 October 2021, was signed by Superintendent John Finucane in his capacity as "Director of the Diversion Programme".

Discussion and Decision

46. Article 41 of the Charter of Fundamental Rights of the European Union provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. This right includes: "*the obligation of the administration to give reasons for its decisions*". In *Council of the European Union v Bamba* (Case C-417/11) the ECJ explained the purposes of the said provision in the following terms:

> "The purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principal of respect for the rights of the defence, is, first, to provide the person concerned with

sufficient information to make it possible to ascertain whether the act is well-founded or whether it is vitiated by a defect which may permit its legality to be contested…"

47. It is fair to say that the foregoing statement of principle is reflected in the relevant jurisprudence in this jurisdiction and I will refer to certain authorities presently.

48. In para. 25 of her affidavit sworn on the 28 October 2021, the Applicant's solicitor avers as follows:

> "25. I say that the Applicant has not been provided with any, or any adequate, reasons for the decision to refuse to admit her to the programme. The letter dated October 21st 2021 does not provide reasons but merely recites the statutory criteria set out in the Children Act 2001".

49. Having regard to the facts in this case, I cannot agree with the contention that no reasons have been provided. The Director did not merely recite the statutory criteria. To suggest this is to ignore, entirely, the first of the two paragraphs of the Director's statement of reasons (contained in his 21 October 2021 letter) which I highlighted in para. 45 of thus judgment,

50. In para. 26 of the same affidavit the Applicant's solicitor went on to make the following averments:

> "26. In his letter of October 21st 2021, the First Named Respondent refers to the Applicant having "benefited" from the programme on several previous occasions. I am an experienced solicitor specialising in defending children accused of criminal offences. In my experience children may often be admitted to the programme on numerous occasions regardless of whether they have previously been admitted in relation to other incidents".

51. There is no dispute between the parties that it can, and often does, happen that a child is admitted to the Programme on more than one and potentially on a number of occasions. Indeed, the Applicant is someone in that very position. It does not follow, however, that multiple previous admissions could not constitute a valid reason for the Director deciding that a further admission would *not* be appropriate. The foregoing hardly seems a controversial statement to make, given what the statute says as to its '*objective'*.

52. It will be recalled that the objective of the programme is to divert a child who accepts responsibility for their criminal or antisocial behaviour away from committing further offences or engaging in further antisocial behaviour, which objective is to be achieved primarily by administering a caution, (the Applicant in the present case having received 5 cautions to date).

53. In light of the Programme's objective and the means by which it is to be achieved, it cannot be the case, that because a child is admitted to the Programme on numerous occasions, there can never come a point where the Director, in exercise of his or her

statutory discretion, comes to the view that further admission to the programme is inappropriate. Insofar as such a suggestion is made, explicitly or implicitly, in para. 26 of the affidavit sworn by the Applicant's solicitor, I feel obliged to reject it as flawed in principle.

The Director's reasons

54. On the facts of the present case, the Director came to the view that further admission to the programme would be inappropriate and made clear that the reasons were that (i) the Applicant had been admitted to the Programme on several previous occasions and, (ii) having considered, (as he was required to), the statutory criteria for inclusion in the programme, the Director was not satisfied that the admission of the Applicant was appropriate, was in her best interests, and was consistent with the interest of society and the complainant. The foregoing reasons were clear to anyone who read the Director's 21 October 2021 letter.

55. It is also clear from the averments made by the Applicant's solicitor at para. 26 of her affidavit that she was aware of, and understood, the reasons given by the Director, but took issue with them. It is beyond doubt that the Applicant's solicitor engaged with and criticised, with reference to her own experience, what I have called reason (i) as given by the Director in the first of the paragraphs of his 21 October 2021 letter. It was plainly in the context of being aware of and understanding the reason (i), that the Applicant's solicitor averred: "*In my experience children may often be admitted to the programme on numerous occasions regardless of whether they have previously been admitted in relation to other incidents*". To say the foregoing was both to understand the reason given and to object to the merits of the Director's decision based on same.

56. It is a statement of the obvious to say that the present proceedings are not an appeal, nor is it permissible for this court to approach the matter as if it was the decision-maker. This court is not concerned with the merits of the decision made, but with its lawfulness. It seems to me, that in the present case there was no failure to give reasons and there is no question of those reasons not having been understood. Rather, the unhappiness is with the merits of the decision made by a decision-maker whom the Oireachtas entrusted with the responsibility for making the relevant decision, and empowered to make it, albeit subject to very specific statutory criteria, involving the exercise of quite a limited discretion in the context of the relevant statutory provisions.

57. It will be recalled that, in their letter to the Director, dated 1 October 2021, the Applicant's solicitors stated *inter alia*: "*We now call on you to furnish us with the reasons why our client has been deemed unsuitable for the programme. We are making the request in line with the High Court decision in S v. The Director of the Garda Juvenile Diversion Programme [2019] IEHC 796*."

***S (Identity Protected) v. Director of the Garda Juvenile Diversion Programme* [2019] IEHC 796**

58. Earlier, I looked at the aforesaid judgement of Simons J. in *S* (*Identity Protected*) in the context of examining the Programme. The same judgement provides clarity both in respect of the obligation to provide reasons and the extent of that obligation, insofar as

the level of detail required in respect of such reasons. It is appropriate to quote, *verbatim*, paras. 89 to 93 as follows:

> "89. Having regard to all of these considerations and, in particular, to the fact that the decision to admit an offender to the Programme must be made in accordance with prescribed statutory criteria and that the Director of Public Prosecutions has no function in this regard, the decisions of the Programme Director do not attract the same standard of attenuated judicial review as is applicable to the Director of Public Prosecutions. This does not mean, of course, that it is "open season" in respect of decisions made under Part 4 of the Children Act 2001. *The Programme Director, as with any other public authority charged with the exercise of a statutory discretion, is entitled to curial deference. A court will not intervene to set aside a decision on the merits unless an Applicant for judicial review can establish that the decision is "unreasonable" or "irrational" in the sense that those terms are used in O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39, and Meadows v. Minister for Justice and Equality [2010] IESC 3; [2010] 2 I.R. 701*. An Applicant for judicial review will have to hurdle this very high threshold before he or she could succeed in setting aside the decision on the merits.
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> 90. *It follows as a consequence of this finding that his decisions are amenable to judicial review that the Programme Director is, in principle, required to provide reasons, if requested, to a juvenile offender who has been refused access to the Programme*. Whereas a juvenile offender does not have a "right" to be admitted to the Programme, they do have an obvious interest in ensuring that the decision has been reached in accordance with the relevant statutory provisions. See, by analogy, *Mallak v. Minister for Justice and Equality* [2012] IESC 59; [2012] 3 I.R. 297.
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> 91. *The reasons can be stated in short form, and there is no obligation on the Programme Director to provide a discursive explanation*. In the unlikely event that the statement of reasons would involve the disclosure of sensitive material, then the Programme Director can decline to provide reasons on that basis.
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> 92. An example of the type of reasons which would pass muster is provided by the facts of *Kelly v. Director of Public Prosecutions* (discussed earlier). On the facts of that case, the decision not to admit the two Applicants to the Programme had been informed by the serious nature and aggravating circumstances of the offences; the racial undertone of the offences; the failure of the first Applicant to make a full admission to the offences; and *the fact that the second Applicant had benefited from the Programme on several previous occasions. A short statement along these lines would fully discharge the duty to give reasons*. Moreover, it would not involve the disclosure of any sensitive information.
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> 93. Returning to the facts of the present case, the Programme Director has declined to provide any reasons whatsoever for his decision not to admit the Applicant to the Programme. *The Applicant is entitled to reasons, or, at the very least, to an*

explanation as to the basis on which the Programme Director purports to withhold reasons. The Applicant is, therefore, entitled to an order setting aside the decision and directing that the matter be reconsidered in light of the findings of the court. I discuss the precise form of order towards the end of this judgment." (emphasis added)

59. Several comments seem appropriate to make with regard to the foregoing, the first being to echo the emphasis laid by Simon's J. on the principle that curial deference must be shown to the Director as decision-maker. In my view, showing the requisite curial deference precludes this court from subjecting the Director's decision to microscopic analysis as regards how he expressed himself (as opposed to looking at the substance of his decision). On this issue, counsel for the Applicant sought to contrast how the Director (a) recorded his decision on 29 September 2021, with (b) what the Director stated in his 21 October 2021 letter to the Applicant's solicitor. Earlier in this judgment, I quoted both (a) and (b) *verbatim*, but for ease of reference both are repeated as follows:

60. (a.) <u>The decision, as recorded by the Director on 29 September 2020</u>: -

> "I have reviewed the report including the details of the assault and LA's previous involvement with the Diversion Programme. I also note the previous referral history documented (2 informal and 3 informal (sic)) for cautions.
>
> However, having considered the required statutory criteria, I am not satisfied that the admission of LA is appropriate - in the best interests of the child or consistent with the interests of society and the victim. I direct UTCO."

61. (b.) <u>The decision as communicated by the Director in his 21 October 2021 letter to the Applicant's solicitor</u>:

> "I have reviewed this incident and note your client has benefited from the Garda Youth Diversion Programme on several previous occasions.
>
> I have considered the required statutory criteria for inclusion in the Garda Youth Diversion Programme and I am not satisfied that the admission of LA is appropriate, in the best interest of L and consistent with the interest of society and the injured party."

62. The Applicant's counsel made a submission to the effect that the difference in wording between (a) and (b) is both material and is of significance. He submitted that the word "However" at the beginning of the second paragraph of (a) suggested that the decision to refuse admission to the Programme was not "*as a consequence of*" prior referrals, but was "*notwithstanding*" prior referrals and he went on to submit that the removal of the word "However", which does not appear in (b), was significant in that context.

63. It was of course (b) which the Applicant's solicitor received. The 'internal' record (a) of the Director's decision was made available in the context of the present proceedings and

constituted part of exhibit "JF1" to superintendent Finucane's 17 January 2022 affidavit verifying the contents of the statement of opposition. I do not regard (a) and (b) as materially different.

64. With regard to (b), Counsel for the Applicant also made a submission to the effect that one would need to "*read in*" the word "Therefore" or "Accordingly" at the start of the second paragraph, for a reader to be satisfied that paragraph 1 "*leads into*" paragraph 2 and is a "*logical consequence*" of same. The thrust of the submission was that, *without* the word "Therefore" or "Accordingly" or such a term at the beginning of the second paragraph, the wording in (b) "*is ambiguous*" and the reasons are "*Delphic*".

65. Regardless of the skill, sophistication and subtlety with which they are made, I cannot agree with the submissions made on behalf of the Applicant which seem to me to amount to an impermissible over-scrutiny of the manner in which the Director expressed himself, as opposed to the substance of the decision expressed. It seems to me that any reasonable and objective reading of (b), or for that matter (a), particularly in the context in which the reasons were given, conveys to the reader that the Director's decision was by reason of the previous referrals to the Programme and the number of same in the context of the exercise by the Director of their statutory discretion in accordance with the provisions of s. 23 (2) and (4) of the 2001 Act. Nor, in my view, is there any material, or significant, difference between how the Director expressed himself in (a) as opposed to (b).

66. Furthermore, the two paragraphs setting out the Director's reasons in his 21 October 2021 letter were preceded by the following introductory sentence: "*Dear Miss Kelly, I refer to your correspondence of 1st and 20th October 2021 in relation to the above matter*." The correspondence of 1st and 20th October 2021 called on the Director to furnish "*reasons*" why the Applicant was not being admitted to the Programme. Thus, the balance of the Director's 21 October 2021 letter obviously constituted the *reasons* which the Director was proffering in response to the request for same. This wholly undermines, in my view, the submission that there was any question of the first paragraph of those reasons not leading into, or being connected with, the second paragraph.

67. It is also appropriate to note again that there was no confusion on the part of the Applicant's solicitor as to the reasons for the Director's decision. In the manner examined elsewhere in this judgment, she challenged the merits of same by means of her averments at para. 26 of her 28 October 2021 affidavit.

68. Returning to paras. 89 – 93 from the judgement of Simons J. the learned judge held that "*…the Director is, in principle, required to provide reasons, if requested, to a juvenile offender who has been refused access to the Programme*." In the present case, reasons were requested, and they were, in fact, provided.

Short form without a discursive explanation

69. As Simon's J. also made clear, "*The reasons can be stated in short form, and there is no obligation on the Programme Director to provide a discursive explanation*." The reasons

were stated in short form without a discursive explanation. That said the reasons were clearly expressed and objectively intelligible. Indeed, the evidence entitles me to hold that the reasons were, in fact, understood and engaged with by the Applicant's solicitor. Far from any failure on the part of the Applicant's solicitor to understand the reasons, she took issue with same, plainly contending for a different outcome. In the course of submissions on behalf of the Applicant, counsel submitted that "*repeated admissions to the Programme is not a good reason*". It will be recalled that in the present proceedings no challenge is made to the rationality and/or reasonableness of the reasons given by the Director. Counsel for the Applicant very fairly and appropriately acknowledged that the present case is not about the merits of the decision, but about whether reasons for the decision were given, and were clear. For the reasons set out in this judgement, I am satisfied that they were both.

70. It seems to me to be entirely comprehensible why the Director's reasons for refusing access to the Programme can be stated "*in short form*" and without "*a discursive explanation*". This is because, in the manner examined earlier, the Director is not 'at large' in the decisions he makes. The proposition that reasons in short form are sufficient seems to me to relate in a direct fashion to the relatively limited scope of the Director's decision-making power pursuant to the 2001 Act, and the context in which the Director's decision was made.

The context in which reasons were given in this case

71. The context in which the Director gave reasons in the present case includes the following, all of which was known to the Applicant and / or her solicitor at the time the reasons were given:

72. The Applicant is not *obliged* to enter the Programme (see s.23 of the 2001 Act);

73. The Applicant does not have any *right* to be admitted to the Programme (see s.24(1) of the 2001 Act which makes clear that "*It shall be a function of the Director to decide whether to admit a child to the programme and the category of caution to be administered to any child so admitted"*);

74. Acceptance of *responsibility* for criminal behaviour is a condition precedent for admission to the Programme, but acceptance of responsibility does not create any right to be admitted. Rather, it is a statutorily mandated requirement in order for a child to be considered for admission (see s.23);

75. The Applicant has perpetrated *5 previous assaults*; (see paragraph 2 of the statement of opposition of the Second Named Respondent, as verified by Garda K.B. who swore his affidavit on 10 February 2022);

76. All 5 assaults have been on *care workers* at the Care Unit where she resides (see paragraph 2 of statement of opposition of the Second Named Respondent, as verified by Garda K.B. who swore his affidavit on 10 February 2022);

77. The Applicant has previously been *admitted* to the programme on several occasions; (see paragraph 2 of statement of opposition of the Second Named Respondent);

78. The Applicant has already received *3 formal cautions and 2 informal cautions* in respect of the 5 previous assaults perpetrated by her on care workers at her Care Unit (see paragraph 2 of statement of opposition of the Second Named Respondent);

79. The Applicant has previously *accepted responsibility* for her criminal behaviour in respect of these 5 previous assaults (see s.23(1) of the 2001 Act which makes clear that acceptance of responsibility for criminal behaviour is a condition preceded for admission to the Programme);

80. The *objective* of the programme is to divert any child who accepts responsibility for their criminal behaviour from committing further offences (see s.19(1) of the 2001 Act);

81. That objective is to be *achieved* primarily by the administration of cautions (see s.19(2));

82. Given that there have been multiple admissions to the Programme and multiple cautions, both formal and informal, previously administered, the Programme's objective has *not* been achieved in respect of the Applicant, insofar as the criminal behaviour carried out by the Applicant *subsequent* to her first admission to the Programme;

83. Despite several prior admissions to the Programme, several prior instances of accepting responsibility for criminal behaviour, and 5 prior cautions, the Applicant is alleged to have carried out a *further* assault, also on a *care worker* at her Unit;

84. In her 8 January 2021 Statement made to Garda K.B., the complainant states that this is the 6th or 7th time the Applicant has assaulted her (note, this Statement was furnished to the Applicant's solicitor on 29 June 2021, along with CCTV footage, i.e. prior to reasons having been sought and given.);

85. In her 8 January 2021 Statement, the complainant attributes to the Applicant the following statement: "*You're the only member of staff I can hit that won't press charges against me*" (see exhibit "NK4" to the affidavit of the Applicant's solicitor sworn 28 October 2021 comprising the Statement);

86. The views expressed by a victim must be given due consideration as regards admission to the Programme (see s.23(4));

87. The Director must be satisfied that the admission of the Applicant to the Programme would be appropriate, in the best interests of the Applicant, and not inconsistent with the interests of society and the victim (see s.23(2) of the 2001 Act).

88. It is in the foregoing context that the Director gave the reasons for the decision to refuse admission to the programme. That specific factual and legislative context seems to me to make it perfectly understandable why, as held in *S (identity protected)*: "*The reasons can*

be stated in short form, and there is no obligation on the Programme Director to provide a discursive explanation".

89. At paragraph 44 of the Applicants written submissions it is stated that: "… *even if it is the case that the fact of previous admission is in and of itself a sufficient reason to refuse subsequent admission, the programme Director failed to engage with the pertinent factor that the Applicant's previous admissions to the programme predated her diagnosis of ASD*". It is fair to say that the foregoing ground is not pleaded, nor was any application made during the hearing to amend the Statement of Grounds. It will be recalled that the Applicant has not sought any relief on the basis that the decision challenged was *irrational* or *unreasonable*. It is uncontroversial to say that lawful decision-making, in the administrative law context, requires the decision-maker to have considered everything they were required to take account of, and to have excluded any considerations not permitted. The Applicant does not plead that the Director failed to take account of the submissions, dated 28 September 2021, furnished to the Director by the Applicant's solicitor and the uncontroverted evidence is that the said submissions were, in fact, considered by the Director.

90. Although a principal submission made on behalf of the Applicant is to the effect that the reasons proffered by the Director were deficient because they failed to set out a narrative in respect of the engagement, by the Director, with the submissions furnished on 28 September 2021 by the Applicant's solicitor, the foregoing submission is, in my view, wholly undermined by what Simon's J. held in *S (identity protected)*, "*The reasons can be stated in short form, and there is no obligation on the Programme Director to provide a discursive explanation*".

91. Whilst stressing that the Applicant does not challenge the rationality or reasonableness of the decision, Counsel for the Applicant emphasised in oral submissions that the Applicant's complaint is not that the Director failed to take account of the submissions of 28 September 2021. Rather, Counsel submits that the Director "*failed to demonstrate*" that he had taken any account of same. Among the oral submissions made on this theme was that: "We don't know if the submissions were given any weight"; "*We don't know if the submissions were shredded, or ignored, or carefully considered*"; "*The failure to give reasons means the Applicant does not know what account was taken of the submissions*"; and "*There is nothing on the face of the decision to say that the submissions didn't go straight into the shredder*".

92. Even if all of the foregoing submissions speak directly to the pleaded case – as opposed to the proposition, not pleaded, that there was a failure on the part of the Director to take relevant information, specifically the submissions of 28 September 2021, into account – I am satisfied for the reasons set out in this judgment, that the Director who, as a matter of fact, considered the submissions in question prior to reaching his decision, was under no obligation to furnish more detailed reasons than he did in fact provide. Applying the principles which emerge from *S (identity protected)*, it seems to me that the Director, when giving his reasons, was not obliged to refer to, or explain how he had engaged with,

the documentation or information considered by him in order to reach his decision (be that (i) the contents of the *report* prepared on the child, as required by s.22 of the 2001 Act; or (ii) the contents of the *file* prepared by the Juvenile Liaison Office, including the views of the Executive Officer; or (iii) the written *submissions*, dated 28 September 2021, as furnished by the Applicant's solicitor).

93. What was required was for the Director to provide reasons which, however succinctly put, were clear and intelligible and sufficient for the Applicant and those advising her to know why, on this occasion, the Director declined to admit her into the Programme. This was done and the absence of any obligation to provide a discursive explanation means, in my view, that the reasons which were in fact provided by the Director were adequate, despite the submission made on behalf of the Applicant that it is unknown whether the 28 September 2021 representations "*didn't go straight into the shredder*". On the facts in the present case, the submissions were considered, as was other relevant material, and clear, intelligible reasons were given which were, in fact, understood.

94. As to what the Applicant maintains the Director should have done in relation to informing the Applicant that her solicitor's submissions had been considered, among the submissions made by counsel for the Applicant was to contend that, all the Director had to say was '*Thank you for your submissions. I don't agree'* or words to that effect. The thrust of the foregoing submission was that a failure by the Director to include confirmation of the foregoing nature in his 21 October 2021 letter, meant that the reasons were deficient. I cannot agree. Leaving aside the principle that the Director is not under an obligation to provide any discursive explanation, and taking into account that the Applicant has not pleaded that the was any failure on the part of the Director to take account of relevant information, it is perfectly plain from the reasons proffered by the Director, in the context in which the reasons were given, that he did not agree with the Applicant's solicitor who took the view that the Applicant should be admitted to the Programme.

95. The logic of the Applicant's submission is that, had the Director, in his 21 October 2021 letter, thanked the Applicant's solicitor for her submissions, or acknowledged receipt of same, and stated that the Director did not agree with same, allegedly deficient reasons would have been rendered sufficient. I feel obliged to reject that proposition. The wording which, according to the Applicant, the Director should have added to his 21 October 2021 letter, was not required to make the reasons given sufficient, clear, and intelligible. Thus, even on a first-principles analysis - and putting to one side for a moment the guidance given in *S (identity protected)* – the additional wording contended for by the Applicant was not necessary to make the reasons adequate, and the decision lawful.

96. On the topic of the 28 September 2021 submissions, it is also worth noting that a central theme in the submissions made by the Applicant's solicitor was to say that "*Our client has extremely complex needs and a prosecution in respect of this matter cannot be in the public interest*". Although that submission was made to the Director, he has no role in

deciding whether or not charges are proffered and what does or does not represent the public interest in that regard, such a decision being one for the DPP.

97. In his decision in *S (identity protected)* Simons J. made reference to the earlier judgement in *Kelly v. DPP* [2009] IEHC 200, which, this Court understands, concerned the Programme prior to it being placed on a statutory footing. Mr Justice Hedigan held in *Kelly* (at para. 38): -

> "I am therefore unable to accept that the Director in the present case had any obligation to inform the Applicants of his reasons for excluding them from the Programme. In my opinion, there is no cause to find any violation of basic fair procedures in the manner in which the Director performed his functions."

98. Although distinguishing it from the case before him, Simons J. made clear that "*An example of the type of reasons which would pass muster is provided by the facts of Kelly v. Director of Public Prosecutions*" and he went on to list, with reference to the facts in that case, several reasons which informed the decision not to admit, to the Programme, the two Applicants in the *Kelly* case.

99. The court did not suggest that this was an exhaustive list. Nor was it suggested that, in order to be adequate, there must be a multiplicity of reasons. One reason cited, with reference to the facts in *Kelly*, was "*the fact that the second applicant had benefited from the Programme on several previous occasions*". That is precisely the reason detailed in the first paragraph of the Director's 21 October 2021 letter to the Applicant's solicitor. As Simon's J went on to state with regard to the examples of reasons given: "*A short statement along these lines would fully discharge the duty to give reasons*". The foregoing occurred in the present case. Furthermore, the reasons were understood by the Applicant's solicitor.

100. One could feel nothing but sympathy for someone who faces the Applicant's challenges but for the purpose of the present proceedings, it seems appropriate to point out that there is no averment made to the effect that, in view of her challenges, the Applicant could not understand the reasons given by the Director; or did not recall her 5 prior assaults on care workers; or did not recall her prior admissions to the Programme; or did not recall the 5 cautions previously issued to her. The evidence before the court is that the Applicant has supportive parents and the benefit of very experienced solicitors and counsel. That being so, the court cannot hold that the Director's reasons could not be comprehended by the Applicant, nor is this suggested.

101. Among the authorities to which the Applicant directed this Court's particular attention is the Supreme Court's decision in *Mallak v. The Minister for Justice* [2012] 3 IR 297, in particular, the following statement by Fennelly J, at para 68:

> "68. In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of

achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

102. As regards the Applicant's reliance, in the present proceedings, on *Mallak* it is clear that Simons J. relied on the same authority as a basis for distinguishing his decision in *S (Identity Protected)* from that in *Kelly v DPP*. Simons J held, at para. 73:

> "73. Having carefully considered the judgment in *Kelly*, it does not appear to me to be conclusive of the issues which fall for determination in the present case. One of the central issues to be determined is how the principles in the landmark judgement in *Mallak* apply to a decision not to admit an offender to the diversion programme. The judgment in *Kelly* had been delivered several years prior to *Mallak*, and, thus, by definition, could not have addressed this question."

103. Thus, reliance on *Mallak*, takes the Applicant as far, but no further, than the principles set out with clarity by Simon's J in *S (Identity Protected)*, as regards the Director's duty to give reasons, and the extent of that duty. It should also be noted that, at issue in *Mallak*, was a 2008 decision by the Respondent Minister to refuse a 2005 application for a certificate of naturalisation, in circumstances where no reasons were provided for the decision, and the Minister insisted that he was not obliged to explain his decision. The legislative context and specific facts in the present case are very different to those in *Mallak*. Far from insisting that he is not obliged to explain his decision, the Director has provided reasons for it, which, in my view, are sufficient in light of his obligations in this regard.

104. At the risk of stating the obvious, it is the principles outlined in *S (Identity protected)* which are of direct relevance to the facts in the present case and which are, therefore, of far more assistance insofar as determining the Applicant's claim, than more general statements of principle which can be found in a wide-range of authorities, including in cases where the factual background and context in which those principles were outlined, is markedly different to that which pertains in the present case.

105. Another authority relied on by the Applicant is the Supreme Court decision of *YY v Minister for Justice* [2017] IESC 61. The facts in *YY* and the context in which the impugned decision in that case arose, are in stark contrast to those in the present case and entirely distinguishable. In *YY* the relevant decision concerned the Minister's reasons to refuse an application pursuant to s.3(11) of the Immigration Act 1991 to revoke a deportation order to Algeria. As O'Donnell J. (as he then was) stated in the very first paragraph of the Supreme Court's judgement:

> "… this case presents in a stark way, the difficulties created when it is sought to deport an individual who is considered a threat to the security of this state and

others but who contends that he will be subjected to treatment contrary to Article 3 of the European Convention of Human Rights if returned to his country of origin, which in such circumstances is the only country to which he or she can realistically be returned. The appellant has been in custody for the duration of these proceedings, first while serving a sentence, and latterly has been detained pending the execution of the deportation order challenged in this case."

106. The Applicant places reliance on para. 80 of the Supreme Court's decision, but to see it in context it is appropriate to also quote para. 79:

> "79. The High Court judge analysed these matters both carefully and lucidly, and considered it was possible to treat the more troubling aspects of the reasoning as no more than what he helpfully described as boilerplate general phrases included routinely in s.3 decisions. Indeed, it can be said that much of the interaction between the applicant and the Minister here consisted at every stage of generalised statements detached from the precise focus of the case, submitted without any link being made to the particular case on behalf of the applicant, and responded to by a collection of generalised and sometimes enigmatic statements on the part of the Minister.
>
> 80. Having considered the matter, I have come to the conclusion that the reasons provided by the Minister were inadequate to support the decision here. In requiring more by way of reasons, I consider that a court should be astute to avoid the type of over-refined scrutiny which seeks to hold civil servants preparing decisions to the more exacting standards sometimes, although not always, achieved by judgments of the Superior Courts. All that is necessary is that a party, and in due course a reviewing court, can genuinely understand the reasoning process. But even taking that broad and common sense approach, I have come to the conclusion that it is not sufficiently clear why the Minister came to the conclusion that the applicant could be deported to Algeria without a real risk of torture, or inhuman or degrading treatment, and why the Minister considered that such a decision ought not to be revoked. I have come to the conclusion that I cannot have the level of assurance that is necessary that the decision sets out a clear reasoned path, and moreover one that was not flawed or incorrectly constrained by unjustifiable limitations or irrelevant legal considerations."

107. The Applicant lays particular emphasis on the Supreme Court's statements that it is necessary that "*a party, and in due course a reviewing court can genuinely understand the reasoning process*" and "*that the decision sets out a clear reasoned path, and moreover one that was not flawed or incorrectly constrained by unjustifiable limitations or irrelevant legal considerations*". It was on the specific facts in *YY* that the Supreme Court held that it was "*not sufficiently clear why the Minister came to the conclusion*" and the Supreme Court's observations were plainly related to the particular facts in *YY*, which involved complex issues including constitutional rights, statutory rights and Convention rights as well as individual liberty and State security. By contrast, what is at issue in the

present case, concerns a decision by the Director who, exercising their statutory discretion, took the view that it was not appropriate to admit the Applicant, for a sixth time, to the Juvenile Diversion Programme to which she had previously been admitted on multiple occasions, (giving rise to multiple previous cautions), which decision is neither said to be unreasonable nor irrational. Admission to the programme is neither mandatory nor as of right. The Director did in fact give reasons for his decision and those reasons, in my view, were adequate.

108. Similar comments apply in relation to the range of authorities cited by the Applicant, including the Supreme Court's decision in *NECI v The Labour Court* [2021] IESC 36 and the earlier High Court decision in *Balz v An Bord Pleanala* [2018] IEHC 535, which case was discussed in *NECI*.

109. In the Applicant's submissions, particular emphasis is laid on the observations of Mr. Justice MacMenamin, at paragraph 157 of his judgement in *NECI*. To understand the context in which the learned judge provided that guidance, it is appropriate to note that *NECI* involved a challenge to a Sectoral Employment Order ("SEO") with far-reaching effect in the setting of terms and conditions in respect of the rights of numerous employees across the entire electrical contracting area in the State. The SEO was the subject of a recommendation by the Labour Court under procedures laid down in Chapter 3 of the Industrial Relations Amendment Act, 2015 ("the 2015 Act") and subsequently embodied in SI 251/2019. The Respondent, *NECI*, represented small and medium-sized electrical contractors and successfully applied for judicial review in respect of the SEO. The case was, on any analysis, a very complex one. In addition to a challenge to the constitutionality of Chapter 3 of the 2015 Act on foot of which the relevant statutory instrument had been promulgated, *NECI* contended that, in making the recommendation on foot of which the relevant statutory instrument was promulgated, the Labour Court acted *ultra vires* the 2015 Act, by failing to give reasons for its recommendation. The *NECI* was successful on both issues at first instance. A sense of what was at issue is clear from para. 34 of the judgment of Mr. Justice Charleton in *NECI*:

> "34. As MacMenamin J. States in his judgement, what characterises the lack of reasons by the Labour Court in this instance is puzzlement: who can say why the decision was made? But, this valuable body, key to the maintenance of industrial peace, is not to be put under the obligation of issuing discursive judgements as if from a leading jurisprudent. The normal rule is this: if the reasons are such that an intelligent person observing the court proceedings can say why the judge made the decision, and that with a knowledge of having heard all of the evidence and submissions as the judge did, then that suffices."

110. Before proceeding further, it is appropriate to state that, in the present case, there is no 'puzzlement'. There is no doubt about why the decision was made, when one looks at the reasons given, in the context in which they were provided. Even if the principles derived from *S (identity protected)* were not directly applicable (and I am satisfied that they are) I take the view, for the reasons set out in this judgment, that what Charleton J. referred

to as the "*normal rule*" (as regards the giving of reasons and their extent) is a rule the Director has complied with in the present case.

111. From para 147 onwards of his judgement in *NECI*, Mr. Justice MacMenamin set out certain principles in respect of the duty to give reasons and, to understand the context in which the learned judge's statements at para. 157 arise, I now set out the relevant section from his judgement, as follows:

Legal Principles: The Duty to Give Reasons - *Connelly v. An Bord Pleanála*

> 147. In *Connelly v. An Bord Pleanála* [2018] ILRM 453, this Court held that it was possible to identify two separate, but closely related, requirements regarding the adequacy of any reasons given by a decision-maker. First, any person affected by a decision should at least be entitled to know, in general terms, why the decision was made. Second, a person was entitled to have enough information to consider whether they can or should seek to avail of any appeal, or to bring a judicial review of a decision. The court held that the reasons provided must be such as to allow a court hearing an appeal, or reviewing a decision, to actually engage properly in such an appeal or review. The court went on to explain that it may be possible that the reasons for a decision might be derived in a variety of ways, either from a range of documents, or from the context of the decision, or some other fashion. But this was subject to the overall concern that the reasons must actually be ascertainable and capable of being determined (see *Connelly*, para. 7.1 to 7.6).

Meadows v. Minister for Justice

> 148. In *Meadows v. Minister for Justice* [2010] 2 I.R. 701, Murray C.J. stated: -
>
> "An administrative decision affecting the rights and obligations of persons should at least *disclose the essential rationale on foot of which the decision is taken*. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.
>
> Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective." (para 93-94)

Rawson v. Minister for Defence

> 149. In *Rawson v. Minister for Defence* [2012] IESC 26 Clarke J. (as he then was) stated, on behalf of this Court, that: -
>
> "How that general principle may impact on the facts of an individual case can be dependent on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned … the particular basis of challenge." (para 6.8)

EMI Records (Ireland) v. Data Protection Commissioner

150. In *EMI Records (Ireland) v. Data Protection Commissioner* [2013] IESC 34, Clarke J. (as he then was) concluded that a party was entitled to sufficient information to enable it to assess whether the decision was lawful and, if there be a right of appeal, to enable it to assess the chances of success, and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends.

Oates v. Browne

151. In *Oates v. Browne* [2016] 1 I.R. 481, Hardiman J., in this Court, stated that it was a practical necessity that reasons be stated with sufficient clarity so that, if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. But to this he added: -

"Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must "satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it". (para 47.)

Balz & Anor. v. An Bord Pleanála

152. Finally, the judgment of this Court in *Balz & Anor. v. An Bord Pleanála* [2019] IESC 90 contains a number of observations which strike home in this case. *Balz* concerned a decision on a planning application. The judgment makes the point that the imbalance of resources and potential outcomes between developers, on the one hand, and objectors, on the other, means that an independent expert body, carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function.

153. Having pointed out that the *Board* and its inspector had carried out their functions with a high degree of technical expertise, the judgment went on to describe that, on the facts of that case, it was nonetheless unsettling that there should be an absence of direct information on one of the central planning issues which arose. O'Donnell J. stated that this might have occurred as a result of an unfortunate misunderstanding at the time of the appeal, and the *Board's* decision might have become entrenched in the defence of these proceedings. He allowed that there might be valid reasons why a board, or other decision-making body, might draft its decisions in a particularly formal way, and that, in most cases, interested parties would be able to consult an inspector's report to deduce the reasons behind the *Board's* decision. But, on the facts before the court, he observed: -

> "However, some aspects of the decision give the impression of being drafted with defence in mind, and to best repel any assault by way of judicial review, rather than to explain to interested parties, and members of the public, the reasons for a particular decision." (para. 45)

154. But the judgment in *Balz* made clear that when an issue had arisen where it was suggested that the Inspector, and the *Board*, had not given consideration to a particular matter, it was also unsettling that the issue raised should be met by the bare response that such consideration was given (for a limited purpose) and nothing had been proven to the contrary. Similarly, while an introductory statement in a decision that the *Board* had considered everything it was obliged to consider, and nothing it was not permitted to consider, might: -

> "… charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision." (para. 46)

155. This last passage has a particular resonance in this case. *Balz* makes clear that a decision-maker must engage with significant submissions. The judgment emphasises that it is a basic element of any decision-making affecting the public that relevant submissions should be addressed, and an explanation given why they are not accepted, if indeed that was the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision-making institutions, if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live. (Para. 57 et seq of the judgment.)

The Duty to Give Reasons: Summary of Principles Applicable

156. The questions applicable in this case are, therefore: -

a. Could the parties know, in general terms, why the recommendation was made?
b. Did the parties have enough information to consider whether they could, or should, seek to avail of judicial review?
c. Were the reasons provided in the recommendation and report such as to allow a court hearing a decision to actually engage properly in such an appeal, or review?
d. Could other persons or bodies concerned, or potentially affected by the matters in issue, know the reasons why the Labour Court reached its conclusions on the contents of a projected SEO, bearing in mind that it would foreseeably have the force of law, and be applicable across the electrical contracting sector?

157. Obviously, the test must be an objective one. The views of an aggrieved party having recourse to a tribunal may be a consideration. But, when determining whether the reasons given were sufficient, the test must be more dispassionate and detached. In this case, the potential audience is relevant. The Labour Court was engaged in a statutory role, involving compliance with statutory duties to protect rights, where public interest required transparency. The reasons had to be sufficient, therefore, not just to satisfy the participants in the process, but also the Minister, the Oireachtas, other affected persons or bodies, and the public at large, that the Labour Court had truly engaged with the issues which were raised, so as to accord with its duties under the statute."

112. The *dicta* in *NECI* needs to be understood in the context of the facts of that case. It seems to me that the questions posed by the Supreme Court at para. 156 were those applicable in light of the particular facts in the case before it. The factual and legislative situation and the context in which the Director made his decision in the present case is entirely different to the Labour Court's decision in *NECI*. It also seems to me that the questions posed by the Supreme Court in *NECI* were a concrete illustration of (a) the reality that there is no 'one size fits all' approach to the question of reasons and their extent; and (b) that justice, including constitutional and natural justice, must react to facts and circumstances.

113. In short, what was required of the Director in the present case differs from what was required of the Labour Court in *NECI*, because of the starkly different facts, circumstances and context. As Mr Justice Hedigan made clear in *Kelly v DPP* [2009] IEHC 200: -

> "All public and administrative bodies are required to conduct themselves to a certain basic standard of propriety and fairness. To this end, they must adhere to the fundamental principles of natural and constitutional justice. However, these principles are not without qualification or limits and *what is required of a decision-maker depends upon the circumstances of the individual case*." (emphasis added)

114. At paragraph 147 of his Judgment in *NECI*, MacMenamin J. summarised certain principles which had been articulated by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] ILRM 453. It is appropriate to note that, whereas Clarke CJ made clear at para. 6.15 in *Connelly*, that a person affected by a decision is (i) at least entitled to know in general terms was made and that (ii) the reasons provided must be such as to allow a court hearing on appeal or reviewing a decision to actually engage properly in such an appeal or review, the learned judge went on to state the following, at para 6.16:

> "However, in identifying this general approach, it must be emphasised that its application will vary greatly from case to case as a result of the various criteria identified earlier which might distinguish one decision, or decision-making process, from another."

115. The foregoing statement of principle seems to me to be highly relevant in the present case, fortifying me in the view that (i) a 'one size fits all' approach cannot be taken with

regard to the adequacy of reasons, and that, (ii) notwithstanding statements of principle in cases where the facts, circumstances, and context in which the decision and reasons given (or not given) are markedly different to the situation in the present case, the Applicant's claim falls to be determined in accordance with the principles set out in *S (identity protected)*.

116. I say the foregoing, conscious of the observations made by the former Chief Justice, from para 5.1 onwards in *Connelly*, with regard to the wide range of different decisions and decision-making processes: -

> "5.1. It is perhaps trite to say that it is very difficult to be specific about the manner in which the obligation to give reasons must apply in different types of situations. This is so not least because the kind of decisions to which the obligation to give reasons applies can vary enormously. Furthermore, the process leading to a decision can differ greatly from one case to the next. Some decisions follow on from a largely adversarial process not entirely unlike that which might occur where a court is required to consider a similar question. Others involve a decision of a regulator who has engaged only with a regulated entity. Some decisions, such as most in the environmental field, can involve the interests of a wide range of persons and the participation of many in the process itself.
>
> 5.2. Furthermore, the legal requirements which go into different types of decisions may, themselves, vary very significantly from case to case. In certain circumstances a decision maker may be required to determine whether very precise criteria are met. The issue will, therefore, be as to whether those criteria are present, and the reasons which will require to be given will necessarily have to address why it is said that the criteria were, or were not, met. That, in turn, may very well itself require an understanding of the process which led to the decision and the precise issues which were focused on in that process. On what basis was it suggested that the criteria were not met and how did the person concerned suggest that those questions could be answered in its favour? The issues which arise clearly inform the reasoning behind any decision.
>
> 5.3. However, other decisions involve much broader considerations involving general concepts, and often, to a greater or lesser extent, a degree of judgment or margin of appreciation on the part of the decision maker. Indeed, it may be said that, in the field of environmental law, issues at various points along that spectrum can arise. There may be specific issues as to whether, for example, a particular project conforms to a development plan or guidelines which the decision maker is required to take into account. On the other hand, a decision may also involve a broader question of whether, for example, a proposed development would involve an excessive impairment of visual amenity in a sensitive area. Many other examples could be given. However, the point is that the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is

being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached.

5.4. In my view it is of the utmost importance, however, to make clear that the requirement to give reasons is not intended to, and cannot be met by, a form of box ticking. One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons."

117. The former Chief Justice's point that "*the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached*" is highly relevant and does not seem to me to be at all at variance with the approach taken in *S (identity protected)*.

118. Even if the principles derived from *S (identity protected)* were not directly applicable and even if this court did not have the benefit of that decision and embarked on a fresh consideration of the adequacy of reasons, I am entirely satisfied that, by virtue of the reasons given in the present case, and the context in which they were given, the Applicant and her legal advisers knew, at least in general terms, why the decision was made; and were given enough information to consider whether to bring a challenge in respect of the Director's decision. Moreover, the reasons provided by the Director were such as to allow this court to engage properly with the decision made. In short, reasons were given which were clear, comprehensible and, in my view, adequate, having regard to not only the principles derived from *S (Identity Protected)* but the principles which emerge from the wider jurisprudence, including the authorities on which the Applicant placed reliance.

119. If the fundamental principle is that "*understanding and comprehension*" should be "*the object of any decision*", I am satisfied that, in the present case, this object was attained by virtue of the reasons given in the 21 October letter. It will also be recalled that the Applicant's solicitor (*per* para. 26 of her 28 October 2021 affidavit) engaged with same, plainly understanding the reasons given, but contending for a different decision than the Director in fact made.

120. For the reasons set out in this judgement, the Applicant's purported reliance on various statements of principle from a range of authorities concerning very different decisions and contexts to the present position, such as the recent judgement in *Ballyboden Tidy Towns Group v. An Board Pleanála* [2022] IEHC 7, does not entitle the Applicant to relief. The Applicant places particular reliance on para. 262 of the judgment in *Ballyboden*. To understand the context in which para. 262 arises and, indeed, to get a sense of the starkly different decision-making which was at play in *Ballyboden*, it is useful to quote verbatim, paras. 262 – 264, inclusive:

> "262. To put it another way, there is a middle-ground between a narrative, discursive essay and a mere anodyne or box ticking or name-checking acknowledgement that regard has been had to a submission. As Clarke J said in *Connelly*: "While it has often been said that a decision maker is not required to give a discursive determination along the lines of what might be expected in a superior court judgment, it is equally true that the reasoning cannot be so anodyne that it is impossible to determine why the decision went one way or the other." And as Clarke J said and Barniville J repeated in *Crekav*, where in that middle-ground the obligation lies, in a particular case, along a spectrum between narrative, discursive essay and the mere anodyne or box-ticking or namechecking, will depend on the circumstances of that case. Reasons must be adequate to the circumstances.
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> 263. Also informing my view of the intended generality of the views of O'Donnell J in *Balz*, I note its distinct echoes of the views of McKechnie J. in *Byrne v Fingal County Council* 214 as to development plans: notably the idea that the plan is "answerable to public confidence", and "those affected, many aversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good." 215 O'Donnell J, entirely predictably in my view, using slightly different wording, tells us that the *Board* and its decision-making are "answerable to public confidence". To be answerable to public confidence requires that reasons be given – and that they be given in form and content sufficient to the aim of maintaining public confidence – and in particular the confidence of those who must abide the result, suffer the pain, undergo the loss and concede to the public good.
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> 264. Though the analogy between a decision in a planning application and a judgment by a court is far from complete, it is nonetheless notable that in *Defender v HSBC France* [2020] IESC 37 O'Donnell J observed that an important part of the administration of justice is that "a party, in particular the losing party, should believe that his or her case was fairly ventilated and considered." Of course, the *Board* is not engaged in the administration of justice and the principle stated by O'Donnell J imposes different degrees of reason-giving obligations in different contexts. But in general terms the principle applies to both forms of decision-making via the public interest in public faith in decision-making by public institutions. And it seems to me that the remarks of O'Donnell J in this regard in *Defender* and in *Balz* are of a piece. As I have said above less elegantly and less completely, reasons are for losers."

121. The foregoing extract clearly illustrates the very different factual including statutory context with which the court in *Ballyboden* was concerned. What also emerges very clearly is the court's emphasis on the principle highlighted by the current Chief Justice in *Defender* as regards "*different degrees of reason-giving obligations*" arising in different contexts. In the present context, the reasons given by the Director were clear and sufficient. I simply cannot agree with the submission that the those reasons were "*delphic*". The reasons given, in the context in which they were proffered, were neither abstruse nor ambiguous. In my view the reasons accord with the principles set out by this court in *S (Identity Protected)* and were sufficient.

122. Although not determinative of the issue in the present case, it also seem to me that if the Applicant was correct, and I am satisfied that they are not (i.e. if the Director was under a duty, when proffering reasons, to set out all information and documentation he had engaged with and the manner he had engaged with it, and to include in this discursive explanation of his reasons, his engagement with any and all submissions made by on behalf of a would-be entrant into the Programme) a potential consequence is the creation of an enormous administrative burden and the introduction of very significant delay with regard to the operation of the Juvenile Diversion Programme. It does not seem unduly alarmist to suggest that if the Applicant was correct as to the obligations on the Director, it would have the potential to prejudice, in a material way, the very operation of the statutory Programme.

123. For the reasons set out in this judgment, I am satisfied that the Applicant's rights to fair procedures have not been breached. At para. 54 of the Applicant's written submissions it is contended that "*the refusal to admit the Applicant to the programme ought to be quashed as the decision-making process was procedurally unfair, lacked transparency, and was not reasonably or soundly based*." Even if the entire of the foregoing submission speaks to the case, as pleaded, the Applicant has not established the foregoing. Reasons have, in fact, been given and the Director's reasons are, in my view, adequate insofar as his obligations. A discursive explanation is not required by constitutional or natural justice, or pursuant to the European Convention on Human Rights. The Applicant's case falls to be dismissed.

124. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically:

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be

published on the website and will include a synopsis of the relevant submissions made, where appropriate."

Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. My preliminary view is that there are no facts or circumstances which would justify a departure from the 'normal rule' that costs should 'follow the event'. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days. Finally, an effort was made to include appropriate redactions in this judgment but if the parties agree that further or other redactions are appropriate, they are invited to make such proposals as are agreed between the parties in that regard, again, within 14 days.