Neutral Citation [2015] IEHC 679

THE HIGH COURT

RECORD NO: 2015/376JR

BETWEEN:

MS A AND CHILD X AND CHILD Y
(SUING THROUGH THEIR MOTHER AND NEXT FRIEND MS A)

APPLICANT

– AND –
THE CHILD AND FAMILY AGENCY

RESPONDENT

Judgment of Mr Justice Max Barrett delivered on 4thNovember, 2015.

PART 1: SOME BACKGROUND FACTS

1. Ms A is in a long-term relationship with Mr B. They have two children, Child X and Child Y, presently aged 13 and 11 respectively. Ms A also has an adult child by a previous relationship. That child no longer resides with Ms A. Certain serious allegations have been made about Mr B as regards his behaviour towards Ms A and their two children. It is important to emphasise that at this time these are allegations only, but they are various; some have been made by Ms A, some by third parties.

2. A number of the allegations arising were discussed between Ms A and staff of the Child and Family Agency (CFA) on 30th March, 2015. Those staff were sufficiently concerned by the substance of this discussion that, on 31st March, CFA staff attended at Ms A's family address with members of An Garda Síochána. The CFA staff recommended to Ms A that she depart from the family home with her children to safe accommodation. It seems to have been a very upsetting occasion for all the family, and understandably so. Ms A indicated that she did not want to leave the family home. However, she was advised that if she did not bring the children to a place of safety, the Gardaí would consider making application for Child X and Child Y to be placed in care.

3. Seemingly convinced that her departure from the family home would be a short-term measure only, Ms A agreed to leave with her two children. In fact, this was the beginning of a more protracted split than the two days that Ms A claims was advised to her by CFA staff on the 31st. The CFA indicates that, if such a timeline was mentioned, it was the timeline for an initial consideration of matters, not a full and final resolution of how best to proceed. Ms A is a mother who naturally wants the best for her children and the court suspects that, to use a colloquialism, in her 'heart of hearts' she must have realised that resolving the delicate issue of how best to ensure her welfare and that of her children, in light of the serious allegations made against Mr B, was never something that could be achieved by or with the CFA within a 48-hour timeframe.

4. A brief timeline of some relevant events is set out below. To preserve the privacy of the parties, this is confined to certain principal events arising, and is not a summary of the detailed evidence placed before the court.

- 30th March, 2015 Meeting between Ms A and CFA.

- 31st March, 2015 CFA strategy meeting held; CFA and Gardaí attend at family home. Ms A and children move to refuge and thereafter to safe house.

- 14th April, 2015 Incidental action taken in respect of Mr B.

- 27th April, 2015 'Child Protection Conference' held.[1] Decided to place details of Child X and Child Y on Child Protection notification System (CPNS).[2]

- 13th May, 2015 Incidental action taken in respect of Child X.

- 27th May, 2015 Further Child Protection Conference held.

- June/July, 2015 Various interactions between CFA and family.

- 8th July, 2015 Leave to seek judicial review of CFA actions granted.

[1]A 'Child Protection Conference' is an inter-agency, inter-professional meeting convened by designated person within the CFA. The purpose of the Conference is to facilitate the sharing and evaluation of information between professionals and parents, to consider the evidence as to whether a child has suffered or is likely to suffer significant harm, to decide whether a child should have a formal child protection plan and, if so, to formulate such a plan. A child protection plan is an inter-agency plan that sets out what changes need to happen to make sure that a child or young person is safe and that her or his needs are met. The aim of the plan is to reduce or remove identified risks so that a decision can be made to cease the child protection plan.

[2] The CPNS records the names of children who have child protection plans agreed in respect of them at a Child Protection Conference. The CPNS can only be accessed by a very small group of people who might need to make important decisions about the safety of a child, e.g. doctors or Gardaí. A child's name is listed on the CPNS as 'active' or 'inactive'. The term 'active' means that there is a child protection plan in place (because it has been decided that the child is at risk of significant harm and needs support to be safe and well). The term 'inactive' means that a child was previously at risk of such significant harm and had a child protection plan in the past. Such a child may need some support to remain safe and well. When a child's name is placed on the list, parents receive a letter advising them of this. If a child's status is 'active', a review meeting must take place within six months to ensure that the relevant child protection plan is working. If it is decided that a child is no longer at risk, her or his status on the CPNS will be made inactive and the parents will be given a letter to this effect. The child's name will not, however, be completely removed from the list when s/he reaches the age of 18 years.

5. Along with the order granting leave to seek judicial review on 8th July last, an order was made by the court (Noonan J.) that the CFA *"be stayed from taking any further action to dis-entitle or prevent the [family] from living together as a family until the determination of the application for judicial review or until further Order…".* Without objection from Ms A, this order of stay was lifted by this Court on 30th October.

PART 2: RELIEFS SOUGHT

6. Various reliefs have been sought by Ms A in these proceedings. Some of the reliefs initially sought have been abandoned or are now

redundant. The court understands that the following are the remaining reliefs sought:

> (1) an order of *certiorari* in respect of the decision of the Child Protection Conferences of 27th April and 27th May, 2015 in relation to the welfare of Child X and Child Y and the continuing separation of the family unit;
>
> (2) an order of *certiorari* in respect of the decision on 27th April to place Child X and Child Y on the Child Protection Notification System;
>
> (3) a declaration that the CFA acted in violation of Applicants' constitutional rights in not allowing Ms A to bring legal representation to the Child Protection Conferences;
>
> (4) an interlocutory injunction restraining the CFA from taking any further action to dis-entitle or prevent Ms A, her children and Mr B from living together as a family;
>
> (5) a declaration that the actions of the CFA *"in issuing an ultimatum to the Applicant's family unit to separate in lieu of a threatened Court intervention"* on 31st March, 2015 were *ultra vires*, disproportionate to the ends achieved and in contravention of the rights of Child X and Child Y under Article 42A of the Constitution;
>
> (6) an order of *mandamus* compelling the CFA to effect the immediate restoration of the family unit and to withdraw the threat of orders under the Child Care Act 1991; and
>
> (7) various ancillary reliefs.

PART 3: THE LEGAL ROLE OF THE CHILD AND FAMILY AGENCY

7. The jurisdiction of the CFA derives from the Child and Family Agency Act 2013. However, the statutory basis for much of the CFA's activities is the Child Care Act 1991. Section 3 of the Act of 1991 provides as follows:

> *"(1) It shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection.*
>
> *(2) In the performance of this function, a health board shall –*
>
> *(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children in its area;*
>
> *(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise –*
>
> > *(i) regard the welfare of the child as the first and paramount consideration, and*
> >
> > *(ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and*
>
> *(c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family."*

8. In addition, Article 42A of the Constitution, and also the European Convention on Human Rights, oblige the State to act in order to safeguard children.

9. As one would expect, the CFA is empowered by statute to seek various court orders. For example, in respect of children perceived to be in danger or in need of care, the CFA can seek an emergency care order of the District Court under s.13 of the Act of 1991, or an interim care order under s.17 of the Act of 1991. A central complaint made in the within application is that in its actions vis-à-vis Ms A and her two children, the CFA did not invoke its powers to seek a court order pursuant to the Act of 1991. The court does not accept as legally correct the proposition that the only appropriate means whereby the CFA can act as regards children who are perceived to be vulnerable is to initiate court proceedings and seek some form of court order. If the CFA is empowered to commence court proceedings (and it is) in the pursuit of its statutory objectives and in satisfaction of its legal obligations, it seems to follow as a necessary corollary that it is entitled to take steps up to and including the commencement of such proceedings. Indeed it seems to this Court to be not just legitimate but laudable that in dealing with delicate family matters, the CFA would try generally to deal with them in a manner that does not involve court proceedings. Courts are where family problems may sometimes end up, not where the resolution of such problems should invariably, or even generally, start out.

PART 4: JUDICIAL REVIEW IN THIS TYPE OF CASE SHOULD BE VERY RARE

10. Life has a habit of throwing up the unanticipated. So the court shrinks from saying that judicial review of the type that it has been asked to undertake in these proceedings ought never to be brought. Even so, the court would echo the caution sounded by Hedigan J. in *I v. HSE* [2010] IEHC 159. That was a case in which the applicant sought an order quashing an investigation into whether any child protection concerns presented regarding a particular child. In his judgment, Hedigan J., at 7, expressed agreement with certain views of Butler-Sloss L.J in R*. v. Harrow LBC, ex parte D* [1989] 3 W.L.R. 1239 that "*judicial review in this type of case should be very rare*" and observed in respect of the HSE, though it applies with equal vigour to the CFA, that they "*ought to be able to conduct these vital investigations without having to constantly look over their shoulder for possible intervention by the courts."* Of course "*very rare"* and "[not] *having to constantly look over their shoulder for possible intervention*" does not mean 'never'. The courts are here; their doors are open; cases may arise to be brought.

PART 5: DECISIONS OF SPECIALIST BODIES

11. When it comes to the specialist bodies that present before the courts, this Court would humbly query whether the individual actors within such bodies whose decisions are the true subject of judicial review applications always and in every instance stand possessed, by virtue of their employment, of an abundance of expertise which exceeds that of a court aided by counsel, informed by forensic argument, and experienced in aspects of the law. Our courts have now held for some time that no little deference to the expertise of statutory agencies is merited. But that does not require judges to become 'Rantzen-ite' jobsworths. A court of conscience can never countenance inequity by affecting legal infirmity. All that said, the CFA and its staff are clearly possessed of

considerable expertise in what are the appropriate steps to take in the context of cases where the personal welfare of a parent and/or child is or are perceived to be at risk. This Court freely admits that its knowledge of how to deal with the delicate practicalities of cases such as that now presenting is greatly inferior to the staff of the CFA who, sad to say, deal with such cases on a regular basis. This being so, although the lawful can never take second place to the practical, this Court's strong sense is that the CFA's area of expertise is one where the courts must yield significant space to the informed discretion of CFA professionals.

PART 6: DELAY

12. The CFA contends that the Applicants are out of time to seek any relief in respect of the events of 31st March, 2015. The Applicants did not seek and obtain leave to bring proceedings until 8th July, 2015, i.e. over three months after 31st March, 2015. In this regard, the CFA refers to O.84, r.21 and the general three-month limit that arises thereunder. This limit, of course, is subject to the possibility of extension under O.84, r.21(3). Moreover, the rules of court are ultimately the servants of Justice, not her master; a, possibly rare, instance could conceivably present in which a court might be satisfied to extend time, even though the requirements of r.21 (3) were not perfectly satisfied. Indeed, in the context of an application such as that now presenting, one could readily imagine a situation in which an applicant caught up in the angst which such matters naturally engender could be outside time as regards O.84, r.21(1) and also outside the strict criteria for extension identified in O.84, r.21(3), yet in which the court would be satisfied nonetheless to exercise its inherent discretion to hear such a case – subject, of course, to this Court's overriding view, as expressed in Part 4, that judicial review in this type of case should be very rare.

13. Counsel for Ms A indicated at hearing that she was objecting to the decisions taken at the Child Protection Conferences of 27th April and 27th May, 2015, which were comfortably within the three month-period previous to 8th July. However, the occasion and decisions of the Conference of 27th April were entirely supplanted by the later Conference, making only the later Conference reviewable in truth, if reviewable at all – and to this 'if', the court now turns its attention.

PART 7: ARE THE ACTIONS OF CHILD PROTECTION CONFERENCES JUDICIALLY REVIEWABLE?

14. The potential for a Child Protection Conference to be judicially reviewable was considered by O'Malley J. in *J.G. v. Child and Family Agency and Others* [2015] IEHC 172. At para.103 of that judgment, she states:

> *"A meeting, the purpose of which is to exchange information could rarely, if ever be a proper subject for judicial review proceedings. However, the respondent can take it on itself to list a child on the CPNS without any court order. In my view, a finding by the statutory body charged with the protection of children in the State that a child is at risk to the extent justifying this measure cannot be described simply as part of an investigation process. It may be that access to the system is restricted to a small number of professional persons – however, it is, in my view, an interference with the autonomy of the family and something that very few parents would welcome. It cannot be said to be without legal effect, since it gives access to private information about the family to persons who would not otherwise be entitled to that information."*

15. This Court finds itself in the uncomfortable position that, with all due respect, it cannot agree with this particular finding of the court in *J.G.* Why so? Take, for example – the example is not drawn from the facts of this case –a child who goes today to the Gardaí and says 'Last night I saw my father punch my mother'. That complaint will be entered into the Gardaí's PULSE system and, the court understands from counsel for the CFA, will always remain on that system, even when the event is later fully dealt with. Is the retention of such detail an "*interference with the autonomy of the family*"? No. It is the expected action of a competent police force. Why then is the CFA's maintenance of the CPNS any different? If anything, the CPNS seems to be something that is highly desirable, enabling the CFA, and the limited categories of person who are able to access the CPNS, to bring an informed and refined response to any interactions with a particular child, instead of coming afresh to that child each time s/he comes under the radar of, *e.g.*, the CFA and/or the Gardaí. Contrary to the view expressed by O'Malley J., this Court respectfully considers that most parents *would* consider it to be – sadly – both necessary and desirable that to prevent 'damage' occurring to vulnerable children, the State, acting through the medium of the CFA, should maintain a confidential list of vulnerable children whom it encounters, provided that access to such list is suitably restricted. After all, the great risk with an entity as large as the State is that a child could come to the attention respectively of, *e.g.,* the Gardaí and the CFA, giving them cumulative knowledge that the child is highly vulnerable but not giving them individually enough knowledge to recognise that this is so.

16. It also does not appear to this Court, again with all due respect, that inclusion of a child's name "*gives access to private information about the family to persons who would not otherwise be entitled to that information.*" At the moment in time that the child is included on the register, the CFA is undoubtedly entitled to that information. Provided the CFA shares that information, and legally it is entitled to share that information, in a manner consistent with the obligations incumbent upon it under the Data Protection Acts, it is not sharing that information with people who are unentitled to that information.

17. When the court asked during the hearings what was the difference between the Gardaí holding a database of complaints and the operation by the CFA of the CPNS, counsel for Ms A suggested that (a) only the Gardaí can access the Garda database and (b) a child's name remains on the CPNS until s/he is 18. The court must admit that it is not convinced by either ground of concern. As to (a), if one takes CFA staff, one is treating with people who have access to the most intimate details about the lives of certain families. The court does not accept that it is somehow objectionable that both they and, *e.g.*, the Gardaí, who likewise come across all manner of information about the private lives of many of those with whom they deal, ought not between them to have access to the CPNS, provided access to the CPNS is suitably regulated. As to (b), it appears that in fact the Gardaí too retain information on the PULSE system for some time. But be that as it may, this Court considers that in any event most people would acknowledge that it is appropriate and desirable that to prevent 'damage' being occasioned to vulnerable children, the State should maintain a list of vulnerable children whom it encounters so that it can deal with them on an informed basis in the event that it re-encounters them before they become adults.

18. Ordinarily, the High Court, as a court of trial, is not considered to be absolutely bound by its earlier decisions. For the sake of judicial comity and legal certainty, there is a general preference that courts of co-ordinate jurisdiction should follow each other's decisions. But this is not an absolute requirement and it is certainly not a requirement where, as here, the court respectfully considers a previous decision of the High Court to which it has been referred to be in error as regards the point in that earlier judgment on which reliance is sought to be placed. This Court must therefore regretfully decline to follow the decision in *J.G.* in the above-mentioned respects and concludes that (a) the operation of CFA Child Protection Conferences, as currently structured, are not typically a proper subject for judicial review proceedings, and (b) the decision to list a child's name on the CPNS is not in and of itself an action that has legal effect and thus, absent some special circumstances presenting, is not judicially reviewable.

PART 8: WHO DOES THIS CASE REALLY BENEFIT?

19. Although the within proceedings have been brought in the name of Ms A and her children, it seems that it is in fact being run on a proxy basis for Mr B. For example, the case-law on fair procedures that Ms A has sought to rely upon, *e.g., M.Q. v. Gleeson* [1998] 4

I.R. 85, is case-law which relates to the rights of someone against whom an allegation of abuse has been made. Yet Ms A is a mother who clearly wants the best for her children, and against whom no allegation of any nature has been made. Mr B is the person against whom allegations have been made; Ms A has no standing to deny or dispute the allegations that have been made against him. Moreover, while it is for Ms A to decide where her own best interests lie, the court is at a loss to understand how these proceedings serve her best interests, given some of the allegations that she has herself made concerning Mr B in the past.

20. This is also a case where there is a possible conflict of interest arising. Ms A is purporting to assert a position and achieve an outcome that she considers to suit her interests. But, despite her best intentions, her interests may not be entirely aligned with those of her children. In this regard, the court notes, for example, that no expert report has been placed before the court to dispute the views reached by competent professionals at the Child Protection Conferences that Child X and Child Y are at some risk. Indeed, the court is slightly mystified as to how the quashing of any decisions made at those Conferences (even if that power is available to it here) could conceivably be in the best interests of Child X and Child Y. The court cannot but be heedful in this regard of the closing observation made by the CFA in its written submissions that it "*remains concerned that* [Child X and Child Y]…*are being exposed to* [defined risk]….*There is no professional basis on which those concerns can be discounted at this point in time.*"

21. What role, if any, is Mr B playing in the background to this judicial review? He has chosen not to be an applicant in this case. He has chosen not to offer any evidence on oath in this case. And still these proceedings seem to operate vicariously for his benefit. Given some of the allegations against Mr B which, if true, suggest that in the person of Ms A the court is presented with a vulnerable individual, the court considers that the curious construction of the within proceedings is a factor which it can bring to its consideration of the within application.

PART 9: NON-DISCLOSURE WHEN SEEKING LEAVE

22. The within application was instituted on the basis that there was no possible basis for the concerns manifested by the CFA and that it was a mystery to the Applicants why the CFA had got involved or what its concerns were. No reference was made to the meeting of 30th March, and the allegations made thereat, as the event or matters that precipitated the intervention of the CFA. This omission was significant. For example, it may well be that Noonan J. would not have made the order of stay that he did had he been apprised of the full truth of matters.

23. An *ex parte* application for judicial review requires absolute good faith on the part of an applicant and vigilance on the part of her legal representatives (though the court notes that there is no evidence of any want of such vigilance in the present case). An applicant must disclose all material facts. Supporting precedent for these propositions is to be found, *inter alia*, in *Brennan v. Lockyer* [1932] I.R. 100 and *Adams v. DPP* [2001] I.L.R.M. 401. That said, as a nation we attach great significance to the family as the bed-rock of society, and an entity in respect of which even the State in its dealings must tread carefully. So when an applicant claims that her family has somehow been unlawfully assailed by the State, that is a matter which is likely, notwithstanding any breach of the duty of absolute good faith, to be heard in full by a court. When that applicant is a vulnerable mother caught in a predicament that is not of her making, and through which she is seeking to navigate as best she can, any court must and would bring a heightened watchfulness before dismissing her application and sending her away unheard or refusing necessary relief. When there are children involved, it is difficult to contemplate any circumstances – indeed this Court would suggest that there are no circumstances – in which an application such as this could be dismissed before it was heard, or without any necessary relief issuing. This is not to minimise the seriousness of non-disclosure when seeking leave for judicial review. It is merely an acknowledgement that in all the circumstances arising, this Court must (and likely any court would) as a matter of basic justice and common decency, decline to rely solely on this ground either to dismiss proceedings such as those now presenting or to refuse necessary relief. The rarity with which judicial review applications of the type now presenting will properly fall to be brought, and the prudent watchfulness of solicitors and counsel involved, have the result that any such non-disclosure as may arise seems unlikely to be common or to go undiscovered in practice.

PART 10: FAIR PROCEDURES

i. Overview

24. The court has indicated above why it considers that the actions of Child Protection Conferences are not generally reviewable. Moreover, it does not consider there to be any exceptional circumstances presenting in this case that would make reviewable the generally irreviewable. Even so, the court considers below certain issues arising from Ms A's claim that she has been denied fair procedures by the CFA.

ii. No 'fixed menu' as to fair procedures

25. There is no 'fixed menu' as to what is required by fair procedures. Though precedent is of assistance, when it comes to discerning the fair and unfair one enters the realm of the (somewhat) *à la carte*: all depends on the circumstances of the case and the stage that the process is at. So, for example, in *W v. United Kingdom* (1988) 10 EHRR 29, para. 64, the European Court of Human Rights indicated that in a case such as this the key question arising is whether "*the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests*".

26. When one comes to the within case, a factor that weighs heavily in any assessment of fair procedures is the fact that Ms A herself has made certain serious allegations concerning Mr B. Moreover, apart from the issue of legal representation, which is considered below, it is difficult see any way in which she or her children have not been afforded sufficient protection of their interests; Ms A may consider that the CFA has been over-zealous in its actions, but there is no evidence to support such a contention and, again save as regards the issue of legal representation, nothing to suggest that it has denied Ms A or her children fair procedures in the process. Specifically: (1) at all times the Applicants have been made fully aware of the concerns arising and which have led to the decisions of the CFA; (2) at the two Conferences, there was a full discussion of all issues of concern; the minutes of those meetings were sent thereafter to Ms A's lawyer and an explanatory cover letter also sent; and (3) Ms A is herself acutely aware of the particular concerns presenting.

iii. Legal representation

27. The court must express considerable unease at the CFA's request to Ms A (consistent with CFA general practice) not to bring a legal representative to the first Child Protection Conference. The CFA appears to adopt this approach because of a concern that lawyers –primed professionally to act single-mindedly in the pursuit of their clients' objectives –may bring an unhelpful, adversarial, even antagonistic approach to meetings that are primarily intended to facilitate information-sharing and solution-finding. However, if, for example, one looks to the facts of this case, (i) Ms A is, with all respect to her, a vulnerable person facing a traumatic situation; and (ii) she comes from a so-called 'ordinary' background and so, rightly or wrongly, may feel herself to be, and may be, at a considerable disadvantage when in the presence of a number of qualified professionals. It is in precisely such circumstances that a person like Ms A would naturally turn to a solicitor and want that solicitor to attend a Child Protection Conference with her. Frankly, if the judge deciding the within application were to be similarly placed, he would want a solicitor to be present at the Conference, if

only to bring a dispassionate mind to proceedings. That is what lawyers are there for: to help people who, by background or circumstance or both, are not best placed to help themselves in particular situations arising. It is all very well for the CFA to emphasise in its submissions (as it has) that it merely "*requested*" that Ms A not bring a legal representative to the Child Protection Conference. But here a 'sense-check' is required: factually, the CFA is correct in what it submits; but the practical reality is that, given the powers that the CFA enjoys, any parent would likely accede to such a 'request' for fear, rightly or wrongly, that s/he would otherwise antagonise the CFA.

28. The CFA also makes what seems to the court to be an only superficially attractive point that it is the second Child Protection Conference that is truly in issue in the within proceedings and that Ms A did not request to bring a lawyer to the second Conference. True, only the second Conference is actually in issue, and true, Ms A may not have made a request to bring lawyers to that second Conference, but this is unsurprising. The CFA had made clear its preference that a lawyer should not attend the first Conference. So why would that be any different as regards the second Conference? In point of fact, there is no suggestion that it was any different. This being so, why would Ms A turn up at the second Conference with a solicitor in tow? Again, cognisant of the CFA's powers and its aversion to the attendance of lawyers at Child Protection Conferences, Ms A, and any parent, would likely be wary of bringing a lawyer along to any such Conference for fear, rightly or wrongly, of antagonising the CFA by so doing.

29. In general, there is no absolute legal right under Irish law to have a legal advisor attend at an administrative meeting. This is clear from cases as diverse as *Corcoran v. Minister for Social Welfare* [1991] 2 I.R. 175, and *Barry v. Review Group* [2001] 4 I.R. 167. As there is no right to have a legal advisor attend, it follows that there is no obligation on the State, here acting through the medium of the CFA, to provide and/or pay for such legal representation. However, one has to recognise the peculiar vulnerability of parents coming to CFA Child Protection Conferences, as well as the sheer human emotion (and the accompanying lack of detachment) that most parents naturally bring to discussion of private family matters with strangers, however professional or well-intentioned the latter may be. This emotional engagement is generally likely to be even more pronounced when it comes to a discussion with a parent about the welfare of her child or children. All of this suggests to this Court that in the particular context of CFA Child Protection Conferences – and this judgment does not speak to any wider reality –fairness of procedures requires that if a party wishes to bring her own solicitor, for whose services she is herself paying, to a CFA Child Protection Conference, she should be neither stopped nor dissuaded from doing so. The court is mindful in this regard of the observations of Scott Baker J. in *R. v. Cornwall County Council, ex parte LH* (High Court of England and Wales, 4th November 1999), 13:

> *"In my judgment a blanket ban on solicitors of the kind operated by the Respondent is contrary to the statutory guidance and is unlawful. Other authorities operate a different policy and seem to manage it perfectly successfully. In my judgment the solution is simple. The chair of the conference has a discretion who should be permitted to attend the conferences and for what purpose. Such a discretion should be exercised without the present background prohibition. Indeed it seems to me that solicitors ought to be allowed to attend and participate unless and until it is felt they will undermine the purpose of the conference by, for example, making it unnecessarily confrontational."*

30. The facts of *Cornwall* are not on 'all fours' with those in the present case. There, unlike here, there was a blanket ban on solicitors attending childcare conferences, and the authorities were refusing to disclose the minutes of such conferences, and the 'no solicitor' policy was in direct breach of applicable statutory guidance. Even so, the very fact that there was such statutory guidance, and that Scott Baker J. adjudged matters as he did, suggests to this Court that (i) it is correct in principle to conclude as it has immediately above, and (ii) the presence of solicitors (or other legal representatives) does not render impossible the proper and efficient conduct of Child Protection Conferences by the CFA. The court further considers that the problems that can and may present for individuals such as Ms A by virtue of not having a solicitor present at a Child Protection Conference – thanks to such attendance being generally disfavoured by the CFA –are not answered or met by the fact that a parent may otherwise have access to a solicitor, and that the CFA is satisfied to liaise with such solicitor, outside the confines of the Conference. By way of practical observation, the court notes too that there is no reason presenting why the Law Society, the Bar Council or, *e.g.*, professional associations of family lawyers, cannot quickly draw up rules or recommendations for how their respective members are to approach, and conduct themselves at, CFA Child Protection Conferences, if such rules or regulations are considered by those professional bodies or organisations to be necessary (and they may consider that they are not).

iv. Audi alteram partem

31. There is no evidence, in truth there is not even a suggestion, that anything said by Ms A was not considered by or at the Child Protection Conferences. Consequently, there is no breach of *audi alteram partem* arising.

PART 11: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

32. As mentioned, there has been some narrowing of the reliefs originally sought by the Applicants. In consequence, it does not appear that there is any surviving claim grounded on the European Convention on Human Rights. However, for the sake of completeness the court notes that no Convention claim has been properly pleaded by the Applicants and the Convention itself does not, of course, form part of Irish law. Neither has any leave been sought or granted to seek any relief pursuant to the European Convention on Human Rights Act 2003. So to the extent, if at all, that any Convention-related claim is considered by the Applicants to survive, the court is coerced to decline any relief on the foregoing grounds.

PART 12: DAMAGES

33. The Applicants have not pleaded any recognised basis on which damages could be awarded and appear not to have suffered any financial loss. At all times the CFA has acted in a *bona fide* manner in accordance with what it understands its obligations to be. No tort or breach of statutory duty has been alleged by the Applicants or committed by the CFA.

PART 13: A MATTER OF TERMINOLOGY

34. Ms A and Mr B have lived for a long time together. They have had two children together. Given the longevity of their relationship, they enjoy what most people would likely consider to be a form of marriage. Indeed the court was struck throughout these proceedings by how Ms A referred to Mr B, in documentation placed before the court, as her "*common law husband*". She also referred to herself, Mr B and their two children as a "*family*" – which they undoubtedly are, though not a form of family, it seems, that enjoys the special esteem afforded "*the Family*" under Article 41.1. 1° of the Constitution, at least if one has regard – as this Court must – to *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 and later binding case-law. But while this Court is constrained by precedent, the supple words of the Constitution are not. No case can fix a boundary to the march of a nation, and in the near-50 years since *Nicolaou* was decided our nation's concepts of family and marriage have transformed from the monolithic perspective contemplated by that case to the rainbow of relationships that society now celebrates. Though not a matter that falls now to be decided, it seems to this Court that the versatile wording of Article 41.1. 1° of our living Constitution already embraces the manifold varieties of family and marriage that pertain in contemporary Ireland. Whether this is truly so will doubtless fall to be determined by a higher forum in some future action. Even so, the People, not precedent, are the ultimate pace-setters of constitutional meaning.

PART 14: CONCLUSIONS
35. For the reasons stated in Part 4 above, the court does not consider that the investigatory matters at issue in the within application are properly the subject of judicial review. This being so, the court declines on this preliminary ground to grant any of the reliefs sought. Subject to this overriding conclusion, the court indicates below its conclusions as regards the various remedies sought by the Applicants.

36. [1] An order of *certiorari* in respect of the decision of the Child Protection Conferences of 27th April and 27th May, 2015 in relation to the welfare of Child X and Child Y and the continuing separation of the family unit.

37. The court considers that the Child Protection Conferences of 27th April and 27th May, 2015 are not subject to judicial review. If the court is wrong in this, it considers no legal deficiency to arise that demands the making of such order.

38. [2] An order of *certiorari* in respect of the decision on 27th April to place Child X and Child Y on the Child Protection Notification System.

39. The court considers that the Child Protection Conferences of 27th April and 27th May, 2015, and any decision/s taken thereat to place Child X and Child Y on the CPNS, are not subject to judicial review. If the court is wrong in this, it considers no legal deficiency to arise that demands the making of such order.

40. [3] A declaration that the CFA acted in violation of Applicants' constitutional rights in not allowing Ms A to bring legal representation to the Child Protection Conferences.

41. The court considers that the Child Protection Conferences of 27th April and 27th May, 2015 are not subject to judicial review. Moreover, *sensu stricto* but still 'on the right side of the line', it is not the case that the CFA did not allow Ms A to bring legal representation to the Child Protection Conferences, which is the form of declaration sought. That said, without making a declaration in this regard, the court would note its considered view that fairness of procedures (i) requires that if a party wishes to bring her own solicitor, for whose services she is paying, to a CFA Child Protection Conference, she should be neither stopped nor dissuaded from so doing; (ii) a 'request' by the CFA that she not do so, constitutes an act of dissuasion; and (iii) although the first Child Protection Conference is not in any event reviewable (because it, and any decisions made thereat, were for all intents and purposes supplanted by the second), the dissuasive 'request' made prior to the first Conference had a continuing effect in respect of the second.

42. [4] An interlocutory injunction restraining the CFA from taking any further action to dis-entitle or prevent Ms A, her children and Mr B from living together as a family.

43. The court cannot grant injunctive relief preventing the CFA from carrying out its statutory duties or obligations.

44. [5] A declaration that the actions of the CFA "*in issuing an ultimatum to the Applicant's family unit to separate in lieu of a threatened Court intervention on 31st March, 2015 were* ultra vires, *disproportionate to the ends achieved and in contravention of the rights of Child X and Child Y under Article 42A of the Constitution".*

45. This ground of relief is out of time. However, the court considers in any event that the actions of the CFA in this regard were (i) *intra vires*, (ii) proportionate, given (a) the risks perceived (and still perceived) to arise, as well as (b) the ends achieved, (iii) aimed at ensuring the rights of Child X and Child Y under the Constitution are fully protected, and (iv) did not involve any transgression of these last-mentioned rights.

46. [6] An order of *mandamus* compelling the CFA (i) to effect the immediate restoration of the family unit and (ii) to withdraw the threat of orders under the Child Care Act 1991.

47. As to (i), no legal deficiency arises that demands the making of such order. Even if there were such a deficiency presenting, given the concerns that the CFA continues to manifest as regards Child X and Child Y, the court would decline to grant this relief on the basis that such an order would serve no legitimate purpose. As to (ii), the court cannot grant injunctive relief preventing the CFA from carrying out its statutory duties or obligations.

48. [7] Various ancillary reliefs (extension of time, damages, European Convention rights).

49. No extension of time is required. Nor, for the reasons stated elsewhere above, is any relief available under the European Convention on Human Rights or the European Convention on Human Rights Act 2003.In light of the court's various findings, including those made at Part 12 above, no order as to damages is merited or required.

PART 15: A CLOSING OBSERVATION
50. The last few months have not been easy for Ms A. In truth, her family life seems not to have been easy for some time. But she, and Child X and Child Y, are not alone. The People through the State, and the State through the CFA, have extended the hand of help. It is for Ms A to decide how she now wants to proceed. If the court could make one respectful suggestion, it is that she should think most carefully before refusing such help as has been, and continues to be, offered by the CFA.

PART 16: REPORTING THESE PROCEEDINGS
51. The court notes that, at the request of the parties to the proceedings, it has made an order prohibiting the publication of or broadcasting of any matter relating to these proceedings that would or could identify any of Ms A, Child X or Child Y.