THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO. 2016/367 JR]

BETWEEN

D.H. AND D.J.H.H.

(A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND, D.H.)

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

AND

T.H.

NOTICE PARTY

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 1st day of April, 2019

Issue dealt with in this Ruling

1. This ruling deals with whether a minor who is a co-applicant in judicial review proceedings should be removed from the position of applicant and instead joined as a notice party to be represented by a guardian *ad litem*. The other applicant is the minor's father, who is named as the next friend for the minor.

Background to the Ruling

2. The second named applicant is a child who has been in care since 2007. He is the subject of a care order which was made pursuant to s. 18 of the Child Care Act 1991 ("the 1991 Act") and which provides for his care until the age of 18 years. The present judicial review proceedings were initiated by the first named applicant by way of an ex-parte application on 30th May, 2016. He is the father of the second-named applicant and at the time of the leave application he was acting as a litigant in person. On that date, the Court (Humphreys J.) directed that the father applicant write to the Child and Family Agency ("CFA") setting out any issues he might have and further specifying any action he required regarding same. The matter came before the High Court again on 13th June, 2016 at which point the CFA was directed to respond to the applicant father addressing the concerns set out by him in his letter.

3. A solicitor for the first named applicant then came on the record and a Notice of Appointment of Solicitor issued on the 3rd October, 2016. By order of Humphreys J. on the 8th November, 2016, leave to apply for judicial review was granted. The same order also granted liberty for the first named applicant to act as Next Friend to the second named applicant, subject to a consent to act being filed; and the second named applicant was formally joined as a co-applicant to these proceedings.

4. The overall thrust of the judicial review is to challenge decisions of the CFA with regard to the father's access to, and information about, the child over a number of years. The District Court had, at a certain point, conferred discretion upon the CFA to regulate the father's access to the child. The father's affidavits are replete with allegations that the CFA has been engaged in a pattern of turning the child against him or, as it was put in oral argument, 'poisoning the child's mind' against him.

5. In its Statement of Opposition. the respondent (the CFA) took issue with the child being joined as applicant to the proceedings. It pleaded that while it recognised that the second named applicant had a constitutionally protected right to litigate and to have access to the courts, it did not accept that the first named applicant had a constitutionally protected right to litigate *on his behalf* in circumstances where the second named applicant was in the care of the respondent pursuant to a s. 18 care order. It claimed that the proceedings were "misconceived insofar as they seek to be maintained by the Second Named Applicant." However, no further action was taken to remove the child from his position as applicant in the proceedings. For example, no motion was issued to set aside the order of the High Court insofar as it joined the minor as an applicant.

6. The case was given several dates for hearing but did not proceed to hearing until it came on before me for the first time on the 24th October, 2018. After the matter was opened to me by counsel, and having read the affidavits provided to me overnight, I raised concerns on the morning of the second day of the hearing about two issues: (1) whether the Attorney General should be on notice of the proceedings, having regard to the potential constitutional nature of some of the issues raised; and (2) the position of the child in the proceedings. With regard to the second of these issues, I invited the parties to make submissions to me with regard to three matters: (1) whether the child's voice ought to be heard in these judicial review proceedings (regarding matters of fact or other matters); (2) if so, by what mechanism this should be effected; and (3) whether or not C.C., the child's District Court guardian *ad litem*, (hereinafter a "GAL") was entitled to be heard or participate in the hearing in which the aforementioned legal issues would be determined. For reasons it is not necessary to discuss here, it was not possible to hold a hearing in relation to these three matters until the 19th March, 2019.

The hearing on the 19th March, 2019

7. On the 19th March 2019, I heard submissions from three legal teams in relation to the question of the role of the child and/or the GAL in the proceedings. Each of the legal teams had prepared written submissions and books of authorities in advance of the hearing. The hearing developed in the following manner.

8. Mr. Durcan SC with Mr. Barrington BL, instructed by Ms. Ghent solicitor, appeared on behalf of the GAL (C.C.) who had been appointed in the District Court care proceedings. Mr. Durcan made it clear that he was not making any application on behalf of the GAL as such, but was present at the request of the Court and was happy to assist with submissions on the law relevant to the potential role of the GAL in the judicial review proceedings if the Court was considering that course of action. Ms. McKeever BL on behalf of the applicants objected strongly to the GAL having any role in the judicial review proceedings; and she also objected to the GAL having a right of audience in relation to the argument on this issue. She indicated that her instructing solicitor, Mr. Smyth, acted

for both the father and son in the judicial review proceedings; and that the son had been added as an applicant by order of the High Court at the time leave was granted. She also indicated that a Senior Counsel, Mr. Whelan SC, was now a member of their legal team although he was unfortunately unable to attend for this particular hearing. Counsel on behalf of the CFA did not object to my hearing submissions from the GAL as to whether the GAL should be involved in the proceedings on a *de bene esse* basis.

9. I decided that I would hear on a *de bene esse* basis from counsel on behalf of the GAL as to the law relating to the role, if any, of a GAL in a judicial review proceeding. I then gave each of the other legal teams an opportunity to respond. I hope the following represents a fair summary of the submissions made on behalf of all parties.

The submissions at the hearing on the 19th March, 2019
Submissions of counsel on behalf of the GAL

10. Mr. Durcan SC stressed that he was present only at the invitation of the Court in circumstances where the Court had asked for assistance as to whether and how the child ought to be represented in the context of the legal proceedings before me. He was careful to emphasise that he was not making any application as such for the GAL to be joined. However, he also made it clear that the GAL who had been appointed by the District Court was willing to act and indeed believed that it would be appropriate for her to act in the present judicial review proceedings.

11. Mr. Durcan SC submitted that the basic legal proposition is that a child does not have any legal status and must normally conduct litigation through a next friend, frequently a parent. In those circumstances, the next friend is *dominus litus* and gives the instructions; not the child. However, circumstances might arise such that a parent would not be the appropriate next friend in the circumstances of a particular case. Mr. Durcan gave the example of a negligence action where the child had been injured in the course of a car accident where the parent was the driver of the car. There might be a conflict of interest in such a case and the driver-parent would not be an appropriate next friend. Therefore, the general position that a parent may act as a next friend of a child in litigation might not be appropriate in certain circumstances.

12. Mr. Durcan SC then referred to the two mechanisms regarding the representation of a child under the Child Care Act, 1991 ("the Act of 1991"), namely the appointment of a solicitor pursuant to s. 25 and the appointment of a GAL pursuant to s. 26. These were alternative mechanisms. However, he submitted that these mechanisms operated only within the four walls of the Act of 1991, and did not apply more generally. The two mechanisms (appointment of a solicitor and appointment of a GAL) were discussed in the *AOD v . Judge O'Leary* [2016] IEHC 555 and there is no doubt that they are distinct from each other; the Court appoints either a solicitor or a GAL but not both. Section 25(2) of the Act of 1991 provides:

> "25.—(1) If in any proceedings under Part IV or VI the child to whom the proceedings relate is not already a party, the court may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so, order that the child be joined as a party to, or shall have such of the rights of a party as may be specified by the court in, either the entirety of the proceedings or such issues in the proceedings as the court may direct. The making of any such order shall not require the intervention of a next friend in respect of the child.
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> (2) Where the court makes an order under subsection (1) or a child is a party to the proceedings otherwise than by reason of such an order, *the court may, if it thinks fit, appoint a solicitor to represent the child in the proceedings and give directions as to the performance of his duties (which may include, if necessary, directions in relation to the instruction of counsel).*
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> (3) The making of an order under subsection (1) or the fact that a child is a party to the proceedings otherwise than by reason of such an order shall not prejudice the power of the court under section 30 (2) to refuse to accede to a request of a child made thereunder.
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> (4) Where a solicitor is appointed under subsection (2), the costs and expenses incurred on behalf of a child exercising any rights of a party in any proceedings under this Act shall be paid by the health board concerned. The health board may apply to the court to have the amount of any such costs or expenses measured or taxed.
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> (5) The court which has made an order under subsection (2) may, on the application to it of a health board, order any other party to the proceedings in question to pay to the board any costs or expenses payable by that board under subsection (4)." (emphasis added)

Section 26 of the Act of 1991 provides:

> "26.—(1) If in any proceedings under Part IV or VI the child to whom the proceedings relate is not a party, *the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian ad litem for the child.*
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> (2) Any costs incurred by a person in acting as a guardian ad litem under this section shall be paid by the health board concerned. The health board may apply to the court to have the amount of any such costs or expenses measured or taxed.
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> (3) The court which has made an order under subsection (1) may, on the application to it of a health board, order any other party to the proceedings in question to pay to the board any costs or expenses payable by that board under subsection (2).
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> (4) Where a child in respect of whom an order has been made under subsection (1) becomes a party to the proceedings in question (whether by virtue of an order under section 25 (1) or otherwise) then that order shall cease to have effect." (emphasis added)

13. Mr. Durcan SC said that it was not open to a child to be a party in High Court litigation without having either a next friend or a GAL.

14. Mr. Durcan SC submitted that in judicial review proceedings, the normal procedure would be to join the child as a notice party *if* the child's interests are 'directly affected' within the meaning of Order 84 of the Rules of the Superior Courts. Mr. Durcan SC summarised the position regarding the Court's power to appoint a GAL as it had developed historically and then referred to the

decision of the High Court (McDermott J.) in *L.N. v. Judge Daly* [2016] IEHC 140. In that case, the Court joined the children as notice parties to judicial proceedings and appointed a GAL to represent the children. The judicial review proceedings in *L.N.* concerned District Court care proceedings and the parents, who were the applicants, had opposed the joining of the children as notice parties.

15. Mr. Durcan SC submitted there was no question of the Court joining the GAL herself as a party, but rather that the appropriate procedure in this instance would be to join the child as a notice party and appoint the GAL represent him, if the Court wished to do so. Counsel accepted that the facts of the *L.N.* case were different insofar as the children in that case were not already in the position of applicants in the judicial review proceedings, unlike the present case. However, he also submitted there were potential ways of overcoming that particular procedural obstacle by the issuing of appropriate motions.

16. Mr. Durcan SC accepted that the appointment of a GAL was not the ordinary way of protecting the child in litigation and that the normal position would be that the child's parents would protect the child's interests. However, if, as in the present case, the child had been taken into care, the CFA might be the appropriate body to protect the child's interests. However, a situation might arise where it would be inappropriate for either of them to represent the interests of the child, because they each had their own interests in the litigation.

17. Mr. Durcan SC also referred to the constitutional protection of the child and, in particular, the text of Article 42A of the Constitution. He accepted that the text explicitly enumerated certain proceedings in which the views of the child must be heard but he suggested that the overall meaning of the Article was that the child is entitled to have his or her best interests at least taken into account in all legal proceedings. He also referred to the principle of the child's best interests in the many authorities in international child abduction cases. He said it was inconceivable, having regard to the overall state of modern domestic and international law, that a child's interests would not be taken into account in an appropriate manner in any legal proceedings in which the child's interests were affected to a significant degree. He said that the very fact that the child had been named as an applicant in the proceedings showed that the child's interests were undoubtedly central in these proceedings.

18. Mr. Durcan SC also pointed out that the District Court had seen fit to appoint a GAL in the proceedings in that court as between the father of the child and the CFA.

19. As to the fact that the pleadings were closed and the affidavits already sworn, which might be considered a significant obstacle to re-configuring the parties in the case, Mr. Durcan SC submitted that there was an important difference between a case involving adult parties and a case where a person under a legal disability, such as that of a child, and that the Court had an obligation to have regard to the best interests of that person in the litigation before it.

20. He also drew the Court's attention to a recent decision of Simons J. in the case of *A Foster Mother v. The Child and Family Agency* [2018] IEHC 762, in which judicial review proceedings were taken by a foster parent regarding a decision of the CFA concerning matters connected with a minor's placement for adoption. In his judgment, Simons J. addressed the place of Article 42A and the role of the High Court in giving consideration to the best interests of the child within judicial review proceedings (at para 66):-

> "66. I fully recognise my obligation as a judge of the High Court to ensure that the Constitution is upheld, and to seek to grant an effective remedy in the event of a breach of a person's constitutional rights. However, *this court must also recognise that the best interests of the child are the paramount consideration. In this regard, I take the view that the within judicial review proceedings are subject to Article 42A of the Constitution and/or section 19 of the Adoption Act 2010*. This is because—as explained in more detail under the next heading below—I regard the proceedings as involving a collateral challenge to the Adoption Authority's decision to authorise the placement of the child with the prospective adoptive parents…
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> 67. As noted earlier, counsel for the guardian *ad litem* has suggested that the judicial review proceedings are not proceedings subject to section 19 of the Adoption Act. If I am incorrect in thinking that the within judicial review proceedings are of a type which attracts Article 42A and/or section 19 of the Adoption Act 2010, there can be no doubt that the court is entitled to take into account the best interests of the child in the exercise of its *discretion* in judicial review proceedings. *It is well established that judicial review is a discretionary remedy, and that one of the factors which a court can consider in the exercise of its discretion is whether the proceedings serve any useful purpose. It must follow a fortiori that a court is entitled to consider whether the proceedings, far from serving any useful purpose, might actually have a detrimental effect on the interests of a child."* (emphasis added)

Submissions of counsel on behalf of the applicants

21. Ms. McKeever BL in her submission in reply again recorded her strenuous objection to Mr. Durcan SC having had any audience from the Court on the preliminary issue raised by the Court as to whether and how the child's interests might be protected. She also voiced her concerns about the fact that the Court itself was raising issues other than issues raised by the parties themselves.

22. On the question of the potential role of the GAL in judicial review proceedings, the bulk of Ms. McKeever's written submissions took issue with the jurisdiction of the Court to join or serve the GAL herself on the basis that her interests were not directly affected in the judicial review proceedings. However, by the time Ms. McKeever came to make her oral submissions, it seemed clear to me from the decision in the *L.N.* case (already referred to) that the only potential basis on which a GAL might be involved in a judicial review such as the present one would be if she were to be appointed to act for a child who had become a notice party to the proceedings, as had been done in the *LN* case itself. I indicated this to Ms. McKeever BL in the course of the hearing. Ms. McKeever BL objected that this could not be done in circumstances where the child was already an applicant, and made the following submissions additional to her written submissions, which had primarily dealt with the issue of joining the GAL as a notice party in her own right.

23. Ms. McKeever BL emphasised that the child had been joined as an applicant in the case by order of the High Court (Humphreys J.) on the 8th November, 2016 and she strongly objected to the child's position as applicant being interfered with in any way by the Court. She referred the Court to the relevant evidence supporting the child's position as applicant which had been submitted to Humphreys J. before he made his order joining the child. She said the child wanted to be a party to the present proceedings and that his wishes should be respected. She said that the pleadings set out that he had asked many times to speak to a judge and see a solicitor. She said that he was very clear and emphatic in his wish to be heard directly and that it was not appropriate that a GAL be used as a *conduit* for the hearing of any evidence he might wish to give. She said that she would like to have direct instructions recorded in writing from the child but that the obstacle in this regard was that the CFA was not allowing the solicitor, Mr. Smyth, to have access to him.

24. She also said that junior counsel for the CFA had indicated to the Court on the last occasion (October 2018) that they were not pursuing the issue relating to the child as applicant as pleaded in the Statement of Opposition, and she expressed dismay that the Court had now raised the issue in those circumstances.

25. Ms. McKeever BL disputed that there was any factual conflict in the judicial review itself and submitted that the case could be decided by the Court on the existing papers without the need for any further evidence. She said that most of what had been averred to by the father on affidavit had not been contradicted by the CFA.

26. She also said that there was a complete congruence of position as between the father and child in the proceedings. She said the child did not want his views put forward in a 'second-hand' manner through a GAL and that he wanted to be an applicant and wants to be able to give his own evidence directly. She said that the most appropriate person to decide if there was a conflict of interest between father and son was their own solicitor.

27. Ms McKeever BL submitted that Article 42A did not apply to judicial review proceedings because it focuses on the legality of past decisions and actions and the assessment of rights and duties, rather than current welfare decisions. She also submitted (presumably in the alternative) that the child's voice was already being heard by virtue of the fact that he was an applicant and that his case was being put forward by his father and next friend. She submitted that the problem, if any, in this case was that the child had not been given access to the solicitor for the applicants, and that the Court should address that problem by allowing access and not by introducing a GAL into the situation.

Submissions of counsel on behalf of the CFA

28. Counsel on behalf of the CFA submitted that its primary position was that it was not necessary for the GAL to be involved in the judicial review proceedings. This was because the CFA's central submission in the judicial review proceedings was that the issues raised by the applicant were matters for the District Court and were not amenable to judicial review, and accordingly, it would not be necessary for the Court to resolve any conflicts of fact. However, counsel accepted that the success of this argument depended upon the success of this submission at the merits stage of the case. He went on to say that he accepted that, as a matter of general principle, that the Court had jurisdiction in an appropriate case to join a child as a notice party in judicial review proceedings. In this regard, he drew the Court's attention to the following matters regarding the decision in *L.N.:*

> i. That many of the arguments made on behalf of the applicant parent in the present case had also been made in the *L.N.* case, including that the involvement of a GAL was not necessary or appropriate in the judicial review proceedings because they did not involve a 'child's welfare' hearing, but that McDermott J. had nonetheless concluded that it was appropriate to join the children and appoint a GAL;
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> ii. That the application in *L.N.* had started out as an application by the GAL herself to be joined to the judicial review, but had ended with an order joining the children as parties and the appointment of a GAL pursuant to the inherent jurisdiction of the Court;
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> iii. That McDermott J took into account that the issues in the judicial review before him were mixed questions of law and fact before concluding that the joining of the children and the appointment of a GAL was appropriate;
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> iv. That there was arguably some ambiguity as to which particular Rule of Order 84 was considered by McDermott J. to be in play, as reference was made to several sub-Rules as well as the inherent jurisdiction of the Court;
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> v. That McDermott J. was alive to the fact that the scope of the role of the GAL may vary, referring to (1) the role of the GAL in District Court proceedings, and (2) the role of the GAL when appointed by the High Court pursuant to inherent jurisdiction.

29. Counsel also noted that in the present case, the child was not a party to the District Court proceedings, but rather that the District Court had seen fit to appoint a GAL.

30. As regards the position concerning the child as applicant in the present proceedings, counsel accepted that the child had been joined as applicant by order of Humphreys J. at the leave stage, and conceded that it might have been better for the CFA to have challenged this prior to the date of the hearing by issuing a motion. Counsel nonetheless submitted that the Statement of Opposition had clearly raised this issue on behalf of the CFA and (by the end of hearing) he indicated that his instructions were now to bring a motion to seek to have the child withdrawn as applicant. He said that despite the child being in his mid-teenage years, the reports before the Court indicate both that he was vulnerable and (at least at an earlier stage of his life) not as developmentally advanced as he should be. (I should record that this view was disputed by Ms. McKeever). The question then arose, Mr. Power said, as to whether the child had the competence to instruct a solicitor, and the solicitor did not have clear evidence that he had met the child and received instructions from him. Regarding the complaint about the refusal of the CFA to grant the child access to the solicitor Mr. Smyth, he pointed out that an application was made in this regard to the District Court on a date after the granting of leave in the judicial review proceedings, but that the application had been refused by the District Court and was currently under appeal.

Direction at conclusion of hearing on 19th March, 2019

31. At the conclusion of the hearing on the 19th March, 2019, I decided to give liberty to the CFA to bring a motion, in accordance with paragraphs 2 and 3 of their Statement of Opposition, to remove the child as an applicant in the proceedings. I gave directions as to a timetable for the filing of the motion and affidavit, and the replying affidavit, and put the matter in for a short hearing on the 29th March, 2019. I indicated that I would rule on the CFA motion in the first instance, and rule on the issue of the GAL thereafter.

Hearing on the 29th March, 2019

32. On the 29th March, 2019, counsel on behalf of the CFA, Mr. Power SC, moved the application (which had been issued and served since the last hearing date) to remove the child from the position of applicant in the case. A grounding affidavit was sworn on behalf of the CFA but no replying affidavit was filed on behalf of the applicants, who rested their submissions on the existing affidavit evidence.

33. Mr. Power SC, on behalf of the CFA, submitted there was no or no sufficient evidence that the child had actually given instructions to the effect that he wished to be joined to the proceedings. He referred to the Law Society's Good Practice guide and suggested that a solicitor dealing with a child should have appropriate training and experience and would have to be satisfied that the child had the requisite capacity to give instructions. He pointed out that where a child is represented by a next friend, the child does not directly give instructions nor is there any appropriately trained person who conveys views to the Court as to what is best for the

child. He also submitted that it was not necessary for the child to be an applicant when his interests could be appropriately dealt with by making him a notice party. He also submitted that the Court's *parens patriae* jurisdiction extended to ensuring that the appropriate parties were involved in the case.

34. Counsel on behalf of the applicants, Mr. Whelan SC, replied and submitted that that the child should not be removed as applicant nor should a GAL be appointed to represent him as a notice party. He submitted that the Court would be engaging in a radical step in doing so. He submitted that if the Court's concern had arisen out of a perceived conflict of fact on the existing affidavits, other mechanisms could be used for putting the child's view before the Court. He submitted that the Court should consider obtaining a report from a psychologist or psychiatrist in this regard. He also stated that the applicant father was concerned that the GAL currently acting in the District Court had a mind-set which was adverse to the father's interests.

35. Counsel on behalf of the CFA responded and opposed the appointment of a psychologist or psychiatrist to compile a report on the child's wishes. He submitted that the appointment of a GAL was the established and most appropriate method of dealing with matters. Regarding the GAL already acting for the child in the District Court, he submitted that she would be the most appropriate person because she already knew and acted for the child, and that the Court should be careful not to subject a child to too many experts and professionals unnecessarily.

36. Counsel on behalf of the GAL (again on a de bene esse basis) confirmed that the GAL was structurally independent from the CFA and employed by Barnardos, and pointed out that children even as old as sixteen or seventeen years of age are frequently represented by GALs in the minors' list. He submitted, *inter alia*, that the appointment of a psychologist or psychiatrist would arguably not be sufficient to protect the child's right to fair procedures because such an expert would have a narrower remit than that of a GAL; the normal method to ensure fair procedures for a party affected was to join the party as a third party. He also submitted that the test of *Gillick* competence did not form part of Irish law and that the position was that the child was under a disability in Irish law.

Decision

37. It is correct to say that the reason I initially raised the issue of the child's voice in the proceedings was by reason of the content of the affidavits filed on behalf of the applicant father and the CFA respectively. It seemed to me, having read the affidavits, that there was a conflict of fact as between the CFA and the father on the issue of how the child had reacted to the father's access to him, and that the determination of this factual issue might well in turn feed into a resolution of many, if not all, of the legal issues in the case. This is because the case is fundamentally a challenge to the manner in which the CFA has exercised its discretion with regard to the father's access visits as well as the provision of information to him about his son more generally. However, having raised the issue and heard submissions from the parties, it seems to me that the question of the appropriate role of the child in judicial review proceedings such as these is always one which needs to be carefully considered by the Court in any such case and perhaps not merely one where there is a conflict of fact. By judicial review proceedings "such as these", I mean cases in which there is a dispute between a child's parent and the Child and Family Agency about access to the child by that parent in circumstances where a care order has been made by the District Court pursuant to s. 18 of the Child Care Act 1991, and that this particular dispute underlies the legal issues sought to be litigated in the judicial review proceedings. Not only may there be conflicts of fact in such cases in respect of which the child's voice may be relevant, but the implications of any relief ultimately granted (albeit in respect of past factual events) may well impact upon ongoing or future arrangements in respect of the child's care and the father's access to him while in care.

38. It seems to me that a child in such a situation should not be an applicant in the judicial review proceedings with the parent at the heart of the dispute acting as his next friend. I hesitate to state such a proposition categorically but I cannot at present conceive of any situation where it would be appropriate for the child in the particular configuration described above to be an applicant in the proceedings, with the very parent who is at the heart of the dispute about the child acting as his next friend. The potential for a conflict of interest to arise in a variety of ways is, to my mind, obvious. The facts of the present case exemplify this potential conflict, since the affidavits already filed demonstrate that each of the parties is accusing the other (in essence) of having in the past wrongly influenced the child's mind. As the underlying dispute - which is the subject of the judicial review - involves something of a tug-of-war between the CFA and the child's father, it would be most inappropriate that the issue of the legal representation in the litigation develop similar tug-of-war aspects. Indeed, it would have been just as inappropriate for the child to be a co-respondent as co-applicant.

39. For clarity, I should perhaps state that where I see a conflict of fact is as between the father and the CFA, not as between the father and the child, as counsel for the father at one point appeared to interpret my references to conflict of fact. Also, I should say that I fully appreciate that this is not a full welfare inquiry but rather a judicial review proceeding where there is less scope for conflicts of fact to arise. Nonetheless, if I am to assess whether the CFA acted reasonably in the exercise its discretion, I may well need to reach conclusions on what actually happened as matter of fact during and after the father-son visits described in the affidavits. Counsel on behalf of the applicant father sought to persuade me that, on the current state of the affidavits, his side of the factual story was not contradicted by the CFA. I do not think that the situation is by any means as black-and-white as they seek to suggest and it would be premature for me to reach a conclusion on their submission in this regard at this stage of the case. Meanwhile, I must ensure that the parties to, and legal representation in the case, are appropriate for all eventualities.

40. It is without doubt unfortunate that the respondent CFA did not take steps to bring a motion to have the child removed at a much earlier stage in the proceedings. This led to a situation where the motion to remove the child as applicant and vacate or amend the leave order of Humphreys J. did not issue until some two and a half years after the order was made, and even that was only done when the Court suggested it. This meant that the applicant father was in a position where he had prepared for the hearing of the judicial review on the assumption of the proceedings being configured in a particular way, and then having the configuration significantly altered by virtue of the Court's intervention *after* the case had started. I can appreciate the dismay of the legal team on behalf of the applicants at the lateness of this development. However, in circumstances where the Court is dealing with a judicial review concerning a matter of the utmost importance in the life of a child in care, namely, the relationship and arrangements as between the CFA and one of his parents, I feel that it would be contrary to the interests of justice for the Court to allow the existing configuration of parties to become an insurmountable obstacle to what I consider to be the appropriate representation to enable the child's best interests, insofar as they might be impacted upon by these judicial review proceedings, to be considered by the Court. Accordingly, while I regret doing this at such a late stage in the proceedings, and even more so in circumstances where the issue was raised initially by the Court and not the CFA, I propose to make an order removing the child from the position as an applicant suing through his father and next friend. It seems to me that the appropriate form of the order in this regard is an order setting aside the order of Humphreys J dated 8th November, 2016 insofar as the order joined the child to the proceedings as applicant.

41. Instead, I propose to join the child as a Notice Party and appoint the guardian *ad litem* who is already involved with the child in the District Court to represent the child in this judicial review. This GAL has appropriate training and background and is represented by a highly skilled and experienced legal team. This seems to me to be the best way of ensuring that there is an independent voice in

court to convey the views of the child and articulate submissions on his behalf, from a party who has no interest of any sort in the outcome of the proceedings. I appreciate that the child's father is not in favour of C.C. being appointed as GAL, based on his experiences of her to date in the District Court, but she is structurally and personally independent from the parties to the dispute, and already has experience of the child, and is therefore in my view the most appropriate person to act. Her views will not necessarily be determinative, but the Court will at least have input from an independent voice.

42. I have considered but decided against the more limited option of appointing a psychologist or psychiatrist to interview the child and report to the Court. There is no precedent for such a course of action whereas the GAL mechanism has a long history and is clearly within the inherent jurisdiction of the High Court. Further, the GAL would look at the case in its entirety and not merely act as a conduit for the child's voice, although of course that is an essential part of the GAL's role.

43. Procedurally, it seems to me that once the order removing the child as applicant is made, the possibility of using Order 84 rule 22(2) of the Rules of the Superior Courts then comes into play because the child is then, technically, no longer in the proceedings. This sub-Rule provides for the service of the notice of motion or summons on "all persons directly affected". In my view there should be service upon the child, being a person directly affected, and I am using the inherent jurisdiction of the Court to appoint the GAL to represent the child as notice party.