# APPROVED

# NO FURTHER REDACTION REQUIRED

# THE COURT OF APPEAL

**Record Number: 2023/89**
**Neutral Citation Number [2024] IECA 187**

**Whelan J.**
**Faherty J.**
**Allen J.**

**BETWEEN/**

**L**

**APPLICANT/**
**APPELLANT**

**- AND –**

**CHILD AND FAMILY AGENCY**

**RESPONDENT**

**JUDGMENT of Ms. Justice Faherty delivered on the 17th day of July 2024**

**1.** This is the applicant's appeal against the judgment ([2023] IEHC 17) and order of the High Court (Hyland J.) dated 2 March 2023 (perfected 24 March 2023) refusing the applicant leave to apply for judicial review and where leave was granted, refusing relief by way of judicial review. The applicant is a grandmother to four children who were taken into the care of the respondent in July 2015 pursuant to the provisions of the Child Care Act 1991 ("the 1991 Act"). It should be noted, at this juncture, that by the time of the

within appeal hearing, the eldest child had attained their majority and the second child was within a few months of obtaining their eighteenth birthday. Thus, for all intents and purposes this appeal concerns the two younger grandchildren who are now both in their mid-teens.

**Background**

**2.** On 10 July 2015, by way of *ex parte* application, the respondent applied pursuant to s.13 of the 1991 Act that the children be received into the care of the respondent on foot of an Emergency Care Order ("ECO"). At the time of the ECO application, the children were aged between 10 and 6 years. They had arrived in this jurisdiction in December 2014 in the company of their mother (a named respondent in the care proceedings along with the father of the two elder children and the father of the other two children) from a third country, having previously resided in the UK. It is common case that upon their arrival in the jurisdiction, the mother and the children resided with the applicant for a period of about a month, thereafter moving to their own accommodation.

**3.** On 17 December 2014, a local authority in the UK was granted permission by the UK courts to share papers relating to the children with the Irish authorities. According to the affidavit evidence in the within proceedings of the social worker allocated by the respondent to the case (hereinafter "the allocated social worker" or "the social worker"), an allegation of child sexual abuse made by one of the children against [a named family member] was upheld in a finding of fact hearing in the UK in June 2015.

**4.** The evidence given by the allocated social worker in the District Court on 10 July 2015 was that by the time of the application for an ECO, the respondent had concerns about the safety of the children on the basis of the finding by a UK court that one of the children had been sexually abused, the fact that the family had given inconsistent accounts of the perpetrator's movements and access to the children, and behaviour by the children's

mother which in the opinion of the social worker was not sufficiently protective. The District Court was satisfied that the threshold for an ECO was met and made an order in respect of each of the four children.

**5.** Also on 10 July 2015, on the application of the respondent's solicitor, the District Court made an order under s.47 of the 1991 Act dispensing with the requirement that an authenticated note of the oral evidence in the District Court be served on the respondent mother in the care proceedings.

**6.** Following the children being brought into care, the applicant sought access to the children. This access request is the subject of copious email correspondence which passed between the applicant and the respondent over the course of 2015-2018. The correspondence also bears witness to the fractious relationship that has unfortunately developed as between the applicant and the respondent. A constant theme in the applicant's emails is her contention that the respondent was refusing to allow her access to the children because of a particular lifestyle choice favoured by the applicant, something the respondent has consistently denied. The emails also queried why she had been excluded from the care plans drawn up by the respondent for the children and the same correspondence details numerous complaints made by the applicant about named personnel within the respondent and the guardian *ad litem* subsequently appointed for the children.

**7.** On 16 July 2016, interim care orders were made pursuant to s. 17 of the 1991 Act and were subsequently extended periodically.

**8.** It would also appear that on 21 September 2017, in the course of an application to extend the interim care orders, the District Court made an order prohibiting the applicant from communicating with the guardian *ad litem* without the consent of the court. The respondent did not apply for this order. Rather, the application was made by the guardian *ad litem's* solicitor. No copy of the said order, if it exists, has been produced before the

High Court or this Court. The fact that such an order was made without the applicant having been put on notice of same and that a similar order was obtained by the respondent in January 2018 is a constant theme of the applicant's correspondence with the respondent and a matter of grievance in these proceedings.

**9.** On 7 December 2017, an application for access to the children by the applicant pursuant to s. 37 of the 1991 Act came before the District Court but was adjourned. This application was subsequently withdrawn by the applicant.

**10.** As just mentioned, on 25 January 2018, in the course of an application to extend the interim care orders, on the application of the respondent, the District Court made an order pursuant to s.47 of the 1991 Act directing the applicant not to make contact with the children without the consent of the respondent. A copy of the District Court order of 25 January 2018 was furnished to the applicant under cover of a letter of 1 February 2018.

**11.** On 25 June 2018, care orders were made pursuant to s.18 of the 1991 Act in respect of the children for three years.

**12.** In 2018, the applicant applied pursuant to s.37 of the 1991 Act for access to her grandchildren. On 15 November 2018, her two access applications were heard and determined by the District Court. The applications were refused on the basis that granting the applicant access was not in the children's best interests, and that the applicant would need to engage with the respondent and the guardian *ad litem* before access could commence. The applicant duly appealed to the Circuit Court.

**13.** On 30 May 2019, the Circuit Court confirmed the guardian *ad litem's* appointment for the purpose of the appeal and directed, *inter alia*, that he furnish a report *"with regard to the proposal of access by the Applicant and the general welfare of the children…"*.

**14.** On 20 February 2020, the applicant's appeal came on for hearing before the Circuit Court. By then the Circuit Court had the report prepared by the guardian *ad litem* and, it

appears, also the report which the allocated social worker had prepared for the District Court in 2018.

**15.** The social work report stated that the respondent did not *"currently"* recommend that the applicant would have access with her grandchildren but that should she *"engage meaningfully"* with the respondent (which, it was said, she had not done to date) it was hoped that the applicant could be safely re-introduced into the children's lives. The report went on to refer to the order made by the District Court on 25 January 2018 directing that the applicant not have any direct or indirect contact with the children without the consent of the respondent. It referred to the applicant having presented on 29 January 2018 in the neighbourhood where the foster carers to two of the children resided and that she had identified herself to neighbours as the grandmother of said children and that they were in care. The report also chronicled various events that were said to have occurred on a visit by the applicant to the respondent's premises on 29 January 2018. Another matter referred to was that before Christmas 2017, the applicant had arranged for one of the older children to be given the respondent's handbook which, the report said, had disturbed the child in question who believed that the applicant was trying to get her to say *"bad things"* about her foster carers. There was also reference to a number of other matters relating to the applicant which, it was said, were of concern to the respondent.

**16.** The report also stated that the applicant *"has historically never believed"* the sexual abuse allegations made by her grandchild in the UK (which had been later confirmed in a *"Finding of Facts"* hearing in the UK) and that she had described the child as *"manipulative"* and who should not be trusted. This, it was said, had caused the child *"great distress in the past and [is] something that she continues to display some anxiety around".* As of November 2018, it was not clear to the author of the report what the

applicant's views were in relation to her grandchild's allegation of sexual abuse or whether she would be able to offer the child the emotional reassurance and support she required.

**17.** The social work report's conclusion was that the applicant's *"continued interference with the children's care and unwillingness to engage with Tusla is causing disruption to the children's placements"*. She had refused to engage with the respondent *"whilst simultaneously adopting an approach focused on discrediting the professionals working with the family".*

**18.** Having met with the children prior to the completion of his report, in his report of 14 January 2020 the guardian *ad litem* updated the Court on the children's living and school arrangements and advised that supervised access was taking place fortnightly with their mother at which other family members also attended. As regards the applicant, he reported that *"at the most basic level all 4 children are willing to get to know their grandmother".* There were, however, complicating issues *"most importantly that all 4 children have a significant level of emotional vulnerability"*. The guardian went on to state that he was not in principle opposed to the applicant having access with the children. However, "*the issues and challenges to date have been adult in nature, not sufficiently child centred".* Hence, in his view, there were certain steps to be taken before access by the applicant to her grandchildren could be contemplated. I will refer later to the guardian's specific recommendations.

**19.** It is worth noting that both the social worker and the Guardian *ad litem* gave evidence in the Circuit Court and were cross-examined by the applicant. Whilst the applicant had had legal representation in the District Court, she was not legally represented in the appeal before the Circuit Court. The applicant remained unrepresented in the High Court judicial review proceedings and indeed before this Court.

**20.** In an *ex tempore* judgment delivered on 20 February 2020, the Circuit Court judge (Judge O'Malley Costello) affirmed the two orders made by the District Court on 15 November 2018 refusing the applicant access to her grandchildren. In effect, the Circuit Court judge abided the recommendations contained in the report of the children's guardian *ad litem,* which were, *inter alia,* that certain conditions precedent should be in place prior to any access by the applicant to the children.

**21.** It is instructive, at this juncture, to reprise what the Circuit Court judge said in her ruling upholding the District Court's refusal of access.

**22.** At the outset, the judge noted that what she had to do was to give a decision as to whether or not it was in the best interests of the children that they would have access to the applicant, their maternal grandmother, who was seeking contact with them, either in the context of visiting them at their homes or meeting them in the company of their mother. She noted that the applicant was supported by the children's mother in her request *"although the children's mother, who has given evidence here on behalf of her mother… has clearly indicated that she can see both sides of the difficulty."*

**23.** Looking at the matter entirely from the children's point of view, which the Circuit Court judge said she was required to do, she stated *"clearly the children have a right to see not only their grandmother but other extended members of their family. That has to be balanced against what is in their best interests and of course one must take into account the need to see and to have contact with extended family and the rights of that extended family to see the children but that has to be, if you like, measured as against what's best for the children and what's in their best interests."*

**24.** The Circuit Court judge was satisfied that the voice of the children had been heard *via* the guardian *ad litem's* report which she found *"very, very helpful".* She stated that that report and the evidence given by the respondent's representatives, and by the guardian *ad*

*litem* was not to be taken as a criticism of the applicant just because at the moment the belief was that the children should not have access to the applicant. The Circuit Court judge continued:

> *"It seems to me from the report is not to say that the children should not see [the applicant] in the future but that access should … only commence when the proper preparations are put in place … The children's mother who has also given evidence accepts that fact, there has to be an appropriate management of any access. Now, even in circumstances where a parent has simply gone abroad without any of the history or a grandparent, for example, has simply gone abroad, there would have to be the preparing of a child for the reintroduction to that person. … You don't just simply, you know, expect them to just all of a sudden build – have a relationship with someone and meet someone without their being prepared. That happens in every case. Now, in this case the children are even more vulnerable. The fact of the matter is that it has been decided there was an issue of sexual abuse here. The fact of the matter is that the children have been taken into care and the Court has directed that that happen and unfortunately the children are in a position whereby they have had to be placed in the foster care of two families. So clearly they are vulnerable children. Clearly they need help in dealing with all of the issues that they have had to deal with in the past. Clearly there has been a break in the time [the applicant has seen the children]. So clearly there has to be a lead into that. Now, the bottom line here is that both the Child and Family Agency representatives and the Guardian ad litem have said really we are not saying that access should not take place, what they are saying is that if [the applicant] were willing to meet with an independent assessor and … willing to meet with the Child and Family Agency social worker and team leader, just to get an understanding around where the children are*

*at, if [the applicant was] willing to trust these people, they have the best interests of the children at heart, and … then willing to engage in the preparatory work that was necessary… to have that meeting, and sometimes children, for example, they might need to see photographs of people, updated photographs, just to know what they're dealing with… that there might be a bit more of a chat about where might be the best place to do it, all of those things, even in the most benign of cases we would do that. So, for [the applicant] not to trust these people and not to engage in this way has to lead to the view that I can't allow access to commence, even supervised access, until such time as that takes place. So therefore my decision in the matter is that no access with their grandmother, the applicant, can take place, and I am affirming the order of the [District Court], until such time as [the applicant] agrees to abide by the recommendations of the guardian ad litem which are to be set out in the context of this order which is (1) that [the applicant] is to meet with the [CFA] allocated social worker and team leader as required prior to any access commencing. Secondly… she is to engage in any preparatory work or assessment that the CFA, either themselves or through an independent assessor, may require prior to access commencing and that even when access does commence that access would have to be supervised."*

The Circuit Court judge went on to state that the applicant would have to follow the directions of the access supervisor and the social worker during access. Moreover, the frequency and the discretion to seek access was a matter for the respondent and there was to be no attempt by the applicant to contact the children directly, either by attending at where they reside or in any other way: all contact was to be made through the respondent. She added that if the applicant were to cooperate with the respondent, she could see a situation where access for the applicant to the children might be restored in the same way

as access had been restored for the children's mother. The Circuit Court judge added that the applicant had to set her own issues aside *"and try and move forward for the children."*

**25.** As the *ex tempore* judgment records, the applicant was asked by the Circuit Court judge if she understood what was being said to which the applicant responded:

> *"I don't think my perspective has been listened to, what I have experienced with the hostility towards me at all".*

**26.** In further exchanges, the applicant stated that she had been trying to engage with the respondent for four and half years to which the Circuit Court judge responded that the offer remained open for the applicant to engage with the respondent *"in an effort to restore access but it has to be at the children's level. It has to be in a way that's good for them."*

**27.** The applicant was advised that the court order would be sent to her and it was explained that the order was to the effect that the Circuit Court judge was affirming the order of the District Court and that she was going to direct that the recommendations of the guardian *ad litem* be attached to the order so that the final conditions that the Circuit Court judge had made for the possibility of reviewing access for the applicant would be available to any court at any time in the future.

**28.** The Circuit Court order duly issued on 20 February 2020 affirming the order of the District Court dated 15 November 2018. As it transpired, the guardian *ad litem's* recommendations were not attached to or otherwise referenced in that order.

**29.** On 25 February 2020, the applicant wrote to the respondent with reference to the hearing on 20 February 2020 stating that *"a circuit court order was pronounced on the 20th February 2020 approving contact between my grandchildren and me and advised me to contact the CFA to arrange contact"*. The applicant then reiterated the complaints she had previously made against various personnel employed by the respondent including the social worker dealing with the case, stating that because of this complained-of conduct she

could not visit the respondent's offices. She also reiterated complaints previously made about the guardian *ad litem* and stated that he had not included the applicant's proposals for contact with the children in the report he had prepared for the Circuit Court. She reminded the respondent that access arrangements were for the respondent and not the guardian *ad litem.* The applicant went on to set out her *"revised proposals for contact"* with the children requesting that the respondent bring same to the attention of the children. Insofar as the Circuit Court had stated that she would have to have a preparatory meeting with the respondent in advance of access with the children, the applicant stated that she would like this to be with a person who is independent of the respondent. She then set out a number of matters of which the respondent was to advise the children.

**30.** Having received no response to her 25 February 2020 communication, the applicant wrote again to the respondent by email on 13 March 2020 setting out her proposals for access to the children. This was responded to by the allocated social worker on 2 April 2020 apologising for the applicant's non-receipt of a letter which had been sent by the respondent's solicitors on 6 March 2020 and attaching a copy of the said letter.

**31.** The letter of 6 March 2020 which was sent by the respondent's solicitors to the applicant enclosed a copy of the Circuit Court order of 20 February 2020. It went on to state:

> *"Further to the court hearing we are instructed to advise you that should you wish for access with your grandchildren to be progressed further, the CFA will require appropriate preparation work to be completed."*

**32.** The applicant was asked to *"request that the CFA source an independent clinical psychological assessment as per the recommendations made by the Court".* She was advised that she was *"required to engage with the CFA in such process"* and that *"until such time, access will not be facilitated".* The writer also advised that the applicant was to

contact a named person (an administrative employee of the respondent) for the purpose of putting in train her request that the respondent source the psychological assessor.

**33.** The applicant responded by email on 2 April 2020 wherein she stated that the Circuit Court had not on 20 February 2020 directed that she had to undergo psychological assessment *"because there are no grounds for me to have to have a psychological assessment in order to have contact with my grandchildren".* She stated that the court had ordered that she present to the CFA to arrange contact with her grandchildren as they were in the care of the CFA. She went on to state:

> *"Of course, as the Circuit Court pointed out, there would need to be an initial meeting about arranging my first meeting with the children as it is nearly five years since I have been cut off from them. Judge O'Malley-Costello stated that this was nothing to do with me personally and she stated that this would apply in all situations not just with children in care where children have not seen someone for a long time, which is common sense and something I would have expected.*
>
> *Therefore what is required is for me to meet in person with someone who will update me on the children's state of health, educational progress and any other matters that I need to be informed of in advance of meeting the children and who will act as a link between my grandchildren and me to arrange our first meeting.*
>
> *Given the mistreatment I have suffered by Tusla including yourself, and [the guardian ad litem and his solicitor], it is not possible for me to enter any Tusla premises or to meet in person with any Tusla staff or with the guardian ad litem.*
>
> *I suggest that an independent social worker or family counsellor is appointed by Tusla to undertake the reunification of my grandchildren and me."*

**34.** The applicant further advised that a judicial review application to the High Court was being prepared on the ground of breach of her Article 8 rights to private family life under the European Convention on Human Rights and Fundamental Freedoms ("ECHR").

**35.** On 22 April 2020, the allocated social worker replied to the applicant stating that there appeared that there were very different understandings of the Circuit Court direction and the comments made by the Circuit Court judge on 20 February 2020 and that he was concerned that a dispute on this issue *"will prevent progress being made with regard to your request to access with your Grandchildren".* He stated that having taken legal advice, he considered that the most appropriate way to bring clarity to the Circuit Court judge's directions and comments would be for the applicant to bring an application for the Digital Audio Recording (DAR) of the Circuit Court hearing of 20 February 2020. Should however the applicant decide to proceed with the assessment as detailed in the respondent's letter of 6 March 2020, the respondent would be happy to progress same and the applicant could instigate that process by contacting the person named in the respondent's solicitors' letter of 6 March 2020.

**36.** The applicant's response by email of 11 May 2020 was to reiterate that the Circuit Court had not directed or recommended that she undergo any kind of clinical psychological assessment and that the Circuit Court judge had merely stated that a preparatory meeting with the respondent before she met with the children would be appropriate (and indeed normal where the children had not been in contact with the applicant for some time) and that that had nothing to do with the applicant personally. She stated that the respondent was not to send her further correspondence, as such *"gross inaccuracies"* were highly damaging to her, not least her worry that such erroneous correspondence would fall into the wrong hands. In this regard, the respondent was

reminded that the applicant had not received the letter of 6 March 2020 and that same had only come to her *via* the email on 2 April 2020.

**37.** It is common case that the applicant duly applied for the DAR transcript of the 20 February 2020 proceedings. This led to a further hearing in the Circuit Court on 21 May 2020 which both parties attended. Following that hearing, the Circuit Court ordered that a transcript of the decision of 20 February 2020 be provided *"and the full written recommendation of the guardian ad litem as set out at para. 4 of the report dated 20 February 2020 in the above entitled matters, be provided to all parties strictly on condition that the in-camera rule is obeyed and that the transcription and said extract from the report is not made available to anyone other than the parties to these proceedings or the Superior Courts who may be conducting any review of these proceedings".*

**38.** The Circuit Court judge refused an application by the applicant for copies of the documents and proceedings in the case being satisfied, having gone through all of the documents in the presence of the parties, that no further documents were required to be furnished to the applicant as she had in her possession all of the documents which were on the court file. She adjourned the motion generally with liberty to re-enter should the Superior Courts require any further portion of the DAR for the purposes of dealing with any review of the decision.

**39.** Two orders duly issued from the Circuit Court on 21 May 2020 one of which contains the entirety of paragraph 4 of the guardian *ad litem's* recommendations which, in relevant part, stated:

> *"4.0 Guardian Views*
>
> *...*
>
> *4.5 As a starting point, to access commencing [the applicant] must commit to:*

*(I). [The applicant] to meet the Child and Family Agency allocated Social Worker and Team Leader as required prior to access commencing.*

*(II). [The applicant] to engage in any preparatory work or assessment the CAF may require prior to access commencing.*

*(III) Access will be supervised and [the applicant] will at all times follow directions of the Access Supervisor and Social Worker during access.*

*(IV) The CFA will continue to exercise discretion regarding frequency of access.*

*(V) The CFA will have discretion to cease access if it is no longer in their children's interests.*

*4.6 The Guardian is hopeful [the applicant] will engage with the Child and Family Agency as recommended. The plan set out a clear pathway to establish access with her grandchildren and for this to develop over time.*

*4.7 Access should continue to be arranged in accordance with Section 37 of the Child Care Act. At each Child in Care Review for [the 4 children] access is to be discussed and detailed in their Care Plans.*

*4.8 The Child and Family Agency are willing to engage with [the applicant] towards establishing access. In the circumstances the first step is for [the applicant] to engage with the allocated social worker."*

**The judicial review**

**40.** The within proceedings were commenced some two days prior to the Circuit Court order of 21 May 2020 by way of a statement of grounds filed in the Central Office on 19 May 2020 verified by an affidavit sworn by the applicant on the same date. On 20 May 2020, the High Court (Meenan J.) directed that the application for leave be made on notice to the respondent.

**41.** On 19 June 2020, the allocated social worker swore a replying affidavit on behalf of the respondent. The applicant swore a further lengthy affidavit on 14 August 2020. This was responded to by the allocated social worker's affidavit sworn 15 October 2020. The applicant swore another affidavit in response on 21 October 2020. She swore a further lengthy affidavit (running to 187 paras.) on 15 March 2021 by way of further evidence. She swore a further affidavit on 15 November 2021.

**42.** On 30 May 2022, the High Court (Hyland J.) extended time for the respondent to file its statement of opposition and gave time to the applicant to file and serve any further affidavit as she might wish. The High Court also directed that the matter would proceed by way of a telescoped hearing on 21 July 2022.

**43.** The respondent's statement of opposition was filed on 21 June 2022 following which the applicant swore a lengthy replying affidavit of some 99 pages in response thereto.

**44.** Ultimately, the matter came on by way of telescoped hearing before the High Court (Hyland J., hereinafter *"the Judge"*) on 10 November 2022. During the course of the hearing, the respondent was directed to file a copy of an additional District Court order of 25 January 2018 to which mention had been made by the respondent in its written submissions. The High Court order also gave the respondent liberty to file a supplemental affidavit identifying the role of the allocated social worker's report in the case and the extent to which it was relied on by the Circuit Court in its decision of 20 February 2020, and to place evidence before the High Court to show that the applicant had been made aware of the child protection concerns held by the respondent prior to the hearing of her Circuit Court appeal. The applicant was given ten days to file a replying affidavit together with her legal submissions should she wish to do so.

**45.** On 21 November 2022, the allocated social worker swore an affidavit addressing the above matters to which on 1 December 2022 the applicant swore an affidavit in response and filed her legal submissions.

***The relief sought***

**46.** The relief sought in the applicant's statement of grounds was for:

(i) Orders of *certiorari* in respect of the District Court order dated 21 September 2017, the District Court order dated 25 January 2018, two orders of the District Court dated 15 February 2018 and the order of the Circuit Court dated 20 February 2020 affirming the District Court order of 15 November 2018 which refused the applicant access to her grandchildren.

(ii) A declaration that the applicant's constitutional right to natural justice and fair procedures was infringed in respect of the way the decision to prohibit contact between her and her grandchildren was made.

(iii) A declaration that the applicant's constitutional right to fair procedures and to her good name was infringed by the ECO hearing on 10 July 2015.

(iv) Damages for *mala fide* breach of the duty to facilitate and maintain the applicant's relationship with her grandchildren.

A claim for an order of *mandamus* that the respondent facilitate contact between the applicant and her grandchildren was not pursued at the High Court hearing.

**47.** As it had intimated in its statement of opposition, in the High Court the respondent maintained three preliminary objections to the challenges the applicant had brought to the District Court and Circuit Court orders. First, with regard to the declaratory relief the applicant was seeking in respect of the ECO made by the District Court on 10 July 2015, it argued that the applicant was not a party to the proceedings the subject of the ECO hearing and that she lacked standing to challenge their constitutionality. Secondly, the respondent

maintained that the applicant was out of time in respect of the District Court orders she sought to impugn. Thirdly, in respect of all the challenges, it argued that in the circumstances of the case, and the statutory regime under the 1991 Act, the High Court should exercise its discretion to refuse judicial review because a more appropriate alternative remedy was available to the applicant pursuant to s.37 of the 1991 Act.

**48.** As already referred to, judgment was delivered on 16 January 2023.

**The High Court judgment**

**49.** The Judge first addressed the applicant's challenge to the ECO of 10 July 2015. She noted that the 10 July 2015 hearing concerned an *ex parte* application by the respondent pursuant to s.13 of the 1991 Act.

**50.** In respect of the declaratory relief which the applicant was seeking, the argument advanced on the leave application was that the applicant's good name was impeached by the terms of the written note of the District Court proceedings of 10 July 2015. The applicant also argued that her right to fair procedures had been infringed by virtue of the respondent's failure to notify her of any concerns prior to the 10 July 2015 hearing, its failure to notify her of the hearing itself, and because the respondent had failed to make access arrangements for the applicant with the children in circumstances where it was open to the respondent to do so at the ECO hearing. It was argued that these failures constituted a contravention of the respondent's duty to facilitate access between the applicant and her grandchildren. The applicant also submitted that the failure of the District Court to adjourn the ECO hearing so that she could be put on notice vitiated her right to fair procedures. She further argued that it was impermissible that an order under s.47 of the 1991 Act had been made precluding the release of the authenticated note of the judgment of the District Court.

**51.** The respondent's position in the court below was that the applicant was neither a parent of the children nor in *loco parentis* at the relevant time. Thus, she was not entitled to fair procedures by virtue of the fact that she was not a party to the care proceedings and had no entitlement to be joined to them. Furthermore, the respondent denied that it failed in its duty to facilitate reasonable access in circumstances where the District Court (and the Circuit Court) had made orders pursuant to s.13 and s.37 of the 1991 Act denying the applicant access to the children.

**52.** The Judge noted that the applicant's complaint in respect of the ECO order was being made some four and a half years after the relevant decision. She observed that the fact that the applicant was only seeking a declaration as opposed to an order of *certiorari* in respect of the ECO did not mean that the applicant could circumvent the normal time limits applicable in judicial review. The Judge found that the normal three-month time limit applied in respect of the relief being sought by the applicant just as it would if an order quashing the order of the District Court was being sought. Accordingly, she was satisfied that the applicant was significantly out of time to seek relief in respect of the 10 July 2015 order.

**53.** In respect of the District Court order of 21 September 2017, albeit no order was before her for her to ascertain its express terms, the Judge accepted that an order had been made on 21 September 2017 that the applicant refrain from breaching the *in-camera* rule and from contacting the children's guardian *ad litem*. The applicant's explanation for her delay in challenging the 21 September 2017 order was that she doubted the existence of the order in the face of the failure of the guardian *ad litem* and his solicitor to furnish her with same. The respondent's position was that the applicant had been made aware of the terms of the 21 September 2017 order and she had not given good or sufficient reason to warrant an extension of time to challenge that order.

**54.** The Judge considered that time started to run from 21 November 2017 when the applicant *"was indisputably informed of the Order".* She observed, however, that it was *"obviously entirely wrong"* that any person should be considered to be bound by an order without that order being provided to them. She found that the fact that no real efforts appear to have been made to communicate the terms or effect of the order to the applicant *"deeply unsatisfactory".* However, she did not believe that she should grant leave in circumstances where the applicant had been alerted to the making of order in a letter of 21 November 2017 from the guardian *ad litem's* solicitor. The Judge considered that from that day on, the applicant could have sought a copy of the order to allow her to judicially review it. She had not explained why she had not done so. In the circumstances, the Judge considered that the applicant did not have good or sufficient reason for the delay in challenging the 21 September 2017 order. There was also the issue of mootness in circumstances where the Judge was satisfied that the order of the District Court of 25 January 2018 had overtaken the 21 September 2017 order.

**55.** As earlier referred to, on 25 January 2018, the District Court extended the interim care order that had been made in respect of the children. During the currency of that hearing, the District Court was reminded of its previous order of 21 September 2017 directing that the applicant not contact the guardian *ad litem* without the leave of the court and the District Court was asked to *"reiterate"* that order in writing to the applicant. The District Court acceded to that request, as evident from a transcript which was available to the High Court in the judicial review proceedings.

**56.** The Judge held that there was a breach of fair procedures in that the applicant had not been notified of the 25 January 2018 hearing in advance, and so, was not heard on the day in question. She considered this state of affairs *"entirely unsatisfactory"* and stated that the respondent ought to have explicitly drawn to the attention of the District Court the

fact that the applicant had not been notified in relation to the hearing insofar as it concerned access to the children.

**57.** However, again in the exercise of her discretion, the Judge did not believe she should grant leave on this ground as the applicant was significantly out of time, and because the 25 January 2018 order was in any event moot having been overtaken by the orders of the District Court in November 2018 (which in turn by were overtaken by the Circuit Court order of 20 February 2020).

**58.** In her affidavit sworn on 15 November 2021, the applicant had averred that the 25 January 2018 order was oppressive and that it intimidated her and restricted her ability to live her life, for fear of the consequences for her of coming into contact with her grandchildren. She averred that there was a *"sinister plot"* between the District Court and other parties to smear her as a danger to her grandchildren. The respondent's argument in the High Court was that the belief on the part of the applicant that the 25 January 2018 order was obtained as part of some campaign against her was not a good or sufficient reason to grant an extension of time. The respondent also submitted that the applicant had sought out an appropriate alternative remedy in bringing an application for access under s.37(2) of the 1991 Act.

**59.** The Judge rejected the argument that the 25 January 2018 order was oppressive and intimidatory, or that it was part of a concerted campaign against the applicant. She considered that the applicant's subjective interpretation of the order as being unfair or draconian was not a basis for her failure to challenge it in a timely fashion. She observed that *"a principal function of judicial review is to remedy just the type of putative impropriety the applicant alleges".* Thus, the Judge found no good or sufficient reason outside of the control of the applicant that prevented her from seeking judicial review within time and she refused to extend time in respect of the 25 January 2018 order.

**60.** On 15 November 2018, the District Court refused two separate applications by the applicant for access to her grandchildren as made by her under s.37(2) of the 1991 Act. As noted by the Judge, the only argument identified by the applicant for her delay in seeking leave in respect of those orders was that she had decided, given that judicial review was a procedural remedy which could not yield an access order, that an appeal to the Circuit Court would be the more appropriate remedy to achieve her goal of gaining access. The Judge observed that *"the fact that things did not work out the way she hoped in the Circuit Court appeal cannot be used as a reason to permit [the applicant] to revisit the order she appealed against by way of judicial review at this stage"* (para. 36). She further noted that *"any judicial review of that Order would be an entirely empty exercise where an appeal was brought against the Order and the Order of the Circuit Court of 20 February 2020 considered below, replaces the District Court Order."* Accordingly, the Judge refused the applicant extension of time to challenge the decision of 15 November 2018.

**61.** When it came to the application for leave in respect of the order of the Circuit Court of 20 February 2020, no question of delay or mootness fell to be decided by the High Court since the challenge to the Circuit Court order was within time, and the Circuit Court order had not been overtaken by any subsequent order. However, as was the case with the District Court orders, the respondent objected to the relief sought by the applicant, arguing that in the circumstances of the case the Judge should exercise her discretion to refuse judicial review since a more appropriate alternative remedy was available to the applicant pursuant to statutory regime provided for under the 1991 Act.

**62.** The Judge granted leave on some, though not all, of the applicant's grounds of challenge. Ultimately, however, she went on to determine that none of the grounds upon which leave was granted were made out.

**63.** As can be seen from her affidavits, the applicant raised a number of arguments which were essentially complaints regarding actions taken by the respondent. As she had not sought to quash any of those actions in her statement of grounds, no leave was granted by the Judge in respect of those complaints. She also found that the applicant's attempts to impugn the evidence of the guardian *ad litem* and the social worker were not a basis for impugning the 20 February 2020 order, being rather a merits-based challenge to the evidence given in course of the Circuit Court appeal. Moreover, the applicant's bare assertions as to irrationality did not meet the leave threshold set in *G. v Director of Public Prosecutions* [1994] 1 I.R. 374. Nor did any of her arguments regarding the pre-hearing order of 30 May 2019 as made by the Circuit Court judge.

**64.** The Judge also refused leave (para. 54) on the basis that the applicant's asserted *"legitimate expectation"* that the Circuit Court would grant her access was not a feature of an adversarial legal system. She found the complaint that it was irrational for the Circuit Court judge to direct that the applicant seek access through the respondent did not meet the criteria for judicial review, being in effect a substantive complaint as to the conclusions reached by the Circuit Court judge.

**65.** She further found on the facts that the applicant's complaint regarding delay in obtaining a hearing date did not call into question the validity of the order of 20 February 2020 and so refused leave on that ground.

**66.** For the purposes of the judicial review proceedings, the Judge had before her the transcript of the *ex tempore* judgment given by the Circuit Court judge on 20 February 2020. She noted that the decision of the Circuit Court turned on whether it was in the best interests of the children that they would have access to the applicant. She observed that considerable time had been given by the Circuit Court judge to the case.

**67.** Insofar as she regarded as arguable the applicant's complaint that the Circuit Court judge had taken the guardian's *ad litem's* report into account when the applicant's views were not included in that report, the Judge found that the applicant had failed to identify why as a matter of law they were required to be. Citing s. 27 of the 1991 Act, she concluded that the pre-hearing order of 30 May 2019 by which the Circuit Court judge directed the guardian *ad litem* to produce a report accorded with the provisions of s. 27. Whilst the Circuit Court judge had directed that *"all parties concerned are to cooperate with [the guardian] with the preparation of the report",* in the Judge's view, it was not necessary that the guardian obtain the views of the applicant in order for him to obtain the views of the children or report on their welfare. She noted that in fact none of the views of the various family members were included in the guardian's report, which, she said, was entirely acceptable. Crucially, she noted that, in any event, the applicant had ample opportunity to make her views known to the Circuit Court and, therefore, was not disadvantaged by the guardian's report. The Judge also rejected the complaint that the children's views were not included in the report in circumstances where the report *"quite clearly reports those views in plain terms in a dedicated section"* (para. 62).

**68.** Insofar as the applicant complained that the guardian was unregulated and a paid agent of the respondent, the Judge found that that did not constitute a challenge to the 20 February 2020 order and thus could not be ventilated in the proceedings.

**69.** The applicant also challenged the Circuit Court order on a number of procedural grounds, alleging that the Circuit Court had limited her evidence to establishing why her grandchildren should see her, and she claimed that she was precluded from adducing evidence of the respondent's refusal to grant her access in the past. This, the applicant claimed, was in contrast to the manner in which the Circuit Court treated the respondent's evidence which, she said, was admitted in its entirety. The respondent's position in the

High Court was that the applicant had been afforded full opportunity to be heard and that it was correct for the Circuit Court judge to have given her as a litigant in person guidance as to what evidence was particularly relevant to the application.

**70.** Albeit that she did not have before her a transcript of the Circuit Court hearing of 20 February 2020, the Judge observed that the applicant had not put before the High Court direct evidence which identified the relevant evidence which she claimed she was restricted from providing. Hence, the applicant had not made out a ground of arbitrary or impartial exclusion. Thus, whilst the Judge granted leave on this ground, the substantive argument made by the applicant was rejected.

**71.** The applicant also complained that she did not receive the guardian's report until the day of the hearing of her Circuit Court appeal. The Judge, however, saw no basis upon which she should depart from the judgment of Murphy J. in *M.S. v Gibbons* [2007] 3 I.R. 785, and so refused leave on this ground.

**72.** The applicant also took issue with the fact that the respondent did not inform her in advance of the evidence upon which it was going to rely at the Circuit Court hearing. The respondent's position (which the Judge accepted) was that the applicant was aware of the case against her in circumstances where she had attended the District Court hearing of 15 November 2018 at which time she was legally represented. Moreover, the District Court hearing of 15 November 2018 was fully contested, and the evidence tendered by the respondent in the Circuit Court hearing was in line with the evidence the respondent had tendered in the District Court. (This was made clear in the affidavit sworn by the social worker on 21 November 2022, post the judicial review hearing).

**73.** The applicant also maintained that the witnesses she had summonsed had failed to appear at the Circuit Court hearing. The Judge, however, found that nothing in this ground impugned the Circuit Court judge's decision, and that a bare statement that witnesses had

failed to appear did not amount to a ground upon which leave should be given. She also refused the applicant leave in respect of a ground that the Circuit Court judge had not provided a written decision in circumstances where an *ex tempore* judgment given on day of the hearing set out clearly the reasons why the application for access was refused.

**74.** Finally as regards the challenge to the Circuit Court order of 20 February 2020, the Judge noted a number of arguments which the applicant had identified in her written legal submissions, including reliance on the decision of the High Court in *J.G. v. Staunton* [2014] 1 I.R. 390 where Hogan J. in an *obiter* comment stated that he did not accept that s. 47 of the 1991 Act would provide a basis for a direction that parents undergo a parental capacity assessment. Since the terms of s. 47 were clearly analogous to the power under s. 37(2) (in issue here), the Judge considered that the applicant's argument had some weight but found it was nevertheless *"wholly outside the pleadings".*

**75.** The Judge next addressed the application for a declaration that the orders of 21 January 2018, 15 November 2018 and 20 February 2020 refusing the applicant access to her grandchildren were incompatible with Article 8 ECHR. In its statement of opposition, the respondent accepted that the applicant had family rights under Article 8 but argued that the applicable sections of the 1991 Act, in particular s. 37, balances the rights of the applicant with the best interests of the children and that those provisions were correctly applied by the Circuit and District Courts.

**76.** In circumstances where she had already addressed in the judgment each of the decisions of the District Court and the Circuit Court impugned by the applicant, the Judge found no reason to disturb those orders and, in circumstances where the applicant did not challenge the operative provisions of the 1991 Act, while granting leave on this ground, the Judge went on to reject the applicant's substantive argument.

**The appeal**

**77.** Ground 1 of the applicant's amended notice of appeal asserts that the Judge erred in law in imposing an arbitrary time limit in relation to 10 July 2015 proceedings and in finding that they were privileged. Citing Article 8 ECHR, she asserts that the 10 July 2015 proceedings offended her right to privacy and family life and that she had a right to be involved in the care proceedings as they involved evidence being adduced against her as a basis for removing the children into care. She further contends that the Judge failed to take account and adjudicate on the following:

- That the fact the applicant had only discovered in June 2019 the evidence [said to have been] used against her at a hearing in the District Court, and that she was awaiting the Circuit Court appeal hearing, hence her delay could be excused.
- The respondent's failure to disclose relevant evidence of the applicant's *bona fide* interest in the children at the hearing of 10 July 2015.
- The respondent's failure to substantiate allegations made against the applicant at the 10 July 2015 hearing and where false evidence was given in respect of the applicant.

**78.** It is contended that the Judge failed to conduct the requisite analysis under Article 8 ECHR of the impact of the hearing of 10 July 2015 and failed to assess evidence of bias against her. Furthermore, the Judge failed to assess evidence that there was no legal basis for the ECO made on 10 July 2015. Moreover, the High Court judgment omitted the fact that the applicant was not given notice of the 10 July 2015 hearing and failed to acknowledge or adjudicate on evidence that the applicant was not notified by the respondent of any concerns held in relation to the applicant prior to the hearing on 10 July 2015.

**79.** The applicant asserts that the Judge made errors of fact by misinterpreting the evidence given by the respondent in the District Court on 10 July 2015 and in failing to find that there was no credible evidence for the claim that the applicant was *"unprotective"* of the children. Furthermore, the Judge failed to establish the facts of the background of the case including the backdrop to the UK proceedings in 2014 and failed to acknowledge that no allegations had been made against the applicant in the UK.

**80.** By Ground 2, the applicant takes issue with the Judge's decision to refuse her leave in respect of the 21 September 2017 order. She contends that the Judge erred in law in:

- Failing to grant her relief despite a finding that her right to fair procedures was breached.
- Failing to determine that there was no legitimate basis for the guardian *ad litem* to apply to the District Court for an order prohibiting a close family member of the children from contacting the guardian *ad litem* for the purposes of seeking assistance in gaining contact to the children and information as to why contact was being refused.
- Failing to set out in the judgment details of the evidence leading up to the hearing in the District Court on 21 September 2017 and the bias and bad faith implicit in the order obtained against the applicant.
- Failing to carry out any detailed assessment of the reasons for or purpose of the said order and/or the impact of the said order on the applicant's right to respect for private and family life under Article 8 ECHR.

**81.** By Ground 3, the applicant asserts that the Judge erred in law in:

- Holding that the applicant was out of time and/or that the application to challenge the 25 January 2018 District Court order was moot despite a finding that the applicant's right to fair procedures were breached.

- Refusing to consider the applicant's ECHR rights before refusing relief.
- Deeming the application moot when there was no credible evidence of mootness.
- Failing to find that the applicant had not been given reasons for the order made on 25 January 2018.
- Failing to acknowledge that the wrong legal test was applied by the District Court in granting the 25 January 2018 order.
- Failing to detail the bad faith grounds upon which the order was granted.
- Failing to take into account the applicant's *bona fide* interest in her grandchildren and her family ties to and support of them.
- Failing to take account of the fact that the applicant had never harmed her grandchildren.
- Failing to take account of bias on the part of the children's social worker and their guardian *ad litem*.
- Disregarding the reasons given by the applicant for the lateness in applying for judicial review and failing to acknowledge that the applicant's right to respect for private and family life trumped *"an expired arbitrary time limit for applying for ... relief"* on the basis that the 25 January 2018 order was a violation of the applicant's rights for her private and family life.
- Erring in fact on the basis that there was no credible evidence to justify the refusal of the application, or the relief sought.

**82.** By Ground 4, the applicant asserts that the Judge erred in law in:

- Giving invalid reasons for refusing to extend time in respect of the District Court orders of 15 November 2018.

- Failing to find that the said orders offended against the applicant's fundamental right to respect for her private and family life.
- Incorrectly finding that the orders were moot by reason of having been overtaken by the Circuit Court order of 20 February 2020 in circumstances where the Circuit Court order affirmed the District Court orders and did not replace them.
- Failing to determine that the applicant's right to a fair hearing was breached as she was not provided with a copy of the written evidence of the respondent in advance, either by the respondent or the District Court.
- Failing to find that the District Court's refusal to grant the applicant access was based on irrelevant evidence and factors or that evidence had been given in bad faith and not made subject to fair procedures or notified to the applicant in advance.
- Failing to find that there was a misuse and misinterpretation of the *in camera* rule to withhold from the applicant information concerning the applicant contained in the reports of others, information in respect of which the applicant had no knowledge and had not given consent for the respondent to share with third parties and which first came to the applicant's attention in the judicial review proceedings.
- Failing to take account of the applicant's *bona fide* interest and family ties with and support of her grandchildren.
- Failing to take account of the fact that the evidence of the reasons given by the District Court judge were not disclosed in his judgment or order or adjudicated upon. The reason given by the District Court judge was that there needed to be a good relationship between the respondent and the applicant

before an access order could be granted. The applicant had contested that the refusal of access was in the welfare or interests of the children, in the absence of any evidence that the applicant had caused the children or anyone else harm. As such the making of the order constituted an unjustifiable interference with and a violation of her right to respect for her private and family life upon which the Judge failed to make a determination.

- Failing to include a detailed assessment of the evidence for the purposes of determining whether the District Court orders constituted a breach of statutory duty under s.37 of the 1991 Act and/or an unjustifiable interference with the applicant's private and family life.

The applicant further contends that the Judge erred in fact on the basis that there was no credible evidence in the judicial review application to justify the refusal of the reliefs sought by the applicant in respect of the 15 November 2018 District Court orders.

**83.** Ground 5 lays challenge to the Judge's refusal of leave and, where leave was granted, her refusal of relief in respect of the 20 February 2020 Circuit Court order. The applicant asserts myriad errors of law on the part of the Judge, to wit:

- The failure to recognise the applicant's legitimate expectation that her fundamental rights required to be respected in the absence of any evidence in the case sufficient to deny those rights.
- The failure to recognise that there was no evidence in the Circuit Court to justify the upholding of the District Court Orders.
- The failure to adjudicate on the role of the guardian *ad litem* in the Circuit Court hearing, in particular the failure to provide the applicant with the guardian's report in advance of the hearing.

- The failure to take account of the Circuit Court's disregard of the applicant's *bona fide* interest in and family ties with her grandchildren.
- The failure to include a detailed assessment of the evidence in the case in order to determine whether the Circuit Court order constituted a breach of statutory duty under s. 37 of the 1991 Act to give access to the applicant or whether said order constituted an unjustifiable interference with applicant's Article 8 rights.
- The Judge's failure to take into account the applicant's complaint of bias and bad faith on the part of the allocated social worker and guardian *ad litem*.
- Misrepresenting the Circuit Court order as a conditional access order.
- The failure to adjudicate on the applicant's allegation of unfair procedures, in particular the fact that the applicant was not provided with the evidence being used against her in advance of the Circuit Court hearing.
- The failure to adjudicate on the guardian *ad litem's* lack of independence and his unregulated status.
- The failure to adjudicate on the applicant's complaint that she had not been given clear reasons by the Circuit Court for the decision to uphold the District Court and the extent to which the implication in the *ex tempore* judgment that the applicant had committed sex abuse, had influenced the Circuit Court decision.

**84.** It is also said that the Judge erred in fact in circumstances where there was no credible evidence to justify the refusal of the relief sought by the applicant.

**85.** Ground 6 asserts that the High Court judgment and order failed to give reasons for refusing the applicant relief and that the Judge failed to disclose evidence or adjudicate on the following issues:

- The failure of the respondent to consult the applicant prior to applying for an ECO on 10 July 2015.
- The respondent's failure to obtain an access order for the applicant on 10 July 2015 to ensure continuity of contact between her and her grandchildren.
- The respondent's failure to consult the applicant as regards the decision taken to exclude her from the care plans for the children after they were taken into care, or to give the applicant reasons for her exclusion or to give those reasons to her pursuant to her Freedom of Information request.
- The respondent's failure to act upon the applicant's multiple requests for access.
- The respondent's failure to act upon the applicant's complaints.
- The respondent's and the foster parents' failure to comply with the Government's National Standards for Foster Care.
- The respondent's taking court action against the applicant without her knowledge and withholding evidence from her.
- The respondent's failure to adhere to social work criteria for what constitutes reasonable grounds for child welfare and child protection concerns.
- The respondents' failure to contact the applicant in advance of court proceedings in an attempt to resolve matters.
- The respondent's unlawful data processing in respect of two allegations recorded against the applicant on 5 December 2017 and its use of those allegations in subsequent court proceedings.
- The respondent's unlawful processing of a witness statement the applicant had made in the UK in February 2014 as a basis for one of the allegations made against the applicant by the respondent.

- The guardian *ad litem* and his solicitor's breach of fair procedures in bringing proceedings against the applicant in September 2017 without her knowledge.
- The refusal of access orders to the applicant based on irrelevant and defective evidence including no substantive evidence that the applicant ever caused harm to her grandchildren.
- The defects in the affidavit which the allocated social worker swore on 21 November 2022.

**86.** Ground 7 asserts that the judgment and order of the High Court did not include a detailed analysis of the evidence tendered by the applicant about the respondent's failure to facilitate access between her and her grandchildren from July 2015. The applicant also asserts that the Judge failed to determine whether a breach of s. 37 of the 1991 Act had occurred by reason of the respondent's refusal to grant the applicant access in circumstances where the respondent had evidence of the applicant's *bona fide* interest in her grandchildren as detailed in reports available to the respondent dated 4 June 2015, the file it received from a local authority in the UK, and in the evidence the applicant gave at court hearings. Ground 7 further asserts that the Judge failed to take account of the applicant's evidence that she had never caused harm to her grandchildren.

**87.** Ground 8 asserts that the Judge failed to determine (as, it is said, she ought to have) that there was no valid reason or purpose given by the respondent, or the guardian *ad litem*, or the lower courts, that satisfied Article 8 ECHR. Moreover, the Judge failed to adjudicate on the evidence given that the respondent and the lower courts used broad discretion in making the decision to refuse the applicant access in defiance of the narrow margin of appreciation granted by Article 8 ECHR and its caselaw.

**88.** Like grounds 6,7 and 8, ground 9 of the amended notice of appeal is largely a reprise of the grounds previously advanced by the applicant save that ground 9.5 asserts that the

Judge failed to adjudicate on the respondent's insistence, without reasons having been given, that the applicant undergo a clinical psychological assessment before access by the applicant to her grandchildren could be facilitated. The applicant says that there was no legitimate basis for the respondent to require anyone to undergo any assessment as a condition for access to children in State care. Pursuant to ground 9.8, the applicant asserts that the High Court was biased towards her in failing to exercise its discretion in her favour. She asserts that the High Court's discretionary powers were exercised in favour of the respondent by dint of the High Court having set a higher onus of proof for the applicant. By ground 9.9, it is said that the Judge failed to adjudicate on data protection violations and multiple attacks on the applicant's reputation, as claimed by the applicant. By ground 9.11, she asserts that she was not given notice that the leave application and the substantive application for judicial review were going to be treated as the judicial review itself and that this was unfair to her.

**The issues in the appeal**

**89.** Arising from the applicant's grounds of appeal and submissions, I consider that the following issues arise in the appeal:

(i) Did the Judge err in fact or in law in refusing the applicant leave to seek judicial review of the District Court orders of 10 July 2015, 21 September 2017, 25 January 2018 and 15 November 2018?

(ii) Did the Judge err in fact or in law in refusing the applicant leave on certain grounds to challenge the Circuit Court order of 20 February 2020 and in ultimately refusing her relief on the grounds in respect of which leave was given?

**Issue (i)- The orders made by the District Court**

***Discussion and Decision***

**90.** In her written submissions, the applicant asserts that she has a right under s.37(1) of the 1991 Act to access since 10 July 2015 on the basis that she has a *bona fide* interest in her grandchildren and had regular family contact with them prior to the ECO in July 2015. This, she says, is evidenced not just in the affidavits she has sworn for the purposes of the within proceedings but also by an *"ISS report"* prepared by the allocated social worker on 4 June 2015 in which he recorded details of the applicant's *bona fide* interest in her grandchildren.

**91.** She says that the Judge failed to make the requisite determination that the respondent failed (at the ECO hearing on 10 July 2015) to obtain (as it should have) an access order in her favour and indeed failed to consult her prior to applying for the ECO. She says that the Judge failed to have regard to the respondent's failure to inform her of the reasons for refusing her access.

**92.** She asserts that again on 21 September 2017, an order was obtained from the District Court prohibiting her from contacting the children or the guardian *ad litem* without notification to her and where she was never served with that order. A similar order was obtained by the respondent on 25 January 2018 prohibiting her from contacting her grandchildren without the consent of the respondent, again without notification to her, and in circumstances where it was alleged at the District Court hearing that her email correspondence to the respondent was in breach of the *in camera* rule. The applicant says that there was no good reason for the respondent to obtain that order.

She points to the fact that the Judge herself found the process by which that order was obtained to be wrong. She submits that it was wrong and offensive to her for the respondent to obtain such an order just because she was seeking access to her grandchildren. She asserts that the respondent and the District Court misinterpreted the *in camera* rule.

**93.** The applicant further submits that the Judge erred in finding that she was out of time in respect of the 15 November 2018 District Court orders and that same were moot. She says that the orders remain valid, albeit same are illegal, on the following bases:

(i) The applicant did not receive the respondent's evidence in advance of the hearing.

(ii) The applicant's evidence of her *bona fide* interest in her grandchildren was not taken into account.

(iii) The child welfare basis given for the orders was false as there was no evidence or analysis of child welfare issues.

(iv) There was no analysis of why orders refusing her access to her grandchildren would be in their best interests and no consideration was given to the applicant's right of access to her grandchildren.

**94.** The respondent's submission is that the Judge was entirely correct to say that the applicant's challenge to the District Courts orders was out of time and, in any event, moot.

**95.** It is immediately apparent, from her grounds of appeal and her written submissions, as summarised above, that the overarching theme of the applicant's appeal against the refusal of leave in respect the District Court orders 10 July 2015, 21 September 2017, 25 January 2018 and 15 November 2018 is that the Judge failed to have regard to the applicant's ECHR rights. Fundamental to the case she makes against the refusal of leave is her submission that the Judge failed to acknowledge that court orders or decisions that constitute an ongoing interference in a person's fundamental rights under ECHR are required to be judicially reviewed by an assessment of the merits of the decisions, irrespective of any delay in applying for judicial review. Indeed, in her oral submissions to the Court, the applicant did not engage in any substantive way with the Judge's findings with regard to her delay in seeking to judicially review the District Court orders, or the

case law cited by the Judge, preferring to advance the argument that in refusing leave, the Judge failed wholly to have regard to her right to respect for her private and family life under Article 8 ECHR.

**96.** Asked by the Court whether she accepted the Judge's decision that her challenges to the District Court orders were out of time and moot, the applicant's position was that time rules did not apply in the case given the nature of the fundamental rights involved: as the breaches of her fundamental rights are ongoing, it cannot be right that the High Court would say that she was out of time to challenge the District Court orders in circumstances where the children are still in care and where the respondent refuses her to let her have contact with them.

**97.** The applicant contends that fundamental to the within appeal, is her right to have been consulted by the respondent prior to the children being taken into care on 10 July 2015. Notwithstanding that she was not a guardian of the children, or in *loco parentis* to them in July 2015, she says she had a right to make representations to the respondent before the children were taken into care. Her entitlement to be consulted arises, she says, because she had a family relationship with the children. This right arises pursuant to Article 8 ECHR into which, the applicant says, must be read the procedural obligation on a body such as the respondent to consult the children's family members, including grandparents, before a care order is made. This, it is said, has been made clear by the European Court of Human Rights ("ECtHR") Guide to Article 8 (as it then stood), which sets out, at para. 306:

> *"306. Whilst Article 8 contains no explicit procedural requirements …, the decision making process involved in measures of interference must be fair and sufficient to afford due respect to the interests safeguarded by Article 8 (Petrov and X v. Russia…; Q and R v. Slovenia), for instance in relation to children being taken into*

*care (W. v. The United Kingdom… and McMichael v. The United Kingdom and K. M. v. The United Kingdom) and the withdrawal of parental responsibility and consent to adoption … Also, the Court has stated that in cases in which the length of proceedings has a clear impact on the applicant's family life, a more rigorous approach is called for, and the remedy available in domestic law should be both preventive and compensatory …".*

**98.** The applicant points to the fact that her grandchildren resided with her for a period of time (a month) following their relocation to Ireland with their mother in December 2014. She says that she also had an involvement with the children while they resided in the UK, which was known to the respondent. Thus, she says, there is evidence of her contact with the children up to the time they were removed into the care of the State. The applicant's position is that one just needs to be a family member for the right to be consulted before children are taken into care is triggered. When asked by the Court where the authority for that proposition was to be found, the applicant pointed to para. 383 of the ECtHR's Guide to Article 8 (as it then stood) which makes clear that *"family life includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life (Marckx v. Belgium … Bronda v. Italy, 9 June 1998… and T.S. and J.J. v. Norway )."* According to the applicant, the present case is on all fours with the approach of the ECtHR in *Q and R v. Slovenia,* Application no. 19938/20, 8 February 2022 and *Kruškić v. Croatia*, Application no. 10140/13, 25 November 2014.

**99.** Whilst I certainly agree, as the ECtHR has said, that there may be family life within the meaning of Article 8 ECHR between grandparents and grandchildren *"where there are sufficiently close ties between them"* (*Lawlor v. The United Kingdom*, Application no. 12763/87), and that this does not necessarily depend on cohabitation (close relationships

created by frequent contact will suffice), to my mind, the case law of the ECtHR upon which the applicant relies does not bear out the broad proposition that she seeks to advance here. The argument that she advances is that the very fact of her being a grandparent of the children was sufficient to trigger an obligation on the part of the respondent in July 2015 to involve her in the making of the ECO, and that, therefore, the Judge should have overlooked, or otherwise excused, not just her delay in seeking to judicially review the order made on 10 July 2015 but also her delay in challenging the subsequent District Court orders.

**100.** I cannot agree with the applicant's submission. In the first instance, here, unlike the position of the grandparents in *Kruškić v. Croatia,* or indeed the grandparents in *Q and R v. Slovenia*, the applicant was not in *loco parentis* to her grandchildren at the time of their removal into care. Nor did she reside in the household of which they were part at the time of their removal into care. Furthermore, as is apparent from *Kruškić v. Croatia*, the ECtHR has recognised that "*in normal circumstances the relationship between grandparents and grandchildren is different in nature and degree from the relationship between parent and child and thus by its very nature generally calls for a lesser degree of protection. Therefore, when a parent is denied access to a child taken into public care this would constitute in most cases an interference with the parent's right to respect for family life as protected by Article 8 of the convention, but this would not necessarily be the case where grandparents are concerned. In the latter situation, there may be an interference with the grandparents' right to respect their family life only if the public authority reduces access below what is normal, that, is, diminishes contacts by refusing to grandparents the reasonable access necessary to preserve a normal grandparent-grandchild relationship"* (para. 110). (Emphasis added).

**101.** Whilst I accept that the applicant has rights *vis-à-vis* her grandchildren in terms of access, as recognised and protected by Article 8 to the extent set out above, it is difficult to extract (as the applicant would have the Court do) from the ECtHR *dicta* upon which she relies, the proposition that she had an unqualified entitlement to be consulted prior to the children being taken into care (in circumstances where she was not *in loco parentis* to the children), much less the proposition that the mere invoking of her asserted Article 8 rights is sufficient to trump the time limits laid down for the seeking of leave for judicial review or, more pertinently, the discretion left to the High Court in deciding whether or not to extend the time for the bringing of judicial review proceedings.

**102.** I say all of this in circumstances where not only could the applicant have applied for leave to seek judicial review of the impugned District Court order of 10 July 2015 (and indeed the other District Court orders of 21 September 2017 and 25 January 2018) within the time limits set down in the RSC as she most certainly knew of these orders within a short time of their making, she had also available to her the right to seek access from the courts, as provided for in s.37(2) of the 1991 Act, which indeed she invoked in 2017 (later withdrawing her application) and again in 2018 and which ultimately led to the District Court orders of 15 November 2018 and, following her appeal of those orders, the Circuit Court orders of 20 February 2020 and 21 May 2020.

**103.** All in all, I am not persuaded that the applicant has established, by reference to her Article 8 rights and the case law upon which she relies, any compelling basis for a reversal of the Judge's refusal of leave in respect of the District Court orders of 10 July 2015, 25 January 2018 and 15 November 2018.

**104.** I turn now to the actual reasons given by the Judge for the refusal of leave in relation to the District Court orders. Looking first to the ECO of 10 July 2015, whilst the applicant sought leave for a declaratory order only, the Judge considered that as she was in effect

challenging the 10 July 2015 order on the basis of a breach of fair procedures and the impugning of her good name, the normal three month time limit applied and, thus, she could not seek to circumvent the requisite time limit by seeking a declaratory order. As no basis for an extension of time was identified by the applicant, the Judge refused to consider the challenges raised to the 10 July 2015 order. I see absolutely no basis for interfering with the Judge's assessment.

**105.** Palpably, the applicant was also out of time in seeking leave for *certiorari* of the orders of 21 September 2017, 25 January 2018 and 15 November 2018, having regard to Order 84, r.21 of the Rules of the Superior Court ("RSC") which requires relief by way of *certiorari* to be sought within three months from the date when grounds for application first arose. Contrary to the applicant's submission, the time rules are not arbitrary given that Order 84, r.21(3) makes provision for time to be extended for "*good and sufficient reason",* which the Supreme Court in *Re Article 26 and the Illegal Immigrants Trafficking Bill 1999* [2000] 2 I.R. 360 (there, considering a fourteen day time limit), considered mitigated any harshness that might otherwise attach to the requisite time limit.

**106.** Here, applying the factors set out by Denham J. in *De Róiste v. Minister for Defence* [2001] IESC 4; [2001] 1 I.R. 190, the Judge duly considered whether the applicant had made out a case for an extension of time as regards each of the orders. In respect of the order of 21 September 2017, she held that as the applicant had been alerted to the making of that order by letter of 21 November 2017, she could have sought a copy of same from that date on for the purposes of judicially reviewing it. The applicant had not explained why she had not done so. I see no basis upon which this Court could take issue with the Judge's reasoning. The Judge also considered that the order had been overtaken by the order of 25 January 2018 and so an order for *certiorari* would be futile. Again, it is impossible to argue with the Judge's reasoning in this regard, in my view.

**107.** As far as the 25 January 2018 order is concerned, the Judge did not consider the applicant's subjective claim that the order was oppressive and intimidatory as constituting good and sufficient reason for not seeking to challenge it. She also took account of the fact that the applicant made a conscious decision in 2018 to make an application under s.37(2) of the 1991 Act; in other words, to seek an alternative remedy. She furthermore considered the 25 January 2018 order moot since it was replaced by the orders made on 15 November 2018.

**108.** Whilst the applicant says that there was no credible evidence for the Judge's finding of mootness in circumstances where the January 2018 order was made pursuant to s.47 of the 1991 Act and the November 2018 orders made under s. 37(2), again, I see no basis upon which to depart from the Judge's reasoning in circumstances where the applicant's access applications in November 2018 were palpably with the objective of putting the question of access before the District Court, and where the same objective was the root of the respondent's application in January 2018 for the order it sought and obtained against the applicant.

**109.** It will be recalled that on 15 November 2018, the District Court refused the applicant's two separate applications for access to her grandchildren. As recorded in the High Court judgment, the applicant's explanation for not seeking to challenge those orders by way of judicial review at the relevant time was that given that judicial review was a procedural remedy, she considered that an appeal to the Circuit Court would be more appropriate to achieve her goal of obtaining access (indeed a rationale with which I do not disagree). The Judge considered that the fact that things did not work out in the Circuit Court could not be used as a reason to now permit the applicant to revisit the 15 November 2018 orders by way of judicial review. She opined that judicial review would constitute

*"an entirely empty exercise"* where an appeal had been brought against the District Court orders. It is impossible, in my view, to disagree with the Judge's reasoning.

**110.** In summary therefore, notwithstanding the applicant's written and oral submissions, including her reliance on case law of the ECtHR, I am not persuaded that the Judge erred in any regard in finding that the applicant was out of time to challenge the District Court orders of 10 July 2015, 21 September 2017, 25 January 2018 and 15 November 2018 and in finding that her challenge to the orders of 21 September 2017 and 25 January 2018 had in any event been rendered moot by subsequent events.

**111.** None of the applicant's appeal grounds with respect to the District Court orders are made out.

**Issue (ii)-The Circuit Court Order of 20 February 2020**

***A snapshot of the parties' submissions***

**112.** The key issue in this appeal is the challenge to the Circuit Court order of 20 February 2020. In various of her grounds of appeal, the applicant takes issue with the Judge's refusal of judicial review of the Circuit Court order of 20 February 2020 and the refusal of leave in respect of some grounds. In summary, the applicant's written and oral submissions say that the Judge wrongfully failed to take account (or sufficient account) of the following:

- The implication arising from the Circuit Court judge's decision that the applicant was involved in sexual abuse (an implication the applicant alleges the Judge replicated at para. 47 of the High Court judgment) in circumstances where there was no credible evidence for such implication.
- The Circuit Court judge's misinterpretation of evidence tendered by the children's mother.

- The evidence of the children's mother that there was no involvement by the applicant in sexual abuse.
- The fact that the allocated social worker submitted the same social work report to the Circuit Court as had been submitted to the District Court in November 2018.
- The applicant's evidence as to the unregulated status of the guardian *ad litem* and the guardian's conflict of interest arising from the fact that he is paid by the respondent.
- The fact that the applicant was not provided with the respondent's evidence in advance of the Circuit Court hearing.
- The unlawfulness of the imposition of conditions for supervised access on the applicant by the Circuit Court judge in circumstances where there is no legislative basis for such requirement.
- The Circuit Court judge's failure to take account the applicant's regular contact with her grandchildren prior to their being taken into care.
- The Circuit Court judge's failure to conduct any analysis as to why an order refusing access would be in the best interests of the children.
- The failure to incorporate the reasons and conditions for access by the applicant to her grandchildren into the order of 20 February 2020.
- The Circuit Court's failure to carry out its duty in a manner compatible with Article 8 ECHR when issuing its order of 20 February 2020 affirming the District Court orders of 15 November 2018.

**113.** The applicant further asserts that the Judge gave unreasonable grounds for justifying the failure to disclose to the applicant the guardian *ad litem's* report in advance of the Circuit Court hearing. She also submits that the Judge failed to take judicial notice of the case law of the ECtHR which established that in order for wrongdoing to be included in

judgments and orders, the evidence for same requires to be thoroughly analysed, or otherwise omitted.

**114.** She contends that it was imperative, given that the case is a fundamental rights case, that the Judge should look at the Circuit Court decision and then conduct an analysis of the facts in order to see if the Circuit Court judge's reasons for refusing access were correct. The applicant says that this was the approach adopted by Meenan J. in *S.Y. v. Minister for Children and Equality* [2023] IEHC 187. She says that albeit what is in issue here is her statutory application for access pursuant to s.37 of the 1991 Act, the approach of Meenan J. was the one that ought to have been followed by the Judge. Having considered the judgment of Meenan J. in *S.Y.*, in my view, it cannot be regarded as authority for the applicant's proposition that the Judge was obliged to embark upon the merits of her access application. Quite clearly, the salient issue in *S.Y.* was whether the Minister had complied with his legal obligation under the European Communities (Reception Conditions) Regulations, 2018 (S.I. 230 of 2018) which was a question of law and entirely within the scope of judicial review.

**115.** The applicant contends that the Circuit Court did not apply the best interest test correctly. To do so, she claims, the court had to first acknowledge that children in care have a right in their best interest to access to their family and then consider whether the person seeking access has ever harmed the children. Only if harm is established can the courts apply restriction to or refuse access. She submits that here, the Circuit Court had no evidence of the applicant having harmed the children. What the Circuit Court judge did was to simply adopt what the guardian *ad litem* said in his report, someone, the applicant says, who was not qualified or eligible to opine on the matters he did but yet substantially influenced the outcome of the applicant's access request. That, the applicant says, was wrong and unfair.

**116.** The respondent's position is that there is no merit in any of the applicant's grounds of appeal in relation to the Judge's treatment of the Circuit Court order. Counsel for the respondent emphasises that, in principle, the respondent is agreeable to facilitating access in accordance with the directions of the Circuit Court. He submits that what the Circuit Court judge did was to identify a pathway for access by the applicant to her grandchildren to be facilitated against both the background of legitimate concerns expressed by the respondent regarding the applicant and the contents of the guardian's report. All of this, the respondent says, was properly acknowledged by the Judge.

***Discussion and Decision***

**117.** The first observation I would make is that it is immediately apparent from the applicant's grounds of appeal, and her written and oral submissions, that many of her complaints concern the merits of the Circuit Court judge's decision something, contrary to the applicant's argument, with which the High Court on judicial review was properly not concerned, as indeed correctly observed by the Judge. What the Judge was required to assess, and which, in my view, she did, was whether the applicant placed before the High Court any facts sufficient to establish any error of law, material error of fact, breach of fair procedures or irrationality on the part of the Circuit Court which might warrant intervention by the High Court. The Judge found that the applicant had singularly failed to establish any of the above.

**118.** Insofar as it can be taken from her grounds of appeal (ground 5), and submissions, that the applicant maintains her claim (at para. 127 of her statement of grounds) that the Circuit Court judge's decision was irrational, I agree with the Judge's observation that a bare assertion of irrationality, absent any evidence to back up that assertion, does not meet the threshold for leave for judicial review.

**119.** Before considering the applicant's other grounds of appeal, it bears repeating that the Circuit Court decision was arrived at following a full hearing during which the applicant was afforded an opportunity to give evidence, and to cross-examine the allocated social worker and the guardian *ad litem*, which she duly took up.

**120.** Insofar as the applicant complains that the Judge erred in finding (para. 22) that her general complaints about the guardian *ad litem* did not constitute a challenge to the Circuit Court order of 20 February 2020 and so could not be ventilated in the within proceedings, I find no merit in this ground of appeal. The Judge was correct to find, as she did, in my view, in the absence of any challenge by the applicant to the legislation that provides for the guardian's appointment. The appointment of guardians *ad litem* is specifically legislated for by s. 26 of the 1991 Act which provides, *inter alia*, that *"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".* The role of a guardian *ad litem* has been considered in detail by MacMenamin J. in *HSE v. DK* [2007] IEHC 488, and subsequently in *AOD v. O'Leary* [2016] IEHC 555 in the context of s. 26 of the 1991 Act where Baker J. cited a number of the principles set out by MacMenamin J. in *HSE v. DK*:

> *"(b) The function of the guardian should be two-fold; firstly to place the needs of the child before the Court, and secondly to give the guardian's views as to what is in the best interests of the child.*
>
> *(c) A guardian ad litem should bring to the attention of the Health Service Executive any risks which he or she believes may adversely affect the best interests of the child, and if not satisfied with the response may bring the matter to the attention of the court. The guardian ad litem should take steps where necessary to co-operate with, and where possible share relevant information with, other care professionals engaged with the minor.*

*(d) A duty of a guardian ad litem is to ensure compliance with the constitutional rights of a minor. For this purpose, the guardian should ensure that there is provided to the minor a means of making his or her views known.*

*(e) A guardian ad litem may fulfil the dual function of reporting to the court regarding the child's care and also by acting as the child's representative in any court proceedings and thereby communicating to the court the child's views."*

**121.** Baker J. went on to add that "*the guardian ad litem is expected to give an expert perspective and to do so in an independent and neutral way, and the guardian is not merely a mouthpiece for the child, and the role is not confined to that of presenting the child's wishes to the court".* Thus, the guardian's function is to place both his/her expert views on the best interests of the child, and the child's views, before the court, which on the face of the guardian *ad litem's* report, is what was done here. That being the case, and in light of the fact that she had opportunity to cross-examine the guardian, to my mind, the applicant has failed to establish any legal error in the manner which the guardian's report was prepared and presented such as might affect the validity of the Circuit Court's decision.

**122.** I also reject the applicant's argument that the Judge was wrong in holding that the guardian was not obliged to include her specific views in his report. As already stated, the import of s. 26 of the 1991 Act is that the guardian's function is to give their view on the welfare of the child whilst also conveying the child's view. Insofar as there is reference to *"all parties"* in the Circuit Court order of 30 May 2019, what was required was that all parties concerned cooperate with the guardian in the preparation of the report. Here, as noted by the Judge, the guardian had access to a significant amount of background material, in addition to having met with the children and some family members prior to

preparing his report. In light of what was known to the guardian, I am satisfied that the absence from the report of any reference to the applicant's specific views on matters pertaining to the children did not constitute a violation of her rights in circumstances where, as noted by the Judge, the applicant had not had a significant level of interaction with the children for a number of years. In any event, as the Judge observed, none of the views of the family members who were consulted were set out in the report. It must also be recalled that the applicant had ample opportunity at the hearing of her appeal to make her views known to the Circuit Court.

**123.** Insofar as applicant complains that the guardian is *"unregulated,"* and remunerated from the respondent's funds, I am entirely satisfied that the Judge was correct in holding that that complaint did not constitute a challenge to the Circuit Court decision, and thus could not be ventilated in the within proceedings, particularly in circumstances where applicant did not seek to challenge s. 26 of the 1991 Act.

**124.** The applicant maintains that the Judge erred in finding that there was no breach of fair procedures in the applicant only being provided with the guardian *ad litem's* report on the morning of the Circuit Court hearing and that she was similarly not unfairly treated in not having been provided with the respondent's evidence prior the hearing. These matters were addressed by the Judge at paras. 69-71 of her judgment. I am satisfied that in rejecting the applicant's complaint the Judge correctly applied the decision in *MS v. Gibbons* [2007] 3 I.R. 785 to the case before her. In *MS v. Gibbons*, Murphy J. held that the operation of the *in camera* rule could be distinguished in the case of legal professionals and self- represented litigants. As the former were officers of the court and thus subject to professional disciplinary sanction, they could be provided with confidential reporting; whereas litigants representing themselves were subject to no such sanction and therefore entitled only to supervised access. Here, as a litigant in person, the applicant was duly

afforded supervised sight of the guardian's report and availed of her opportunity to cross-examine the guardian, which, according to the respondent's affidavit evidence, she did at length.

**125.** I am also satisfied that there is no merit in the applicant's complaint that she was not apprised in advance of the respondent's evidence. As the Judge observed, there could be no question of the applicant being taken unawares by that evidence since she had already been before the District Court where she fully participated with the benefit at that time of legal representation. Moreover, the applicant herself observed in her legal submissions to the High Court that the allocated social worker's evidence in the Circuit Court was *"mostly the same as he gave at the District Court".* Thus, the Judge was entirely correct in saying that the applicant's ground in this regard was not arguable. There is also no merit in her claim that the Circuit Court only had the report the social worker had prepared for the District Court in circumstances where the author of that report gave evidence in the Circuit Court and was cross-examined by the applicant.

**126.** Insofar as the applicant maintains that the Judge did not uphold her claim that the Circuit Court did not give reasons for refusing her access, this complaint is unsustainable in circumstances where detailed reasons are evident from the transcript of the Circuit Court judge's decision, as the Judge duly observed. In respect of the complaint that the Circuit Court judge did not take account of the applicant's contact with her grandchildren prior to their being taken into care (in other words the applicant's *bona fide* interest in her grandchildren) and did not conduct any analysis as to why an order refusing access would be in the best interests of the children, again, these complaints are baseless, in my view. Aside altogether from the fact that the complaints are tantamount to an appeal on the merits of the Circuit Court decision, it is immediately apparent from the face of her decision both that the Circuit Court judge was aware of the applicant's prior involvement

in the children's lives *qua* grandparent, and that the children's best interests were foremost in the mind of the Circuit Court judge when she rendered her decision.

**127.** The applicant asserts that the Judge erred in failing to take account of the implication in the Circuit Court decision that she had committed sexual abuse and failed to consider the extent to which this implication had influenced the refusal of access to her grandchildren. When asked by the Court where in the *ex tempore* judgment of the Circuit Court judge that implication was to be found, the applicant pointed to p.4, lines 33-34 of the judgment where the Circuit Court judge states as follows: *"The fact of the matter is that it has been decided that there was an issue of sexual abuse here".*

**128.** In my view, the applicant is wholly misguided in seeking to extract from those words an implication of sexual abuse on her part. The respondent made no such suggestion, nor was such implied by the Circuit Court judge. There was a finding made in the UK courts that one of the children had been subjected to sexual assault by a named individual who, for the avoidance of any conceivable doubt, was not the applicant. It was against that factual backdrop that the Circuit Court judge made her remarks and considered that as a result, the children were *"vulnerable"*, as the applicant well knows. Therefore, I reject her complaint that the Judge erred in failing to hold the Circuit Court judge to account for her remarks. I reject equally the applicant's suggestion that what was said by the Judge at para. 47 of her judgment was tantamount to a continuation of the implication that allegedly arose in the Circuit Court decision, in circumstances where the Judge was merely reprising what the Circuit Court judge had said for the purpose of putting the Circuit Court judge's words into their proper context, as indeed I have done herein.

**129.** The applicant further seeks to impugn the Circuit Court order on the ground that the Circuit Judge had no legal basis to impose the conditions she did (namely abiding by the recommendations set out at para. 4 of the guardian *ad litem's* report) with which the

applicant was required to comply before access by her to her grandchildren could be facilitated. In reliance on the decision of Hogan J. in *J.G. v. Staunton* [2013] IEHC 533, she contends that the guardian's report and recommendations are invalid, and that the respondent has no power or authority to require that she be psychologically assessed. In *J.G. v. Staunton*, in the context of a challenge made by the parents of two children to a care order made by the District Court upon the application of the respondent Health Service Executive, Hogan J. opined that s. 19 of the 1991 Act (which empowers the District Court to make supervision orders in cases where the court is satisfied that there are reasonable grounds for believing that a child has been abused or neglected and, by s.19(4), provides that the District Court is expressly empowered to require the parents of the child to cause the child *"to attend for medical or psychiatric examination…"* ) did not, however, empower the District Court to direct that the parents submit to a parental capacity assessment. Nor did Hogan J. accept that s. 47 of the 1991 Act (which gives the District Court power to give directions and make orders on any question affecting the welfare of a child as it thinks proper) gave the District Court such power.

**130.** I note that at para. 74 of her judgment, the Judge considered that the applicant's argument had *"some weight"* but dismissed it and other arguments as *"wholly outside the pleadings"*.

**131.** The applicant's argument in relation to the conditions on which her access to her grandchildren might be restored is confused. Specifically, it fails to acknowledge that the proposal that she might undergo a psychological assessment was no part of the Circuit Court order. Even accepting for the purposes of argument that the applicant's complaint in this regard is in the pleadings (and in this regard I am looking at paras. 124 and 125 of the statement of grounds), I note that the applicant's complaints are directed at the respondent and the guardian, respectively, and not the Circuit Court judge. Indeed, when questioned

by the Court on this issue, the applicant agreed that the Circuit Court did not order her to undergo a psychological assessment. That being so, I fail to see how the applicant's reliance on Hogan J.'s *dictum* is of any assistance in this case in circumstances where the Circuit Court judge made no order that the applicant be psychologically assessed.

**132.** It is of course the case that the Circuit Court judge took on board the guardian's recommendations, in particular the recommendations at para. 4.5 (I) and (II) of his report that as a starting point to access, the applicant must commit to meeting the allocated social worker/team leader and engaging in any preparatory work the respondent may require. In light of the evidence the Circuit Court had regarding the children's history and their vulnerability, and bearing in mind that, as her decision shows, the Circuit Court judge had to the forefront of her consideration the best interests of the children, I perceive no basis for impugning the Circuit Court judge for (after duly weighing the applicant's request for access against the children's best interests) having concluded that there were steps to be taken by the applicant before access by her to her grandchildren could be facilitated. This was properly the function of the Circuit Court judge, and it is not lightly to be interfered with, particularly when the Circuit Court decision reflects both the analysis carried out by the Circuit Court judge and the reasons for her decision.

**133.** Undoubtedly, there was evidence before the Circuit Court judge from which she could legitimately determine that it was not in the children's best interests that the applicant would have immediate access to the children, given their vulnerability, and the applicant's own position (later confirmed on affidavit in these proceedings) that she had not believed the allegation of sexual assault made by one of the children while living in the UK. That allegation, however, was borne out by fact finding made by a UK court. Indeed, when put to her by the Court that the respondent's concern, arose, *inter alia,* from a suggestion that the applicant did not believe the allegation of sexual assault made by one of

the children, the applicant's response was that the criminal aspect of that allegation had been dropped by the UK authorities.

**134.** In circumstances where it is clear that all relevant factors were assessed and duly weighed by the Circuit Court judge, there is, therefore, no merit, in the applicant's contention that the Judge failed to conduct a detailed assessment of the evidence in the case *"in order to determine whether the Circuit Court order constituted a breach of statutory duty under Section 37 of [the 1991 Act]".*

**135.** Insofar as the applicant argued on appeal that there was a failure on the part of the Judge to adjudicate on alleged data breaches and alleged bias and bad faith on the part of the respondent and the guardian towards her, I am satisfied that her complaints in those regards are misconceived in circumstances where what was sought to be impugned in the judicial review proceedings was the Circuit Court order of 20 May 2020, to which the Judge properly and adequately directed her consideration and duly determined that no grounds for relief were established.

**136.** In summary, the applicant has not established any basis upon which the decision of the Circuit Court could be impugned.

**137.** Insofar as the applicant wishes to pursue access to those of her grandchildren who remain in the care of the respondent, it remains open to her to pursue this objective by way of a further application pursuant to s.37 of the 1991 Act. This is the optimal mechanism for achieving her desired goal of access, as made clear by the Supreme Court in *FG v. Child and Family Agency* [2018] IESC 28. In that case, much like the present case, the appellant mother sought access to her children by way of judicial review. McKechnie J. held that an application pursuant to s.37 of the 1991 Act was the appropriate avenue for a person wishing to challenge access arrangements. He put it as follows:

> *"It remains open to the appellant to make an application under that section and this, it seems to me, is the appropriate avenue by which to pursue the increased family access which Ms. G wishes to have to her children. Indeed, it should be said that in the circumstances of this case, section 37 represents not only an alternative remedy, but a palpably superior remedy."* (para. 111)

**138.** To my mind, those words are entirely apposite to this case, where it is eminently clear to the Court that the applicant's principal objective is to secure access to her grandchildren. In light of the foregoing, the Judge was correct to hold that the applicant's complaints about the merits of the Circuit Court decision are not a matter for judicial review and are more appropriately addressed by a further application pursuant to s.37 of the 1991 Act, that provision, in my view, being an entirely appropriate and sufficient mechanism for the *"requisite protection"* of the applicant's interests as envisaged by the ECtHR (*Q and R v. Slovenia*, at para. 105).

**139.** For the reasons stated herein, none of the grounds of appeal in respect of the Circuit Court order of 20 February 2020 are made out.

**Summary**

**140.** I would dismiss the applicant's appeal on all grounds.

**Postscript**

**141.** The core issue at the Circuit Court hearing in February 2020 was the question of access by the applicant to her grandchildren. That issue was determined by the Circuit Court judge on the evidence before her in the best interests of the children having given due credence to the applicant's Article 8 rights. By the terms of her decision, the Circuit Court judge effectively forged a pathway for access by the applicant to her grandchildren. The applicant has not availed of that pathway. As counsel for the respondent fairly acknowledged, it is regrettable that the situation is as it is, where it is clear that the

applicant wants access to her grandchildren and where, equally, the children now say that they want to see their grandmother.

**142.** When reminded by the Court that as per the affidavit of the allocated social worker and as recorded in the *ex tempore* judgment of the Circuit Court judge, the respondent's position is that it does not *in principle* object to the applicant having access to the children but that there needs firstly to be engagement between her and the respondent in the terms outlined by the Circuit Court judge, the applicant's response was to rehearse the entire history of events and levy myriad complaints against the respondent and the guardian *ad litem* (much as she has done since the children were first taken into care) thereby ignoring the pathway forged by the Circuit Court judge to enable access to take place. Indeed, it is clear from the email the applicant sent to the respondent on 25 February 2020 in the immediate wake of the Circuit Court decision that (intentionally or otherwise) she very obviously misinterpreted the Circuit Court judge's decision as permitting her, effectively, immediate access to her grandchildren and, to that end, she requested that the respondent arrange access and she set out in her email certain matters that she wanted the respondent to attend to in order to facilitate that access, including that any preparatory meeting she was required to have be with a person independent of the respondent. However, the process outlined in the applicant's email was very obviously not what the Circuit Court judge had in mind.

**143.** At the same time, the applicant's intransigence has not been helped by the manner in which the respondent approached the Circuit Court judge's decision and order of 20 February 2020. As we have seen, the applicant's correspondence of 25 February 2020 was ultimately replied to by the respondent by email on 2 April 2020 (the respondent attaching thereto prior correspondence of 6 March 2020 which the applicant had not received). The 6 March 2020 letter requested that the applicant meet with a named administrative staff

member of the respondent in order that that staff member would source "*an independent clinical psychologist as per the recommendations made by the Court".*

**144.** To all intents and purposes, the respondent's request effectively reversed the Circuit Court's intended schematic in circumstances where it was clearly the intention of the Circuit Court judge (adopting the format set out in the guardian *ad litem's* recommendations) that the first step in the process envisaged by the Circuit Court as *might* lead to access for the applicant to her grandchildren was that there would be a face-to-face meeting between the allocated social worker/ team leader and the applicant at which, presumably, both parties could take stock of the situation, and where following such meeting, as again envisaged by the Circuit Court judge, the respondent would be in a position to make a decision about such *"preparatory work or assessment the CFA may require prior to access commencing",* (effectively step 2 in the Circuit Court judge's schematic).

**145.** It seems to me that the respondent's inversion of the process envisaged by the Circuit Court compounded the already difficult relationship that existed between the applicant and the respondent, as evidenced by the applicant's reply to the respondent's 2 April 2020 email in which she said that she was not prepared to engage with the respondent and where she pointed out (correctly) that the Circuit Court judge had made no mention of a psychological assessment in her *ex tempore* judgment (nor, indeed, had the guardian referred to such in his report).

**146.** As can be seen, therefore, neither the respondent nor the applicant properly interpreted the Circuit Court judge's decision.

**147.** Whilst, given the history of this matter and the parties' respective approaches in the immediate aftermath of the Circuit Court decision of 20 February 2020, I have no great expectation that matters between the applicant and the respondent will progress in the way

the Circuit Court judge hoped they might, I would nevertheless urge that the respondent abide the steps ordained by the Circuit Court judge in her 20 February 2020 decision (as clarified in her order of 21 May 2020). Thus, the respondent should forthwith write to the applicant inviting her to a face-to-face- meeting with the respondent's allocated social worker/team leader. Once that letter is sent and were the applicant to engage with the respondent in relation to such meeting, then any meeting between the applicant and the allocated social work/ team leader could be arranged within days, according to the counsel for the respondent.

**148.** If the applicant accepts the respondent's invitation and attends the meeting, then what might transpire thereafter is obviously a matter for the respondent to assess, as per the Circuit Court judge's order and, thus, it is not appropriate that this Court would speculate further in that regard. It is hoped, however, that some progress could be made, given that two of the applicant's grandchildren remain in the care of the respondent and that there is but a couple of years for the applicant to re-connect with them while they are still children.

**Costs**

**149.** The respondent having been entirely successful on the appeal is presumptively entitled to an order for its costs. However, as I have said, it appears that the pathway forged by the Circuit Court with a view to restoring contact between the applicant and her grandchildren may have been impeded by the respondent's imposition of a condition-which had not been directed or recommended by the Circuit Court judge-that the applicant should first undergo a psychological assessment: as well, it must be said, by the position taken by the applicant immediately following the making of the Circuit Court order on 20 February 2020. Provisionally, it seems to me that the failure of the parties to take the path forged by the Circuit Court judge may have been a factor in the commencement of the judicial review proceedings. Strictly speaking, the respondent's insistence that the

applicant undergo a psychological assessment did not go to the validity of the impugned order, but it seems to me that it did go to the respondent's argument that the applicant had available to her an appropriate available remedy. At the very least, it was a legitimate cause for complaint.

**150.** I note that the High Court made no order as to costs and that the respondent has not cross-appealed against that part of the order. I am provisionally of the view that there should be no order as to the costs of the appeal. If either party wishes to contend for any other costs order, they may notify the Office within ten days of the electronic delivery of this judgment: in which event the panel will reconvene before the end of July 2024 to deal with the question of costs. Absent such notice, the order of the High Court will be affirmed, and the appeal dismissed with no order as to costs.

**151.** As this judgment is being delivered electronically, Whelan J. and Allen J. have indicated their agreement therewith and with the orders I have proposed.