THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 551 J.R.]

BETWEEN

T. R.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 27th day of July, 2017

1. This is an application by way of judicial review in which the applicant seeks to prohibit the respondent from continuing an investigation into his behaviour and to prevent it from carrying out any determination of the veracity or credibility of accusations of sexual abuse made against him by C.D., his wife's niece, or from indicating to any third party that the applicant poses a risk to children and/or has sexually abused or may sexually abuse a child. The respondent is the statutory body charged with responsibility for the protection of minors pursuant to the Children Act 1991.

2. The applicant is employed as a professional chauffeur. He is married to A.B. and has three children, E. a girl (then aged 14), F. a boy (then aged 12) and G. a daughter (then aged 7).

3. The applicant was informed by letter dated 5th February, 2015 that the respondent intended to investigate a retrospective allegation of child sexual abuse by C.D., alleged to have been committed by him when she was a minor. C.D. is now an adult. The letter stated that the writer, Mr. Mc Larnon, a qualified social worker employed by the respondent, was tasked to carry out an assessment of these allegations. The allegations were outlined and two sets of notes of interview held with C.D. dated 16th April, 2013 and 30th October, 2013 were enclosed. It was alleged that the applicant had sexually abused C.D. between the ages of eight and fourteen or fifteen years.

4. The applicant was informed that if the assessment made by the writer concluded that the allegations were "Founded" and that he posed a potential risk to children he would be given an opportunity to appeal that conclusion. He was also informed that if the outcome of the assessment reached that conclusion the respondent might need to take steps to disclose that information to other relevant third parties such as his employer, members of his family and any other relevant person. He would be given advance warning of any such intended disclosure. If he declined to engage in the process the assessment would continue without his response and a professional determination would be reached. He was assured that "no opinions had been formed in respect of these allegations and my responsibility now is to ensure that you have an opportunity to answer the allegations". The letter stated that the assessment would be conducted in accordance with fair procedures at all times.

5. The two notes of interview included with the letter stated that a complaint had been made to An Garda Síochána concerning these allegations in May 2012. The second interview clarified some aspects of the first. C.D. complained that she was first sexually abused in her mother's home during a party. She then alleged that she was repeatedly abused at the home of the applicant and his wife A.B. when visiting from the age of eight in the basement of the house where she slept. She claimed that the abuse ended when she was fourteen to fifteen years old, when she informed the applicant's wife. It was said that his wife put the applicant out of his then home but that he was later allowed to return following the taking of a polygraph test "to prove his innocence".

6. An initial investigation was commenced which was also challenged by way of judicial review in *T.R. v. the Health Service Executive and the Child and Family Agency* (Record No. 2014/160 J.R.). By order made 7th November, 2014 (Kearns P.) these proceedings were struck out:-

> "The court being informed … that the inquiry the subject matter of the within proceedings will be terminated forthwith (without prejudice to the Respondent's right to commence a new inquiry arising from the same allegations)."

7. During the first investigation and in the course of those proceedings and correspondence concerning the second investigation following the conclusion of the first set of proceedings, it was indicated to the applicant that the investigation would now be carried out in accordance with the procedures set out in Policy Document "*Policy and Procedures for Responding to Allegations of Child Abuse and Neglect* (September 2014)" ("the 2014 Procedure").

The 2014 Procedure

8. The Procedure is divided into four sections. Part A outlines the general principles under which the management of allegations against individuals accused of abuse is organised. Part B concerns the responsibility of social workers for the quality of their assessment. It sets out policy protocols governing the responsibility to respond to reports of child abuse where the complainant and the alleged abuser reside in different social work areas. It also provides guidance in respect of anonymous reports and the use of forensic assessment which are not relevant to these proceedings. Part C contains the operational procedures to be followed by the social work office when investigating allegations against an individual who may pose a threat to children. This part contains details of the appeal procedure that should be followed when a person who has been the subject of an adverse assessment by the social work office under these procedures is dissatisfied with the conclusion reached and any subsequent decisions. Part D provides guidance in respect of the communication of this policy and procedure.

9. Part A of the Procedure provides inter alia that the general principles set out therein are to be applied by Children and Family Social Work Services in the management of the response to allegations of abuse whether reported by a child or an adult. Any individual against whom allegations of abuse are made has a right to fair procedures. That right may need to be secondary to the protection of children at risk. Paragraph 1.4 states that:-

> "Conclusions following assessment by a social work office are based upon the balance of probability. Social work services have a different function to An Garda Síochána and the Office of the Director of Public Prosecutions (DPP) who seek to

prove beyond reasonable doubt that a criminal offence has been committed."

10. Para. 1.5 provides that:-

> "Models of assessment that might be applied in the process of operating this policy and procedure are either part of current social work practice in regard to the assessment of child abuse, or, will be provided as learning and the provision of assessment tools as part of the professional development programme provided to social work staff members by the Child and Family Agency."

11. It states that the Child and Family Agency must ensure that all persons against whom allegations are made are treated fairly and 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". Paragraph 2.2.2 states:-

> "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."

12. Paragraph 2.4 acknowledges that an increasing number of adults were disclosing abuse that took place during their childhoods. If these occurred, it is essential to establish whether there is a current or future risk to any child who may have had contact with the alleged abuser.

13. Paragraph 3.3.1(g) states that one of the key principles informing decision making is based on the duty to ensure that any action taken in relation to an abuser is done in accordance with natural justice and fair procedures:-

> "In particular, individuals have a right to be informed of what is alleged against them and to be given a reasonable opportunity to put forward their submission or make representations. This is set out further below."

A detailed procedure is set out in Part C.

Part B
14. Part B refers to the responsibilities of Child and Family Agency social workers and the importance of the quality of their assessments. Paragraph 6.6.1 requires social workers to take every care in checking the reliability and accuracy of allegations in their assessments.

Part C
15. Part C sets out a detailed procedure and series of protocols to be followed on the receipt of reports of allegations of child abuse which must be processed in accordance with Children First (2011) and the Child and Family Agency Standard Business Processes. Paragraph 9.4 provides that the alleged abuser must be informed at the earliest stage of the allegations and supplied with copies of documentation directly relevant to them and which will be used by the social work team in carrying out the assessment. The alleged abuser has the right to copies of all documents relied upon. However, if there is information in the relevant documents which relates to third parties that may be redacted in accordance with data protection law.

16. A number of procedures are provided under paras. 10 and 11 for the taking of immediate protective action where there is an immediate serious risk apprehended to a child and notification to An Garda Síochána that a child has been or is being physically and sexually abused or neglected.

17. Paragraph 11.4 provides that where an individual makes a retrospective allegation contact should be made with An Garda Síochána to enquire as to whether the complainant is known to An Garda Síochána and whether a statement has been made. Where the report to the respondent indicates that a statement has been made the social worker should confirm this with An Garda Síochána.

18. The social worker upon receipt of a retrospective report must under para. 13.1:-

> "(a) Acknowledge the report to the complainant;
>
> (b) notify An Garda Síochána;
>
> (c) make contact with the complainant."

The following protocol applies in respect of the complainant:-

> "13.2 In contacting the complainant, the social worker should:
>
> (a) Explain that they, the complainant, will need to be interviewed so a full account of their story can be taken.
>
> (b) Inform them that this is the first stage of the assessment which will have a particular status being used as the reference point for the further assessment to be undertaken with the alleged abuser to determine if any children are currently at risk or whether there is a future risk to children yet to be identified
>
> (c) Be clear with the complainant that the social worker's task is to assess the allegations and should explain that no further action can be taken until such time as a professional determination on the reliability of the allegations has been made.
>
> (d) Inform the complainant that as per the requirements of Children First, An Garda Síochána has been notified of the report and that they can, if they have not already done so, make a statement to An Garda Síochána at any point.
>
> (e) Following this, the social worker should finalise the arrangement with the complainant to undertake the first stage of the assessment. The social worker must then confirm to the complainant in writing that the first stage of the assessment will be carried out and the details of where and when the first stage of the assessment will take place."
>
> 19. Part C then addresses the procedure to be followed where the complainant refuses to engage in the first stage

assessment or if the complainant is a child, or the complaints are based on an anonymous report against an identified person.

First Stage of the Assessment
20. The first stage of the assessment is addressed in para. 17 of the Procedure. The decision to be made at the conclusion of the first stage is whether the assessment is to continue or not. This decision is preceded by an information-gathering exercise. Following the interview and/or gathering of further information in respect of the allegations the social worker must determine whether they need to interview anybody else who may be of relevance. If the complainant disclosed that they told a friend or parent shortly after the abuse took place, speaking to these people may assist in the assessment of the complainant's account. Para. 17.2 states that where the alleged person has been working with a therapist or counsellor a meeting with that person should form part of the first stage of the assessment. Paragraph 17.4 provides that once the first stage of the assessment is completed the social worker should discuss the assessment with their team leader or a colleague who is experienced in working with child abuse. If a member of An Garda Síochána is involved in the case, he/she should similarly be consulted. The next stage of the process is as follows:-

> "17.5 Following the consultation and discussions, the social worker must decide the next step(s) to be taken in the assessment.
>
> 17.6 Details of the decision made and the process of decision-making including the reasons for decisions, must be recorded on the file by the social worker.
>
> 17.7 The complainant should be informed of the decision made by the social worker following the first stage of the assessment. If the decision is that the assessment is to continue the alleged abuser should be told that the assessment is not complete until such time as the alleged abuser has opportunity to respond to the allegations. The complainant should receive confirmation of this in writing.
>
> 17.8 Where there is a decision not to proceed further with the assessment the social worker should inform the complainant of the decision and the reason for this. The complainant should be told that no further action will be taken. The complainant should receive confirmation of this in writing.
>
> 17.9 Dependent on the nature and circumstance of the allegation the social worker in consultation with their line manager should determine whether the person accused of the abuse should be informed of the allegations and the outcome of the first stage of the assessment."

Second Stage of the Assessment
21. The only decision reached in the first stage of the assessment is whether the assessment should continue or not. There are detailed provisions set out in respect of the second stage for engagement with the alleged abuser. It is clear from para. 20 that engagement with the alleged abuser is deemed to be a crucial part of the assessment and it is important that the social worker does not reach any conclusions as regards to the veracity of the allegations before the alleged abuser is given an opportunity to reply to the allegations. Under para. 20.4 the respondent must ensure fair procedures are applied in respect of the alleged abuser and a number of steps must then be taken:-

> "20.4 Write to the alleged abuser at the earliest stage. The letter should:
>
> (a) Provide the alleged abuser with full details 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 fourteen days for a response. (If no response is received, a second letter should be sent allowing a further fourteen days for response)."

22. In this instance the letter of the 5th February, 2015 is said to operate as the letter that fulfils the requirements of para. 20.5. No time limit was put on the period within which a response was to be furnished. However, a reply was received from the applicant's solicitors on 6th February, 2015. An extensive correspondence followed which is outlined in more detail below.

Meeting and Interviewing the Alleged Abuser
23. Paragraph 22 indicates that the purpose of an initial interview with the alleged abuser following the furnishing of appropriate information is to confirm the details of the allegation and explore his/her response and where appropriate to advise and discuss risk management and therapeutic options. The initial interview with the alleged abuser is conducted under the provisions of para. 22.2 which states:-

> "The interview and any subsequent interviews should be conducted by the social worker in the company of another social work staff member or suitably qualified professional of the Child and Family Agency.

(a) Arrangements for the interview should be made in a timely manner following receipt of confirmation from the alleged abuser that they are willing to participate in the social work assessment process.

(b) It is also important for the social worker to explain the limits of confidentiality in case any admission or disclosure is given by the alleged abuser in the course of the interview. The social worker should explain that he/she may be required to notify An Garda Síochána about information out of the interview.

(c) The purpose of the interview should be explained to the alleged abuser (as set out above at paras. 3.14 [and] 4.1 above).

(d) The first stage of the assessment should be explained (all documents would have been provided already).

(e) The alleged abuser must be afforded an opportunity to respond to the allegations against them which they will have received in writing, together with all relevant documents and the identity of the person or persons making them.

(f) It should be explained that the interview with them is part of the process of assessing the allegations against them and that following the interview and any other necessary enquiries the Child and Family Agency will reach a preliminary conclusion as to whether the allegations against them are substantiated (and then a final conclusion).

(g) It should be made clear to the alleged abuser that no predetermined position on whether the allegations have been substantiated has been reached and that a determination can only be made once they have been given an opportunity to respond to the allegations.

(h) In the interview process the social worker should attempt to explore the allegations with the alleged abuser and provide the opportunity for them to respond to each allegation. The social worker should, as part of the process, explore the alleged abuser's own history and allow them to provide any detail of their life they think is important. Areas of exploration may include:

• Their response to each allegation;

• Their relationship and past history of the complainant;

• The reason they think the allegations have been made;

• Clarifying details relating to the information given by the complainant and any points of that information with which the alleged abuser agrees or does not agree;

• Own history;

• Personal history of abuse;

• Relationships;

• Mental health or addiction history;

• Hobbies and outside activities;

• Attitude to child abuse;

• Cultural and religious influences.

(i) The purpose of the interview is not only to hear their response to the allegations but also to try to build a picture of them as an individual and their relationship with the complainant. This allows the interviewers to set the allegations against the alleged abuser's history, life experience and knowledge of the complainant which will help to inform the conclusions. ….

(k) Identify anyone else that should be interviewed arising out of the interviews with the alleged abuser. Tell the alleged abuser it may be necessary to contact that person and seek contact details.

(l) It may also be relevant in a particular case to interview the wife, husband or partner as part of the assessment process. …

(m) Once the interview is finished the alleged abuser should be told that he/she will be provided with a copy of the typed notes of the interview and any other relevant information (some may have already be given).

(n) The social worker should retain all handwritten notes on file and the alleged abuser should be given the opportunity to notify any clarifications or inaccuracies within ten days of the notice being sent to them.

(o) The alleged abuser should be told that he/she will be informed of the provisional conclusion of the social work office about the allegations when they are reached."

24. During the initial interview the alleged abuser is entitled to be accompanied by a legal adviser or support person. If any issue arises which the social worker believes requires legal advice the meeting may be adjourned so that advice may be obtained.

After the Initial Interview

25. Following the initial interview, the social worker must provide written confirmation to the alleged abuser of any agreement with them in respect of future action. If an alleged abuser requests an opportunity to put questions to the complainant or a witness about the allegations, the social worker should discuss this with their line manager and the particular circumstances of each individual case should be taken into account. It is stated at para. 24.1 that:-

"A balance should be drawn between the right of the complainant, the legal obligations on the Child and Family Agency

under s. 3 of the Child Care Act 1991 and the need to afford fair procedures to the alleged abuser."

The social worker must carry out any further assessment that may be appropriate in the light of the information and responses furnished by the alleged abuser including interviews of other persons as identified as relevant to the assessment. A further meeting with the alleged abuser should be arranged if required. Following the interview, the notes of interview should be prepared and sent to the alleged abuser. Action points arising out of the interview should be identified and followed up by relevant personnel.

26. Further investigations may be required arising out of the information provided by the alleged abuser. This may require the further exploration of detail with the complainant or any other persons involved in the assessment. This work should be completed before any provisional conclusion is reached by the social worker and may also involve additional interviews and assessment work with the alleged abuser.

The Provisional Conclusion
27. Under para. 25 the social worker is obliged to reach a "provisional conclusion" in respect of the allegations. The procedure to be followed is as follows:-

> "25.4 Having provided an opportunity for the alleged abuser to make representation and having undertaken any follow-up assessment enquiries, a provisional conclusion should be made about the likelihood of future potential risk posed towards children by the alleged abuser.
>
> 25.5 Remember that the determination is based upon balance of probability. The detail and judged likelihood of the allegations being true will have to be weighed further. It is important that no opinion is reached as to the likelihood of the allegations being true until all information is carefully assessed and the process for the alleged abuser has been completed.
>
> 25.6 Best practice requires that the social worker discusses the provisional finding of the assessment with an experienced colleague or supervisor.
>
> 25.7 The social worker can reach either of the following provisional conclusions:-
>
> • Founded, or
>
> • Unfounded
>
> 25.8 The social worker should inform the alleged abuser of the provisional conclusion and advise them that they may respond by a specified date. The alleged abuser should be informed that if any new information is put forward by the alleged abuser, it will be considered, and if there is no new information, the provision conclusions will be deemed to be the final conclusion by a certain specified date."

28. The terms 'founded' or 'unfounded' have a specific meaning set out in the glossary of terms of the 2014 Procedure:-

> "Founded and Unfounded – section 5.5 of Children First "Unfounded concerns" provides guidance and actions to be taken where after an assessment or appeals process, concerns or suspicions of child abuse are considered as unfounded. Best practice in a number of other jurisdictions utilises the terms Founded or Unfounded as a way of concluding on the findings of child protection enquiries. As Children First 2011 does not provide any direction in respect of a term to be used to describe a concluding position on assessments where it is established that child abuse has occurred or on the balance of probability has occurred, it has been decided to use the terms Founded and Unfounded."

29. It is clear that absent any new information the "provisional conclusion" crystallises into the "final conclusion". The provisional conclusion may only be reached if the decision maker is satisfied that the facts said to constitute child sexual abuse are established on the balance of probabilities. If so satisfied, the social worker is entitled to conclude that the allegations are "founded" with the consequences described in the procedure.

The Final Conclusion
30. Paragraph 26 provides that the alleged abuser should be informed of the final conclusion of the assessment in writing. The letter must explain the final conclusion and inform the alleged abuser of his/her right to appeal it. A reasonable time-frame within which the conclusion must be appealed is to be provided. It should be made clear that if the final conclusion is not appealed it will stand. If it stands the letter must indicate the actions that may be taken by the social worker to inform relevant third parties. It should afford the alleged abuser the opportunity to inform any relevant third party themselves of the final conclusion unless to do so may put a child at risk. The letter must also make it clear that if the social worker does not hear from the alleged abuser by a specified date the third party will be contacted and that he/she will be fully informed of the allegations both verbally and in writing by the social worker. Any letter to a third party informing them of the allegations must also be copied to the alleged abuser.

31. The notification of the final conclusion to a relevant third party is dealt with in paragraph 27. If it is decided to inform a third party the social worker must determine what information will be conveyed, the level of cooperation to be sought from the alleged abuser in relation to any professional planning, arrange to meet with the relevant third party and agree with him/her any steps to be taken to ensure the ongoing safety of any child under his/her care and control.

32. The social worker should also inform An Garda Síochána in writing of the final conclusion of the assessment and any appeal brought by the alleged abuser. The social worker must also consider any obligations to report the conclusions and decisions of the assessment to the National Vetting Bureau under s. 19 of the National Vetting Bureau Act 2012. If such a notification is made the alleged abuser must be fully informed in writing and provided with a copy. It may also be necessary to notify the outcome of an assessment to an employment registration body if the alleged abuser is employed in a registered professional capacity. If this occurs the alleged abuser must be fully informed in writing and provided with a copy.

Appeals
33. An alleged abuser has a right to appeal a "final conclusion". If he/she wishes to appeal the respondent must as soon as practicable nominate an Appeal Panel which consists of two individuals. It may include senior social workers or practitioners or qualified professionals with the required expertise who are independent of and external to the Child and Family Agency. The respondent's area manager in consultation with the regional director of services must constitute the Appeal Panel and appoint a chair and terms of reference. The panel must meet within twenty-eight days of the lodging of an appeal and will be furnished with copies of

all written documentation prior to the panel's initial meeting. In its deliberations the panel will review all documentation and submissions and arrange to interview relevant social worker personnel and the alleged abuser. The Appeal Panel must write to the alleged abuser setting out clearly the details of the allegations under inquiry and the principles applicable to the conduct of the appeal. This letter should also include the documentation with which the Appeal Panel has been provided for the purpose of the appeal.

34. The Appeal Panel is also obliged to observe fair procedures. Under para. 29.8 it must inform the alleged abuser that he has:-

> "(a) An opportunity to make any written submission within a period of twenty-eight days of his or her receipt of the letter.
>
> (b) An opportunity to meet alone, or accompanied by a representative, with the Appeal Panel within a period of thirty-five days of his receipt of the letter. At that meeting, he or she should be entitled to a reasonable opportunity to:
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> • Make any statement or legal submission
>
> • Provide any data, documentation or information
>
> • Provide any expert report, and
>
> • Have a statement provided by any person (including any expert) that is reasonably material to the appeal."

The Appeal Panel should endeavour to conclude its work within six weeks of the commencement date.

35. The Appeal Panel must formulate a report for the area manager which details its conclusions and recommendations. Under para. 29.12, the Panel will then provide the alleged abuser with a copy of its draft report so that he/she can make representations. When this process is concluded the Appeal Panel will reach a conclusion. The alleged abuser will then be informed in writing of the outcome of the appeal process and furnished with a copy of the Appeal Panel's concluding report.

36. In this case the procedure has only progressed to the first steps in the first stage of assessment. The efforts made by the social worker to proceed to the second stage by engaging with the alleged abuser have led to the current proceedings. The applicant takes serious issue with the procedures by which these allegations are investigated and determined to be "Founded" or "Unfounded".

Correspondence

37. The second investigation was commenced by the letter dated 5th February, 2015, to which reference has already been made. On 6th February, the applicant's solicitors requested an explanation of the authority, scope and jurisdiction of the inquiry proposed and the legal basis upon it which it was asserted that the respondent could carry out an investigation which might lead to adverse findings of fact and conclusions against their client so as to impugn his good name including, but not limited to findings of sexual abuse and a finding that he might pose "a risk to children".

38. On 18th February, the respondent replied that it was the statutory body charged with responsibility for the protection and welfare of minors pursuant to s. 3 of the Childcare Act 1991. It had an obligation on the receipt of allegations raising issues of child protection to investigate them and reach a conclusion concerning their reliability and accuracy so that it could determine whether the care or welfare of a minor is at issue. It stated that the agency may come to a conclusion regarding the allegations and inform the alleged perpetrator of the outcome of the investigation and his/her right to appeal. It was confirmed that the procedures applicable to these assessments were contained in the 2014 Procedure outlined above. A copy of same was enclosed with the letter. It was noted that the applicant's solicitors had been in possession of the procedure since early November 2014.

39. By reply dated 6th March, 2015, the solicitors sought an immediate undertaking that the respondent would not proceed in any way with the investigation or decision-making process or any of the procedures until it had addressed matters set out in the letter and permitted the applicant an adequate opportunity to receive legal advice. The letter objected to the involvement of Mr. McLarnon in the process, or to any reliance being placed on any information or documents generated by him during the initial investigations. It was noted that his investigation was abandoned by the respondent during the challenge in the course of the previous judicial review proceedings. It was submitted that should a fresh investigation be commenced he should not be involved and that it should begin afresh with personnel who could not be regarded as compromised by their previous involvement in the initial investigation. It was also argued that any documents cited in or arising from the first investigation should not be relied upon in the second. A total of 22 queries and demands were raised in relation to the proposed investigation. Apart from Mr.McLarnon's involvement, assurances were sought that the decision maker would not be given access to or have any regard to materials generated in the initial decision-making process and that they would be provided with copies of all documents relating to the allegation made against their client and the current investigation including relevant social work files. Copies of all documents exchanged with the respondent and An Garda Síochána were requested. In particular, the respondent was asked to identify the children whom it was believed might not be receiving adequate care and attention to such an extent as to engage the respondent's statutory functions in the case.

40. Queries were raised about the burden of proof to be applied in the course of the investigation and assessment. The respondent was asked to confirm whether the decision would be based on the application of the standard of proof on the balance of probabilities. Details of the assessment made by a social worker following the first stage of the assessment as referred to in para. 17.7 of the procedures were requested. In addition, the solicitors indicated that they would be formally requesting a facility to put questions to the complainant pursuant to para. 24.1(b) of the procedures. They asked "may we take it that there is no automatic right to put questions to the complainant (or cross examine her through counsel)?" They also sought representation at any meeting between the decision-maker and the complainant and an opportunity to ask the complainant questions at such a meeting.

41. By reply dated 24th March, the respondent stated that when the first judicial review proceedings were struck out, it was on the express understanding that a new investigation would be forthwith conducted by the respondent following the procedures laid down in the new procedure of September 2014. It queried why, if the applicant was of the view that the respondent was not entitled to proceed to investigate the allegation, this was not communicated to the respondent and the President of the High Court at the time of the making of the first order. In fact, many of the queries raised by the applicant's solicitors were referred to in the 2014 Procedure document. Each of the 22 issues raised was addressed seriatim. It was stated that the new investigation was being conducted on foot of the original complaint which would be addressed in the new investigation. The applicant would be given a copy of everything upon which the new investigator relied. It was agreed that all documents exchanged between the respondent and An Garda Síochána would be made available. A copy of the original complaint would be furnished but it was noted that they already had a copy of the complaint. The respondent confirmed that it was acting in exercise of its statutory functions under section 3.

42. The respondent indicated that the children whom it believed might not be receiving adequate care and attention such as to engage the respondent's statutory functions were the applicant's children.

43. The burden of proof applicable to the investigation and assessment was set down in the procedure document. The respondent stated that it was not purporting to determine or assess the veracity of any criminal offence. In respect of the queries raised concerning the decision made following the first stage of the assessment referred to in para. 17.7 and 17.9, the respondent replied that para. 17 envisaged a scenario whereby a complaint is received for the first time under the procedures document. This was not the case in this instance because the investigation arose on foot of a resolution of the first judicial review proceeding before the President of the High Court and was based on the original complaint. The investigation was to be carried out in accordance with the procedure document. The respondent was clearly relying on a right to commence a new inquiry arising from the same allegations. The allegations had been made before the introduction of the September 2014 Procedure. The respondent maintains that the first judicial review proceedings were resolved on the basis that the allegations would be investigated pursuant to the procedures document.

44. This contention was contested in a reply dated 26th March. The applicant's solicitors stated that it was not suggested at the time that the policies and procedures produced to them on 6th November, 2015, should have been litigated at that time. The letter noted that the respondent intended to continue with the investigation. It was asked to confirm by close of business that the investigation would not continue until the applicant had a reasonable opportunity to address the points raised in the letter of 24th March. Appropriate proceedings would be issued without further notice if such an undertaking was not received.

45. By letter dated 26th March, the respondent requested a response to their letter within fourteen days but confirmed that they would not commence the assessment within that time.

46. This led to an eight page reply dated 15th April. While the conduct of the investigation under the new procedure was welcomed, the solicitors indicated that the proposed procedures appeared to fall far short of the requirements of what they considered to be their applicant's right to fair procedures. They complained that a number of the 22 issues raised were not answered or not answered adequately. They welcomed the fact that Mr. McLarnon would not now be involved in the decision making process. The solicitors questioned whether a different procedure to that set out for the first stage process under para. 17 could be followed and did not consider it acceptable that an alternative procedure to that involved in the "first stage of the assessment process" would be pursued. They also complained that the burden and standard of proof was unclear. In particular, they stated:-

> "Kindly confirm that the burden of proof will always be on CD to prove her allegations and the burden of proof will never switch to our client to prove his innocence."

47. The letter again sought an assurance that the applicant would have the right to put questions to the complainant or cross-examine her through counsel. In particular, the letter states:-

> "We note that our client is not to be afforded an oral hearing with procedures approaching those of a court trial. Please note our objection to same. We still await clarity as to the parameters within which it will be possible for the complainant to be questioned by our client's legal representatives."

48. On 27th April, the applicant's solicitors sought confirmation that the respondent's investigation would not proceed pending a reply to their letter of 15th April. It was confirmed by reply of the same date that the respondent would not proceed to progress the assessment in advance of their response. The response issued on 28th August. It addressed the original 22 issues again. In respect of the para. 17 procedure, it stated as follows:-

> "Section 17 of Policy and Procedures is designed to deal with the situation where a new complaint is made. In the present case, the matter has been remitted back from the High Court so that a fresh investigation of the original complaint can be made. There is no new complaint that is being investigated. It follows that s. 17 is inapplicable to the particular circumstances which arise in this case. We do not believe that you could have been under any misapprehension as to this and if you had any difficulty with it you should have raised that at the time when the matter was before the High Court. There is no question of your client being disadvantaged by this."

49. The respondent stated that new decision makers would be appointed namely Ms. Lisa O'Loughlin and Mr. Michael Lawlor, Social Work Team Leaders. They had no part in the first investigation and would be monitored by their line manager to ensure that they followed the proper procedures but the line manager would have no role in the actual decision-making. It was noted that the first judicial review case was resolved on the basis that the complaint would be investigated afresh pursuant to the procedure. The applicant's solicitors were now informed for the first time that the investigators had met with the complainant for the purpose of taking a full account of her allegations. It was stated that this new investigation would not use or rely upon the work produced by Mr. McLarnon.

50. The respondent reiterated that the standard of proof as set down in the procedures was the civil standard of the balance of probabilities. The letter added:-

> "The issue is whether the allegation that has been made and which has led to a potential child protection concern is, on the balance of probabilities, founded or unfounded. We do not believe that the document contains anything to cause confusion in that regard and we believe that the concept of the balance of probabilities is a well-known one. We do not believe that it is appropriate to refer to the complainant proving her case or the defendant proving his innocence since this is not a court case between parties. Nor is the Child and Family Agency purporting to make any finding in the nature of a court determination. Its role is a very different one which is connected with the welfare and protection of children rather than the determination of any criminal or civil rights or liabilities."

51. It was also noted that no "model of assessment" or "assessment tools" had been contemplated at this stage of the investigation:-

> "All that is proposed at this stage is an initial meeting at which the allegations would be put to your client. Any issues of concern that subsequently arise out that meeting will be clearly outlined to your client and he will be given every opportunity to address them."

52. It was also stated that the process had not reached a stage at which the applicant might request an opportunity to put questions to the complainant or any other person. Any such request would be considered in the light of the criteria set out at para. 24(1)(b) at the appropriate time based on all the facts and circumstances. The respondent did not consider that it was "helpful or

accurate to talk in terms of an 'automatic right' since every right is dependent on the facts and circumstances that pertain at a given point in time". It added:-

> "Your client does not have the right to be present at 'any' meeting between the complainant and the Child and Family Agency. Nor does the complainant have the right to be present at 'any' meeting between your client and the agency. The right to ask questions of a complainant or witness is set out at paragraph 24(1)(b). The procedure to be followed will depend in all the circumstances of the case at the time the issue arises including what requests are made and why. Once again it is premature to engage in a hypothetical debate about this issue in circumstances where it simply does not arise at this point in time."

53. The letter concluded by stating that since the respondent had addressed the large number of questions raised, it was "time to move the process onto the preliminary meeting with your client". A number of dates were offered, namely 2nd, 7th and 15th September, 2015. It was stated that:-

> "given the passage of time since the allegation was first made and your client was first asked to attend an initial meeting and the fact that we have exhaustively addressed every query raised we are not prepared to engage in any more correspondence prior to the first meeting occurring."

54. It was indicated that if the applicant did not attend on one of the three dates, the investigation would proceed to the next stage.

55. By letter dated 1st September, the applicant's solicitors indicated surprise at the fact that the assessment had commenced having regard to the letter of 28th April, indicating the intention not to proceed with the investigation until the respondent had replied to the letter of 15th April. It suggested that later dates be offered for the attendance of their client and his attendance was conditional on the advice of senior counsel.

56. October dates were offered on 11th September, 2015.

57. By letter of 28th September, the applicant's solicitors raised four points and indicated that their client might be in a position to attend a meeting on 9th October, if the information requested was provided The four points raised were:-

> "(1) It is now the appropriate time for your office to confirm whether we will be in a position to cross examine the complainant in this matter or not. We note the absence of any representative of our client from the interview that was held with the complainant. We note also that the interview took place in circumstances where the investigation was to have been on hold.
>
> (2) It is essential that you now confirm the standard of proof to be applied as there are several different standards set out in the policy document and it is essential that we know which standard of proof is to be applied. For the avoidance of doubt, we believe that the appropriate standard is one approaching a level that would be seen in a criminal trial.
>
> (3) We note that we have not received any of the relevant documents, in particular any note or recording of the interview with the complainant. Before our client is in a position to decide whether to attend a meeting, it is essential that we have all of these documents.
>
> (4) Our client cannot possibly agree to attend a meeting until we have the above essential information…"

58. The correspondence was brought to a conclusion in a reply from the respondent dated 30th September, noting the points raised and stating that the respondents had nothing further to add to the previous correspondence in which their position had been fully set out. The documents sought were enclosed with a number of redactions to protect third parties. The document enclosed was an interview with C.D. conducted on 21st August, 2014, by the new assessors/investigators. The meeting of 9th October was confirmed and it was indicated that if the applicant did not attend, the assessment would proceed in the absence of their client's engagement.

A New Investigation

59. The respondent instituted a new investigation into C.D's allegations following the order made by Kearns P. on 7th November, 2014. Ms. Benson, solicitor states that the learned President indicated a concern that there was no written procedure in place for this type of investigation and was then informed of the procedure document which had been implemented in September 2014 which would govern any new investigations. The case was briefly adjourned to allow the parties to consider the position and the applicant was furnished with a copy of the document. Ms. Benson states that an offer was put to the applicant whereby the respondent would proceed with the investigation on foot of the new document and the applicant would engage with the process and "would not return to court with another legal challenge until at least a preliminary assessment had been reached". Ms. Benson states that this was an open offer approved by the President who struck out the judicial review proceedings. The issue of costs was later resolved by agreement. Ms. Benson exhibits an attendance by the respondent solicitor. The respondent maintains that the open offer was made on the basis that the applicant would not return to court until after the preliminary finding stage of any new assessment, i.e., that he would engage with the assessment. It was claimed that this open offer was accepted by the learned President who thought it was appropriate, but not wishing to adjourn the case he struck out the proceedings.

60. The solicitors for each party agreed on the fact that the learned President expressed reservations about the unwritten procedures applicable to the investigation of the applicant's case. Mr. Smith for the applicant states that "the ultimate result of the hearing was that the court was informed that the inquiry the subject matter of the proceedings would be terminated forthwith". He states that the proceedings were therefore moot and were struck out. He states that an attempt was made by the respondent to adjourn the matter to permit the inquiry to be conducted in accordance with the new procedures. The applicant's counsel rejected this approach on the basis that the inquiry which was the subject matter of the proceedings was being terminated and that the new investigation should not be made part of the existing proceedings if any difficulties arose.

61. The order made by the learned President states that the court was informed "that the inquiry the subject matter of the within proceedings will be terminated forthwith (without prejudice to the respondent's right to commence a new inquiry arising from the same allegations)".

62. The applicant also rejects the contention that the court was informed that the applicant would be obliged to engage with any new assessment or was somehow estopped from challenging same until after "the preliminary findings stage". There is no such provision in the order.

63. The court is satisfied that the earlier proceedings were struck out on the understanding that the inquiry then underway would be terminated forthwith. The respondent was entitled to commence a new inquiry arising from the same allegation. It still had to address the complaints made by C.D. It had a statutory obligation to do so. It did so under its new written procedures. It commenced that investigation by letter dated 5th February, 2015. That letter initially indicated that Mr. McLarnon had been tasked with carrying out an assessment of the allegations. Following representations made by the respondent's solicitors an undertaking was given that this would not be so and that the investigation would be carried out by named personnel completely independent of, and who had no dealings with the first investigation. The appropriate next step was to appoint the independent investigators who would then proceed to the first stage of the procedure as outlined above. The independence of the process was thereby assured.

64. A number of things had already happened by this stage. C.D., an adult complainant had made a retrospective report. This had been acknowledged. It had been ascertained that the matter had already been reported to An Garda Síochána in 2012. Contact had, as a matter of fact, been made with the complainant. Two initial interviews had been held with her the copies of which had been furnished to the respondent. This occurred on 16th April and 30th October, 2013 and Mr. McLarnon was involved in the interviews.

65. As noted above, in the course of correspondence the applicant's solicitor expressed concern that the "work product" of Mr. McLarnon should not be used and sought an assurance that the new decision makers would not be given or have access to any materials generated in the initial decision-making process which was subsequently abandoned other than the original complaint. In the letter of 28th August the respondent identified the two new decision-makers who had no part in the first investigation. The applicant's solicitor was then informed that they had met with C.D. for the purpose of taking a full account of her allegations. It was emphasised that this was a new investigation which would "not use or rely upon the work product of Mr. McLarnon".

66. The court is satisfied that the respondent had by that stage accepted that under its own procedure it had to conduct a first stage interview with the complainant, C.D. as part of the First stage Assessment. This was done on 21st August. That is the only step taken in respect of the second investigation. It was taken at a time when the respondent's solicitor had assured the applicant's solicitors that no further step would be taken until their queries had been the subject of a detailed response by the respondent. Ms. Benson acknowledges in her affidavit that the respondent agreed from time to time not to proceed with the assessment until the various queries raised in the correspondence had been addressed. The complainant and her mother were interviewed on 21st August and Ms Benson states that because of an oversight the applicant was not informed that a step in the assessment was being taken. She states that it was necessary to inform the complainant that a new investigation was underway and to keep her up to date as to where matters stood. She adds that because this was a fresh investigation with a new social work team, it became necessary for them to speak to the complainant and hear her account. She states that it is regrettable that the respondent did not make clear in correspondence that it was going to meet with the complainant though it did not proceed with the interview of the applicant as agreed. However, she states that she does not believe that the applicant would have any right to stop the respondent from meeting the complainant. She also adds that had it transpired that there was no basis for proceeding with the investigation this would have been the end of the matter. Therefore, she states that it made sense for the second investigation team to make sure that the complainant was still standing over the allegations.

67. This is somewhat at odds with the respondent's letter of 28th August, 2015 in which reference is made to para. 17 of the procedure. It was stated that the matter had been remitted back from the High Court so that a fresh investigation of the original complaint could be made. It was contended that no new complaint was being investigated. It was then stated that "it follows that s.17 is inapplicable to the particular circumstances which arise in this case". The court is not satisfied that this is so. The respondent was obliged to investigate a complaint alleging child sexual abuse made retrospectively by C.D. in accordance with its written procedures. The investigation was commenced but had not even proceeded to the initial first stage under the second assessment. The complainant had not been interviewed by the new investigative assessors at the time when the respondent assured the applicant that no further step would be taken in the investigation until the applicant's objections and the clarification sought were the subject of a response. This assessment required an interview with the complainant which was part of the first stage of the procedure. Following that interview an assessment would be made as to whether the second assessment should continue or not. It is only at that stage that the applicant could be invited to engage in the process. The second procedure was an entirely new one. The respondent accepted that it could not and would not rely on any materials including the interviews conducted by Mr. McLarnon or any decision made by him in the course of the first investigation.

68. It is not clear whether following the interview or information gathering process with the complainant in respect of the allegation that the two assessors determined whether they needed to interview anybody else who might be of relevance. However, the court is satisfied on the evidence that that First Stage Assessment has not been completed. When the relevant materials are gathered the assessors must discuss the assessment with their team leader who is experienced in working with child abuse. They must then decide the next step to be taken. Details of that decision and the process of decision-making including the reasons for the decision must be recorded on the file. The complainant must be informed of the decision made by the assessors following the First Stage Assessment. That decision is whether the assessment is to continue or not. The complainant must then be furnished with confirmation of that decision in writing. Under para. 17.9 the assessors must, in consultation with their line manager, determine whether the accused person should be informed of the allegations and the outcome of the First Stage Assessment. All that has happened to date is that the complainant has been interviewed by the assessors on 21st August, 2015. A copy of that interview has been furnished to the alleged abuser. The First Stage Assessment has not yet been completed. Consequently, there has been no determination that the assessment should continue. In those circumstances it is difficult to see how the alleged abuser could have been invited to a meeting on 9th October, 2015 since there is no evidence of compliance with the procedures set out under para. 17 or the conclusion of an assessment by the two social workers in conjunction with their overseeing line manager that the assessment should continue.

69. The court is not satisfied, on the basis of the evidence, that the next phase of the assessment could or should take place in the absence of the requisite determination on the First Stage Assessment. Equally, the court is not satisfied that the applicant could in any way have been prejudiced by the interview conducted by the two social workers with the complainant under the first stage of the procedures, notwithstanding the assurance given that the investigation would not proceed pending the conclusion of the correspondence. It does not appear to me that anything arose from the concluded correspondence or from the complaints made by the applicant or the interview conducted with the complainant on 21st August that would in any way compromise the completion of the First Stage Assessment. However, the applicant advances other grounds which suggest that a more extensive range of fair procedure rights ought to have been accorded in the first interview of the complainant which should also apply.

Fair Procedures

70. It is submitted on behalf of the applicant that as he has been accused of repeated acts of sexual abuse, he is entitled to a high level of fair procedures because of the potentially devastating effect of an adverse finding on his family and personal relationships and his employment as a professional chauffeur. The respondent in carrying out an investigation as to whether the allegations made by C.D. are "credible" and whether the applicant poses a risk of sexual abuse to children now does so in accordance with the 2014 Procedure. The respondent accepts that it could proceed to a conclusion that the applicant constitutes a potential risk to his own

three children. It is submitted that the determination of this issue requires a finding of fact that the applicant sexually abused C.D. in the manner alleged. The alleged acts constitute criminal acts under Irish law (though most of them were alleged to have been committed in United States). The applicant in his grounding affidavit denies all of the allegations. The consequences for him are of the most serious kind. Although it has been accepted by the respondent that it is satisfied that the applicant's three children are not at immediate risk of potential harm, nevertheless an adverse finding may result in third parties being informed of same, including his employer and members of his family.

71. The respondent submits that it is entitled to examine the veracity of the complaint to determine if it is credible. It claims that it is not purporting to finally determine the veracity or the credibility of the complaint in the manner that a civil or criminal court might do in legal proceedings inter partes brought against or involving the applicant. It is also denied that the respondent intends to make any determination similar to that made by a court but "intends to assess the credibility of the complaint for the purpose of performing its statutory child protection obligations".

72. The applicant claims that he is entitled to prior notice of the allegations made against him, the materials upon which the investigation is based, an oral hearing, the right to call and cross-examine witnesses and the right to have the "credibility" of the allegations and complainant determined by an independent decision-maker. It is also claimed that any finding of fact should be made only on the basis of the criminal standard of proof beyond reasonable doubt and not on a civil standard of the balance of probabilities. The applicant also claims an entitlement to prior notice of the procedures that will actually be followed in the course of the investigation at each stage.

73. Section 3 of the Child Care Act 1991 as amended states:-

> "3—(1) It shall be a function of the 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, the 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."

74. Prior to the introduction of the new procedure in September, 2014 the governing principles concerning the investigation of allegations of child sexual abuse by the respondent were set out in *M. Q. v. Gleeson* [1998] 4 I.R. 85. In that case the then childcare authority, the Eastern Health Board, received a number of complaints concerning the applicant of alleged sexual abuse against his partner and their children. It became aware that the applicant was enrolled in a course of study in childcare work and formed the opinion that the applicant was not a suitable person to engage in such work, that it had a statutory duty to advise his college of this opinion and recommend that he be removed from the course. On receipt of this information the college withdrew the applicant from the course until such time as he could prove his suitability to work in that field. The applicant was not informed by the college of the nature or details of the allegations made by the Health Board. The applicant 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 inquiry and the conveying of information to third parties conducted by the Health Board.

75. Barr J. stated that the Health Board had a child protection function which differed fundamentally from the prosecutorial function of the police and the Director of Public Prosecutions. The Health Board's emphasis was on the protection of vulnerable children. The police and DPP were focused on the detection and conviction of child abusers. He noted that 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 capacity, be unable to testify against an abuser or if there are repeated injuries sustained by the child there may not be sufficient evidence to rule out accident or establish proof of abuse in law by a particular suspect. He added:

> "However, there may be evidence sufficient to create after reasonable investigation a significant doubt in the minds of competent experienced health board or related professional personnel that there has been 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)

76. There must be a reasonable assessment of each complaint or finding about an alleged wrongdoer.

> "This also necessarily entails reasonable investigation of each such 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 official 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 wrongdoer - 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."

77. Barr J. noted that two fundamental principles of natural or constitutional justice must be observed namely, a person charged with wrongdoing should be informed of what is being alleged against him and he should be given a reasonable opportunity to make his defence. 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. In that regard, the investigating authority must remember that complaints if unfounded had potential for great injustice not only to the person complained about but perhaps to the particular child or children sought to be protected and others in the family under scrutiny. A false complaint if incorrectly interpreted could involve the destruction of a family as a unit by wrongfully

having children taken into care. It may also destroy or seriously damage a good marital relationship or relationship between long standing partners. He concluded in the instant case that:-

> "… before raising the issue of the applicant's course of education with the [college], [the Health Board] had a duty 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. 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 had been carefully assessed. The need to take that course was all the more important in that the [social worker] had no prior experience of the applicant, his family or other concerned persons.
>
> 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 herein, 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." (pages 102-103)

78. In that case the learned judge found that the Health Board was in error because it failed in its duty to afford the applicant the benefit of constitutional justice by not furnishing him with information as to the charges against him, not giving him an adequate opportunity to defend himself, 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 care child work without first taking these steps and reviewing the matter in the light of whatever defence he might have raised.

79. Barr J. did not require that the Health Board in that instance reach a determination that the allegations were established on the balance of probabilities or beyond reasonable doubt. He did not specifically engage with the issue of the standard of proof. He refers to the obligation to carry out a reasonable investigation of each complaint, and the duty to ensure "fairness to the applicant as to the reliability of the information it furnished to the [college]" in that case. The Board was obliged to take all reasonable steps to investigate "the likely veracity of a complaint of child abuse" but if it did so and formed "a considered opinion that the complaint may be well-founded", it then had an obligation to take appropriate action which may include reporting the matter to third parties. In addition, the learned judge noted (at p. 107) that the social worker carrying out the assessment believed that the applicant was not a suitable person to enter childcare work or to engage in a course of instruction leading to a qualification in that area and that the Health Board "had an abundance of information which, if found to be credible after proper investigation, would lead to that conclusion".

80. The principles set out in M.Q. were regarded as well-established by Hedigan J. in *M.I. v. the Health Service Executive* [2010] IEHC 159 in which the applicant sought orders quashing a decision to investigate child protection concerns arising from an allegation that the applicant sexually abused a thirteen year old girl and restraining the continuation of an investigation pending the conclusion of criminal proceedings against the applicant. The learned judge summarised the relevant principles as follows:-

> "5. As applicable here it seems to me that those principles are as follows:-
>
> (1) The respondent herein has a duty to investigate in 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."

Hedigan J. noted that the nature of the investigation was clear. It was an enquiry into whether there were any concerns that arose for the safety of a girl from the allegation of sexual abuse against her which required to be addressed and dealt with. This type of investigation is a most serious obligation that falls on the respondent because the safety of vulnerable children was at stake. The investigation should always occur at the earliest possible time after the risk to a vulnerable child is apprehended and "before the risk crystallises into actual harm". The learned judge considered the issuing of the proceedings precipitate in light of the principles set out in M.Q. and that the better and obvious course was that the applicant's solicitors, if they had any concerns, should have engaged further with the respondent and ascertained further information as to the proceedings that concerned them. He noted that judicial review in this type of case should be very rare and limited to points of principle that need to be established. He added:-

> "The HSE ought to be able to conduct these vital investigations without having to constantly look over their shoulder for possible intervention by the courts."

81. The 2014 Procedure reflects the principles set out in M.Q. The wide ranging nature of the circumstances in which issues of child protection may arise are reflected in the judgment of Barr J. and in the assessment procedures set up under the Procedure. The cases which require intervention or assessment will vary. There are cases in which there is an immediate risk perceived based on a reasonable suspicion which require immediate communication to An Garda Síochána, and/or third parties and in respect of which it would be wholly inappropriate to give notice of the allegation or enter into a dialogue at that stage with the alleged abuser because of the dangers which that might pose to the child or children concerned. This type of case is provided for in the paragraphs of the Procedure which allowed for early and immediate intervention upon receipt of the complaint. If the case is not one that requires urgent intervention or action to protect the complainant child as in the case of the retrospective allegation of child sexual abuse by an adult, the assessment may be conducted within a more extended timeframe which allows for a greater engagement with the alleged abuser, especially where no immediate serious protection issue arises in respect of any other children. This scenario is also addressed within the 2014 Procedure.

82. There is an important distinction between the investigative stage under the 2014 Procedure and the final conclusion reached. The first stage of the assessment is focused on the gathering of information. At the conclusion of the first stage, the social worker

conducting the assessment determines whether or not to proceed with the assessment.

83. In *O'Sullivan v. Law Society* [2012] IESC 21, the Supreme Court considered the level of fair procedures applicable to the investigation of an allegation of professional misconduct based on overcharging by a solicitor. It was satisfied that the full panoply of natural justice rights did not apply to every phase of the investigative process. If a disciplinary procedure contains a number of successive or tiered stages in respect of the investigation of a disciplinary offence, the investigative stage and the fairness of procedures applicable in that process must be viewed against the overall procedure for the investigation and hearing of the disciplinary charge. The Supreme Court affirmed the judgment of Edwards J.[2009] IEHC 632 who examined the issue in this way:-

> "What level of fair procedures and natural justice rights was the applicant entitled to?
>
> It seems to this Court that the answer to this question depends upon the nature of the investigation being conducted by the Law Society. In very broad terms it can be stated that if an investigative process, or investigative processes (if two or more investigations are being run in parallel), has the potential to result directly in the making of an adverse finding or findings against, and/or the imposition of sanctions upon the person under investigation that person must be afforded the level of fair procedures and respect for his/her natural justice rights appropriate to a formal disciplinary inquiry. If, however, an investigative process is in the nature of a preliminary step, in which the investigator does not have the power to make adverse findings against, or impose sanctions upon, the subject under investigation, and which involves merely the gathering and sifting of information which requires to be assessed in order to determine if there is a basis for the initiation of some further process in the course of which the subject will have a full opportunity to deal with relevant complaints or concerns, e.g. a formal disciplinary inquiry, then less formal procedures may be quite adequate and appropriate…."

84. It was submitted by the applicant that the procedures should include an entitlement for the applicant to cross-examine his accuser. A complaint is made that the complainant was interviewed in the absence of the applicant and his legal representatives. The respondent submits that the applicant is not entitled to direct questions to, or cross-examine the complainant at the interview stage or even to be present himself or have legal representatives present or otherwise observe the demeanour of the complainant at that interview.

85. I am satisfied that the interviewing of the complainant during the first stage of the investigation is the preliminary stage of a fact finding exercise which the respondent is obliged to carry out in accordance with its statutory duty under the Child Care Act 1991. A suspected abuser has no right to participate in the interviewing of a complainant at this stage. The interviewing is an essential first step in the investigative process. This may lead the social worker to discontinue the assessment or to carry out further inquiries resulting in the gathering of further information. This also may lead to a discontinuance of the process or a decision to proceed to the second stage of the assessment on the basis that the assessment should continue. In this case the second stage of the assessment has not yet been reached.

The Second Stage

86. The second stage of the assessment provides for the interviewing of the alleged abuser. The alleged abuser is afforded an opportunity to respond to the allegations of which they have notice and the contents of relevant documents furnished. The interview with the alleged abuser is part of the assessment of the allegations. The interviewee is informed that following this interview and any other necessary inquiries, the respondent will reach a "preliminary" conclusion as to whether the allegations against him are substantiated. As part of the second stage, it may be necessary to interview anybody else identified by the assessor as a person who ought to be interviewed including members of the alleged abuser's family. Following the gathering of all of this information, the assessor will reach a "provisional" conclusion.

87. After the initial interview with the alleged abuser carried out under para. 22.2, the interviewee may request an opportunity to put questions to a complainant or a witness about the allegations. Once the request is made, the social worker must discuss it with his/her line manager and the particular circumstances of each individual case should be taken into account in determining whether the request should be facilitated under paragraph 24.1(b). This sub-paragraph also provides that when making the decision a balance should be struck between the right of the complainant, the legal obligations on the respondent under s. 3 of the 1991 Act and the need to afford fair procedures to the alleged abuser. It is also important at this stage to determine the suggested conflicts of fact. These should be ascertainable from the materials gathered during the assessment to date (including the interview with the alleged abuser) and the terms and basis of the request to put questions or "cross-examine" the complainant or the witness concerned.

88. It is clear, therefore, that the 2014 Procedure envisages that in certain circumstances, the applicant will be afforded a facility whereby the complainant or witness may be subjected to questioning in relation to the allegations made. It is clearly envisaged that this issue may arise and be determined in the course of the second stage of assessment.

89. It is clear from the judgment in M.Q., that there are instances in which the complainant may not be available or amenable to questioning by the alleged abuser or his legal representatives. There are many reasons why this may be so. The child may be very young. The fact that a child has been subjected to fear, intimidation, domineering behaviour, manipulation, trauma or suffers from a mental or physical disability or incapacity may render such a procedure impossible, and/or inappropriate. Furthermore, it cannot be the case that the respondent is not entitled to carry out or continue an assessment where the complainant is not competent or available as a witness even though it reasonably suspects that a person has engaged in child abuse or is in a position to expose any other child to such abuse. To end the inquiry because the alleged abuser must be afforded an opportunity to cross-examine the complainant in all circumstances would be an abnegation by the respondent of its statutory responsibility in respect of child protection. In M.Q., Barr J. stated that if, following a reasonable investigation, the evidence is deemed to be sufficient to create a significant doubt in the mind of competent experienced health board or related professional personnel that there has been abuse by a person, the health board could not "stand idly by but has an obligation to take appropriate action in circumstances where a person whom 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." It is precisely because the circumstances in which allegations of child sexual abuse arise vary so widely that it is appropriate that the facility to question a complainant or a witness should be the subject of a properly exercised discretion as provided under paragraph 24.1(b).

90. The assessor should also take into account under para. 24.1(b), the potential consequences of provisional and final conclusions adverse to the alleged abuser. These include the potential initiation of childcare proceedings or criminal proceedings against the alleged abuser or a decision to inform a relevant third party in respect of child protection issues that arise for example, in respect of employment. It should be noted, however, that the full panoply of fair procedure rights will be available if court proceedings in respect of childcare issues or criminal proceedings are initiated in respect of the children concerned and the allegations made. Ultimately, a determination will be made by a judge in accordance with the Constitution as to whether the allegations have been established to the

requisite standard of proof in the proceedings initiated. Unhappily, a person may be prosecuted for a child abuse offence and may, following the trial, be acquitted. In addition, wrongful allegations may be made against a parent or adult of child sexual abuse. The matter may ultimately result in childcare proceedings. The court may or may not be satisfied of the allegations made to the appropriate standard of proof. This may result in a very damaging, and difficult experiences for those accused of such abuse. However, these matters are ultimately determined following the deployment of a full panoply of fair procedures in civil or criminal proceedings in which the trials of these matters are properly conducted under Articles 34 and 38 of the Constitution by the courts in accordance with statutory and common law and constitutional justice.

91. In other situations, persons have been accused of misconduct, or professional misconduct which has led to their dismissal or suspension from their employment following the conclusion of an investigation, sometimes into criminal behaviour. Professionals such as doctors, nurses and solicitors are subject to disciplinary procedures for misconduct or professional misconduct under statutes which provide for an investigation. If a prima facie case of misconduct is found the matter may be referred to a disciplinary tribunal for determination of various allegations of misconduct made against them. In *Ó Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54 the Supreme Court considered the fair procedures applicable to the holding of an inquiry under s. 38 of the Nurses Act 1985. The Board made a decision to hold an inquiry into the applicant's conduct without notifying her of the allegations or requesting her comments before deciding to do so. The Board had to be satisfied that there was a prima facie case before deciding to hold an inquiry. Hardiman J. noted that a decision to hold such an inquiry into alleged professional misconduct was "a very grave matter". It could have resulted in potential restriction of the applicant's practice and damage to her reputation. It was held that the right to fair procedures required a process by which representations could be made but "not necessarily by oral hearing but in whatever way it was necessary for her reasonably to make her reply".

92. The court is satisfied that there may be cases where it would be not only appropriate but necessary to vindicate an applicant's rights to fair procedures by granting a facility whereby the complainant or another witness may be questioned on the applicant's behalf. However, the court is also satisfied that this is not invariably required and should be the subject of careful consideration under para. 24.1(b) (see *Mooney v. An Post* [1998] 4 I.R. 288 and *O'Callaghan v. Disciplinary Tribunal* [2002] 1 I.R. 1). The extent to which the right to cross-examine may be appropriate has been considered in a number of cases relied upon in submissions. These include *In re Haughey* [1971] I.R. 217, *Maguire v Ardagh* [2002] 1 I.R. 385, *Gallagher v. Revenue Commissioners* [1995] 1 I.R. 55*, Borges v. the Fitness to Practice Committee of the Medical Council* [2004] 1 I.R. 103, *R. v. Hull Prison Board and Visitors*, *Ex-parte St Germain (No. 2)* [1979] 1 WLR 1401 and *Flanagan v. UCD* [1988] I.R. 724. These decisions emphasise the importance of cross-exanimation in allegations of serious impropriety up to and including allegations tantamount to criminal offences. Where there is an allegation of serious misconduct which may lead to very serious consequences for the accused the right to be heard will involve the right to cross-examine and a right to call evidence. However, it must also be emphasised that the right to be heard is not exclusively dependent on those factors or circumstances. Most decisions relied upon in these proceedings recognise that it is wrong to attempt an exhaustive definition as to the appropriate cases or circumstances in which the right to cross-examine must be afforded. It seems to me that in establishing the 2014 Procedure the respondent complied with its general duty to act fairly, proportionately and in accordance with the principles of constitutional justice. (See *Carroll v. Law Society* [2000] 1 ILRM 161 and *Phillips v. Medical Council* [1992] ILRM 469).

93. I am satisfied also that the level of flexibility which the assessors may properly apply in deciding whether the questioning of the complainant ought to be permitted is consistent with the rights of children under Article 42A and 40.3 of the Constitution and the respondent's child protection duties. It is also consistent with the level of protection of children and parents within the family and the protection of the rights of the family under Article 41. It is important to ensure that the best interests of any children who may be affected by such a cross-examination are given primary consideration in any such decision.

94. Furthermore, the court is satisfied that it should not anticipate the determination by the assessor of whether any application made to cross-examine the complainant or any other witness ought to be granted. It is sufficient to state at this stage that a procedure exists whereby such an application may be considered and it must be considered in accordance with the principles of fair procedures and in a proportionate manner. (See *Kennedy v. Director of Public Prosecutions* [2007] IEHC 3 at p. 21-22 and *Fingleton v. Central Bank of Ireland* [2016] IEHC 1 at paras. 114-116).

95. The 2014 Procedure was considered in detail by O'Malley J. in *J.G. v. Child and Family Agency* [2015] IEHC 172. In that case, the level of fair procedures applicable to parents as individuals and members of a family unit in Child Protection Conferences in which significant decisions are taken concerning their children was considered. The court noted that it was only in exceptional cases that the Director of Public Prosecutions could be permanently injuncted from proceeding with a prosecution where to do so would inevitably result in unfairness to the accused. The court also noted that in cases of child protection where an application is contemplated under the Child Care Act 1991, somewhat different considerations apply. O'Malley J. was satisfied that it would require even more exceptional and extreme circumstances than those applicable to criminal cases to justify an order prohibiting the Child and Family Agency from initiating childcare proceedings in the District Court which was vested with jurisdiction to consider and act upon evidence concerning children at risk. The court in that instance declined to grant an order restraining the respondent from seeking District Court orders in respect of a number of children. However, the learned judge accepted that in respect of other decisions taken at a case conference, that do not involve court protection, an appropriate level of fair procedures must be afforded the parents of a child. In that case a case conference was to be held which might lead to a decision to list a child on the Child Protection Notification System. The learned judge noted:-

> "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. …
>
> 104. It must, I believe, follow that parents must be afforded proper fair procedures in relation to the holding of such conferences. …"

The case highlights the importance of appropriate fair procedures being afforded to persons who are the subject of allegations which give rise to child protection issues and may result in decisions adverse to such persons.

96. In *MSA v Child and Family Agency* [2015] IEHC 679 Barrett J. declined to follow J.G insofar as O'Malley J. held that a decision made at a Case Conference was amenable to judicial review. However, he expressly agreed with the view that caution must be exercised in entertaining applications for judicial review in respect of investigations of issues of child protection. However, both J.G

and M.Q are useful examples of the application of fair procedures when decisions are required at various stages of assessments concerning child protection issues such as the placing of the children on the CPNS or the notification of relevant third parties of child protection issues where this is deemed necessary.

97. Another such example, in which a high degree of fair procedures was required is to be found in *P.D.P. v. Board of Management of a Secondary School* [2010] IEHC 189. In that case the relevant health board which had charge of the investigation of an allegation of child abuse made by an individual who lived outside the jurisdiction committed a number of errors in its handling of the case. For example, it permitted the complainant's counsellor to act as the validator of the allegation of abuse. The complainant was at the time of the investigation an adult and the applicant submitted that he was entitled to a right to cross-examine the complainant. O'Neill J. stated:-

> "5.16 … the investigation carried out by [the health board] … was … utterly wanting in the norms of natural justice. 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 [health board] 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 [health board]. 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."

Though orders of certiorari and declarations were granted in respect of the relief claimed, O'Neill J. refused an order of prohibition in respect of the future conduct of the investigation on the basis that notwithstanding its past failures, the court could not assume that in the future conduct of the investigation the applicant's right to fair procedures would be breached. The clear difficulty that arose for the applicant in that case was the potential damage to his future employment as a teacher having regard to the obligations which the health board had under the Childcare Act and acknowledged by the court. The child complainant was never the child whose care was the objective of the investigation by the health board as he had lived outside Ireland since the commencement of the investigation. It was the applicant's professional status as a teacher in a secondary school and his likely contact with children that gave rise to the particular childcare consideration and the power to intervene and investigate under s. 3(1) of the 1991 Act. The learned judge noted that that power was not confined to those situations where the person suspected of being a danger to children has a particular access or relationship with identified or identifiable children. Thus it would be contrary to the obvious purpose and objective of the section if the power was limited to those situations in which the persons suspected already had an established access to a child or children. This may also require notification to third parties such as the employer if an allegation of child abuse is made against a teacher who is employed by a school or has made application for employment. As O'Neill J. noted:-

> "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."

At the time of that judgment the September 2014 Procedure was not in operation.

98. The decision in P.D.P. was applied by Humphreys J. in *E.E. v. the Child and Family Agency* [2016] IEHC 777 (which was delivered after the hearing of this case). In the E.E. case it was determined that the applicant against whom allegations of sexually inappropriate behaviour were made, was entitled to a right to cross-examine the complainant who was no longer a minor. The Child and Family Agency notwithstanding the fact that it had adopted the new Policy and Procedure Documents in September 2014 had not sent it to the applicant. The Agency made a first instance decision upholding elements of the complaint in November 2014. It found that the applicant had engaged in child sexual abuse and recommended that he not have unsupervised contact with children in any context including his family. He indicated a desire to appeal. Only limited materials in respect of the allegations were released to him. An appeal panel was appointed and further disclosure was requested. The applicant asserted an entitlement to cross-examine the adult complainant at a meeting with the appeal panel in December 2015. He was denied the right to cross-examine the complainant but was offered a facility of furnishing a list of questions which the agency would put to the complainant.

99. It may be that in a particular case it is appropriate that an alleged abuser be given the right to cross-examine an adult complainant. This is particularly so where a decision may be made following the assessment undertaken and a finding that the allegations are "founded" to notify a relevant third party of the investigation or conclusion. There may also be countervailing reasons as to why it would be inappropriate to permit such a right to cross-examine such as the mental capacity of the complainant. In each case it is my view that the extent of the right must be determined under paragraph 24.1(b). The decision to allow cross-examination must be fair, reasonable and proportionate. It should take account of the consequences of an adverse finding of "founded" for the alleged abuser. It may be that the fact that the complainant is an adult should weigh more heavily with the decision-maker in permitting cross-examination than if the complainant is a child. The extent and mode of exercise of the right must also be considered. Clearly, the potential for the abuse of the right if the alleged abuser is unrepresented (a factor that has arisen and been considered in criminal trials (see O'Malley Sexual Offences,2nd Ed. paras 17.44-17.45) and to a limited extent in E.E.) must also be taken into account. Each case must be considered upon its own facts.

100. In effect, I consider that to be the import of the judgments in P.D.P. and E.E. In this case an application under para. 24.1(b) would be premature having regard to the fact that the first stage of the assessment has yet to be completed. It only arises following the engagement by the alleged abuser with the respondent in respect of the allegations following which a request may be made to question the complainant or another witness.

Standard of Proof

101. It was submitted on behalf of the applicant that the standard of proof to be applied by the respondent in the assessment process was unclear. It was submitted that though the civil standard of proof of "the balance of probabilities" is to be applied it was not clear what issue was to be determined on the balance of probabilities.

102. I am satisfied that it is necessary in order to establish that a complaint is "founded" that the allegations be established on the balance of probabilities, the civil standard of proof. In addressing the application of that standard in childcare or child protection cases in Re H. (minors) [1996] A.C. 563 Lord Nicholls stated:-

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

103. The nature and extent of the evidence available in childcare proceedings may vary considerably. Thus the courts and legislature have considered the extent to which the evidence of children may be admitted in statement or other form where it would otherwise be unavailable. In *Eastern Health Board v. M.K.* [1999] 2 I.R. 99 the Supreme Court considered the admissibility of a complainant's statements which were contested. The complainant had made these statements to a speech therapist and a senior social worker. The latter statement was recorded on video tape and was available. The Supreme Court was unanimous in declaring the statements inadmissible in the course of wardship proceedings. However, the court recognised an exception to the inadmissibility of hearsay evidence in wardship cases upon certain conditions being fulfilled. Keane J. was satisfied that in wardship proceedings which were inquisitorial in nature and where the paramount purpose was to secure the welfare of children, departure from the established rules might be justified. In exercising that jurisdiction the learned judge stated that "the strict application of the rule against hearsay would be impracticable, undesirable and unnecessary". The court held that a video statement by a child complainant might be admitted in evidence if the child was deemed to be otherwise competent as determined by the trial judge following an appropriate interview. The question of the reliability and weight to be attached to the video statement must be determined by reference to its terms, the understanding of the child, the absence of any reason or motive for fabrication, the circumstances in which the statement was procured, and its consistency within itself and with other relevant evidence. (per Denham J. pp. 113-114, per Keane J. pp. 131-138).

104. In *Vogel v. Cheeverstown House Ltd*. [1998] 2 I.R. 46 the plaintiff was employed by the defendant which operated a residential day centre for persons with mental handicap. One of the residents made a complaint of sexual abuse. A committee was established to investigate the claim which decided on certain procedures including that the complainant would not be available for examination and cross-examination at the inquiry because of her condition. Shanley J. was satisfied that the requirements of natural justice did not dictate that the complainant should be produced to be examined and cross-examined before the Tribunal. He was satisfied on the evidence that to do so might seriously damage her mental health and he had to balance that evidence against any risk that injustice would be done to the plaintiff. He was satisfied that the requirements of natural justice must depend on the circumstances of each case and the nature of each particular inquiry. He directed that a validation exercise should precede the disciplinary inquiry and a report outlining its findings by a psychologist or psychiatrist should be available before the disciplinary hearing took place. That exercise, despite its risk to the complainant's health, presented a far lesser risk to her than requiring her to attend for cross-examination at the inquiry.

105. The Children Act 1997 provided that statements made by a child who is unable to give evidence by reason of age or where the giving of evidence would not be in the interest of the welfare of the child may be received in evidence. These provisions are a recognition of the special nature of proceedings involving the welfare of children by the legislature. They make appropriate provision for the admissibility of statements by complainant children in childcare proceedings which necessarily means that the child will not be cross-examined.

106. The court is satisfied that these common law and statutory provisions applicable to court proceedings support the proposition that the fair procedures applicable under the 2014 Procedure are fair, proportionate and reasonable in that they allow for an appropriate and fair flexibility having regard to the circumstances of each particular case and in particular in relation to the cross-examination of complainants under para. 24.1(b). It is also clear that the courts and the assessors in reaching a conclusion on the balance of probabilities may do so by reliance on different types of evidence and are entitled to do so in respect of serious allegations, even if in the complainant is not cross-examined or is not available for cross-examination, if the evidence is such as to establish on the balance of probabilities that the allegations are "founded". However, it may be very difficult for assessors to hold that an allegation has been established as 'founded' to the level of probability in the absence of an opportunity to cross-examine a complainant. In particular, the more serious the allegation the more cogent the evidence required to support it.

107. In this instance, the court is satisfied that the issue of the cross-examination of the complainant in the course of the second stage of the assessment must be determined having regard to particular circumstances of the case by the assessors under paragraph 24.1(b). It may be that the assessors will feel obliged to require the attendance for cross-examination of the complainant having regard to the fact that she is now no longer a minor. This was clearly a factor of significance in the P.D.P. and E.E. cases. However, in this case the first stage of the assessment has yet to be completed. Until the applicant is interviewed the nature and extent of the conflict of fact between the applicant and the alleged abuser will not be assessed. The only information available in that respect is that the applicant denies the allegations made. The second stage requires an engagement with the applicant and an expiration of his version of his engagement, if any, with the complainant at his home in the United States. As matters stand the assessors have no version of events submitted by the applicant. I am not satisfied that the court should intervene at this stage in an investigative process which is only at an early stage.

108. In the circumstances, it was premature of the respondent to invite the applicant to attend for interview in the second investigation. That decision and invitation could only issue if the assessors appointed made the appropriate determination in accordance with the 2014 Procedure. I am satisfied that the second assessment may now proceed.

109. The court is satisfied that no issue falls to be determined under the provisions of the European Convention of Human Rights Act 2003.

Conclusion

110. For all of the above reasons and having considered all of the grounds, evidence and submissions advanced I am satisfied that this application should be refused.