

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 702 J.R.]

BETWEEN

W. M.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 31st day of July, 2017

1. The applicant was given leave to apply for judicial review on the 24th November, 2014 (McDermott J.) to seek an order of *certiorari* quashing the determinations made by the respondent on or about the 5th September, 2014. The applicant also seeks orders of prohibition and injunctions restraining the respondent from further publishing the determination to any third party. The respondent determined that the applicant was a risk of harm to children and vulnerable adults. The applicant also sought a restriction on the publication of the identity of the applicant.

2. The applicant is a senior nurse employed by the Health Service Executive since 2000. On the 7th October, 2013 Ms. Susanne Pelican-Kelly of the Health Service Executive (HSE) the predecessor of the Child and Family Agency, the respondent, informed the applicant by letter that a referral had been made by a principal social worker with Adult Mental Health Services concerning a retrospective disclosure made by his sister S.F. of alleged sexual abuse. He was requested to call to the writer's office on Tuesday the 15th October, 2013 at 2:30pm.

3. On the 9th October, 2013 a further letter was sent to the applicant outlining to him the concerns which S.F. "has outlined to her mental health team and me". He was informed that he could bring a support person to the meeting. A statement of allegations was included in the letter as follows: -

"(1) She alleges that she was abused by her brother identified as W.M., when she was eleven years old and he was seventeen years old on a number of occasions. She believed it began in September of 1984 and ceased at Christmas that same year. It was more than three but less than ten[occasions] ...

(2) Alleged abuse occurred in the family home, when he was home from [university] at weekends.

(3) Alleged that when she was sitting at the piano he approached her from behind and rubbed his body against her.

(4) She alleges you touched her outside of her clothing but never inside her clothing.

(5) Alleged that you blocked an exit and laid on top of her making grinding movements.

(6) Alleged that you pulled up her bedclothes and spoke about her underwear to her as she was in bed, you left the room when you heard a door bang down the corridor.

(7) Alleges that you rubbed her underwear and digitally penetrated her with your fingers on this occasion.

(8) She alleges that you came to your sister [K.M.'s] home and alleged that you had inappropriate feelings for her [S.F.] when she was younger but did not act on them."

The letter also stated that S.F. alleged that she informed her sister about these instances thirteen years previously. S.F. also stated that she informed the applicant of her disclosures seven years ago but that she did not discuss the quoted allegations with him directly. The applicant was informed that he could access any information that is set out above by applying to the Freedom of Information office in Aras Slainte, Wilton Road, Cork City.

4. The applicant attended the meeting with Ms. Pelican-Kelly and her colleague Ms. Emer Sanders on 15th October as requested. He was informed that the allegations were made while his sister was a patient in hospital. His sister had a long history of mental illness. On 18th October, the applicant's line manager informed him that his employers would be carrying out a risk assessment arising from what was described as "an allegation made relating to an alleged offence".

5. The applicant and his wife met Ms. Pelican-Kelly and her colleague Ms. Sanders on the 11th March and 8th April, 2014. At the second meeting he was informed that the respondent had contacted Mentor Forensic Services Limited who recommended that he be required to undertake an assessment by them. It was suggested by Ms. Pelican-Kelly that he move out of his family home. He and his wife declined to act on the suggestion.

6. On 2nd May, 2014 the respondent informed the applicant that it considered itself obliged to notify his employer that retrospective allegations had been made against him and that he had agreed to undertake an assessment with Mentor Forensic. An assessment was carried out on behalf of the respondent by Mentor Forensic by Dr. Joseph Sullivan on 19th June, 2014. Dr. Sullivan is a forensic psychologist and director of the company which is said to specialise in the investigation of allegations of sexual misconduct and child protection issues. Dr. Sullivan holds a PhD in Forensic Psychology, a Masters Degree in Criminology and a Post-Graduate Diploma in Psychology. He has worked in the assessment and treatment of people involved or allegedly involved in sexual exploitation since 1986. He has given evidence as an expert witness in civil and criminal courts in Ireland, the United Kingdom and the United States.

7. This interview was video recorded and lasted for five hours with a break for lunch. In the course of the interview the applicant alleges that Dr. Sullivan made it clear that he believed that he had molested his sister, by touching her with a sexual motive. The applicant states that he did not admit any of the allegations but stated that he did have "the unexpected experience of sexual

arousal in her presence”.

8. The applicant spoke with Dr. Sullivan on the 14th July, 2014 for a total of eighty-one minutes over three telephone calls. Mr. Sullivan informed him that he had spoken with his sister and that he regarded her story as consistent and stated that if she wished to make false allegations she could have invented a much worse story. Dr. Sullivan is said to have stated his view that something had happened and that he had sexually abused his sister. He also informed him that he would have to inform his parents that “something happened”. A further interview took place on 21st July, 2014 also recorded on video and lasting three hours.

9. In the course of the interview on the 21st July, the applicant acknowledged that he had gone to his sister’s room and tickled her, whereupon he had become unexpectedly sexually aroused and then immediately left the room. He also admitted having sexual feelings for her at the time, some thirty years previously. He denied having sexual fantasies about her and denied all other aspects of the allegations.

10. At that meeting new allegations by S.F. which had not previously been put to him, were made. Dr. Sullivan indicated that the applicant’s indication that he had sexual feelings for his sister thirty years ago meant that he was currently a risk to children and vulnerable adults.

11. The applicant states that he participated in good faith in the process although he and his wife felt pressured into doing so by the suggestion that their children might be taken into care if they failed to cooperate.

12. On 26th August, 2014 Dr. Sullivan informed him that he had submitted a draft Report to Ms. Pelican-Kelly and had asked her to show it to the applicant. He stated that he would correct any factual errors identified but that he would not change his opinion.

13. The applicant was permitted to view an extract of a copy of the Report in draft form on 2nd September and a copy of the Report in full in draft form on 5th September so as to make observations if he wished on its contents. He was not given a full copy of the Report in advance. He has never been provided with a copy of the final version of the Report and is not aware of what changes were made to the draft Report on foot of his observations.

14. The applicant claims that he made corrections to the Report in so far as he could in the circumstances. He disputed an apparent admission of fact and claimed that certain observations were based on an incorrect assumption made by Dr. Sullivan. He felt that it was particularly unfair that he was not permitted to take the draft Report to his solicitors so that he could receive legal advice about it and have observations made by his solicitor on his behalf.

15. On 5th September, 2014, Ms. Pelican-Kelly stated that she was accepting the Report of Mentor Forensic. The applicant complains that this was without any independent assessment by her or the respondent and instead stated that Dr. Sullivan was the expert whose decision she must follow. On 23rd October, he was informed that he had been placed on administrative leave by the HSE who were conducting a further risk assessment on foot of a notification received from the respondent of its assessment. The HSE notification noted that he had been advised on 8th October that as a protective measure he had been placed ‘off duty with pay’ for a period of four weeks while clarification was sought from Tusla (Child and Family Agency) regarding their notification to management of 5th September that he presented a risk of harm to children and vulnerable adults. A further meeting was arranged for the 6th November, the purpose of which was to review the protective measures in place as part of the ongoing risk assessment. The letter stated:-

“As previously advised, at an appropriate stage in the risk assessment process, management will take whatever protective measures are necessary to ensure that no patient/client, staff member including you, or the HSE is exposed to unacceptable risk.”

16. A feature of the correspondence between the applicant and the respondent is the proposal made by Dr. Sullivan that he might undergo a polygraph test. Mr. Buttimer, the applicant’s then solicitor wrote on 12th September, 2014 that he was of the view that such a test would be of no evidential value in this jurisdiction for the purpose of proving or disproving any particular proposition. As a result, the applicant did not take part in any polygraph testing. The applicant rejected the conclusions of the assessment made by Dr. Sullivan and informed Ms. Pelican-Kelly that he contemplated obtaining an independent report from a clinical forensic psychiatrist. This was not done.

17. The evidence of Ms. Pelican-Kelly is that having raised the specific allegations in correspondence with the applicant he attended the meeting on 15th October, 2013. She stated that the applicant admitted to her that he had sexual feelings towards his sister when she was a minor and had previously advised the complainant of these. The applicant also advised that a rift had occurred in his family as a result of this disclosure. He stated that his sexual feelings towards his sister were transient and had now been resolved. He informed her that a dispute had arisen with his sister when she had informed his parents that the issue between them arose out of something that she defined as “sexual”. He was informed by his parents of the suggestion and thereafter began thinking of previous feelings he held towards his sister. Ms Pelican-Kelly was informed of a family meeting that had occurred during the course of which his sister questioned whether he had sexual feelings towards her. He admitted that he answered in the affirmative in the presence of his family. He was not aware of any further concerns until he received Ms. Pelican-Kelly’s letter.

18. Between 10th April and 25th July 2014 the applicant engaged with Dr. Sullivan as set out above. On 10th April, Ms. Pelican-Kelly stated that the applicant agreed to undergo an assessment by Mentor Forensic Services Ltd. He also agreed at that stage to undergo a polygraph test in order to assist the assessment.

19. On 2nd May, 2014, the applicant informed her that he had sought and received legal advice in respect of the assessment and was willing to proceed with it but was no longer willing to consent to the polygraph testing suggested.

20. Ms. Pelican-Kelly referred to a letter received from the applicant dated 7th May, 2014, in which he acknowledged that he had inappropriate feelings for his sister. He agreed to undertake such other psychological examination or interviews as might be deemed reasonably necessary. In this letter dated 7th May, 2014, the third page of which appears to be missing and was not exhibited, the applicant stated that he rejected all of the allegations except No. (8) in the original letter. This stated that the complainant alleged that the applicant came to his sister’s home and alleged he had inappropriate feelings for his sister when she was younger but did not act upon them. He stated that he never acted on those feelings which were very brief and fleeting. He stated that S.F. had never informed him of the disclosures said to have been made seven years previously.

21. He stated that S.F. behaved in a normal manner towards him until his daughter’s first birthday in 2015 after which she cut off contact with him and his family. When challenged by family members about this she reportedly disclosed that it was “something

sexual". The applicant claims surprise at this revelation as he had thought his "feelings were so discrete that she could not have known about them". He believed that she had somehow picked up on these inappropriate feelings. He states that he had no reason to suspect that she was harbouring ideas that he in any way acted upon these feelings which he believed to be the source of her anger towards him. On one occasion she asked him whether he had these sexual feelings for her and he gave an affirmative answer which was correct. He alleged that the allegations were a mixture of malice and "the product of a disturbed mind". He said that her claims were contradictory and fabricated and the product of "a fantasy or dream".

Consent to Assessment

22. The applicant accepted the terms of the consent to assessment in June 2014. The consent outlined the context in which it would be carried out. It is a standard form document produced by Mentor Forensic Services Ltd. It states that the process is concerned with assessing what risk, if any, he posed. It also states that assessment or intervention is not an exact science and no guarantees are made as to results. It states:-

"people who have transgressed professional and/or sexual boundaries can be assisted to learn effective control technique for the future."

23. The consent is confirmation that the applicant agreed to participate in the "assessment/enquiry/intervention process" with Mentor Forensic Services Ltd. in the knowledge that the process was not confidential and the content of interviews would be "on the record". Anything said to staff might be included in the final Report or interim discussions with the referrer. At para. 2 the consent states:-

"I acknowledge and accept that it is MFS policy to video record all sessions. I understand that these recordings are not produced to an evidential standard but are made to ensure and facilitate the accurate reporting of the contents of discussions. I accept that MFS does not permit any additional recording of the sessions and I undertake not to record the sessions or discussions with MFS staff in any way. I accept that MFS will be the sole owner of the video generated and will not provide copies of the sessions to other parties."

24. At para. 4 the consent states:-

"The Report should only be used for the purpose for which it was commissioned. Any copies of the Report made at the discretion of the referrer, may be shared with other agencies, if necessary, to comply with statutory guidelines and in the interest of protecting others."

It is stated at para. 6 that:-

"If, on the completion of a Report, the subject and/or their legal advisor dispute the accuracy of the Report of the subject's account they may review the relevant disputed section of the video recording. MFS do not provide copies of recordings of the interviews but will meet with the subject and/or their legal advisor to facilitate a review of the disputed parts of the Interview."

25. In the consent MFS undertake to correct any factual inaccuracies identified in reports and will resubmit a corrected version. In that eventuality all copies of the original Report will be returned to MFS.

The Assessment

26. The assessment carried out by Dr. Sullivan is entitled "Comprehensive Forensic Psychologist Risk Assessment" and the subject is the applicant. The Report is thirty-nine pages in length.

27. The circumstances of the referral are outlined. Dr. Sullivan records the fact that the concerns first came to light in March 2013 when social worker Ms. Fitzgerald and consultant psychiatrist Dr. Campbell wrote to Ms. Pelican-Kelly outlining allegations made to them by S.F. while she was receiving treatment for mental health issues. They stated that S.F. alleged that when she was eleven years old she was abused on a number of occasions by her older brother who was seventeen at the time. It started before September 1984 and ceased at Christmas of the same year. She was unsure of the exact number of occasions but it was approximately more than three and less than ten. The letter of instruction stated that Mr. M. had admitted to having sexual feelings in the past towards his sister. The applicant stated that he had not formally addressed these feelings but with his own training as a psychiatric nurse believed it had been dealt with. However, the letter stated that S.F. had made other allegations of a sexual nature against her brother which he completely refuted. The allegations set out in the original letter are then set out in the Report.

28. On 28th March, 2014 social work records indicated that S.F.'s sister K.F. was interviewed and is reported to have stated that she was unaware of any sexual behaviour at the time of the alleged incidents but did recall being concerned about her sister having an eating disorder around that time. Her sister stated that she believed S.F. was truthful and would not lie about the allegations. She also stated that she did not believe that her brother's children were at risk from him but nonetheless stated that she would not leave her own children in his care. The referrer requested an assessment of whether the applicant posed a risk of harm to his own or other children as well as all vulnerable adults.

29. Dr. Sullivan was provided with the following documentation:-

- (a) a copy of a social work file;
- (b) a letter from the social worker and consultant psychiatrist dated 6th March, 2013 giving details of S.F.'s allegations against her brother;
- (c) a copy of the letter of complaint sent by S.F. to Ms. Pelican-Kelly in June 2013; and
- (d) Mr. M.'s response dated 7th May, 2014.

30. Following a meeting with Mr. M. on 19th June, Dr. Sullivan requested that further information be obtained from S.F. and K.F. He discussed the matter at length with K.F. and S.F. on 27th June "to facilitate their making statements which are attached to the Report". He met with the applicant's parents at their home on 14th July. They declined to make a formal statement but were open to discussing the issues relating to the allegations which are referred to in the Report. He requested to speak with the applicant's wife but she declined to meet with him. The letter of instruction noted that the applicant's wife did not believe that he had sexually assaulted his sister but was aware that he had admitted having sexual feelings for her at the time of the alleged assaults.

31. Paragraphs 18 to 21 set out the context for the assessment. It includes the principles upon which Dr. Sullivan conducted the assessment. It states:-

"18. A suspicion or accusation of sexually inappropriate or abusive behaviour is often difficult to prove or disprove. It would be wrong for any one undertaking an assessment to assume guilt from the outset. Neither is it helpful to assume innocence on the part of the accused, as the various accounts/perspectives need to be examined and explored evenly. This assessment is not an exact science and it is impossible to categorically conclude someone has or has not committed a sexual offence if they persist in denying the allegation. However, the process of exploring the version of events given by the accused in minute detail does allow for inconsistencies and untruths within the account to be exposed. This of course does not prove the guilt of the accused but it does provide the basis for assisting the individual to reconsider their perception of events.

19. Even where the accused acknowledges some form of inappropriate, abusive or even criminal behaviour they will rarely agree fully with their accuser's account. Even where in essence they accept responsibility for this behaviour it is human nature to present oneself in a sympathetic light."

32. It is then noted that when initially confronted with a suspicion of child abuse most will deny the behaviour and offer rationalisations as to why the victim may have falsely accused them. If they subsequently admit sexually inappropriate behaviour "they will often justify and minimise the behaviour". He then states:-

"What we learn from child sex abusers is that the offending is normally part of a deliberate, planned and developing spiral behaviour which is supported by a range of distorted beliefs and attitudes through which the offender justifies, minimises and excuses the offending."

33. The section on context then states:-

"Clinical risk assessment with someone who denies committing any sexual offence against children relies initially upon an exploration of perspectives and beliefs expressed which can then be compared with clinical and research insights into those who have admitted sexually abusing children. It is impossible to be conclusive, where denial is maintained. The best which such a clinical risk assessment can offer is that the perceptions and behaviours highlighted can be found to be either, consistent with what would be expected from someone who might sexually abuse a child, or devoid of any of the key component elements of a potential child sex offender."

34. The Report then goes on to place a value on the use of polygraph tests which have been shown, it is said, in the United States and the United Kingdom to be "effective in breaking down denial in sex offenders". The applicant was offered the opportunity to incorporate a polygraph examination into the assessment "to test the veracity of his account". There is a somewhat understated reference to evidential difficulties in the use of polygraphs and Dr. Sullivan acknowledges that the approach is not universally supported and "there remain concerns about the use of polygraph in post-conviction assessment".

35. The Report then outlines the various interviews and allegations made by S.F. and the statement of K.F. It also contains an outline of the interviews with the applicant. He denied all of the allegations initially made by S.F. When Dr. Sullivan explored with him how his sister could have known that he was having sexual thoughts about her he suggested initially that she was dreaming. However, he later accepted that there were a number of incidents which might have led her to have suspicions about the sexual motivation behind his behaviour. He stated that he could think of a few occasions when he had gone into her room when she was a child and become aroused as he was tickling her but as soon as that happened he left the room. He also accepted that he had been "peeping" at his sister when she was preparing to have a bath. Initially he denied that he sexually fantasised about his sister but later accepted that he did. Dr. Sullivan considered this to be a type of qualification which was typical in risk assessment interviews where somebody who has engaged in sexually and inappropriate behaviour in respect of a child initially denies it but then following examination of his account, acknowledges it as a possibility and finally admits some behaviour but qualified in a manner intended to minimise the severity of the admission. Extracts from interviews are included in the Report.

36. In particular, Dr. Sullivan summarised that he had identified up to four instances where arousal had manifested itself in behaviour. These were one occasion when the applicant looked through a keyhole and two to three events when he had gone on to subsequently touch his sister in a manner that he found was sexually arousing under the guise of tickling her. It was suggested to the applicant that this was embarrassing for him rather than untrue and he agreed.

37. Dr. Sullivan at the conclusion of the first day of interviews informed the applicant that his disclosures had confirmed S.F.'s allegation that she was sexually abused by him, though he still contested some of the specifics. He explained to him that the first objective of the risk assessment had been met in that Dr. Sullivan could conclude that he was someone who had the capacity to exploit a child sexually. He was informed that the next objective would be to explore the nature and extent of this propensity and try to establish implications for his own children. He was informed that he would ask members of his family to contribute to the assessment and asked if his wife would be willing to speak with him. She subsequently declined to be involved.

38. Dr. Sullivan then described how the applicant became somewhat more defensive in the second interview.

39. At paras. 88 to 91 Dr. Sullivan discussed "the risk to other children". He noted the lack of further allegations against him was a positive factor but also stated that research indicated that only about 5% of victims ever report abuse. The lack of additional allegations should not be regarded as conclusive proof that Mr. M. did not retain sexual interest in children. He thought that the six-year age gap between the applicant and his sister was important and that research suggested that the majority of adults who sexually offend against children have begun to abuse when they were children. While not all children who sexually offend become adults who sexually abuse children it is safer to assume that they are a possible risk of sexual harm to children as adults. He suspected that the applicant was not admitting the full extent of his abuse. He encouraged him to take the polygraph test. If he passed it, it would indicate that he no longer thought about or engaged in sexual contact with children and the doctor could offer a more positive prognosis for his ongoing contact with his children and vulnerable adults. He concluded that the applicant possessed a number of the characteristics that he would normally expect to find in an adult who represents a risk of sexual harm to children.

40. Dr. Sullivan concluded that based on the applicant's responses to questions about his admitted assault on his sister, he appeared to be able to dismiss and grossly minimise his abusive acts towards her. He believed this was a characteristic to be found in someone who has the capacity to sexually molest a child in the future. This would need further therapeutic work to help the applicant build a clearer understanding of this and work towards a more realistic acceptance of responsibility for his actions in abusing his sister. His ability to minimise and justify the abuse of his sister suggested that he did not possess the ability to overcome the normal inhibitors

to acting in an abusive manner with children. Dr. Sullivan stated that it was unlikely that having engaged in the sexual abuse of his sister the applicant would not have used the experience in his subsequent sexual fantasies. He concluded that the applicant's version of events following the assessment had moved closer to the account given by S.F. Though he denied the extent of the sexualised touching he now accepted that he did sexually molest her.

41. He believed that it was necessary for the applicant to engage in further exploration of his behaviour within a structured specialist therapeutic process with suitably qualified professionals because he did not believe that he had revealed the full nature and extent of his abuse of his sister. Dr. Sullivan concluded that the applicant displayed little insight into how his sister is likely to have been damaged by his behaviour. He concluded that this was likely due to a self-protective process which he used to distance himself from its consequences. He stated: -

"136. In the absence of any objective evidence to support...his denial of subsequent or current sexual interest in or sexual abuse of children, I can only conclude that Mr. M. has many of the characteristics of an adult man who could repeat his sexually exploitative behaviour towards children. As such he should be considered to represent a risk of sexual harm to his own and other children.

137. Research has shown that men who sexually exploit children in their workplace will often sexually exploit vulnerable adults. In the absence of any objective evidence to support.... his denial of ever having sexually exploited vulnerable adults in the course of his work, I cannot rule out the possibility that Mr. M. may represent a risk of sexual harm to patients with mental health problems."

Dr. Sullivan cites his own thesis as the research referred to in para.137 upon which this conclusion is based.

42. Dr. Sullivan's conclusions and recommendations are set out at paras. 138 to 145 of the assessment. He states that he was not able to determine conclusively whether the applicant continued to have a sexual interest in children. He believed it likely that he did. He was of the opinion that the applicant represented a risk of harm to children and vulnerable adults because of his previous sexual abuse of S.F. He recommended that steps be taken to restrict his access to children and vulnerable people until a clearer understanding of the nature and extent of the risk was obtained.

43. He concluded that the applicant's wife needed to be included in any risk assessment or management process. If she and other members of the family were to protect their children adequately, they ought to be made aware of his admissions of sexual assault and the consequent risk which this implied. They had children aged twelve and ten and if they were:-

".... not able to understand/acknowledge his behaviour in an honest and non-minimising fashion it raised concerns about how they may engage with their children. While Mr. M. is adamant that he would not and has not been sexual with his children, his denial and minimising of his sexual abuse of his sister suggests that he may not be best positioned to evaluate his own behaviour in terms of appropriate and non-abusive sexual boundaries and thinking."

44. Dr. Sullivan states: -

"144. On reviewing the content of this Report Mr. M. retracted many of the admissions he made in respect of sexually abusing his sister. While this is not unusual it indicates he may struggle to maintain any progress he makes in the course of a therapeutic intervention. His retraction and refusal to acknowledge that the admissions he made in the course of the assessment indicating that he sexually abused his sister does not change the conclusions or recommendations of this Report."

45. Mr. Buttimer, solicitor wrote to Ms. Pelican-Kelly on 12th September expressing complete dissatisfaction with the manner in which the assessment by Dr. Sullivan had taken place. He complained that Dr. Sullivan appeared to form a conclusion on the basis of "no objective facts" and he asserted that the applicant had been made aware when the report was presented to him that there was some suggestion that "specialist professional help" would be needed. The applicant denied any wrong doing but Mr. Buttimer on his behalf stated that he would be willing to submit for such assistance "for the purposes of assurances" only if the person rendering such professional help was an individual other than Dr. Sullivan."

46. Subsequently there was a change of solicitor and on 10th November, 2014 Messrs. Phelim O'Neill solicitors wrote to Ms. Pelican-Kelly on behalf of the applicant complaining that the determinations reached that their client sexually abused his sister when she was a child and that he poses a risk to children and vulnerable adults and intended to notify his employers of same were reached in breach of fair procedures. They requested the written statutory administrative procedures followed by the respondent in reaching each of the determinations, an account of the notice given to the applicant of these procedures and of the procedures actually followed and the steps taken by the respondent in making the adverse determinations. Copies of various documents including the complaints made by S.F. and minutes of all relevant meetings together with copies of all original notes and any video recording whether held by the respondent or Mentor Forensic Services Limited, an account of the procedures followed and steps taken by the C.F.A. independently of Mentor Forensic Services Limited and all documentation generated in the course of reaching the determinations were also sought. In the absence of receipt of an adequate reply it was intended to issue High Court proceedings. An application to the High Court was made on 24th November.

The Challenge

47. There is a very detailed statement of grounds setting out numerous grounds upon which leave was granted namely, grounds 5,8,9,10,11,12,13,15,16,18,19,20,24 and 25 (with the exception of sub-paragraphs 31 to 35 inclusive). Many of these were not pursued and are somewhat repetitive and overlap. In the course of argument and in submissions to the court, the applicant concentrated on the right to fair procedures pursuant to which the impugned determination was reached. It was submitted that the respondent failed to have due regard to the applicant's right to prior notice of the allegations made against him, disclosure of all relevant material, an oral hearing, the right to call and cross-examine witnesses, the appointment of an independent decision maker and the provision of a clear written procedure pursuant to which the allegations of sexual abuse made would be investigated and assessed. In particular, the applicant focused upon the fact that the complainant, his sister, was now an adult and might be properly be the subject of cross-examination.

48. The nature and extent of fair procedures applicable in any particular situation may vary. The court notes that the assessment in this case took place before the implementation of the "Policy and Procedures for Responding to Allegations of Child Abuse and Neglect (September 2014). There is now in place an extensive written procedure which was recently discussed and considered by this court in *T.R. v. Child and Family Agency* [2015] 551 J.R. (unreported High Court, McDermott J. 27th July 2017). Prior to the implementation of the 2014 procedure there had been a number of High Court decisions which considered the level of fair procedures applicable to the

investigative and assessment stages of allegations of child sexual abuse by the respondent.

49. The respondent's responsibilities and jurisdiction in issues of child protection are set out in s. 3 of the Child Care Act 1991 as amended which states:

"3. - (1) It shall be a function of Child and Family Agency to promote the welfare of children in its area who are not receiving adequate care and protection.

(2) In the performance of this function, Child and Family Agency 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;

(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."

50. In *M.Q. v. Gleeson* [1998] 4 I.R. 85 the then Childcare Authority, the Eastern Health Board received a number of complaints concerning alleged sexual abuse against the applicant's partner and their children. The applicant had been enrolled in a course of study in childcare work. The Board formed the opinion that he was not a suitable person to engage in such work and that it had a statutory duty to advise his college of this opinion and recommend that he be removed from the course. The college acted on this advice and withdrew the applicant from his course until such time as he could prove his suitability to work in that area. The applicant was not informed by the college of the nature or details of the allegations by the Health Board. He sought to quash the college's decision to remove him from the course. The High Court quashed the decision and in doing so considered the fair procedures appropriate to the process of enquiry and the conveying of information to third parties by the Health Board.

51. Barr J., stated that the function of the Health Board as a Child Protection Agency differed fundamentally from the prosecutorial function of An Garda Síochána and the Director of Public Prosecutions. An Garda Síochána and the Director of Public Prosecutions were focussed on the detection and conviction of child abusers. There were many circumstances which may indicate that a particular person is likely to be or to have been a child abuser but there may be insufficient evidence to establish the abuse in accordance with the standards of proof required in a criminal or civil trial. An abused child may, through fear or family pressure, age or mental incapacity, be unable to testify against an abuser or if there are repeated injuries they may have an alternative explanation such as accident and the authorities may not be able to establish proof of abuse in law by a particular suspect. He stated:

"However, there may be evidence sufficient to create after reasonable investigation a significant doubt in the minds of a competent experienced health board or related professional personnel that there has been an abuse by a particular person. If such a doubt has been established then it follows that a Health Board cannot stand idly by but has an obligation to take appropriate action in circumstances where a person who the Board reasonably suspects has indulged in child abuse is in a situation, or is planning to take up a position, which may expose any other child to abuse by him/her". (pp. 100-101).

52. The learned judge was satisfied that there had to be a reasonable assessment of each complaint or finding about an alleged wrongdoer and added:

"this also necessarily entails reasonable investigation of each complaint by the Health Board. In the ordinary course in serious cases the complaint should be put to the alleged abuser in the course of the investigation and he/she should be given an opportunity of responding to it. However, an exception in that regard may arise where the Board officially concerned has a reasonable concern that to do so might put the child in question in further jeopardy as, for example, where the abused child is the complainant. An obligation to offer an alleged abuser an opportunity to answer complaints made against him/her would arise in circumstances where the Board contemplates making active use of the particular information against the interest of the alleged wrong doer – such as publication to a third party, as in the present case, or embarking on proceedings to have a child or children taken into care."

It was essential that a person charged with wrongdoing should be informed of what is being alleged against him and that he should be given a reasonable opportunity to make his defence. The learned judge stated that the Board had a duty of fairness to the applicant as to the reliability of the information it furnished if making a report to a third party. The investigating authority must remember that complaints if unfounded had potential for great injustice not only to the person complained about but to the particular child or children sought to be protected and others in the family under scrutiny. A false complaint if incorrectly interpreted could be very destructive of a family unit for example by wrongfully having children taken into care. It may also destroy or seriously damage a good marital relationship or a relationship between long standing partners. The requirements imposed upon the Board before raising the issue of the applicant's course of education with his college included an obligation to take all reasonable steps to interview the applicant, to furnish him before interview with notice of the allegations against him in short form, to give him a reasonable opportunity to make his defence and to carry out such further investigations as might appear appropriate in the light of information furnished by him in response to the complaints. Barr J. stated that no opinion as to the weight to be attached to each complaint should have been formed until the foregoing investigations relating to the applicant had been made and information derived therefrom carefully assessed. He stated the need to take that course was all the more important when the social worker involved had no prior experience of the applicant, his family or other concerned persons. He added:

"If a health board takes all reasonable steps to investigate the likely veracity of a complaint of child abuse, including its obligation to the accused as stipulated ... and it forms a considered opinion that the complaint may be well-founded, then it has an obligation to take appropriate action which may include a report to the police and/or, as in the instant case, a report to [the college] that the alleged abuser may not be suitable for a particular course of education which leads to employment as a child-care worker." (pp. 102-103)

53. In *M.Q.* the Health Board was found to be in error because it failed in its obligation to furnish the applicant with information as to the charges against him, by not giving him an adequate opportunity to defend himself and by not taking reasonable care and checking the accuracy of information furnished to the college and by taking a crucial decision adverse to him regarding his suitability for childcare work without first taking these steps and reviewing the matter in the light of whatever defence he might have raised.

54. Barr J. described the nature of the Board's obligation to carry out a reasonable investigation of each complaint and its duty to ensure "fairness to the applicant as to the reliability of the information it furnished to the [college]". The Board was obliged to take all reasonable steps to investigate "the likely veracity of a complaint of child abuse". If it did so and formed "a considered opinion that the complaint may be well founded" it had an obligation to take appropriate action which might include reporting the matter to third parties.

55. These principles were regarded as well established by Hedigan J. in *N.I. v. The Health Service Executive* [2010] IEHC 159 and were summarised as follows:

"(1) The respondent ...has a duty to investigate the circumstances ... There may be a risk and that risk must be assessed.

(2) The respondent must afford the applicant fair procedures.

(3) If the respondent comes to the conclusion that there is a risk, it is under a duty to communicate that to an appropriate party.

(4) The respondent's role in conducting this investigation is not an administration of justice. It does not make any determination of guilt or innocence. Its role is quite distinct from that of the Director of Public Prosecutions. Its role is the protection of vulnerable children. The Director of Public Prosecution's role is the detection and conviction of criminals, including child abusers."

Notice of the Allegations-Grounds 15,16,18,19,20,25(x),(xii),(xiii),(xiv),(xv),(xvi),(xvii), (xxi) and (xxii)

56. The applicant claims that the letter of the 9th October set out briefly but inadequately the allegations made by S.F. against him. The initial letter outlined in very short form that the applicant had sexually abused his younger sister on three to ten occasions between the ages of eleven and seventeen years. The specifics of two allegations were made in that letter. Firstly, an allegation was made that when S.F. was seated at a piano he approached her from behind and rubbed his body against her and in doing so touched her outside her clothing. He blocked her exit and lay on top of her making grinding movements. The second allegation concerned an incident in S.F.'s bedroom where he is alleged to have spoken to her about her underwear whilst she was in bed and digitally penetrated her vagina with his fingers before leaving the room when he heard a door bang down the corridor.

57. As a result of interviews with Dr. Sullivan two further specific events were described by S.F. The first was a sexual assault alleged to have occurred in the hot press of the family home and the second was a sexual assault in the complainant's bedroom.

58. Dr. Sullivan in his report states that the process of obtaining a statement from the complainant often uncovers details of incidents which go beyond the initial accounts provided at the point of first disclosure. He was satisfied that this was the case with S.F. He outlines the details and sequence of these alleged sexual assaults at pp. 8 – 10 of his report. The first one is alleged to have occurred at the hot press, the second at the piano, the third in her bedroom as was the fourth.

59. The applicant states that he was not given advance knowledge of the evidence and materials considered by the respondent or Mentor Forensic or particulars of the allegations against him until confronted with them without notice at interviews with Dr. Sullivan. He was not given an opportunity to familiarise himself with the evidence to be considered and in particular the interviews with S.F. were not furnished to him or his solicitors. He states in his affidavit that he first learned of the hot press allegation and the first bedroom allegation when confronted without notice with them in interview with Dr. Sullivan. The limited information provided in the letter of the 9th October in respect of the piano allegation and the second bedroom allegation are said to be entirely inadequate and did not contain the detail set out in the report.

60. Dr. Sullivan was provided with the full social work file and a letter from the consultant psychiatrist and Ms. Campbell dated 6th March, 2013 which first outlined the allegations made by S.F.

61. Dr. Sullivan in his affidavit of 26th November, 2015 states that it was not intended that the individual undergoing risk assessment would have a prepared defence to hand in when undertaking the process. He said:

"...risk assessment is an evaluation of the individual's version of events. Therefore, it is not a legal process but one of exploration that evolves and develops during the course of the assessment. The process tests and evaluates the credibility or otherwise of the applicant's account. I say that it would be counterproductive and unhelpful if the applicant undertook the process with a prepared version of events as this would not allow for evaluation or an exploration of the applicant's account."

Dr. Sullivan was satisfied that the applicant had every opportunity to express his views regarding the allegations made against him and that he was aware of the full nature of the allegations and therefore familiar with all relevant matters.

62. It is clear that the full details as set out in the quoted extracts from statements in the report and the interviews said to have been attached to the report but which were not made available to the applicant were not furnished to him or his solicitors in advance of interview. On the evidence available, Dr. Sullivan declined to furnish these details in advance because he felt it would be unhelpful to his work. He did not view it as a legal process. The applicant was presented for the first time with the details of some of these allegations during the course of the interviews with Dr. Sullivan. This is not in accordance with the fair procedures envisaged in the case law. Indeed, the fact that he was not notified appears to have been intentional and calculated to generate a more spontaneous and unguarded response from him in the course of the assessment. Dr. Sullivan accepts that this was intended to ensure that he did not have an opportunity to prepare a response prior to interview.

63. One of the fundamental requirements of fair procedures is that a person accused of very serious misconduct in the course of an investigation, assessment or inquiry the result of which may result in an adverse finding and consequences for him/her must be given notice of the allegations and full details and disclosure of materials upon which they are based. This was central to the decision in *M.Q.* It has been a core principle of the right to fair procedures as set out in *In Re Haughey* [1971] I.R. 325 and reaffirmed in the

context of allegations of child sexual abuse in *PDP v. Board of Management* [2010] IEHC 189 in which O'Neill J. stated that:

"the applicant is entitled to have made available to him all of the material assembled by the second named respondent in its investigation into the allegations made against him that is relevant to those allegations."

The purpose of giving full notice of the allegations and the materials upon which they are based is to ensure that the applicant has an adequate opportunity to defend himself and/or make representations in the course of the inquiry or assessment. (per Barr J. in *M.Q.* at pp. 108 – 109).

64. The court is therefore satisfied that in this case the respondent failed to ensure that the applicant was fully informed of the allegations made against him and furnished with all relevant materials upon which they were based. Absent a good and sufficient reason referable to the welfare and protection of the complainant or other children or otherwise based on child protection issues of concern to the respondent in the instant case, such notification and disclosure should be made as a matter of course. These are the principles which inform the 2014 Procedure under which the respondent presently conducts investigations and assessments of child abuse allegations. The court is satisfied therefore that in this case the respondent has failed to meet the requirements of fair procedures on those grounds.

65. It should be noted that at the time of this assessment there were no written procedures in place pursuant to which such investigations or assessments were conducted. The applicant complains that he felt pressurised by the respondent into acquiescing in this assessment because he and his wife felt that their children might be the subject of care proceedings and his employment might be under threat if he did not do so. No terms of reference were agreed with the applicant prior to the commencement of the assessment other than the form of consent which was exhibited which was in the court's view a document intended to protect the interests of Mentor Forensics Ltd rather than the applicant's rights. The letter of referral was never furnished to the applicant or his solicitors. It is apparent that the applicant only became incrementally aware of the basis of the assessment as it evolved. This is in complete contrast to the present system that applies under the 2014 procedure. It placed the applicant and his solicitors at a complete disadvantage as to knowledge of the standard of fair procedures applicable in the case as evidenced by his solicitor's letter of the 12th September which attempted to address a continuous insistence by Dr. Sullivan on the advantages of polygraph testing. Irrespective of the merits of the use of polygraph as an evidential basis for any conclusions, the introduction of such a device and procedure with the clear implication that a failure to submit to it would be viewed negatively was in the court's view unfair and inappropriate. It is not a feature of the 2014 Procedure.

An Oral Hearing and Cross-Examination-Grounds 5 , 24 and 25(i),(vi),(vii),(ix), (x) and (xviii)

66. The applicant submits that the failure of the respondent to afford the applicant an oral hearing and the right to cross-examine the complainant who is now an adult constituted a breach of fair procedures. In *Re Haughey* [1971] I.R. 217 it was held that a person whose conduct and reputation were impugned as part of an inquiry must be afforded reasonable means of defending themselves. He should be:-

- (a) Furnished with a copy of the evidence against him;
- (b) allowed to cross-examine by counsel the accuser;
- (c) allowed to give rebutting evidence;
- (d) be permitted to address the adjudicating body in his own defence.

67. In particular, when there is a conflict of fact of a substantial nature between the parties it was submitted that the holding of an oral hearing to receive submissions and to provide an adequate opportunity of dealing with the issue of personal credibility was essential when the key issue concerns an account of facts given personally by the complainant and the rejection of the applicant's account. It is submitted that the right to cross-examine the complainant is a constitutional right and an essential aspect of fair procedures. Reliance was placed upon the decision of the Supreme Court in *Maguire v. Ardagh* [2002] 1 I.R. 385.

68. The court is satisfied that the circumstances in which the full panoply of fair procedure rights is required in its determination of the credibility of sexual abuse allegations in a child protection investigation and assessment may vary. The holding of an oral hearing is not always required and was not deemed to be an essential feature of the fair procedures required in *MQ* (see also *T.R. supra* at paras 86-99). Similarly, the right to cross-examine a complainant is not an absolute right that is appropriate in all circumstances. Child protection issues arise in respect of children who are very young, may have various disabilities physical or mental, may be suffering from trauma for various reasons which may or may not be connected to the alleged abuse and may not be available or amenable to cross-examination. There may be no identifiable issue of fact in a particular case.

69. It may be easier to procure the agreement of an adult complainant to attend an oral hearing for the purpose of cross-examination. In *P.D.P. v. Board of Management* [2010] IEHC 189, O'Neill J. stated in respect of the right to cross-examine a then adult complainant:-

"5.16 If a new investigation was to commence in light of the prospect or possibility of the applicant's return to teaching then, in my view, at this stage the investigation could not progress in any meaningful way respecting the norms of natural justice, without affording the applicant an opportunity to confront his accuser ... in cross-examination. As the complainant is now twenty two years old, I am satisfied that there is no good reason why he should not be made available for cross-examination in respect of the complaint that has been attributed to him. In addition, the applicant is entitled to have made available to him all of the material assembled by the second named respondent in its investigation into the allegations made against him that is relevant to those allegations. He is also entitled to be heard in his own defence and to have the testimony of such persons who can give testimony on his behalf, relevant to the allegations in issue, heard and considered by the second named respondent. In my judgement, having regard to the very serious and criminal nature of the allegations made against the applicant, the foregoing provisions are the minimum necessary to vindicate the applicant's right to fair procedures if this investigation is to continue."

70. The court is satisfied that absent a reason relating to the welfare of children or child protection issues or the mental health and welfare of the complainant, the standard appropriate to the investigation of the allegations made against the applicant requires the level of fair procedures envisaged by O'Neill J.

71. It is important to emphasise that the present case was investigated and assessed without a written procedure and prior to the introduction of the 2014 Procedure which provides a process under para. 24.1(b) whereby the assessors in the course of an

investigation or assessment may receive an application from an alleged abuser to be provided with the facility to cross-examine the complainant. Such an application must be considered in a fair and proportionate manner. It must take account of all the circumstances and balance the rights of all concerned before a decision is made. I am satisfied that this case comes within the ambit of cases such as *P.D.F.* in which an opportunity to cross-examine should have been afforded to the applicant absent any reason related to the complainant's mental health that would render it inappropriate or impossible. However, it is clear that this matter was not even considered in the process which was initiated by the respondent.

72. Apart from the discretion referred to in para. 24.1(b), the courts have accepted that in civil proceedings, child protection issues may arise as a result of which statements which might otherwise be viewed as hearsay or inadmissible are admitted in evidence due to the vulnerability or inability of a child to give such evidence. In addition, s. 23 of the Children Act 1997 provides for the admissibility of otherwise hearsay statements in circumstances where it would not be in the welfare of the child to produce him/her as a witness. I am satisfied that it is appropriate in all the circumstances to consider the rights of the complainant whether a child or adult and the rights of the alleged abuser to fair procedures before the respondent makes a decision permitting or refusing an opportunity to cross-examine a complainant. However, it should also be noted that the applicant never sought the right to cross-examine in this case, nor did he ever suggest seek an oral hearing to which I will return later.

Other issues

73. The court is not satisfied that the procedures required in a child protection assessment of risk which is largely investigative in nature should approach those of a criminal or civil trial. It is now well established that this process and the power, jurisdiction and duty of the respondent are of a different kind and have a different purpose to the determination of rights or liabilities in civil proceedings *inter partes* or the investigation and prosecution of criminal charges. The purpose and duty of the respondent in child protection matters is to investigate and make a timely assessment of risk to children whose welfare is paramount (per Butler-Sloss L.J. in *Regina v. Harrow LBC* [1990] 3 All ER 12 at pp 16-17). If the respondent decides in the course of or as a result of its investigation that it is proper to inform An Garda Síochána of any allegation of child sexual abuse, the investigation will be carried out by the Gardaí and the laying and prosecution of any criminal charges will be dealt with by the Director of Public Prosecutions and determined by the courts. Similarly, if child protection proceedings are deemed necessary or custody and/or access proceedings in which child protection issues arise and fall to be addressed, the proceedings will be conducted in courts established under the Constitution. The full panoply of rights guaranteed under Articles 34, 38 and 40.3 of the Constitution will be afforded the alleged abuser in any such proceedings.

74. It is also submitted that Dr. Sullivan did not conduct the assessment independently and that the respondent should not have regarded his conclusions as final and binding in respect of whether the applicant had committed the acts alleged, that they constituted child sexual abuse and that the applicant could therefore be deemed to be or pose a risk to children or vulnerable adults. It is also submitted that in extending his assessment to the issue of whether there was a risk posed by the applicant to vulnerable adults he and the respondent exceeded the child protection role pursuant to which the assessment was initiated because the respondent has no role in respect of vulnerable adults under the Act.

75. There are elements of Dr. Sullivan's approach in this case that are inconsistent with the right to fair procedures. The failure to give the applicant due and reasonable notice of the allegations and the materials upon which they were based has already been addressed. The fact that he did so deliberately so that the applicant would not be able to prepare a response prior to interview is indicative of the fact that as Dr. Sullivan himself states he did not treat this as a legal process. In doing so he and the respondent fell into error. He appeared to treat the process as a form of professional therapeutic exercise in which from a very early stage the language used in respect of the applicant and the overall approach is one of scepticism towards the applicant and acceptance of the complainant's allegations. He made robust findings adverse to the applicant. There may ultimately be a finding that the applicant needs to address issues arising from his teenage dealings with his younger sister if a further investigation or assessment is carried out but he was entitled to a full and independent factual review of the allegations within a defined procedure which allowed them to be fully and fairly explored and his representations or those of his solicitors to be received and considered. I am not satisfied that this occurred.

76. It is also an important feature of the assessment that the applicant held a senior nursing position. There was never any allegation against him of sexual or other impropriety in respect of children or vulnerable adults during his thirty years working as a nurse. He was not working with children and his then position did not involve access to children. The extension of the assessment to a risk to vulnerable adults was not something of which any adequate notice was given but was one of the reasons for the decision to inform his employer of the allegations with the consequences outlined earlier. While there are occasions upon which it is of course proper to make known to the relevant authorities a risk that a person may pose to vulnerable adults, it is not an issue that ostensibly comes within the child protection issues for which the respondent has responsibility. If that issue was one which it was anticipated would be an important or indeed central focus of this inquiry, the reason for that and notice that it would be so treated should have been given to the applicant and his solicitors. It is entirely possible that an investigation could reveal matters which raise issues arising from alleged child sexual abuse which also relate to the protection of vulnerable adults or some alleged professional misconduct by a nurse which will require notification to some third party. If this is so it should be brought specifically to their attention at the earliest reasonable opportunity unless otherwise obvious from the nature of the assessment. Dr. Sullivan's finding in that regard is one which appears to arise from the finding that the allegations by his sister were credible. The applicant was not afforded a realistic opportunity to challenge that conclusion or the nature and extent of any perceived risk within the procedures adopted.

Discretion

77. The respondent submits that the applicant admitted to elements of the allegations and that therefore the applicant should not be entitled to any relief. In effect it is claimed that these proceedings are maintained because an adverse conclusion was reached by Dr. Sullivan against the applicant which was amply justified by the applicant's own admissions. It is also submitted that the applicant acquiesced in and consented to the form of assessment carried out and never objected to the fairness of the procedure at the time. I do not consider that the latter submission is sustainable in the light of the opaque procedures adopted by the respondent which were ad hoc and appear to have been left to the discretion of the assessor.

78. The applicant clearly rejects many of the inferences drawn by Dr. Sullivan in his report and his interpretation of the nature and effect of what he said during the interviews as unwarranted. There was no opportunity to challenge those conclusions by making submissions to some other decision-maker by way of appeal.

79. The court is not satisfied that in this case the applicant could or should be regarded as having consented to or acquiesced in the form of assessment carried out in its flawed state. I do not regard the consent executed for the benefit of Mentor Forensic Ltd as a proper notification of the decision-making procedure to be followed in the assessment. I do not consider that it has been demonstrated that had the applicant been accorded an appropriate level of fair procedures the result would have been the same in the light of his suggested admissions. The nature, effect and interpretation of what he said and the potential results of any cross-

examination of the complainant in respect of occurrences most of which he continues to deny persuade me that I should not draw such a conclusion.

80. I am not persuaded that any issue arises under the provisions of the European Convention on Human Rights Act 2003.

Conclusion

81. I have considered all of the relevant grounds upon which leave was granted and the evidence and submissions made. I am satisfied for the reasons set out above that the procedure followed by the respondent in this case was fundamentally flawed and will make an order quashing the determination made following the assessment and prohibit the further publication of the said determination to other parties. The anonymity of the applicant should be preserved . It is open to the respondent in the exercise of its child protection duties to carry out a fresh investigation of the complaints made against the applicant by his sister which the court must presume will be carried out with due regard to fair procedures and will likely be pursuant to the 2014 Procedure.