Neutral Citation: [2015] IEHC 172

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2014/778 JR]

BETWEEN/

J.G. SNR., K.G., J.G. JNR. (A MINOR SUING THROUGH HIS PARENTS/NEXT FRIENDS) AND B.G. (A MINOR SUING THROUGH HIS PARENTS NEXT FRIENDS)

APPLICANTS

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 11th day of March 2015

Introduction

1. The first and second named applicants are the parents of the third and fourth named applicants. Two other children of the family are currently in care. The applicants' claim in these proceedings is that their rights were breached by the respondent in relation to the convening of a case conference on the 13th June, 2014, which resulted in an application to the District Court for a supervision order pursuant to the provisions of the Child Care Act, 1991. They make similar complaints in relation to a case conference held on the 25th November, 2014. They seek declaratory relief, orders of *certiorari* and orders preventing the holding of a further conference or the making of an application to the District Court unless full disclosure of specified material is made to them.

2. The respondent opposes the application on the basis that the applicants have *"failed to identify facts from which an arguable case in law can be made that [they] are entitled to the reliefs which they seek."* The availability of judicial review in the context of the case conference process is contested. There is also an argument that the application is out of time.

3. Without prejudice to these contentions, it is pleaded that no rights of the applicants have been breached and that the decisions taken to hold the case conference and to make an application to the District Court for orders relating to the third and fourth named applicants were properly made.

Background facts

4. The first and second applicants married in December, 2007. Mrs. G. had two daughters from a previous relationship. The third and fourth named applicants, both of whom are boys, were born in April, 2008 and February, 2009 respectively. The family has lived in Ireland since June, 2008.

5. In September, 2012 when the family was living in County X, the eldest girl presented herself at a Garda station and claimed that she had been assaulted by the first and second named applicants. This allegation, which is now the subject of criminal charges and which is denied by the applicants, resulted in all four children being taken into care on foot of an emergency care order. Since that date there have been a number of applications and orders in care proceedings before the District Court, the Circuit Court (on appeal by the respondent against a refusal of full care orders) and judicial review proceedings as well as an application under Article 40.4 in respect of the boys. The latter proceedings ultimately became moot and were struck out in May, 2013.

6. The outcome of the District Court proceedings had been an order made on the 16th May, 2013, that the two girls be taken into care until they reach the age of 18. Applications for interim care orders in respect of the two boys were refused and they were returned to the parents on foot of six-month supervision orders.

7. It should be noted that an appeal against the care orders in respect of the girls was not pursued and the first and second named applicants indicated through their solicitor that they would not be attending any care review meetings relating to them. However, they continue to maintain that the eldest girl is a fantasist who should be psychiatrically examined and that the younger girl is following her lead.

8. The first and second named applicants were unhappy with certain terms attached to the supervision orders relating to the boys – specifically, that they were to undergo parenting capacity assessment; that the second named applicant was to receive counselling/psychotherapy; and that they were both to comply with all requirements of the HSE/CFA. They were granted leave to seek judicial review in respect of these matters in September, 2013.

9. It appears that after the grant of leave, the respondent returned to the District Court and applied for interim care orders on the basis that the first and second named applicants were not complying with the terms of the supervision orders. The alleged non-compliance related to those parts of the orders challenged in the judicial review proceedings. On the 25th October, 2013, the District Court granted interim care orders for 20 days. A stay was granted to enable the applicants to make an immediate application to the High Court. On the 29th October, 2013, the High Court granted leave to seek *certiorari* in respect of the interim orders. The respondent discharged the supervision orders in the District Court on the same day, but applied for and obtained warrants to search for the two boys. This apparently involved armed Gardaí arriving at the family home and breaking into it, while the parents were attending the High Court in Dublin.

10. The judicial review application was heard in November, 2013. The interim care orders were quashed on the basis that the District Court had no power to order that the applicants attend for psychological or parenting assessment, and the decision to make the interim care orders was based at least in part on their refusal to do so – see the judgment of Hogan J. in *J.G. & ors v Judge Staunton & ors,* [2013] IEHC 533, delivered on the 27th November, 2013. The matter was remitted to the District Court, as Hogan J. felt that there had been findings of fact by the District Judge, which might in themselves ground a care order.

11. The respondent then renewed the applications before the District Court for interim care orders. In January, 2014 the application was refused. According to the applicants herein, the District Judge expressed concern that the situation had become a "power struggle" between the parents and the social workers. What was being asserted against the parents was that they were "coaching" the boys in their responses to social workers, but there was no evidence of physical abuse or neglect in relation to them.

12. According to the respondent, the District Judge found that there had been "coaching", that the parents were thwarting the sibling relationship between the boys and the girls and that there had been a degree of emotional abuse. However, he did not deem it to be in the boys' best interests to remove them from their parents.

The June 2014 case conference

13. After the refusal of the orders the family moved to County Y and the boys started at a new school. The applicants say that they heard no more from the respondent until a date in April, 2014, when two social workers turned up at their house. It appears that the social work file had been transferred to the new area. Two weeks later one of the social workers who had been at the house, a Mr. D.C., rang the second named applicant. He identified himself and said that he wanted to arrange a meeting between the applicants and the respondent about the boys. She responded that any communication should go through their legal representative and refused to answer any questions as to the address of the family or the name of the boys' school. She says that he threatened to return to court if she didn't tell him.

14. On the 9th June, 2014, the applicants received a letter dated 20th May from the respondent inviting them to a child protection conference scheduled for 10 a.m. on the 13th June. The letter stated that the conference was being convened because "child protection concerns" had been expressed in relation to the boys. It was further stated that

> *"The purpose of the conference is to discuss matters that affect you and your child/ren, and to look at how we can assist you. Various professional people, who will know you and your child/ren, will be at this meeting."*

15. A list of other persons invited to attend was enclosed. This included a number of social workers, a garda, a public health nurse and the principal of the boys' school. There was also an explanatory leaflet about child protection conferences. This is a short document and in full reads as follows:

> *"If the decision is that the child is not at risk of significant harm there may be discussion about providing some supports to the child and family and the meeting finishes.*
>
> *If the decision is made that the child is at risk of ongoing significant harm, then a Child Protection Plan will be made and agreed. The child's name will be placed on the Child Protection Notification System (CPNS). The decision to make a Child Protection Plan and to list a child on the CPNS is a very serious one and is only taken where there are clear signs that a child is at risk of significant harm from abuse or neglect by one or both parents.*
>
> ***What is a Child Protection Plan?***
>
> *The purpose of the plan is to provide support to the child and their parents in making sure that the child is kept safe from harm and that the risks to the child are lowered. This can happen in different ways, it might mean the parents have to attend parenting classes or some form of counselling service, or bring their child to appointments, or allow professionals to visit the child at home. Our aim is to involve parents and children in the decision making around the plan. A copy of the final plan will be sent to the parents after the conference and a social worker will be named as the Key Worker who will make sure that the plan is carried out.*
>
> ***What is the Child Protection Notification System (CPNS)?***
>
> *The CPNS records the names of children who have Child Protection Plans agreed at a Child Protection Conference. The CPNS can only be accessed by a very small group of people, such as doctors or Gardaí, who might need to make important decisions about the safety of the child. We control the CPNS very strictly and only allow access to those who have a very good reason to look for the information. A child's name will either be listed as Active or Inactive.*
>
> • *Active means that there is a Child Protection Plan in place because it has been decided that the child is currently at risk of significant harm and needs support to be safe and well*
>
> • *Inactive means that the child was at risk of significant harm before and had a Child Protection Plan in the past. The child may need support to remain safe and well.*
>
> • *A child's name is removed completely from the list as soon as they reach 18 years of age.*
>
> *Parents will be given a letter to tell them that their child's name is on the CPNS. Where a child has a Child Protection Plan and is listed as active, a review meeting must take place within six months to make sure the plan is working. The review aims to find out if the risks to the child are decreasing or if further support is needed.*
>
> *If it is decided that a child is no longer at risk, then their status on the CPNS will be made inactive and the parents will be given a letter."*

16. No other information was provided as to the reasons for convening the conference.

17. The applicants forwarded the letter to their solicitor, who consulted with counsel and wrote a letter in reply. In brief, the letter complained of the fact that notification of the conference had been sent directly to the applicants rather than to the solicitor; asserted that, having regard to the history of the case, the respondent had no right to take any further steps in the absence of new information; and demanded disclosure of documents and information under fourteen different headings before the conference. It appears that it was intended that this letter should be sent on the 12th June, the day before the planned conference, but was not in fact transmitted until shortly after the conference had begun on the 13th June.

18. The conference proceeded in the absence of the parents. The applicants' solicitor wrote on the 17th June, and again on the 5th July, enquiring whether the conference had gone ahead. The respondent did not reply to him but on the 10th July the applicants

received a letter, dated the 23rd June, at their home address. It informed them that following the child protection conference, it had been decided that the two boys were at ongoing risk of significant harm and a child protection plan had been agreed. The boys were to continue being listed as "active" on the CPNS and the plan would be reviewed in three months time. The letter stated that, if the applicants felt that the conference was not run in accordance with proper procedures or that the information presented was inaccurate or incomplete, they could appeal by contacting the Area Manager.

19. The "revised child protection plan" agreed at the conference in respect of each of the boys and the minutes of the conference were attached to the letter. The actions to be taken were

- To meet with the parents to discuss the plan within two weeks
- To apply in the District Court for supervision orders within four weeks
- To make a referral for a parenting assessment of Mr. and Mrs. G.

20. Without going into full details, it is clear from these documents that the matters identified as "risk factors" for the boys came from the Co. X file and all predated the family's arrival in Co. Y. The only new information was that they were doing well in school.

21. The minutes of the conference record that the social workers had not been able to engage with the family since they moved to the area and therefore, in order to reassess the risk to the boys, they had in fact applied in advance of the conference for supervision orders. However, it appears that this is an error and no application had yet been made.

Subsequent developments
22. On 8th August, 2014, the parents were both charged with offences of assault and child cruelty in relation to the girls.

23. Subsequently the parents were notified that the applications for supervision orders would proceed on the 15th October, 2014. However, after some correspondence between the parties' solicitors, the respondent agreed to have the applications struck out with no order. It appears that this was on the basis of legal advice to the effect that a review conference should be convened to ensure that fair procedures would be afforded.

The November, 2014 conference
24. On the 17th November, 2014, the parents received an invitation to a child protection conference to be held on the 25th of that month. The invitation was in the same terms as the previous one and enclosed the same leaflet.

25. On the 18th November, the respondent forwarded a copy of the social work report to be discussed at the conference. This document referred to the specific allegations made by the two girls and to observations made of the boys while they were temporarily in care. It was noted that charges had now been brought and concerns were expressed as to the parents' ability to care for the boys given the charges. It was reported that efforts by staff to arrange access visits with the boys and the girls had been impeded by the parents and that there had been no sibling access since July, 2013. The parents had refused to engage with social workers.

26. There is no reference in the report as to the findings of the District Court in respect of any of the matters predating the family's move. The applicants complain that the report is therefore manifestly biased and misleading.

27. The social worker's view was that a comprehensive assessment was necessary. To this end, he recommended that the Agency should apply for supervision orders and that the parents should meet with staff and permit them into their home.

28. The applicants' solicitor then wrote a lengthy letter complaining that the conference was again being convened without his clients having been given the material sought in advance of the previous occasion. He contended that the material contained in the social worker's report referred to the matters that had already been shown (in the District Court in Co. X) to be without credibility or foundation. He called for full disclosure of all material in the respondent's possession and for confirmation that the proposed conference would be cancelled.

29. The Agency's solicitor responded on the 24th November, stating that the conference would proceed on the following day. The purpose of the conference was said to be to take into account the new information that charges had now been brought against the parents.

30. The response to the request for disclosure was as follows:

> *"In relation to previous documentation requested by yourselves, we would submit that your clients have been involved in the processes for the same amount of time as the Child and Family Agency and your offices hold historical documentation to include Social Work Reports etc and therefore no further material is required by yourselves at this stage to have an understanding of why the Child and Family Agency are holding this review Child Protection Conference."*

31. A copy of the social work report that had been before the June conference was enclosed. It was said that if the parents attended in advance of the meeting, the social worker would go through this and the up-to-date report with them.

32. Mr. G. has averred that no "historical documentation" has been received by the applicants other than social work reports. In his grounding affidavit he complains as follows:

> *"We received nothing in respect of what is alleged as being true in social work reports: no records or notes recording that which was asserted in such reports or no material whatsoever in respect of 'material gathering' which the CFA engage in pursuant to s.3. Our complaint throughout the proceedings was a lack of fair procedures and entire reliance on hearsay without producing any corroborative material or providing any disclosure to us so as to meet the case and present a defence; in addition to the issues already referred to…refusal to investigate the matter from our perspective at all and an effective prejudging of the issues against us.*
>
> *I say and am advised that the reply further compounds the issue for us as it is the stated position, although unclear if it is in fact policy, of the CFA that we are not entitled to social work reports ourselves. The CFA position, as repeatedly relayed to us, is that our legal team cannot allow us to have a copy of same and that we are constrained to having same read to us in advance of a hearing (usually on the day of the hearing) hence it is utterly futile to suggest that reports held by our solicitor, the content of same which are the exact issues usually in dispute, can be of any assistance*

to prepare for any such meeting we are 'invited' to at which decisions are proposed to be taken in respect of our family. We say this is further compounded by the fact that we are prevented by the Respondent from having a legal representative attend the meeting with us."

33. The applicants did not attend the conference. By letter dated the 4th December, 2014, their solicitor was furnished with the minutes and plans from the meeting.

34. It is clear from the minutes that both the previous history of the case and up-to-date information was considered. The risk factors relating to the boys were stated as being both the "confirmed" history of abuse in respect of the girls and current concerns including the absence of sibling access, the inability of social workers to meet the boys in private to assess their situation, and the high rate of school absenteeism in respect of one boy. On the positive side, the boys were happy and settled in school, the mother was generally cooperative with the school and the boys had a good bond with her.

35. Of note, a social worker from the Co. X area is recorded as stating that "the video evidence from the girls to court was believable". The applicants complain that they have not seen this video. They presume that it relates to a garda interview and object to the fact that it has been disclosed to social workers but not to them.

36. Under the heading "Discussion" the following statement is made:

"The issue is despite the good school report does the Conference consider the boys to be at ongoing risk [of] significant harm, due to concerns based on previous history in the case in respect of their sisters."

37. The actions agreed included continued listing of both boys on the CPNS and the making of applications for supervision orders at the earliest opportunity. The purpose of making the applications was stated to be to ensure that social workers could have access to the boys to ascertain that they were safe and were physically and emotionally well cared for.

38. Leave to seek judicial review was sought and granted on the 15th December, 2014.

The statutory context

39. By virtue of the Child and Family Agency Act, 2013 the functions of the Health Service Executive (previously the functions of the health boards) under the Child Care Act, 1991 were transferred to the new Agency. Section 3 of the Act of 1991 as amended therefore confers on the respondent the function of promoting the welfare of children who are not receiving adequate care and protection. In performing this function, the 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."

40. Section 16 of the Act provides that it is the duty of the respondent to make an application for a care order or a supervision order, as it thinks fit, where it appears with respect to a child

"… that he requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order…"

41. Section 19 deals with supervision orders and provides in relevant part as follows:

(1) Where, on the application of [the Child and Family Agency], with respect to a child, the court is satisfied that there are reasonable grounds for believing that –

a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or

b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or

c) the child's health, development or welfare is likely to be avoidably impaired or neglected,

and it is desirable that the child be visited periodically by or on behalf of [the Agency], the court may make an order (in this Act referred to as a "supervision order") in respect of the child.

(2) A supervision order shall authorise [the Agency] to have the child visited on such periodic occasions as [the Agency] may consider necessary in order to satisfy itself as to the welfare of the child and give to his parents or to a person acing in loco parentis any necessary advice as to the care of the child.

42. It may be useful to contrast the threshold criteria for a supervision order with those for a care order. Section 18 of the Act provides for the making of such an order where the court is satisfied that the child *"has been or is being"* mistreated and requires care or protection which he or she is unlikely to receive in the absence of an order. Thus, a care order requires proof to the *satisfaction* of the court that a state of affairs exists, while a supervision order only requires the Agency to show that there are *reasonable grounds for believing* that it exists.

The respondent's policy document

43. Although it is not referred to in any of the affidavits, the court has been given a document entitled, *"Policy & Procedures for responding to Allegations of Child Abuse & Neglect"*, published by the respondent in September, 2014.

44. This is a comprehensive code for the investigation of allegations of this nature. The relevant parts for the purposes of the instant case are those which deal with the interaction between the Agency and alleged abusers.

45. The document states that an individual against whom allegations of abuse are made has a right to fair procedures, although it is noted that at times this right may need to be treated as secondary to the protection of children at risk.

46. Specifically, it is stated that alleged abusers must be treated fairly, with due consideration given to their right to know who has made the allegations, the nature of the allegations and the right to reply to them.

> *"No final conclusion in respect of the allegations should be made until such time as the alleged abuser has had the opportunity to reply and participate in the social work assessment process."*

47. If a child is believed to be at immediate serious risk, the child's interests take priority over consideration of the alleged abuser's right to be informed prior to the taking of necessary protective action.

48. It is noted that social work professionals have to make decisions based on the balance of probabilities. This is contrasted with the higher standard to be applied by Gardaí and the Director of Public Prosecutions.

49. A distinction is drawn between two categories of children who may be at risk. Category (a) refers to specific or identifiable children who are or may be at immediate serious risk of abuse and require urgent care and protection. The example is given of a situation where the child has daily contact with the person against whom the allegations are made. Category (b) relates to identified and yet to be identified children who, by reason of a potential situation in the future, are liable to require protection at that time from a prospective danger, the nature of which is presently known or reasonably suspected by the CFA. The example given here concerns a person who does not currently have contact with children but is training to work with them.

50. Where a category (a) risk exists, direct action may be taken prior to contacting the alleged abuser. The latter is then entitled to be fully informed "at the very earliest opportunity" of the allegations.

51. Where category (b) is concerned, intervention

> *"…should cede priority to the constitutional rights of the alleged abuser".*

52. To justify the taking of urgent action prior to informing the alleged abuser of the allegations there must be

> *"(a) a reasonable concern that contacting the alleged abuser first may place a specific or identifiable children at further risk; or*
>
> *(b) a concern that because of ongoing contact between the alleged abuser and identifiable children, it is necessary for the Child and Family Agency to take steps to immediately protect children by notifying a relevant third party."*

53. There is a mandatory requirement to formally notify An Garda Síochána where it is suspected that a child has been or is being physically or sexually abused.

> *"If An Garda Síochána is conducting a criminal investigation it will be important to coordinate any actions being taken by the social work office with An Garda Síochána. At no point should any compromise to a child's safety be considered acceptable because of concern for the integrity of a criminal investigation. A child's safety takes priority at all times and An Garda Síochána holds this as a child protection and welfare policy position."*

54. The section on engaging with the alleged abuser again stresses the importance of that person's constitutional rights. It is noted that engagement with the alleged abuser is a "crucial" part of the assessment, and that the social worker should not reach any conclusions in advance of the person being given an opportunity to reply to the allegations.

55. The procedural steps to be taken require the writing of a letter to the alleged abuser at the earliest stage. The letter should:

> *"(a) Provide the alleged abuser with full detail of the allegations in writing (including the identity of the complainant unless that person wishes to remain anonymous) together with detail of the procedural process which will be followed.*
>
> *(b) Enclose a copy of written information, including any reports in respect of the allegations made against them. This does not include third party information which would have to be obtained by them directly from the third party.*
>
> *(c) Offer the alleged abuser an early opportunity to represent their position on the allegations either in person at a meeting or in writing.*
>
> *(d) Inform the alleged abuser where contact with an identified relevant third party is being considered, and that in the absence of agreement to meeting or written response, a decision to proceed will be made without the benefit of their response.*
>
> *(e) Detail that any written response from the alleged abuser and or any face to face meeting will be used as part of the assessment process being undertaken to determine whether there is any current or potential future risk posed towards specific or identifiable or yet to be identified children.*
>
> *(f) Inform the alleged abuser that if they choose to meet with the Child and Family Agency, they should have the opportunity to bring another person with them.*
>
> *(g) Allow 14 days for a response. (If no response is received, a second letter should be sent allowing a further 14 days for response.)"*

56. Where the alleged abuser does not "engage" with the Agency and a decision is taken to inform a relevant third party, the former

should be told in writing that this will happen on a specified date, with sufficient notice to allow him or her to respond.

57. The document then goes on to deal with the process of interviewing the alleged abuser, assessment of the case and the drawing of a provisional conclusion as to whether the allegation is founded or unfounded. The alleged abuser is to be notified of the provisional conclusion and given an opportunity to respond.

58. When the final conclusion is reached, the alleged abuser is to be informed. There must be an opportunity to appeal within "a reasonable time limit." This is not to delay the taking of any necessary child protection steps. Appeals are to be dealt with by a panel of two individuals, who may be senior social workers or other qualified professionals who are independent of the Child and Family Agency. It is the responsibility of the Area Manager to put together the panel and appoint a chair. A detailed procedure is set out for dealing with appeals.

Submissions on behalf of the applicants

59. The applicants say that the child protection conference is one of the methods by which the respondent carries out its obligation under s.3 of the Act to investigate concerns arising in respect of particular children. In performing this function, the respondent should act in a wholly impartial and transparent manner, and should disclose all material gathered in the investigation, before deciding to take any steps. The investigation should therefore be complete before a decision is made to apply to court, and it is improper to use the court process for the purpose of assessment. The decisions made at the conference have such potentially serious consequences for the family that they must attract the rules of natural justice and fair procedures. A child protection plan can only be drawn up where a decision is made that the child is at risk of significant harm, and that cannot be decided without speaking to parents in a "meaningful" way.

60. The conference itself can be seen as a pre-emptive procedure, whereby unnecessary court applications can be avoided. Since parents are invited to attend, it is to be presumed that they have something to contribute to the discussion. They should be in a position to present their case properly, whether by oral or written submissions, and that requires disclosure.

61. It is submitted that parents should not have to wait until the matter is before the District Court to seek discovery. The argument is made that the respondent will inevitably object to an order for discovery, saying that there is no authority for it. The District Court, it is said, will be told by the respondent that the matter is urgent and the orders sought by it will be granted.

62. It is also submitted that the parents were entitled not to appeal in circumstances where the first hearing was manifestly unjust and the appeal to the area manager is, in any event, of very limited scope.

63. The *"Policy and Procedures"* document (which was introduced by counsel for the applicants in the course of reply to the respondent's submissions) is relied upon as representing the law applicable to cases such as the applicants'.

64. The applicants rely in particular on the two judgments of O'Neill J. in *P. v A Secondary School & the Health Service Executive* [2010] IEHC 189 and the authorities referred to therein.

65. In that case, the applicant was a schoolteacher. In late 2001 a health board received a written complaint from the mother of a former pupil that he had been sexually assaulted by the applicant. The gardaí were notified but, as the former pupil did not wish to make a statement, no criminal proceedings followed. Correspondence continued between the mother and the health board but it was not until July, 2003 that the applicant was informed that a complaint had been made against him. The identity of the complainant was not disclosed. He was invited to meet with a social worker to discuss the allegations.

66. The applicant replied, requesting details of the allegations and the person making them. He also posed some questions – not in a confrontational manner – as to the procedure being adopted. He advised that he would make no decision as to whether or not he should attend the proposed meeting until he was fully informed about the intended process.

67. The applicant's questions were not answered and, despite written complaints by him to senior staff in the health board and health authority, it was decided that his school should be notified of the allegations because he had not attended a meeting. This was characterised by health board staff as a "refusal" to meet. In December, 2003 the HSE wrote to the school saying that the allegations had been "validated". The school then commenced its own investigation.

68. Matters appear to have dragged on throughout 2004 and 2005. In March, 2006 the applicant was informed of the identity of the complainant. One day later a social work report concluded that the applicant posed a potential risk to children and the board of management of the school was so informed. In April, 2006 the applicant was placed on administrative leave, on the stated basis that it was the only way to guarantee the safety of the pupils in the school. He was invited to make submissions to a meeting to be held later that month and also that he could read the social work report in advance of the meeting, on the school premises or in a HSE premises. He did not avail of this offer.

69. In the judicial review proceedings the Health Service Executive consented to orders of *certiorari* quashing the conclusion, communicated in December, 2003, that the complaints had been "validated" and the conclusion in the report of March, 2006 that the applicant posed a serious potential risk to children. The issue ultimately dealt with by the court was the applicant's claim for an order of prohibition to restrain the carrying out of further investigations of the applicant in relation to allegations in question.

70. O'Neill J. held that the power to investigate was activated when a credible complaint of child sexual abuse was received.

> *"If the allegation is found to be established after appropriate investigation, it is then a matter for the statutory authority in whom s.3(1) powers are vested to select the appropriate means to protect any children it finds to be at risk from the predatory behaviour of the abuser in question. Needless to say the statutory authority must in its investigation observe the norms of natural justice and fair procedures….*
>
> *…To consider the future conduct of the investigation that the second named respondent proposes to carry out, it is necessary to review what occurred in the past. The evidence in this case discloses a litany of failures on the part of the second named respondent to adhere to the requirements of fair procedures in its conduct of its investigations into the allegations made against the applicant. Those failures commenced with the first bare demand made of the applicant, that is, that he attend at a meeting to discuss the allegations. The second named respondent refused to give any details or documentation to the applicant in advance of that meeting. I am satisfied that the insistence on the applicant's attending the proposed meetings without knowing any details of the allegations made or sight of relevant documents placed him in grave jeopardy. I am in no doubt that the procedure proposed for that meeting with the applicant which*

the second named respondent wholly disregarded the extraordinary jeopardy in which the applicant was being placed and his constitutional right to fair procedures."

71. On the facts of the case O'Neill J. also found that the social workers had developed an inappropriate working relationship with the complainant's mother and had failed to ensure a proper validation of the complaint. In the circumstances the sending of the March, 2006 report to the school was "an extraordinary disregard of the applicant's right to natural justice and fair procedures." The first named respondent was not to blame for then removing him from the school since, having regard to the child protection guidelines, it had no option. It had also offered him adequate fair procedures for the April meeting.

72. In considering whether a new investigation should be permitted to commence, (if the applicant were to return to teaching) O'Neill J. said that

> *"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 judgment, 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."*

73. In deciding to refuse an order of prohibition, the learned judge found that the rights of the applicant had to be balanced against

> *"the very serious public interest in having the second named respondent properly discharge its statutory duty under s.3(1) of the Act of 1991."*

74. He went on:

> *"Notwithstanding its past failures in this investigation, this Court cannot assume that the future conduct of this investigation will involve any breaches of the applicant's right to fair procedures. On the contrary, the Court must assume that the second named respondent will comply with the provisions set out above to ensure respect for the applicant's rights."*

75. In a subsequent hearing the applicant in the case was awarded a very significant sum in damages.

76. In the course of his judgment O'Neill J. referred to the decision of Barr J. in *M.Q. v. Gleeson & ors* [1997] IEHC 26. In that case, it was held that the Eastern Health Board had acted unlawfully in communicating to an institute offering a child care qualification its view that the applicant was an unsuitable person for the course. The applicant had not been afforded any proper opportunity to deal with the allegations made against him.

77. The applicants in the instant case also rely on the decision of the European Court of Human Rights in the case of *W. v The United Kingdom* (1992) ILR 212. There, the applicant's youngest child had been placed in voluntary foster care while an infant. Without the knowledge of the applicant, the care authority passed resolutions pursuant to statutory powers enabling it to assume the parental rights of the applicant and his wife. It then placed the child in long-term foster care with a view to adoption. The parents were refused access to their child and ultimately their consent to adoption was dispensed with by court order.

78. Both the facts and the legal process were, obviously, more complex than this brief summary might suggest. There are however statements of principle in the judgment of the Court which are of assistance in this case.

79. In dealing with the debate as to whether the undoubted interference with the applicant's family life, protected by Article 8 of the Convention, could or could not be justified as "necessary in a democratic society" the respondent had argued that procedural matters such as the right to be heard and the right to be fully informed were relevant to that Article.

80. At paragraph 62 of its judgment the Court said:

> *"The Court recognises that, in reaching decisions in so sensitive an area, local authorities are faced with a task that is extremely difficult. To require them to follow on each occasion an inflexible procedure would only add to their problems. They must therefore be allowed a measure of discretion in this respect.*
>
> *On the other hand, predominant in any consideration of this aspect of the present case must be the fact that the decision may well prove to be irreversible: thus, where a child has been taken away from his parents and placed with alternative cares, he may in the course of time establish with them new bonds which it might not be in his interests to disturb or interrupt by reversing a previous decision to restrict or terminate parental access to him. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences.*
>
> *It is true that Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary…"*

81. At paragraphs 63 and 64 the Court said:

> *"The relevant considerations to be weighed by a local authority in reaching decisions on children in its care must perforce include the views and interests of the natural parents. The decision-making process must therefore, in the Court's view, be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them. In fact the 1983 Code of Practice stresses the importance of involving parents in access decisions.*
>
> *There are three factors which have a bearing on the practicalities of the matter. Firstly, as the Commission pointed out,*

there will clearly be instances where the participation of the natural parents either will not be possible or will not be meaningful – as, for example, where they cannot be traced or are under a physical or mental disability or where an emergency arises. Secondly, decisions in this area, whilst frequently taken in the light of case reviews or case conferences, may equally well evolve from a continuous process of monitoring on the part of the local authority's officials. Thirdly, regular contacts between the social workers responsible and the parents often provide an appropriate channel for the communication of the latter's views to the authority.

In the Court's view, what has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, 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. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of Article 8."

Submissions on behalf of the respondent

82. Counsel for the respondent do not stand over what happened in June 2014 (although it is pointed out that no communication was received in advance of the conference) but say that when concerns were raised by the applicants' legal representative, coupled with the fact that criminal charges had been brought, the respondent decided to withdraw the pending applications and convene a new case conference. The applicants were then provided with the material deemed necessary to vindicate their rights – that is, they were given a précis of the findings and recommendations.

83. It is submitted that the applicants did not exhaust their options before coming to this court. They could have exercised their right to appeal, and/or could have availed of their right to discovery and fair procedures in the District Court, which is vested with exclusive statutory jurisdiction on the substantive issues in the case. It is denied that the respondent would object to disclosure of relevant documentation in that context, subject to any claim of privilege

"and regulating strictly personal and confidential information."

84. The respondent contends that a decision made in a child protection conference is not amenable to judicial review because, it is said, a decision made at this stage of the process is not adverse to the person. It has no legal consequences and there is therefore no infringement of the applicant's constitutional rights. The purpose of the case conference was said to be

- To facilitate the sharing and evaluation of information between professionals and parents in order to identify risk factors, protective factors and the child's needs;
- To determine whether the child is at ongoing risk of significant harm; and
- To develop a child protection plan and list the child on the Child Protection Notification System when it has been determined that a child is at ongoing risk of significant harm.

85. It is said that the holding of such a conference is not a statutory requirement, although it is considered to be best practice. The practice could in theory be abandoned and a case brought directly to court. There is, therefore, no duty of disclosure prior to the court application.

86. It is submitted that the authorities relied upon by the applicants relate to procedures before a court or tribunal which can make a finding adverse to persons.

87. With reference to *W. v U.K.*, reliance is placed on the recognition of the Court of Human Rights that care authorities are faced with an extremely difficult task and that

"to require them to follow on each occasion an inflexible procedure would only add to their problems."

88. The facts of the instant case are distinguished from *W.*, where a decision was made to deny a parent access to a child in care and participation in the placement of the child for adoption. It is said that by contrast all that was involved in this case was a preliminary decision, without statutory basis, where the parents were given prior notice and invited to attend.

89. An analogy is drawn with a decision made by the Director of Public Prosecutions to initiate criminal proceedings. The rights to fair procedures and a trial in due course of law do not arise at the investigation stage and have no place until *after* the decision to prosecute is made and the matter comes before the court. Reference is made in this regard to the decision of the Supreme Court in *Brady v Haughton & Ors* [2005] IESC 54, which dealt with the appropriate procedures to be adopted in relation to a request from authorities in the United Kingdom for assistance in the gathering of evidence in a criminal investigation, pursuant to s.51 of the Criminal Justice Act 1994. The Court held that the procedure did not, despite the fact that it was presided over by a District Judge, involve the administration of justice. The role of the judge under the Act was simply to identify material brought before him in the contest of the request and furnish it to the relevant authorities in this jurisdiction.

90. The appellant had contended that he was entitled to fair procedures and therefore notice of the process so that he could attend and cross-examine any witnesses. This was rejected by the Supreme Court, members of which compared the process with other steps taken in the course of criminal investigations such as, the issue of search warrants, the seizure of property or the making of enquiries generally. In none of those situations would the person concerned be entitled to notification in advance and an opportunity to contest the matter.

Discussion and conclusions

91. I consider that the analogy drawn by the respondent with the position of the Director of Public Prosecutions is of limited assistance. Whether or not the Director decides to institute a prosecution, she has no powers to take any steps against a suspect, based on a view of the guilt of that person, outside the court process. The respondent's functions are quite different and include potential interventions in the life of the family that do not depend on court proceedings. This issue is addressed further below.

92. A decision to apply for a court order under the Act of 1991 is a duty imposed upon the respondent by statute once the view is taken that such an order is necessary for the protection of a child. This is somewhat akin to a decision to prosecute, and its effect is the same – the matter is brought before a court vested with the jurisdiction to determine the issues in question.

93. In exceptional circumstances the Director of Public Prosecutions may be permanently injuncted from proceeding with a prosecution where to do so would inevitably result in unfairness to the accused (whether by reason of delay, missing evidence or other circumstances including abuse of process) which could not be cured by the trial judge. This is because of the fact that, having regard to the competing rights of the accused to a fair trial and the right of the public to have crimes prosecuted, the latter must in appropriate circumstances give way to the former.

94. The context in which the instant case arises is quite different. The relevant provisions of the Act are intended to deal with situations where children are at ongoing risk of significant harm and require the protection of a court. It is difficult to see that considerations of pre-court fairness to the parents could ever trump the right of the child to that protection, should that choice ever fall to be made.

95. For the avoidance of doubt, I am not to be taken as suggesting that parents are not entitled to fair procedures – they are, both in their capacity as individuals and as members of a family unit under the particular protection of the Constitution. It must also be remembered that the Constitutional and statutory position is that it is generally in a child's best interests to remain within that unit. That position will be best respected by the application of fair procedures to the members of the family. The point I wish to make is that an order preventing the respondent from making an application to the District Court, which is the court vested with jurisdiction to consider and act upon evidence that a child is at risk, would require circumstances even more exceptional and extreme than those applicable to criminal proceedings.

96. It is possible that such circumstances might arise where a court application amounts to an abuse of process. This could happen if, for example, the application were to be grounded entirely on evidence that has already been heard and rejected by a judge of competent jurisdiction in a different court area. That is not the situation here. The fact that the parents have been charged with offences against children is a matter capable of affecting their ability to care for the two boys – obviously, I make no finding in that regard – and the respondent is entitled to bring that matter before a court. Clearly, scrupulous care would have to be taken to ensure that a second judge is informed as to what matters have already been determined.

97. The District Judge hearing such a case has of course the onerous obligation to ensure that the rights of all parties are fully vindicated. Where inadequate disclosure has been made, or otherwise inadequate procedures followed, before the court process is invoked, that is likely to make the judge's role all the more difficult but it does not mean that he or she is incapable of making orders to remedy any deficiencies. I cannot accept the argument made in this regard that the judge will be unduly swayed by representations made on behalf of the Agency. Apart from anything else, there would be little logic in this court imposing pre-hearing obligations on the respondent on the basis that fair procedures would not be available in the court process.

98. Cases such as *M.Q.* and *P.* should in my view be distinguished from this situation, in that in neither of those cases was the purported investigation intended to ground a court application. The risk to the applicant in each case was that the out-of-court actions of the relevant care authorities jeopardised their right to earn a livelihood and indeed their right to their good names without any proper procedures being followed and without any recourse to a court hearing. In my view that was the logic of the finding by O'Neill J. that an adequate investigation in the circumstances of the *P.* case would at that stage require the availability of the complainant for cross-examination. I do not consider that this could be applied to a case conference discussing whether or not an application to court should be made.

99. In the circumstances I do not consider it appropriate to grant an order prohibiting the respondent from seeking the District Court orders in question.

100. There is a further consideration in the case, in so far as a case conference may make decisions that do not involve court applications. In particular I am concerned with the decision to draw up a child protection plan with the result that a child is listed on the CPNS. The question therefore arises as to whether the conference is amenable to judicial review if it takes such steps.

101. The case conference is not a statutory procedure but it clearly plays an important role in the respondent's operations. In Dr. Shannon's book *Child Law* (2nd ed., Round Hall, 2010) the following analysis is given at paragraph 4-63:

> *"Case conferences are mechanisms whereby information is exchanged between agencies and individual professionals so that co-ordinated decisions can be taken based on such information. The Report of the Kilkenny Incest Investigation noted that the case conference serves a number of broad purposes, including that:*
>
> > *(i) it will bring together relevant professions involved with the particular child so that they can pool information about his or her circumstances so as to develop a clearer picture of the risks to the child;*
> >
> > *(ii) it will also reach decisions as to what action is to be taken and appoint a key care-worker to manage the case. A subsequent case conference will also be used to review the intervention decided upon;*
> >
> > *(iii) it will pool information which may be used in legal proceedings and recommend that the child's name should or should not be included in the list of children at risk.*
>
> *The Report recommended the following:*
>
> > *(i) where a case is being referred to the DPP with a view to prosecution, the case conference should formulate a view on the effect that this will have on the welfare of the child and this view should be transmitted to the DPP with the garda file;*
> >
> > *(ii) the agenda and the purpose of the case conference should be set out in advance and circulated with the invitation to those who are expected to attend;*
> >
> > *(iii) all health professionals who have had previous dealings with the case should bring their records to the conference and should have prepared a written summary of the case history for the initial conference. Facts should be distinguished from opinions;*
> >
> > *(iv) the minutes of the case conference should set out clearly the conclusions reached, recommendations made, and the information upon which they are based. Action to be taken should be noted."*

102. In commenting on this, Dr. Shannon continues:

> *"The Report is silent on the vexed question of the attendance of parents at the case conference. It may be argued that if parents are present throughout the case conference, there will be a less frank exchange of information between professionals. Excluding parents from participation at case conferences where major decisions are taken with regard to their children must be justified or otherwise may well constitute an interference with respect for family life under the Constitution and the ECHR."*

103. 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 a 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. I am not sure if the information leaflet is correct in stating that a child's name will remain on the system up to the age of 18, whether as "active" or "inactive", but if it is correct that emphasises the seriousness of the matter.

104. It must, I believe, follow that parents must be afforded proper fair procedures in relation to the holding of such conferences. I do not regard the letter and information leaflet given to the parents in advance of the June conference as remotely adequate in this respect. Both are generic documents with no indication given to the parents as to what factual matters are to be discussed.

105. The furnishing of the social worker's report in advance of the November conference was a considerable improvement. However, both the extent of the disclosure and the timing of it were, I believe insufficient to vindicate the applicants' rights. The suggestion that they already had all the relevant documents is surprising in a situation where a fresh application for court orders would have to be based on some evidence other than that which had already been rejected. The offer to meet with the social worker shortly before the conference was scheduled to begin was also not adequate in terms of allowing the applicants to prepare themselves.

106. By contrast, the course of action set out in the respondent's policy document, referred to above, appears to be a model of proper procedure. I am unaware of the exact status of this document and am not, therefore, prepared to hold that it was binding on the respondent by the time of the November conference, but it certainly provides an appropriate template. To be clear, I do not believe that a parent is automatically entitled to full disclosure of the entire file of material in the respondent's hands but the document provides for sufficient disclosure for the parents to make their case.

107. However, the foregoing does not, in my view, lead necessarily to the conclusion that the orders of *certiorari* sought should be granted.

108. In the first place, the applicants are out of time to challenge the June conference. I do not think that there would be any point in extending the time since, in any event, the respondent withdrew the then pending court applications and reconvened the conference in November.

109. Neither the June nor the November conference made the decision to place the boys on the CPNS. That had clearly already happened before the family moved into the area, based on the situation where their two sisters had been taken into care. The November conference decided to continue the listing. It is difficult to see how, in the current circumstances (at least, pending the outcome of the criminal process) that decision could properly be reversed by the High Court when exercising its discretionary jurisdiction.

110. In the circumstances I refuse the orders of certiorari and prohibition. However the applicants have also sought declaratory relief. I will therefore hear the parties on the order to be made.