Neutral Citation [2016] IEHC 777

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 578 J.R.]

BETWEEN

E. E.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. The central issue in this telescoped judicial review application is whether the right to fair procedures of a respondent to a Child and Family Agency child sexual abuse investigation includes the right to cross-examine, through counsel, a complainant of full age and capacity who is available but unwilling to attend for that purpose.

2. A comprehensive resolution of the proceedings involves a number of issues, which I can identify as follows:

(i). is there a right to cross-examine a complainant of full age and capacity in such an investigation?

(ii). are there practical objections such as to outweigh the right to fair procedures in such a context?

(iii). is this particular applicant disentitled from making this point for procedural reasons?

(iv). would the provision of cross-examination at this juncture provide an effective remedy in the light of possible concerns as to the nature of the investigation overall to date?

(v). to what extent is the finalisation of the investigation relevant to the applicant's family law proceedings?

Facts

3. The applicant was born in 1974 and is now forty-two years of age. He is the father of two children with two different mothers.

4. The applicant's older child was born in 1995. She alleges that the applicant engaged in certain inappropriate acts of a sexual nature (not involving any sexual contact) between 2001 and 2007 when she was aged between six and twelve, and when the applicant was aged between twenty-seven and thirty-three.

5. The applicant's younger child was born in 2004. While the applicant enjoyed a somewhat chequered relationship with his older child, he had a much closer relationship with the younger child. He was in a four-year relationship with the mother, from 2002 to 2006, which involved cohabitation; the child was born half-way through that relationship; and after the end of that relationship he enjoyed regular access to her during the week and overnight at the weekend.

6. On the 4th April, 2013, when the younger child was eight, the mother of that child made contact with the HSE as a result of a communication made to her by the older child in respect of the alleged inappropriate behaviour.

7. Around this time, the mother of the younger child withdrew her cooperation to overnight access, or indeed any unsupervised access. The applicant then had to bring an application for access before the District Court, which came before Judge Gerard Furlong on 13th March, 2013.

8. The applicant and his younger child, who enjoyed regular access up to the age of eight, have not had any unsupervised contact in the three and half years since that date. In the meantime, the child's paternal grandfather has died and the child was unable to see him prior to his death.

9. Judge Furlong's order gave "*liberty to father to issue a summons to vary immediately at the appropriate time*", which apparently envisaged a speedy resolution of the agency investigation to be followed by a further court application. There was no speedy resolution. The applicant brought a notice of application to vary access on 6th June, 2014, which was adjourned on 3rd October, 2014, and has been adjourned again from time to time thereafter.

10. The original complaint against the applicant was recorded as closed because the older child's mother did not respond to contact. However it was subsequently reactivated on the system on 13th June, 2013.

11. Ms. Deirdre Donnelly, team leader in the HSE as precursor of the agency, met the complainant on 26th July, 2013, and was given detail of the complaints of non-contact sexual abuse with some places, details and some information about times.

12. Most of the complaints referred to alleged masturbation by the applicant when the complainant was present. Certain elements of many of the complaints are suggestive of the proposition that the applicant was not seeking to have this witnessed by the complainant. For example, "*He would tell [the complainant] he was going to the toilet and to turn around and keep watch*." On a later occasion "*She describes the same behaviour, that [the applicant] would ask her to turn around away from him and keep watch*." On another date walking through a field there was some charged conversation allegedly followed by him "*again asking [the complainant] to keep watch*".

13. On a further date "*when she was in the back garden of her granddad's house she saw [the applicant] looking at her from the backroom and he had his trousers & boxers around his ankles and he was masturbating*".

14. Also "*on occasions [the applicant] spoke to her in a sexualised way*".

15. On another occasion when the applicant was cohabiting with the younger child's mother, the complainant "*opened her bedroom door and saw [the applicant] on his bed, across the landing (described as a tiny space) lying on his bed masturbating. [The complainant] feels that [he] did this on purpose as he would know she would see him*". This complaint clearly involves a good deal of interpretation as well as what was directly observed. What was observed was again not masturbation in front of the child – it was in the applicant's own bedroom.

16. On a later date in his own apartment she says that "*he put on a pornographic DVD, which she could hear but that there were no images on the screen*". Again, in the absence of her having had sight of the video, there seems to be a very large element of interpretation to this allegation.

17. Finally the applicant in his apartment was wearing boxers but "*was visibly erect … he held out the 'shape' of his penis and said 'fellas get paranoid about the size of their dicks, do you think its (sic) big or small'*."

18. The intake record of June, 2013 refers to the allegations as a "priority 3" (the lowest out of 3). Ms. Donnelly describes these allegations dramatically in her sworn affidavit as "*a number of serious allegations which, if founded, could impact on the safety and well being of children generally*" including the other daughter (para. 9).

19. A written statement was provided by the complainant on 2nd August, 2013.

20. On 1st November, 2013, Ms. Deirdre Donnelly first notified the applicant of the complaint. The notification of the complaint is in one short two-sentence paragraph. All detail from the interview of 26th July, 2013, has been stripped from the formulation of the complaint in the letter. Ms. Deirdre Donnelly had a significant amount of further information which was not notified to the applicant prior to a meeting. Despite this, she swears in these proceedings that she "*wrote to the applicant and put him on notice of the allegations made*" (para. 13).

21. The applicant was invited for interview on 6th November, 2013, which he attended with his sister and without lawyers. The letter inviting him to interview did not refer to his entitlement to bring a lawyer and said he could bring "*a friend or family member as a support*."

22. The letter was dated the 1st November (a Friday) so presumably was received on the following Monday (4th). It invited the applicant to interview on Wednesday morning 6th November, 2013, a period of two days' notice.

23. At that interview he was furnished with a written statement of the allegation, despite the fact that the HSE had had the written statement for over 2 months prior to the meeting. Yet it chose to give the applicant no advance notice of the detail of that statement prior to interviewing him.

24. At the interview, but only at that point, the applicant was "*advised he could reschedule the meeting if he wished to have further time to consider the details*." He declined to do this.

25. At the interview the applicant denied the abuse. In relation to the masturbation in his own bedroom he said this could have happened but he never intended his child to witness this. He and his sister described the complainant as "*manipulative and spiteful*", jealous of the applicant's younger child, "'*wild*', *sexually active and drinking from an early age*" and that she had "*overheard details of a family member's own experience of alleged childhood sexual abuse and is now portraying this as her own experience*". It was suggested she could have been abused by her mother's father, who was said to have abused her mother and her siblings.

26. On 13th December, 2013, Ms. Donnelly on behalf of the HSE wrote to the applicant's solicitors (who were acting in the family law matter rather than the abuse investigation) informing them of the relevant policies, namely the HSE Child Protection and Welfare Practice Handbook 2011, the Departments' document Children First 2011 and National Standards for the Protection and Welfare of Children 2012.

27. By the end of 2013 the older child had turned eighteen.

28. On 1st January, 2014, the agency was established, taking over functions from the HSE.

29. Between January and March, 2014 the applicant and the older child and her mother were interviewed by Ms. Maura O'Sullivan Acting Principal Social Worker and Ms. Laura Carey trainee psychologist in St. Claire's Unit in Temple Street Hospital. According to a memorandum of a telephone call between Ms. Donnelly and Ms. O'Sullivan of that unit on 5th March, 2014, Ms. O'Sullivan stated that the applicant "*presented as convincing*". However this important statement favourable to the applicant was not mentioned in the report of the Unit or of Ms. Donnelly. It did not come to light until the filing of Ms. Oakes' affidavit in these proceedings. It is not disclosed in Ms. Donnelly's affidavit.

30. Ms. O'Sullivan also said that the Unit would be upholding at these three instances of "*sexual abusive/sexually inappropriate behaviour*". The distinction between sexual abuse and sexually inappropriate behaviour is absolutely central to this case, because sexual abuse has a particular definition. Not all sexually inappropriate behaviour constitutes abuse. In that regard the Unit and the agency appear to have blurred the distinction from the outset.

31. On 18th March, 2014, St. Clare's Unit refused the applicant access to its report.

32. On 26th September, 2014, there is an attendance note of a telephone call between Deirdre Donnelly and the applicant in which the applicant "*asked I send report to his solicitor*" and Ms. Donnelly "*cautioned against this given level of detail, seriousness of allegation against him*".

33. On 2nd October, 2014, the agency notified the applicant of its provisional conclusion upholding the allegations. There was no provisional recommendation about a loss of unsupervised contact. He attended for interview again on 30th October, 2014, and again denied the allegations.

34. In September, 2014 a new Policy and Procedures document was adopted by the agency for abuse and neglect investigations. This was not sent to the applicant.

35. The agency made a "first instance" decision upholding elements of the complaint on 11th November, 2014. In that decision the agency stated that the applicant had engaged in child sexual abuse and recommended that he not have unsupervised contact with children in any context including a family context. He was told to contact Ms. Lorna Kavanagh Area Manager who would arrange for an independent person to conduct the appeal.

36. As far back as May, 2010, *P.D.P. v. A Secondary School* [2010] IEHC 189 laid down that "*all material on which the complaint is based would have to be released to [the applicant] unequivocally*" (per O'Neill J. at para. 5.18). But notwithstanding that the first instance investigation concluded without Ms. Donnelly at any stage furnishing the applicant with either the policy and procedures document or the crucial St. Clare's report, as would have been required by the judgment in P.D.P., she has sworn in her affidavit (para. 36) that "*at all times I conducted the investigation … in accordance with what I understood were the appropriate procedures*".

37. By telephone call on 11th November, 2014, the applicant immediately informed the agency of a desire to appeal the decision. The letter seeking to appeal was received on 2nd December, 2014. In that letter the applicant says that he is "*distraught*" at, *inter alia*, "*the effects this has had on my life and my youngest daughter's life. My youngest daughter and I have had a wonderful daughter, father relationship of which I know my eldest daughter … has always been jealous of, although [she] denies this, it has always been very evident to everybody mainly family*".

38. The letter alleges that the complainant's mother "*suffered sexual abuse at the hands of her own father whom to this day has played an active role in her life and all of her children including [the applicant's younger child's] life. Deirdre Donnelly was made aware of this abuse by my sister … at our first of two meetings over one year ago … I strongly feel that everything I have said was in comparison completely unheard and there were excuses mad[e] for [the complainant's mother and the complainant] at every turn*".

39. The applicant said that "*I am mearly (sic) a shadow of my former self as the past year and a half has almost killed me between missing my little girl terribly and my name has been destroyed. I am a good person, a good father and a good uncle which is something I am very proud of and hold very dear to me. I am appealing to you to please hear me so I can have my good name back and pick up the pieces of my life*."

40. Despite the applicant's plea as to the effect of the previous year and a half on him, there was then a delay of around 10 months of relative inactivity on the part of the agency (another feature in common with the P.D.P. case) before the appeal was convened. The draft report of the appeals panel misleadingly claims a date of commencement of the appeal of June, 2015.

41. That date appears to refer to the signature of a "terms of reference" document by Ms. Lorna Kavanagh on 15th June, 2015 (over 6 months after the appeal was lodged) which does not identify the precise nature of the conduct alleged. The "*statement of the allegation being inquired into*" is laconic and unspecific.

42. The delay in operation of the appeals panel is obscured by the evasive nature of the affidavit of Liz Oakes which under the heading of "*the chronology of events*" refers to a series of dates and asserts the appointment of the panel but fails to disclose when this occurred.

43. On 28th August, 2015, the agency wrote stating that *St. Clare's* (not the complainant) had consented to releasing their report but only a redacted version would be made available.

44. On 22nd September, 2015, more than 3 months after the terms of reference document, the agency wrote stating that Ms. Liz Oakes and Ms. Suzanne Phelan had been appointed as an appeal panel.

45. The applicant's solicitors continued to seek disclosure of the St. Clare's Report which was only furnished to the applicant on 19th October, 2015.

46. The applicant met with the appeal panel in December, 2015. At that time he asserted an entitlement to cross examine the adult complainant and responded to the report. He attended without lawyers and I accept what is said by Ms. Teresa Blake S.C. (with Mr. Alan Brady B.L.) for the applicant that the legal aid board does not provide solicitors to attend at non-judicial hearings such as this. In effect the applicant was forced (by a lacuna in state provision of legal aid) to attend without lawyers. He clearly had no understanding of his legal entitlement to privilege and handed over his counsel's opinion. I accept Ms. Blake's assurance that this was never intended or advised by his lawyers and could not have amounted to a knowing waiver of his legal rights.

47. The agency did not query this with the legal aid board. Fair play might have suggested that it would have been worth considering a phone call to them to ask if their client really understood what he was doing and really intended to waive privilege.

48. Not only that but the agency has gone out of its way to exhibit the opinion in these proceedings and has seen fit to comment on it in submissions.

49. On 22nd January, 2016, the applicant was notified of the provisional conclusion of the appeals process, which was a proposal to reject his appeal.

50. In February, 2016, his solicitors wrote seeking a right to cross-examine the complainant, who was now an adult. That was rejected on 14th March, 2016, and the alternative was offered of furnishing a list of questions which the agency would put to the complainant.

51. The agency only sent the applicant the current policy and procedures document on 14th March, 2016, even though it had been adopted in September, 2014. Thus the applicant had gone through the first instance basis and was well into the appeal process without ever having been informed of the detail of the procedures before the appeal. The policy and procedures document is not available on the agency website. Mr. Paul Anthony McDermott S.C.'s submission (with Ms. Sarah McKechnie B.L.) for the respondent that the policy is a "*public document*" falls flat in those circumstances.

52. The policy document itself at para. 20.5(a) states that notice of procedures should be given to the person concerned.

53. The applicant's solicitors wrote threatening the current proceedings on 4th May, 2016. There was no substantive response for some time. In May, 2016, Ms. Donnelly spoke with the complainant who confirmed she would not be prepared to make herself available for cross examination. The applicant was never told of this contact.

54. Following an ultimate refusal by the agency to allow cross-examination, the present proceedings were instituted.

55. Ms. Donnelly failed to make any reference to the contact with the complainant regarding cross-examination in her principal affidavit sworn in these proceedings.

56. A further affidavit was sworn on 3rd November, 2016, disclosing this for the first time to the applicant and the court.

Distinguishing child sexual abuse from sexually inappropriate behaviour

57. *Children First: National Guidance for the Protection and Welfare of Children* was published by the Department of Children and Youth Affairs in 2011. Sexual abuse is defined in para. 2.5.1 as follows: "*Sexual abuse occurs when a child is used by another person for his or her gratification or sexual arousal, or for that of others. Examples of child sexual abuse include: (i) exposure of the sexual organs or any sexual act intentionally performed in the presence of the child; (ii) intentional touching or molesting of the body of a child whether by a person or object for the purpose of sexual arousal or gratification; (iii) masturbation in the presence of the child or the involvement of the child in an act of masturbation; (iv) sexual intercourse with the child, whether oral, vaginal or anal; (v) sexual exploitation of a child, which includes inciting, encouraging, propositioning, requiring or permitting a child to solicit for, or to engage in, prostitution or other sexual acts. Sexual exploitation also occurs when a child is involved in the exhibition, modeling or posing for the purpose of sexual arousal, gratification or sexual act, including its recording (on film, video tape or other media) or the manipulation, for those purposes, of the image by computer or other means. It may also include showing sexually explicit material to children, which is often a feature of the 'grooming' process by perpetrators of abuse; (vi) consensual sexual activity involving an adult and an underage person. In relation to child sexual abuse, it should be noted that, for the purposes of the criminal law, the age of consent to sexual intercourse is 17 years for both boys and girls. An Garda Síochána will deal with the criminal aspects of the case under the relevant legislation*."

58. Non-contact sexual abuse (as defined by the *Children First* policy) includes masturbation in the presence of a child, but only where that comes within the overall definition of child sexual abuse which requires the act to be for the purpose of sexual gratification or arousal. It must be emphasised therefore that there is both a mental and physical element, and that a clear distinction needs to be maintained between sexually inappropriate behaviour more generally (which can cover a wide category including acts which children may witness) and child sexual abuse as defined by the policy.

59. Masturbating in the presence of a child does not complete the act of child sexual abuse. The masturbation (or other act) must firstly in some way be directed towards the child (in the sense of something that the person intends the child to be involved in as a witness or participant) rather than something the person is doing which the child happens to see.

60. In addition, the mental element requires that the act be for one's sexual gratification or arousal and not out of failure to respect boundaries, failure by negligence or even recklessness to keep one's sexual life at a distance from a child, poor judgment, poor boundaries as to what is appropriate sexual conversation with a child, immaturity, or inappropriate sexual discussion with a precociously sexually mature child, and so on. If people are being honest (which in sexual matters they rarely are), it would be recognised that parental failings or idiosyncrasies of many kinds can contribute to particular parents exposing children to inappropriately candid discussion of sexual matters (such as those the applicant is alleged to have engaged in: inappropriate comments on penis size, pubic hair, masturbation, puberty, bras and so forth), other sexual talk, parental nudity, sexual behaviour, pornography or other age-inappropriate material, co-sleeping at an inappropriate age, and so on and on; one can like it or not but different parents have different and presumably often misguided ideas about how much of such phenomena is acceptable in a house populated with children; but these acts are not child sexual abuse unless done for the sexual gratification or arousal of the person concerned by reference to intentionally directing the behaviour towards the child for such gratification. Failure to prevent a child from seeing or being aware of such matters is not child sexual abuse, although it may be some other form of avoidable harm. Actually exposing a child to such behaviours without the intention to derive sexual gratification oneself therefrom is likewise not child sexual abuse.

61. As far back as in its *Consultation Paper on Child Sexual Abuse* (1989), the Law Reform Commission under its President, Keane J. (later Keane C.J.) recommended as follows: "*The definition of child sexual abuse should not be over-broad. There is general agreement about a core of sexual acts in relation to children which should be prohibited, but on the borderline there exist honest differences of opinion about what is appropriate conduct. The law should only concern itself with those forms of abuse which are generally recognised as unacceptable*" (p. 7).

62. Non-contact sexual abuse can be viewed as at the lower end of the scale of sexual abuse but is also potentially much more ambiguous and elusive in certain respects. There is no ambiguity about sexual penetration of a child; whereas acts not involving contact require considerably greater subtlety, discretion and caution on the part of investigators. Most of the incidents as described in this case are consistent with the applicant not wishing the complainant to view the alleged behaviour. The other acts are consistent with the behaviour not being directed towards the child in the sense indicated or with the applicant's conduct being a failure of judgment or boundaries rather than an attempt to derive actual sexual gratification from involving the child in sexual matters. Furthermore there is at least a question as to whether some of the alleged behaviour would ever be capable of coming within the definition. The absence of real and effective consideration of the actual definition is a matter of concern.

63. When making her complaint, the applicant's older child had a certain amount of direct evidence, but a great deal of her own interpretation. It is possible that at least some of her primary evidence may have some foundation, but her interpretation of that evidence may be incorrect. What strikes one in reading her interpretations is how quick she is to assume the worst and to offer interpretations that are damning of the applicant. In that regard a desire by the agency to ensure that the complainant is heard and supported can poison the objectivity that it required to untangle objective elements of a complaint from a judgmentalism on the part of a complainant, perhaps particularly acute in the case of teenagers or young adults with all the black-and-white thinking of that stage of life, that may have roots in wider family dynamics such as the parent-child relationship overall.

64. It is in relation to the distinction between primary evidence and interpretation that a properly functioning, independent agency sensitive to the rights of all concerned and aware of the complexities of the human condition, must be vigilant in not allowing itself to be carried along by the negative interpretations of any complainant. If a complainant alleges that he or she has been sexually touched or violated, no interpretation is required and the act speaks for itself, assuming that that evidence is accepted. But in the much more ambiguous case of behaviour that involves no sexual physical impact with a complainant, the agency must be exceptionally sensitive and vigilant to distinguish between those matters in the complaint of which the complainant can truly give first-hand evidence, and those matters that are merely his or her interpretation.

65. In a process of proper consideration, due regard needs to be given to what one might call the exculpatory features of the evidence. What jumps out from the complainant's account is that on multiple occasions, the applicant was seeking not to involve her

in the alleged sexual behaviour. Insofar as it is alleged that he masturbated, he repeatedly asks her to stand or look away. When he was in a state of undress, he asked her to close her eyes. Even on the complainant's account, there are multiple features of the evidence which suggest that the applicant was not seeking to involve the complainant in witnessing masturbation. The question arises as to whether any or any real, due and proper consideration was given to these elements.

Is there a right to cross examine an adult complainant by counsel in a child abuse investigation?
66. The short answer to this question is that this matter has already been determined by O'Neill J. in *P.D.P.*, where he said of an analogous investigation at para. 5.16 "*the investigation could not progress in any meaningful way respecting the norms of natural justice, without affording the applicant an opportunity to confront his accuser R.K. in cross-examination. As the complainant is now twenty two years old, I am satisfied there is no good reason why he should not be made available for cross-examination*".

67. That decision is directly on point and should be followed in accordance with the normal rule of *stare decisis*. There is no good reason to depart from it, and indeed there are substantial reasons to follow it.

68. Mr. McDermott seemed to think it was a point in his favour that the policy and procedures document did not rule out cross examination (see para. 24.1(b) which confers a power to allow questions to be put in broad terms which would include cross-examination). But that is not a point in his favour. Indeed the lack of doubt as to the existence of that power underscores the agency's lack of basis for exercising it in a case where a complainant of full age and capacity is unwilling to be questioned.

69. Cross-examination is clearly necessary in bodies (of which this is not one) which are administering justice (*Borges v. Fitness to Practice Committee* [2004] 1 I.R. 103); but it is not limited to such a context. This appears from Keane C.J.'s finding on p. 113: "*It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. That has been the law since the decision of this court in* In re Haughey *[1971] I.R. 217 and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal's finding may not simply reflect on his reputation but may also prevent him from practising as a doctor, either for a specified period or indefinitely.*" At p. 119, Keane C.J, said that "*the applicant cannot be deprived of his right to fair procedures, which necessitate the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person*."

70. It is clear that the right to cross examine in a purely investigative context is a constitutional right even where all that is at stake is the good name of the person against whom an allegation is made and where the body concerned is not actually administering justice. Whether that be in the context of a Dáil inquiry into weapons smuggling (In re Haughey), an Oireachtas inquiry into a fatal shooting (*Maguire v. Ardagh* [2002] 1 I.R. 385), or a judicial tribunal of inquiry where the good name of a politician, business person or other individual may be at stake, the fundamental status and value of the right to cross-examine has been repeatedly emphasised by the courts. If a right to cross-examination is recognised as fundamental where merely the right to a good name is at issue, it is even more important where there are matters at stake that strike to the heart of an applicant's family relationships, such as a recommendation that he not be permitted unsupervised contact with his own child.

71. To require, as a matter of mandatory constitutional law, a right to cross-examine politicians and businesspeople in a tribunal or mere inquiry whose findings are "*legally sterile*", but to refuse to accept such a right at the suit of a "man of no property" such as this applicant, where there are huge and fundamental issues of human, natural, constitutional and ECHR family rights at issue, would be an egregious form of judicial doublethink and an abdication of the judicial function to vindicate the rights of the individual. The court cannot take fright simply because what is in issue is the actions of a body seeking to investigate child abuse. No doubt the agency is to be presumed to have good intentions; but that is part of the problem. Good intentions are not enough, because linked to enormous power to devastate the life of a citizen, and unharnessed from a deep commitment to even-handedness, absolute fairness and the human rights of the individual, from a willingness to fairly acknowledge doubt, and from a humane and understanding response to the complexities of people's motivations and actions, good intentions may be positively dangerous insofar as they discourage scrutiny and accountability. As William Blake put it in *Jerusalem: The Emanation of the Giant Albion* (f. 55, ll. 48–53, 60–6):

> "He who would do good to another must do it in Minute Particulars.
>
> General Good is the plea of the scoundrel, hypocrite, and flatterer".

72. The respondents submit that the State is under a positive obligation properly to investigate allegations of child abuse, relying on *E. v. United Kingdom* [2003] 36 EHRR 31 at para. 99. Of course, at the general level that is true, just as the State is under a positive obligation to conduct an effective investigation of any criminal offence (see *Söderman v. Sweden*, Application No. 5786/08 (European Court of Human Rights, 12th November, 2013) para. 88), but an investigation is not a proper one unless it is timely, unless it is lawful, and unless it is proportionate; nor indeed is it the law that an investigation or prosecution must continue indefinitely despite tenuous and equivocal evidence and procedural flaws in the process.

73. Reliance is placed on *W. v. U.K.* [1988] 10 EHRR 29, where the Strasbourg court spoke in terms of parental involvement in the process seen as a whole to a degree sufficient to provide the requisite protection of parental interests, rather than a specific menu of required fair procedure. But it is the nature of the ECHR that its guarantees are framed at a general level. The convention is a baseline and not a statement of the maximum rights under national Constitutions that a citizen can expect to enjoy. *W. v. U.K.* does not advance the respondent's proposition.

74. The status of the ECHR as a minimum rather than a maximum protection was not adverted to in *A. v. Child and Family Agency* [2015] IEHC 679 (Barrett J. at para. 25) where this point had also been raised by the agency. Fairness is a definitive objective that must be achieved in all cases. What the procedural requirements might be to achieve fairness may depend on the circumstances. To take an example, even in the context of a criminal trial, where fair procedures are pitched at their highest, a person does not have the right to cross-examine in relation to a proposition that is precluded by virtue of his or her plea. Thus a person who has pleaded guilty does not have any constitutional fair procedures entitlement to cross-examine a witness at a sentencing hearing in order to show that he was not in fact guilty. Certain kinds of decision have such a limited effect on a person, or are of such a nature as to be quintessentially managerial, such as not to engage any extensive fair procedures requirements, such as a decision to transfer a civil servant from one piece of work to another (see *Hosford v. Minister for Social Protection* [2015] IEHC 59). But to refer to fairness as "*à la carte*" in the manner the agency seeks to do here (reading too much into para. 25 of A. v. C.F.A.) is to suggest a discretionary element to fair procedures which does not exist. The notion of something being *à la carte* suggests an extensive freedom of choice. But fairness is a mandatory requirement, as are the fair procedures that are necessary in the particular context, even if those procedures may be either more or less extensive in a different context.

75. The agency asks me to distinguish P.D.P. on a number of grounds. Firstly it is said that the finding in relation to a right to examine "*only arose in the very particular facts and history of that case*" (respondent's submissions para. 77). But such a formula can be used to "distinguish" any case from any other case. If legal submissions are to convince, or, lowering the bar, to achieve intellectual integrity, or even, lowering it further, to rise above the level of mere sophistry, some coherent jurisprudential basis must be established as to why it makes sense for the point to have been good for the previous decision but not the present one.

76. Next it is suggested in oral submissions that the complainant in *P.D.P.* was "*gone*". But that does not distinguish *P.D.P.*; it makes this case an easier one to decide. *P.D.P.* was a more difficult case, given that the complainant was less available in that he lived abroad. If a complainant such as that had to be made available, then a fortiori this complainant should be made available.

77. Next it is said that P.D.P. did not deal with a written procedures document. But given the constitutional status of the right to cross-examine, the existence or otherwise of a written document could not be a basis to deny this applicant that right.

78. Also it is submitted that P.D.P. was "*not laying down terms for all investigations*". But few decisions do that sort of thing in express terms. Decisions generally resolve the controversy between the parties, and it is the reasoning and logic which is of broader application rather than the order made. The agency would have had to point to something fairly significant in the decision which would mean that this investigation is materially different.

79. In *J.G. v. C.F.A.* [2015] IEHC 172, O'Malley J. considered fair procedures in the context of case conferences which were for the purposes of making a District Court application. She noted that if the purpose of the agency action is to decide on making a court application, rather than investigation, that is a different situation which does not involve the full panoply of fair procedures rights except in exceptional circumstances (para. 95). That is not relevant to an investigation of the type at issue here.

80. In my view *P.D.P.* cannot be fairly or sensibly distinguished from the present case.

81. Failing an attempt to distinguish that decision, it is suggested in written submission that there may be a "*conflict*" between *P.D.P.* and the decisions in *M.Q. v. Gleeson* [1998] 4 I.R. 85 and *I. v. H.S.E.* [2010] IEHC 159 (Unreported, High Court, Hedigan J., 5th May, 2010).

82. The fundamental difficulty for this argument is that neither *M.Q.* nor *I. v. H.S.E* specifically addressed the question of the right to cross-examine an adult complainant. Both cases spoke in general terms about fair procedures and both emphasised that fair procedures must be afforded to an applicant. Indeed in *I. v. H.S.E*, Hedigan J. noted that the investigating body "*does not make any determination of guilt or innocence*" in the investigation (para. 5(4)), whereas here, the agency has gone well beyond finding that the complaint is credible or that a concern exists, and has found that this applicant has committed specific acts of child sexual abuse. In operational terms, it is hard to distinguish such a finding from the finding of "*guilt or innocence*" that was viewed by Hedigan J. as not properly arising in such a procedure.

83. What the agency are therefore suggesting is that there is a "*conflict*" between two decisions that speak in general terms about fair procedures where the question of cross-examination did not specifically arise for decision, and another case where that issue arose, was directly in point, and was decided upon adversely to the agency's position. Unfortunately for the respondent, that is not how *stare decisis* works. General concepts are teased out as their particular dimensions arise and come into focus in subsequent caselaw. Sweeping obiter statements are sometimes borne out, or, perhaps more frequently, limits are discovered that were not apparent at the time of the first articulation of the point.

84. *P.D.P.* is the only case where the right to cross-examine an adult complainant has squarely fallen for decision in the context of a child abuse investigation. In the absence of any other case deciding the issue in any other way, there is no "*conflict*" and nothing for me to prefer to the *P.D.P.* decision, which I am following not only by reason of the doctrine of *stare decisis* but also because it has jurisprudential underpinnings that are consistent with the context of the right to cross-examine more generally.

85. The agency also seeks to rely on the opinion of counsel mistakenly handed over by the applicant and submits that the counsel's opinion given to the applicant says that it is "*arguable*" that cross-examination is required whereas his counsel in the present case submitted that it was required. Even assuming (which I am very much not deciding) that there was a conscious waiver of privilege, and that the submission is not (as it appears to be) something akin to sharp practice and a form of taking advantage of a mistaken action by a layperson unaccompanied by lawyers, and assuming that the opinion should be regarded as properly before the court at all, the point made is, unfortunately, spurious. There is no such thing as a case you cannot lose. Therefore in any contested matter, unless lawyers are oblivious of litigation risk, an opinion given by lawyers to clients will always be more tentative than the ultimate submission made to the court. That is entirely proper. One cannot infer from such tentativeness that the party's case is actually weak.

86. Admittedly, liability to being cross-examined could put some adult complainants off pursuing their complaint. It might also even deter some children on the cusp of adulthood, such as the complainant in this case, who turned eighteen shortly after the issue was reported (although she herself did not make a complaint to the agency). But on the other hand, it might not be an altogether bad thing that adult complainants appreciate that some level of follow-through is required for their complaint, particularly in an era of mandatory reporting. In any event, in the case of conflict between the policy objective of facilitating complainants and the constitutional imperative of ensuring fairness to a respondent to the complaint, the latter must have priority. Ultimately, what the agency may have lost sight of is that the unwillingness of a person of full age and capacity to be cross-examined on their story in itself may (and generally does) undermine the credibility of that story.

Practical objections

87. It is submitted that there cannot be cross-examination because the agency does not have power to administer an oath. That is a spurious objection because it is equally an objection to the agency receiving primary evidence.

88. It is also suggested that the agency cannot afford immunities and privileges to witnesses, who therefore maybe liable in defamation. But this would also be an objection to the agency receiving any evidence at all. A complainant is not any more liable in defamation for undergoing cross-examination than he or she is for a making a complaint in the first place. In any event qualified privilege applies.

89. A further objection is whether the applicant would be liable to cross-examination. But the applicant already is liable to cross-examination by the agency in the sense that by meeting the agency, its social workers can ask him questions and investigate issues. That is a form of cross-examination. One might argue that if an applicant refuses to meet the agency, adverse inferences could be drawn; but a similar approach applies to a complainant who declines to be cross-examined by the person complained against. Such an

adult complainant, whatever his or her reasoning may be, significantly dilutes the value of their evidence even if cross-examination were not a matter of legal entitlement.

90. The agency also asks whether all family members interviewed are to be cross-examined, or other persons involved such as the Temple Street interviewers. Again, this depends on the nature of the defence. If evidence adverse to an applicant is being relied on from an adult witness, and the person complained against wishes to challenge that evidence, then such persons must be made available for a cross-examination. But cross-examination does not necessarily involve a witness box and an interrogator in a standing position. A discussion around the table involving a small group of protagonists, or even by video link, may amount to satisfactory cross-examination as a matter of law. In any event such questions go well beyond the present case.

91. The agency suggested in written submissions that a power to hold hearings would have to be statutory. Reliance was placed on *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240, which is an authority of no relevance. There is a passing reference in the decision to the existence of a statutory power to hold hearings in that case, that it is not authority for the proposition that any form of "hearing" requires a statutory basis. Reliance is placed on *Martin v. Data Protection Commissioner* [2016] IEHC 479, in which it was held that the Data Protection Commissioner has no power to hold oral hearings because it would require legislation regarding oaths and privileges and immunities. But that was a case where there was a statutory right of appeal to a forum which did have a statutory and constitutional power to have a full oral hearing. Furthermore, the logic of applying the *Martin* approach to child abuse investigations is that the agency does not have a power to conduct a great deal of the business it is doing at the moment. It, either directly or through its servants or agents (such as Temple Street), invites in any interested parties, asks them questions and records the answers. That is a rudimentary form of hearing. If statutory authority would be needed to add an extra person to the meeting, a lawyer for the person complained against, to ask some further questions, then it seems highly doubtful as to how the agency can lawfully do what it is currently doing without statutory basis.

92. The agency also suggests that if one concern is delay in investigations, then cross-examination could contribute to further delay. On the other hand, it might avoid the delay in wrangling about whether it should be provided. Human rights ultimately must take precedence over such ostensibly pragmatic (but in reality makeweight) considerations.

93. Finally under this heading I should emphasise that the only right to cross-examine in a child abuse or neglect investigation relates to the questioning of a complainant *by counsel* on behalf of the respondent to the complaint. There is no constitutional or legal right for the respondent himself or herself to directly confront the alleged injured party, or even to be in the same room where the questioning takes place. To require such direct confrontation could be to facilitate victimisation of the complainant. The mere fact that the person chooses not to have lawyers, or dispenses with them, does not create a right to directly confront the complainant. Doing so constitutes waiver unless it is due to an inability to pay, in which case the solution is to look to the State for legal assistance, not to engage in direct confrontation.

Whether this argument cannot be pursued for procedural reasons

94. Aside from the merits of the present judicial review, the agency has sought to erect a thicket of procedural objection by way of obstacle to the grant of any relief.

95. The agency has put forward the notion that by submitting questions which it could put to the complainant, the rights of the applicant could be protected. It has developed the submission by suggesting that the applicant is disentitled to relief for not having taken up this all-too-generous offer, or indeed that he is deprived of *locus standi* by having failed to do so and that his case becomes a *jus tertii*.

96. This submission is unfortunately devoid of merit. The massive ramifications of the process engaged in by the agency, and its devastating potential effect on the relationship between the applicant and his younger child, are obvious. If the applicant has a right to cross-examine the complainant, the submission of written questions to be put by the agency would fall far short of justice. Such a procedure is no substitute for cross-examination, and the applicant's failure to take up that offer does not disentitle him from pursuing this application.

97. The notion that the appeal panel has not made any final decision and may not do so until the applicant has furnished his written questions and had them answered by the complainant (floated in Liz Oakes' affidavit at paras. 36 and 37) is not an answer. Cross-examination to be effective involves an entitlement on the part of the cross-examining party to keep his or her powder dry, and not to dilute the position by having to disclose in advance the questions to be addressed. Such a requirement would significantly weaken the ability of a person to meaningfully protect themselves or to use cross-examination to discover the truth. This is a case where minutely detailed cross-examination could potentially have a significant benefit in the discovery of the truth, given the particular circumstances including the evolving nature of the applicant's versions of events as given over several different iterations. Contrary to the agency's position these versions cannot all be regarded as entirely consistent.

98. The agency submits that the applicant is out of time to impugn procedures in the initial investigation (respondents submissions para. 16), while at the same time submitting that the appeal panel is merely a review and cannot be asked to invoke any procedure that could turn it into a *de novo* hearing.

99. What is unacceptable about this submission is that it is the agency itself that has created the appeal mechanism. A public body must act in good faith; and must act at all times to vindicate the human, constitutional and ECHR rights of persons affected by its actions. It is simply not open to a public body to create an appeal mechanism, to encourage or at the very minimum offer the option of availing of that mechanism, and then rely on any ineffectiveness of that mechanism (e.g. "merely a review") as a basis for contending that the first instance decision cannot now be challenged.

100. To uphold the agency submission would be to allow the agency to push applicants into a procedural elephant trap, condemned to an allegation of acting prematurely if they fail to take up the appeal process, and to an allegation that they are out of time if they do appeal.

101. Having established the appeal procedure, the respondent cannot be heard to rely on any way its ineffectiveness. Nor can the agency contend that an applicant loses any rights by availing of that appeal procedure. Any remedy that a court might fashion must have regard to that basic principle.

102. If an applicant avails of the appeal process and it emerges on subsequent judicial review that a flaw exists in the investigation capable of impugning the first instance decision as well, it would be an infringement of the rights of the individual to refuse any relief on the grounds that the applicant did not challenge the original decision within time. For the court to resolve the case on that basis would be to legitimise a process whereby rights are removed from citizens by false pretences.

103. A passing comment in *J.G. v. Child and Family Agency* [2015] IEHC 172 at para. 108 that the applicant was out of time to challenge an earlier case conference does not resolve the issue or address in any way the double bind of time and prematurity which the respondent is now seeking to create.

104. Mr. McDermott ultimately very fairly accepted the proposition that merely by appealing, an applicant is not losing an entitlement to a point. That was an absolutely essential concession in my view; otherwise, to borrow from Lord Denman in *O'Connell v. R.* (1844) 11 Cl. & F. 155, 8 E.R. 1061, the appeal process would be "*a delusion, a mockery and a snare*".

105. In terms of remedies in such a situation the court is not without options. The court can grant declaratory relief in relation to the first-instance decision. Another option would be to make a mandatory order requiring the agency's appeal panel to allow the appeal and set aside the first instance decision. Alternatively one could extend time to challenge the original decision although that is more procedurally complex: for example leave to challenge the first instance decision may have been refused on time grounds as they appeared at that time. But overall the court has ample power to fashion whatever remedy safeguards the rights of the citizen.

106. The argument that the agency separately makes that the case is a *jus tertii* because the applicant did not seek to cross-examine at first instance, did not avail of the opportunity to put questions, and was dealing with a complaint by a seventeen year old at the very early stages, is artificial. The applicant is not seeking to argue anyone else's case. He is caught in a very real situation which affects him personally. The complainant may have been seventeen initially, but she was eighteen well before the decision was made in this case, and the fact that the matter might have been initiated shortly before she turned eighteen is not decisive. Similarly the applicant can in no way be faulted for failing to take up the flawed offer of putting in written questions.

107. As regards the applicant's failure to seek cross-examination at first instance, any court that is concerned with the human rights of the individual must have particular regard in this context to the fact that there is no procedure for legal aid for persons in the applicant's situation. A person who enters such a process without considerable legal assistance is in grave jeopardy. Whether that absence of legal aid is a breach of the constitution or the ECHR must await a future case. But it is clear from the papers in the present case that the applicant was totally out of his depth in dealing with the agency. Had he been fully legally represented in the process, I have no doubt that the issue of cross-examination would have been raised, the St. Clare's report issue pursued, and the policy and procedures document followed up. Indeed the applicant's lack of understanding of the legal process is perhaps best illustrated by the fact that he handed over to the agency privileged documents including attendances and an opinion of counsel. It seems highly unlikely that doing so was a conscious waiver of his legal rights. It much more likely arose from the inability of a non-legal person to deal with or understand legal matters. The agency appears to have taken advantage of this naïvety and has seen fit to comment on the wording of his counsel's opinion in their submissions. While not necessarily unlawful, there is something distasteful about their willingness to do so (even allowing for the fact that the applicant referred to the attendances for a separate purpose in his own affidavit).

108. The agency submits that allowing the right to cross examination would turn the appeal panel into a body that conducted a de novo hearing. But such a conclusion does not necessarily follow. The function of the appeal panel is to confirm that no procedural or substantive error has occurred at first instance. If a breach of the rights of the applicant were to be established, the appeal panel could set aside the decision. It is not automatic that it cannot do anything about issues such as cross-examination without engaging in a *de novo* rehearing. I understood Mr. McDermott to ultimately accept that the appeal panel must have jurisdiction to review procedures in that manner.

109. The further procedural objection launched by the agency is that the applicant has waived his rights by not seeking to cross-examine the complainant during the initial stage. But waiver implies knowledge and deliberation. The applicant was never expressly offered the opportunity to cross-examine the complainant. The procedures (which themselves were never notified to him) do not provide for this option to be so offered. As I have mentioned, no legal aid is available. Under those circumstances, an unrepresented applicant cannot fairly be faulted for not having pursued the issue of cross-examination at the outset. The applicant has not waived any rights.

110. As well as complaining that the applicant is out of time, the agency also complains that the application is premature. Relying on *P.O'T. v. Child and Family Agency* [2016] IEHC 101, *Kennedy v. DPP* [2007] IEHC 3, *Fingleton v. Central Bank of Ireland* [2016] IEHC 1 and *D.C. v. DPP* [2005] 4 I.R. 281, the agency says that the applicant should wait until the process is over before challenging the outcome.

111. However, as I explained in *P.O'T*, while *certiorari* is generally preferable to prohibition, there are cases where prohibition is indeed appropriate, and those cases will include circumstances where the risk of unfairness goes well beyond a mere possibility. As explained in that decision, in the context of child abuse investigations, while an investigation should not be halted mid-stream without good reason, there will be cases where significant points of principle arise that are appropriate for prohibition.

112. However, that of course assumes that a public body will comply with court orders and judgments against it. Given that O'Neill J. in *P.D.P.* made clear an obligation on the agency to furnish all relevant material and to permit cross-examination of adult complainants, and that those stipulations have not been implemented here by the agency, who failed for a very lengthy period to furnish essential material and continues to fail to afford the right to cross-examine, it has to follow that prohibition of investigations by the agency must be contemplated in cases where what is at issue is not so much a new point of principle but an existing point of principle to which the agency is not giving effect.

113. The agency also launches pleading objections, suggesting that the reliefs are inadequately specific, and that the findings being objected to are not dated in the statement of grounds (respondent's submissions at paras. 20 and 21). These makeweight arguments can be addressed in the form of submissions as to the form of any order that might be made in due course.

114. The agency also suggests that detailed discussion of the practical ramifications of a right to cross-examine might not be appropriate in a telescoped hearing. Unfortunately I can see no jurisprudential basis for such an objection. The telescoped hearing is no different from a hearing following grant of leave, in the sense that the parties are just as much at liberty to take any procedural steps that would be open to them in the telescoped context as they would be in the context of a hearing following leave. This objection is without substance. If there was any such difficulty it should have been raised long before written legal submissions, when the question of telescoping first arose.

115. Rounding out the respondent's arsenal of procedural smoke-bombing, the entire proceedings are spuriously characterised as a challenge to "the exercise of a discretion as regards a procedural matter arising during the course of an internal appeals procedure" (respondent's submissions para. 10).

116. But the concept of an "internal" appeal is not apposite in that it suggests that it is one that does not affect third parties. More fundamentally, while cross-examination might at one level be "*a procedural matter*", it is essential to the vindication of the rights of the individual. For that reason, to characterise the case as "*the exercise of a discretion*" is to miss the point that this case is about rights – the right to fair procedures of course but also the underlying constitutional and ECHR family rights which are affected by both the finding of child sexual abuse and the recommendation of no unsupervised access.

Any analysis of the requirements of fair procedures at this point must have regard to the process overall

117. The logic of the foregoing analysis would be, all other things being equal, to set aside the refusal to allow cross-examination or direct the appeals panel to set aside the first instance decision on that basis. However all other things are not equal. A number of matters arising on the papers relating to the process overall in this particular case are of concern. Mr. McDermott fairly acknowledges that a court can draw attention to wider matters of concern to it but did not propose to deal with anything which was not part of the case as pleaded. But whether I should grant relief in the form sought or in some other form or at all is not something that can be divorced from where we are in the process and what has happened to date. Subject to hearing further argument on this aspect, it is not entirely apparent to me at this stage that allowing the process to continue, even with cross-examination, would be sufficient to ensure that fair procedures are afforded to the applicant and that justice is also done for the younger child whose relationship with the applicant is affected by the matter under discussion and for whom the court must have an autonomous concern, particularly having regard to Article 42A of the Constitution (see e.g., *Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53). I emphasise that these are matters that I am identifying at this point for submission or other response and not a form of finding, still less final finding at this stage. Such concerns may be allayed or attenuated in the light of further submission or response. Of course they may also be aggravated depending on what the response is if any. Subject to that caveat, the matters (other than the failure to actually allow cross-examination) on which issues may arise, and which individually or collectively raise the question as to whether the process can or should properly proceed further, and on which I would therefore invite further submission, include the questions as to whether there are grounds for being concerned about the following possible issues.

118. A first issue is that of the neutrality of the agency. In P.D.P. the court condemned "*a client type relationship*" between complainant and investigators (para. 5.10) including acceding to demands for confidentiality. This concern arises, having regard to matters such as the nature of the referral letter to St. Clare's from Ms. Donnelly on 13th November, 2013, which directly casts doubt on the applicant's story from the very outset ("*if [the complainant] had fabricated this allegation why had she not alleged abuse that involved more physical contact*") and significantly departed from a neutral analysis ("*it is important for her to have an opportunity to be fully heard, and she will likely feel let down if the DPP makes a decision not to but (sic) the case forward for prosecution*"); ominously it also states "*an assessment would be important for [the applicant] in terms of his future relationship with his [younger] daughter … and for the HSE to make recommendations re his contact with children should this arise*". Other related matters of concern in relation to neutrality are the fact that Ms. O'Sullivan and Ms. Carey base their conclusions in part on the applicant's denials in that he "*stated that they did not happen. This is at odds with the level of consistent information and detail provided by [the complainant]*"; and the failure by Ms. O'Sullivan and Ms. Carey of the St. Clare's Unit to record in their report that the applicant "*presented as convincing*", and of Ms. Donnelly to convey this. In addition the St Clare's report refers to the complainant's mother's "*own history of childhood sexual abuse*" (p.6) without identifying that it was from her father or that according to the applicant, her father continued to have access to the younger child during the very period under which the applicant was under investigation; and the failure to investigate or act in relation to this aspect or to identify the nature of the abuse; the fact that in an attendance with the complainant's mother of 15th October, 2014, Ms. Donnelly apparently agreed not to disclose in the report the potentially pertinent issue of the sexual abuse of the mother by her father, and also appeared to accept unquestioningly and at face value without any investigation whatsoever the mother's blanket statement that the father "*never cared for [the complainant] alone*"; a note to file of 26th July, 2013, asserts that she "*is clear that [the daughter] was not cared for by her father*" (that is not what she is recorded as having said) "*and there is (sic) no other concerns that he may have abused [the complainant]*"; the fact that at the instance of the complainant's mother Ms. Donnelly intentionally obscured the identity of the alleged abuser in her report as is apparent from her attendance with the complainant's mother and did not refer in her report at all to the alleged abusing grandfather having had access of a continuing nature, or indeed to that abuse having been of multiple children and of a possibly more serious nature. Again it is to be recalled that in *P.D.P.* the court condemned "*a client type relationship*" including that "*Demands for confidentiality were conceded, which should not have been having regard to the [HSE]'s role as impartial investigator of the allegations made and the consequent natural justice and fair procedures obligations imposed on the [HSE]*" (para. 5.10); and the issue arises as to whether the foregoing is suggestive of an attempt by Ms. Donnelly to sweep under the carpet allegations of unspecified allegations which for all one can know from the papers may be child rape or criminal sexual assault by the father of the child's mother, who was alleged to have had ongoing access to children, in the service of her pursuit of allegations of an apparently much milder nature, not involving any sexual or even physical contact, or any criminal offence, against the child's father.

119. A second issue is one of fairness to the applicant, in particular a failure to assess the extent to which the complainant's allegations had evolved in content from the original statement at interview by the HSE; an assumption seems to be made that the story is consistent whereas there are crucial differences in detail; a related issue is the fact that in the final report the applicant's objections to the alleged viewing of masturbation from the back garden is dismissed by reference to the statement that "*on review of the assessment information [the complainant] alleges that she saw this from the steps at the back door as she walked into the house*", whereas the written note of the original interview refers to the back garden and the subsequent allegation that the complainant had come into the house and actually seen the masturbation up close was introduced only in the second and third interviews with St. Clare's, which may not be mutually consistent, and in circumstances where the second interview contains the allegation that the applicant could see the complainant walking towards the house (thus that she was visible well before the steps); furthermore the complainant's written statement of 2nd August, 2013, indicates that she saw the applicant's arm moving in a masturbatory manner *before* she "*walked into*" the house; that statement does not mention seeing him masturbating when she did so enter but rather that his garments were down; this on the context of Ms. Donnelly's refusal to view the garden location as requested by the applicant, despite it providing at least one possible island of fact in a case with perhaps few such islands.

120. A third issue is the question of the correct application of the definition of child sexual abuse or whether elements of the complaint such as the sexualised talk are even capable of coming within it, and the failure by the agency to give any consideration, notwithstanding the applicant's denial, to what might have explained the alleged conduct, other than an intention to engage in sexual abuse; the failure by the agency to give any or any due regard to the fact that most of the allegations on their face are consistent with the applicant not wishing the complainant to witness the alleged masturbation; the failure by the agency to give any or any due regard to the possibility that the applicant's conduct, including sexualised talk such as the size of his penis, was due to poor boundaries, poor judgement or immaturity as opposed to his own sexual gratification from a sexualised interaction with a child; the lack of any clear engagement by the agency with the need for proof of the mental element of "*child sexual abuse*" as defined by Children First, namely that the conduct is for sexual gratification or arousal.

121. A further issue is a lack of clarity as to what was and was not being upheld; the fact that Ms. Donnelly in an attendance with

the complainant on 23rd September, 2014, records that "*some of the allegations cannot be deemed credible as [she] did not witness directly*" and that three incidents will be found credible in the provisional report, but that the wording of the provisional report did not contain this clear distinction; thus the blurring of the clarity as to what is and is not upheld insofar as three specific incidents are highlighted and other matters are referred to merely as "*credible information*"; amounting to the apparent significant expansion of the St. Clare's report findings which upheld only 3 incidents, the other matters being ones they were "*highly concerned*" about but not the subject of specific findings; Ms. Donnelly did not include in her report the specific finding of St. Clare's that the applicant's intentions in relation to the alleged outdoor masturbation and masturbation at home cannot be determined due to "*gaps in [the complainant's] accounts of the incidents*".

122. A final concern is the crude nature of the conclusions as to risk insofar as there is no assessment of the degree of risk; the absence of any process to assess this risk contrary to what appears to be required by the HSE child protection and welfare handbook. It needs to be emphasised that the goal of the agency cannot be the elimination of risk. That is an impossible goal and one must have sympathy for the agency insofar as it is confronted by some outside commentators who hold the delusion that it is only some systems failure that is preventing the agency from ensuring that risks can be eliminated. It is a reflex response from such sources after any high profile child protection issue arises that "this must never happen again". But that is a nonsensical demand. Even a lawless state willing to stoop to interventions of a totalitarian nature cannot guarantee that children will never be harmed because prediction is not an exact science. Risks can however be managed and that management involves judgment and discretion given how uncertain predictions can be. Proportionality is the key requirement here because certain actions taken to minimise or manage risk will in and of themselves involve the certainty of irreversibly negative effects on a child (such as interference with the parent-child relationship). No system can be based on an automatic assumption that any previous inappropriate behaviour, however minor, involving a child necessarily and as a matter of course requires removal of all unsupervised contact in every context including the family context. That is not proportionality; nor could it be regarded as good social work practice. Risk needs to be separately and sensitively assessed having regard to the particular family dynamic concerned. Whatever about resisting external comment, one should expect that the agency's own staff do not fall into a process whereby the elimination of all risk such as the elimination of all unsupervised contact is an automatic response to any and all adverse findings without further detailed consideration; to do so would give rise to a suspicion that the main protection objective being promoted by such an unworthy and unprofessional approach is protection of the child and family agency as opposed to protection of the child and family. Much depends on what context we are talking about. Even very light risk could be disqualifying in terms of voluntary activity such as sports involving children. Somewhat more tangible risk might be necessary to deprive someone of their livelihood. But the family context requires a more firm basis to apprehend future risk to the child in order to outweigh the very real interference with a child's rights that is brought about by destruction of or damage to a child's relationship with a parent. In this decision, all contexts were lumped together in a blanket finding without separate consideration, analysis, reasons, or examination of the particular child-parent relationship at issue.

The family law proceedings

123. The only measure of agreement between the parties was that the decision of whether further access should be granted to the applicant to his younger daughter, and whether any report of the agency is to be admissible, or what weight should be attached to it, is a matter for the judge of the District Court dealing with the family law proceedings (see respondent's submission at para. 19). Given how central the question of access to the younger child is to the present proceedings, it seems necessary to comment on two issues, the question of whether the District Court should wait further for the process to conclude and the impact of the agency decision on those proceedings in any event.

124. As regards delaying the matter further pending the outcome of the agency process, the one thing I should emphasise is that it would appear to be a breach of the rights of the child under Article 42A, and of the applicant, whether having regard to the Constitution or art. 6 of the ECHR, were there to be any further delay in dealing with the application for additional access. Childhood is a wasting asset, and the younger child has already grown from 8 to 12 in the time it has taken to progress the matter even to this point. To fail to address access improvements until the child is too old to benefit would be an absolute negation of justice.

125. Separately from that, a court dealing with family law matters cannot wait indefinitely for a process before the agency to finalise where the correctness, admissibility and weight of the agency's view is so open to debate. Ms. Blake suggested that the matter might have been adjourned because of a belief that a family law judge might be in effect "spooked" (I paraphrase her submission) by an adverse report. But judges both in theory should be and in fact are robustly independent; and experienced family law judges are well capable of looking past the recommendations of a particular expert or state agency in general, or the child and family agency in particular, to the inherent merits of the case and the reality of the family dynamic. In the present case, for all the agency may say, the behaviour of the applicant in regularly taking up the limited amount of access he has been able to have over the past three and a half years, and his dedication in pursuing the overall positive father-daughter relationship he has with his younger child throughout very adverse and confining circumstances, tells its own story.

126. While it is a matter for that judge, the report of the agency is not a statutory report under s. 20 of the Child Care Act 1991. Insofar as it contains opinion evidence, it is not immediately obvious how that is admissible as a matter of general law. The report is authored by a statutory body, rather than an individual expert whose duties are to the court rather than to the institutional structure of an agency. It is hard to see how Ms. Donnelly or anyone else on behalf of the agency could properly be deemed to be an expert in relation to the carrying out of their own statutory functions for the purposes of the law of evidence such that their opinion evidence was admissible.

127. If I am wrong about that, the evidence in any case appears to go to the ultimate issue of whether unsupervised access should be allowed, and would appear to be inadmissible in any event on that basis.

128. Furthermore, admissibility of expert opinion does not prove the facts on which the opinion is based, which would appear to have to be proved in the normal way. As Finlay C.J. emphasised in the *State (D.) v. Groarke* [1990] 1 I.R. 305, opinion evidence requires back up evidence of "*the basic evidence from which such conclusion was reached*" (at p. 310). This could not be done without the complainant giving evidence. *Southern Health Board v. C.H.* [1996] 1 I.R. 219 was a case on inadmissibility of hearsay video evidence, but it was emphasised that that was a case where the child was too young or would be too traumatised to give evidence. That has no application to a case such as the present one where the complainant is a person of full age and capacity.

129. Even if the report is to be regarded as admissible, the question of its weight arises. The District Court will formulate its own view of the matter having heard from the mother who was not a party to this judicial review, but I might be permitted to say, with all appropriate qualifications, that if the picture that presents itself to that court is anything like the picture that emerges on the papers in this case, it is not immediately apparent that there is adequate, legitimate and proportional justification, still less compelling justification, for a continued requirement that the applicant's access be supervised or restricted in the current manner or indeed at all.

Order
130. In the light of the foregoing I will order:

(i). that the order under s. 45 of the Courts (Supplemental Provisions) Act 1961 restraining publication of material tending to identifying non-professional parties to the proceedings will continue on a permanent basis;

(ii). that the applicant be entitled to furnish a copy of this judgment (and/or such further judgment, if any, as may be given in the proceedings) and/or as appropriate any other papers in the proceedings to a court dealing with family law proceedings relating to him and/or his minor daughter;

(iii). that the stay be varied to provide that respondent be restrained from any further action in relation to the investigation or from relying on the first-instance decision and recommendations until further order; and

(iv). that the matter be adjourned for further submissions or responses in the light of the matters set out in this judgment on the question of what order is appropriate in the circumstances.

Postscript
131. Following delivery of the foregoing judgment in unapproved form, Ms. Blake indicated that the applicant was not going to seek any amendment of the pleadings to adjust the reliefs being sought. Thus the matters I have identified as being concerns in the wider process do not now arise in terms of reliefs to be considered. A court can raise points, even very significant points, at its own initiative (*T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, where the Supreme Court noted without apparent disapproval (see judgment of Fennelly J. at para. 2) that Hogan J. had, of his own motion, taken a very major point as to the validity of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 in terms of EU law; *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473, where Hogan J. took an important point of his own motion after having reserved judgment, and reconvened the hearing to invite further submissions on it), but after that it is generally up to the parties as to whether they want to pursue the issues. The position is that set out in *Al-Medenni v. Mars UK Ltd.* [2005] EWCA Civ 1041 *per* Dyson L.J. at para 21: "*The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis*."

132. The order that was therefore appropriate in the circumstances was therefore in the terms of paras. 130(i) and (ii) above together with:

(i). a declaration that the respondent is obliged to set aside the First Instance Examination Report herein and to allow the applicant's appeal to the Appeal Panel in the event of the Respondent failing to provide the applicant with the right to cross-examine the complainant within two months of the perfection of the Order

(ii). an order that the stay granted previously be varied to provide that respondent be restrained from any further action in relation to the investigation or from relying on the first-instance decision and recommendations until the right to cross-examine as aforesaid is afforded, or further order