APPROVED **[2020] IEHC 464**

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 906 J.R.

BETWEEN

J.
(A PERSON SUBJECT TO AN ALLEGATION OF ABUSE)

APPLICANT

AND

THE CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 October 2020

INTRODUCTION

1. One of the statutory functions of the Child and Family Agency ("***the Agency***") under the Child Care Act 1991 (as amended) is to promote the welfare of children who are not receiving adequate care and protection. This statutory function has been interpreted in a number of judgments of the High Court as imposing an obligation on the Agency to inquire into complaints of child sexual abuse (including historical abuse). The Agency has sought to ensure that such inquiries comply with fair procedures by publishing a detailed "policy and procedures" document to guide social workers in carrying out such inquiries. This document is dated September 2014. It appears that a revised version of this document has recently been prepared, *Child Abuse Substantiation Procedure*, but its introduction has been delayed until next year (2021).

2. The applicant in these judicial review proceedings is a person against whom an allegation of historical child sexual abuse has been made. For ease of exposition, the applicant will be referred to as "***the alleged abuser***", and the person making the allegation will be referred to as "***the complainant***".

3. The facts of the present case illustrate the very real practical difficulties which can arise in attempting to inquire into child sexual abuse which is said to have been perpetrated decades earlier. The incidents the subject-matter of the inquiry impugned in these proceedings are said to have occurred some fifty years ago, during the summer of 1969. Both the complainant and the alleged abuser are now aged in their sixties.

4. The complainant first notified a complaint to the Agency in December 2013. (The making of the complaint predated the introduction of the "policy and procedures" document in September 2014). A complaint was made to An Garda Síochána shortly thereafter, and the Director of Public Prosecutions ultimately directed that no charges be brought against the alleged abuser. The Agency closed its file in respect of the complaint on 13 September 2016, only to reopen it subsequently. The further inquiry commenced in earnest in November 2017.

5. These judicial review proceedings seek to challenge a decision issued by the Agency on 26 July 2018 ("***the impugned decision***"). The impugned decision is to the effect that the Agency had reached a "provisional conclusion" that some contact of a sexual nature had occurred between the alleged abuser and the complainant during the summer of 1969. The decision-letter outlined the next procedural steps, including the right to an appeal. The decision-letter also indicated that if the outcome of a social work assessment (or any appeal) concluded that the concerns were "founded", and that the alleged abuser poses a

potential risk to children, then the Agency may need to take steps to disclose that information to other relevant third parties, such as, his employer, his family or any other relevant person.

6. The alleged abuser instituted these judicial review proceedings on 2 November 2018. The Agency has now conceded that the impugned decision is invalid and should be set aside by this court. The parties are, however, in disagreement as to what consequences flow from this concession. The Agency submits that it should be entitled to continue its inquiries against the alleged abuser. Conversely, the alleged abuser seeks orders restraining any further inquiry into the events alleged to have occurred in the summer of 1969.

PROCEDURAL HISTORY

7. The parties, very helpfully, submitted an agreed chronology of events to the court on 18 August 2020. A summary of the key events is set out below. Before turning to that summary, however, it should be noted that no affidavit evidence has been filed by the Agency explaining the nature of the assessment carried out during the period December 2013 to September 2016. The most that has been done is that documentation in the form of what appear to be case notes has been put before the court by way of exhibits to affidavits. Of course, the mere fact that a document is exhibited in an affidavit does not, in and of itself, turn that document into admissible evidence (*RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 2 I.L.R.M. 273).

8. The social work team in [location redacted] was first notified of a complaint of historical child sexual abuse by the complainant in December 2013. The complainant had been interviewed by a social worker on 18 December 2013. The

social worker prepared a detailed note of her meeting. The disclosed child sexual abuse is summarised as follows. (Certain locations and personal details have been redacted by the court so as to protect the anonymity of both the complainant and the alleged abuser).

> "• When aged 9, nearly 10 years of age in 1969 [the complainant] was doing odd jobs in a Hotel [details redacted]. At the time a young man or teenager was working there also. (He later named this individual as [name and address of alleged abuser redacted]).
>
> • He guesses that [the alleged abuser] was about 16 or 17 years of age at that time.
>
> • [The complainant] told me that he was lured into bed (in the hotel), he cannot recall how this happened, but he recalls that they were naked and 'playing with each other'. He recalls that this happened on 3 separate occasions not on the same day but around the same time, i.e. that summer. [The alleged abuser] told him afterwards not to say no more about it to anyone. [The complainant] has not told his family.
>
> • He remembers asking [the alleged abuser] what a date was. [The complainant] told me that no force was involved, that it was nothing vicious, that he thought it was harmless. He now has started thinking that what happened then may have played a part in him having a mental breakdown aged 23 and having had ongoing mental health issues.
>
> • He did on some occasion 'it just came out of me', he referred to 2 occasions when he 1) told [the alleged abuser] that he had abused him, after he taunted [the complainant] over something. 2) during a period when he [the complainant] was not well he shouted across the road at [the alleged abuser] that he is a paedophile. On this occasion [the alleged abuser] told him to go away and that he was looking for money.
>
> • [The complainant] believes that [the alleged abuser] knows that he did wrong.
>
> • [The alleged abuser] has adult children and possibly grandchildren.
>
> • His wife works here in the [details redacted].

- [Personal details redacted]
- [The complainant] does not want to ruin [the alleged abuser's] life, but feels if he did him wrong and if he ruined his life he would like to be compensated.
- He understands that our role is in establishing if any other children may be at risk from [the alleged abuser]. [The complainant] at this point does not wish to make a formal complaint to gardai, but he has no problem with social work talking to [the alleged abuser] 'because I'm telling the truth'.
- [The complainant] asked some questions about if this was classed as abuse and if this would have done him harm. I told him that even if he feels there was no force involved that he was of an age where no young child should have been interfered with in that way and that this is abuse. I advised him that I cannot assess what damage may have been done to him that he needs to talk to a counsellor about this. I told him that children in general are likely to be seriously affected by such abuse and that we need to ensure that this is not ongoing.
- [The complainant] has on and off spoken to counsellors about his mental health but he doesn't really want to pursue this."

9. It should be noted that the making of the complaint predated the introduction of the "policy and procedures" document in September 2014.

10. The complainant also made a statement to An Garda Síochána in January 2014. The Garda file was subsequently sent to the Director of Public Prosecutions. The Director ultimately notified An Garda Síochána that a decision had been taken not to institute criminal proceedings. The precise date upon which this decision was communicated to the Agency is not evident from the papers, but it appears to have been notified by October 2015 at the very latest.

11. It *appears* from the exhibited documentation that the Agency had written to the complainant on a number of occasions seeking to follow up on the complaint but

received no response. It is not apparent what the intended purpose of the follow-up meeting was to be. In particular, it is unclear whether it was intended to interview the complainant again or whether the purpose of the meeting was to provide support to the complainant. There is a reference to the complainant having mental health issues and needing to be facilitated with a meeting (handwritten note of 20 January 2014). There is also a case note dated 21 January 2015 which states as follows.

> "The most recent file note indicates contact between Gardai and the social work department but the exact nature of this contact is not clear. For instance did [the complainant] make a complaint to the Gardai? There is a question mark regarding [the complainant's] mental health which necessitates a 2nd interview with him."

12. At all events, on 13 September 2016, the Agency wrote to the complainant in the following terms.

> "I refer to your contact with this department in December 2013. I have recently reviewed your file and I note that you were written to on the 23rd January 2014 and again on the 30th September 2015 with a view to following up on your complaint. I can find no evidence on the file that you responded to these letters.
>
> I am writing to advise you that a decision has been made to close your file. If you wish to discuss this outcome please contact me at the above number."

13. This letter is signed by a principal social worker, and appears to have been prepared after a case conference.

14. It is not entirely clear from the papers as to what happened next. It is suggested, however, that the complainant may have contacted the Agency on receipt of the letter and requested that the file remain open. At all events, the complaint appears to have been referred onwards to what is described as the Agency's "specialist inquiry team" in [location redacted]. The exhibited correspondence indicates that

the specialist inquiry team was first in contact with the complainant in November 2017.

15. As discussed presently, counsel on behalf of the alleged abuser places much emphasis on the fact that the Agency had been satisfied to close its file into the complaint in September 2016, and that an investigation into the complaint was, apparently, not reactivated until over a year later in November 2017.

16. It is necessary to break off from the chronology briefly at this point, to explain that the existence of this correspondence from September 2016 had not been disclosed to the alleged abuser until *after* the within judicial review proceedings were instituted. Put otherwise, the Agency failed to inform the alleged abuser that a decision had been taken, at an earlier stage, to close the investigation.

17. Returning to the chronology, the alleged abuser was first notified of an investigation into him by letter dated 15 May 2018. Thereafter, there was a detailed exchange of correspondence between the solicitors acting on behalf of the alleged abuser and the Agency.

18. By letter dated 29 June 2018, the solicitors acting on behalf of the alleged abuser queried why, contact having been made by the complainant to the Agency on 18 December 2013, it had taken up until that date (2018) to continue with any investigation.

> "However, before that meeting takes place […] can you please explain if [the complainant] made contact with Tusla back on the 18th of December 2013 why it has taken until now to continue with any investigation."

19. The Agency responded to this query as follows by letter dated 4 July 2018.

> "Further to the query as to why following the Complainant's initial contact with Tusla (HSE) in 2013 there was no assessment undertaken. I can confirm that the Complainant was offered an assessment by the [location redacted] social work department in 2013. However, it is evident that the

> Complainant chose to report the matter to An Garda Siochana. This case remained open to Tusla pending completion of the criminal investigation. We understand this investigation was completed in September 2015. In September 2016 the […] social work department transferred the case to the Specialist Inquiry Team. This team was established in 2016 to assess allegations of historical Child Sexual Abuse. The case was allocated for assessment in November 2017 and contact was made to the Complainant on 16/11/2017. At that juncture, the Complainant chose to engage in a social work assessment of his allegations of historical Child Sexual Abuse."

20. As appears, there is no reference in the Agency's response to the fact that a decision to close the file in respect of the complaint had been made on 13 September 2016.

21. A meeting was then held between the alleged abuser (and his solicitor) and two social workers on 10 July 2018. At this meeting, the alleged abuser denied the allegations of child sexual abuse and stated that he had never had bodily contact with the complainant. It was suggested that the allegations were malicious and that there had been "aggro" between the parties in relation to certain matters.

22. It appears from the minutes of the meeting prepared by the Agency that the solicitor acting on behalf of the alleged abuser had again raised a query in respect of the sequence of events leading to the complaint, as follows.

> "The [alleged abuser's solicitor] clarified that when [the complainant] first made his allegations to Tusla in 2013 he was offered an assessment of these allegations but chose not to do so and that he then went to An Garda Síochána to make a statement, and that [the complainant] was later offered another opportunity by Tusla to have an assessment of his allegations of child sexual abuse. Social Workers confirmed that was correct. [The assistant social work team leader] clarified that [the complainant] was advised of his right to make a report to An Garda Síochána and he did so. [THe assistant team leader] clarified that the case was not closed to Tusla but remained as on assessed."

23. Again, there is no reference in the Agency's response to the fact that a decision to close the file in respect of the complaint had been made on 13 September 2016.

24. By letter dated 26 July 2018, the Agency wrote to the alleged abuser's solicitor indicating that a finding of "founded" had been made. This decision is referred to in this judgment as "***the impugned decision***" or "***the decision-letter***". In order to protect the anonymity of both the complainant and the alleged abuser, the detail of the reasoning of the Agency will not be replicated in full in this judgment as to do so would involve publishing information, i.e. in terms of dates, locations and names, from which it might be possible to identify the parties. It should be noted, however, that one of the considerations informing the decision that the complaint was "founded" is as follows.

> "The Complainant's emotional reaction was consistent with the abuse being described."

25. The provisional conclusion and the subsequent procedural steps are set out in the decision-letter as follows. (The term "***PSAA***" is used in the decision-letter to refer to the person subject to allegations of abuse).

> "The provisional conclusion of the Social Work Assessment is **Founded**. It is deemed likely that some contact of a sexual nature occurred between the PSAA and the Complainant given the credibility of the Complainant's account and the insufficient quality of the account provided by the PSAA.
>
> [Name redacted] (PSAA) is now afforded an opportunity to respond to the provisional conclusion should he wish to do so, either by way of a further meeting with us or in writing. Should he wish to respond to the provisional conclusion please do so within 14 days of receipt of this letter.
>
> If [name redacted] responds to the provisional conclusion, any necessary further investigations will be carried out as appear appropriate in light of this response, before a final determination is made.
>
> If [name redacted] does not respond to the provisional conclusion, the Child and Family Agency will proceed to reach its final determination in relation to the allegations in the absence of any further input from him.

> If, at the conclusion of this investigation, the conclusion reached is that the concerns are founded and that [name redacted] may pose a potential risk to children, he will be given the opportunity to appeal that conclusion.
>
> [Name redacted] should note that if the outcome of the social work assessment (or the appeal, if he chooses to exercise that right) concludes that the concerns are Founded and that he poses a potential risk to children, then the Child and Family Agency may need to take steps to disclose that information to other relevant third parties, such as, his employer, his family or any other relevant person.
>
> [Name redacted] will be given warning in writing of any decision by the Child and Family Agency to inform relevant third parties of the outcome of its investigation.
>
> We await your response."

26. The alleged abuser adopted what might be described as a twin-track approach to the provisional conclusion. First, steps were taken to invoke the administrative appeal procedure: the alleged abuser's solicitor sent a letter to the Agency on 9 August 2018 enclosing a notice of appeal. Secondly, a separate letter was sent to the Agency on the same date suggesting that the Agency was acting *ultra vires*.

27. In the event, the within judicial review proceedings were instituted prior to the administrative appeal having been heard and determined. (It seems that an agreement had been reached between the parties to stay the appeal proceedings).

28. Given the concessions made by the Agency, it is unnecessary to detail the chronology of these judicial review proceedings thereafter, save for the following event. On 4 March 2019, it came to the attention of the alleged abuser's solicitor that further relevant documentation in the possession of the Agency had not been provided. On 7 March 2019, the documentation was sought by the alleged abuser's solicitor and provided by the Agency's solicitor. This was the first time that the alleged abuser's side had been provided with a copy of the letter of 13 September 2016. It will be recalled that this letter indicated that a decision

had been taken to close the file in respect of the Agency's investigation into the complainant's allegation.

29. Arising out of this belated disclosure, an application was made to amend the statement of grounds. An order giving liberty to amend was made on consent of the parties by the High Court on 15 July 2019.

30. On 27 January 2020, the solicitor acting for the Agency filed an affidavit conceding *certiorari*. This had been predated by correspondence indicating that the proceedings would be conceded (whilst maintaining that the Agency had not acted *ultra vires*). More specifically, the Agency had made an offer to compromise the proceedings on certain terms by letters dated 20 December 2018 and 21 February 2019. The letters did not, however, identify the grounds upon which an order of *certiorari* quashing the impugned decision was being conceded. Rather, the letter of 21 February 2019 stated as follows.

> "This offer (and the previous offer) should not be misconstrued as [the Agency] conceding the matters at issue in any way. This is simply a pragmatic approach to avoid this important and sensitive matter being delayed pending this litigation."

31. The case came on for hearing before me over two consecutive days commencing on 21 July 2020. At the direction of the court, the precise grounds upon which the proceedings were being conceded by the Agency were formally recorded in writing and submitted to the registrar on 18 August 2020.

CHILD CARE ACT 1991 (AS AMENDED)

32. Insofar as relevant to these proceedings, section 3 of the Child Care Act 1991 (as amended) provides as follows.

> 3.(1) It shall be a function of the Child and Family Agency to promote the welfare of children 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.
>
> […]

33. Section 8(1)(b) of the Child and Family Agency Act 2015 provides that one of the functions of the Agency is to support and promote the development, welfare and protection of children.

34. These statutory provisions should be read having regard to Article 42A of the Constitution of Ireland.

35. The statutory function under section 3 of the Child Care Act 1991 had, initially, resided with the regional health boards, but as a result of a series of legislative amendments, it now resides with the Child and Family Agency.

36. There is a well-established line of case law which has given a broad interpretation to the statutory function to promote the welfare of children who are not receiving care and protection. The leading judgment is that of the High Court (Barr J.) in

M.Q. v. Gleeson [1998] 4 I.R. 85. The applicant in those proceedings had been pursuing a vocational course with a view to obtaining qualifications as a social worker. The applicant and his family had previously come to the attention of the relevant health board on a number of occasions. The health board was of opinion that the applicant was not a suitable person to engage in child care work, and that it had a statutory duty to advise the vocational college of its opinion and to recommend that the applicant be removed from the course.

37. For present purposes, it is the High Court's finding that the statutory duty is not confined to protecting specific identified or identifiable children who are already at risk of abuse, that is most immediately relevant.

> "I have no doubt that in the exercise of their statutory function to promote the welfare of children, health boards are not confined to acting in the interest of specific identified or identifiable children who are already at risk of abuse and require immediate care and protection, but that their duty extends also to children not yet identifiable who may be at risk in the future by reason of a specific potential hazard to them which a board reasonably suspects may come about in the future. Subject to the proper exercise of its functions in the matter of complaints about child abuse and its duty to afford the applicant the benefit of fair procedures, I have no doubt that in the instant case, on the premise that it had taken appropriate steps to inform itself, the [health board] would have been entitled to form an opinion that the applicant was unfit for child care work and would have had an obligation under s. 3(1) of the Act of 1991 to communicate its opinion to the [vocational college] with a view to having the applicant removed from the social studies course on which he was engaged. The [health board] was not obliged to wait until a child or children had been actually abused by the applicant after he had taken up child care employment. On the contrary, on becoming aware that he proposed to embark on a career in child care and that he was attending an educational course to qualify for such work, the [health board] had an obligation to protect children who in its considered opinion would be at risk of abuse by the applicant should he carry out his stated intention of embarking on a career in that area. Such an obligation would require the communication by the [health board] of its opinion to the [vocational college] coupled with a request to remove him from the course in question."

38. The judgment in *M.Q.* highlighted the risk inherent in a false complaint of child abuse as follows.

> "A health board ought always to remember that such complaints, if unfounded, have of their nature a potential for great injustice and harm, not only to the person complained of but perhaps also to the particular child or children sought to be protected and others in the family in question. A false complaint of child abuse, if incorrectly interpreted by a health board, could involve the destruction of a family as a unit by wrongfully having the children it comprises taken into care. It may also destroy or seriously damage a good relationship between husband and wife or long-standing partners."

39. To guard against this risk, the judgment identifies in detail the procedures to be followed in order to ensure compliance with natural and constitutional justice. (These procedures are sometimes described as "the Barr principles" in reference to the author of the judgment, the late Mr. Justice Robert Barr). The Agency has published a detailed "policy and procedures" document to guide social workers in carrying out such inquiries. The version of this document referenced in these proceedings is dated September 2014.

40. The principle that it is not necessary to identify specific children at risk has been elaborated upon in *P. (D.P.) v. Board of Management of a Secondary School* [2010] IEHC 189. The High Court (O'Neill J.) stated as follows at §5.5 of his judgment.

> "Whilst the applicant's professional status, that is, as a teacher in a secondary school, having contact with children, clearly gave rise to a particular, easily identified, child care consideration, the power to intervene and investigate under s.3(1) should not be confined to those situations where the person suspected as being a danger to children has a particular access or relationship [with] identified or identifiable children. Persons who have a tendency to abuse children in this way can and do develop many varied and often insidious means of access to children. It would be contrary to the obvious purpose and objective of s.3(1) of the Act of 1991 to confine the power given in s.3(1) of the Act of 1991 to those

> situations in which the person suspected had already an established access to a child or children. Thus, I am satisfied that the power given in s.3(1) of the Act of 1991 is activated when a credible complaint of child sex abuse is received by the [health board], as it then was, or currently the Health Service Executive. 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."

41. The broad interpretation of section 3 has been endorsed in a number of more recent judgments, including, in particular, *W.M. v. Child and Family Agency* [2017] IEHC 587; *T.R. v. Child and Family Agency* [2017] IEHC 595; and *F.A. v Child and Family Agency* [2018] IEHC 806.

42. Counsel for the Agency has explained that the practice, at least insofar as allegations of historical child sexual abuse are concerned, is first to determine whether the allegation of child sexual abuse is "founded" or "unfounded" before moving on to a risk assessment. The position is put as follows at §3.36 of the written submissions of 15 July 2020.

> "The simple reality is that there cannot be a meaningful risk assessment as to what risk is posed by a person alleged to have committed abuse until it has first been determined whether the allegation against them is 'Founded' or 'Unfounded'. Only if the allegation is determined to be 'Founded' can the [Agency] continue the process to consider whether that finding creates a current or future risk to children, to assess the extent of that risk and to identify the specific children or categories of children who may be at risk."

43. One difficulty presented by the Agency's approach is that it tends to suggest that the role of the Agency is to adjudicate on an *adversarial* dispute between a complainant and an alleged abuser. In truth, the role is *inquisitorial*. Whereas it may be necessary for the Agency to reach a conclusion on the credibility of an

allegation of child sexual abuse, its principal focus must always be on the protection of children. It is not the Agency's role to vindicate the complainant nor to sanction the alleged abuser. A complainant has a separate remedy by way of civil proceedings for damages, and any sanction for the alleged abuser is a matter for the criminal justice system.

44. Finally, for the sake of completeness, brief reference should be made to the most recent judgment on the interpretation of section 3, namely that of the High Court in *C.D. v. Child and Family Agency* [2020] IEHC 452. There, having cited *M.Q. v. Gleeson* [1998] 4 I.R. 85, Humphreys J. observed as follows.

> "On that logic, the duty to promote the welfare of children in need of protection is a foundation for a wide-ranging power to investigate and make findings of child abuse against potentially anybody against whom an allegation is made, because any child abuser could in future abuse children in need of protection. That logic is a very slender and wobbly basis for an entire statutory jurisdiction to conduct child sexual abuse inquiries and findings or indeed findings as to any other form of child abuse or neglect. One can only suggest that perhaps the Oireachtas might consider that this particular area warrants a more explicit statutory underpinning for the procedures of investigation of child harm."

45. Given the narrow issue which falls for determination by me in these proceedings, it is unnecessary to express a concluded view on the important questions of principle which fell for consideration in *C.D.*

GROUNDS UPON WHICH RELIEF HAS BEEN CONCEDED

46. At the direction of the court, the precise grounds upon which the proceedings were being conceded by the Agency were formally recorded in writing and submitted to the registrar on 18 August 2020. Three grounds are conceded as follows.

47. First, it is conceded that the Agency failed to apply the correct standard of proof, i.e. the balance of probabilities, in reaching its provisional conclusion. The Agency concedes that the language employed in the impugned decision, i.e. it is "deemed likely" that some contact of a sexual nature occurred, implies that the incorrect test was applied.

48. Secondly, it is conceded that only one of the two social workers who had signed off on the provisional conclusion had actually interviewed the complainant. The significance of this is that the wording of the impugned decision makes express reference to the complainant's emotional reaction being consistent with the abuse being described. This conveys the impression that both decision-makers had the advantage of observing the demeanour of the complainant at his interview, when, in truth, one of the social workers had not been present at the interview, and, indeed, has never met the complainant.

49. Thirdly, it is conceded that the letter of 13 September 2016 (which records the decision to close the file in respect of the complaint) was relevant, and should have been disclosed. Under §§9.4 and 22.2(e) of the "policy and procedures" document an alleged abuser should be given all relevant documents.

SUBMISSIONS OF THE PARTIES

50. In circumstances where the Agency has conceded that the impugned decision should be set aside, by reference to the three errors identified in its formal document of 18 August 2020, it is agreed that the court should make an order of *certiorari* quashing the decision. The parties are, however, in disagreement as to what the consequences of this order are for any further investigation of the events of the summer of 1969.

51. On behalf of the applicant for judicial review, it is submitted that the Agency should be restrained from carrying out any further investigation into the alleged historical child sexual abuse said to have occurred in 1969. Counsel attaches significance to the fact that the Agency had made a decision to close the file into the complaint in September 2016. It is said to be implicit in this course of action that the Agency must have been satisfied that the applicant presented no risk to any child. Given this decision, it is said that it is unnecessary for the Agency to carry out a further investigation. Crucially, no *new* material has been put before the Agency which could possibly justify its reaching a different decision than that reached in September 2016: the statement signed by the complainant on 10 May 2018 contains nothing new, and expressly records on its face that it has been "extrapolated" from the statement made to An Gardai Síochána on 27 January 2014. Emphasis is also placed on the fact that the Director of Public Prosecutions has directed that no charges be brought against the alleged abuser.

52. Conversely, the Agency submits that, pursuant to section 3 of the Child Care Act 1991, it is under a statutory obligation to resume its investigation. Counsel places emphasis on the judgment in *P. (D.P.) v. Board of Management of a Secondary School* [2010] IEHC 189. There, the High Court (O'Neill J.) refused to make an order prohibiting the Health Service Executive ("***HSE***") from continuing an investigation into allegations of child sexual abuse against a school teacher. This was so notwithstanding that the court had held that there had been a "litany of failures" on the part of the HSE (and its predecessor, the regional health board) to adhere to the requirements of fair procedures in its conduct of its investigation into the allegations made against the applicant. See §5.19 of the judgment as follows.

> "In conclusion, I am satisfied that [the HSE] has the power to conduct an investigation into the allegations made against the applicant. It could very well be said that the continuation of this investigation is oppressive of the applicant, in the light of the gross breaches of the applicant's right to natural justice and fair procedures as set out above and in the light of the very serious and culpable delay on the part of [the HSE] in progressing the investigation. A balance must be struck between the applicant's rights in that regard and the very serious public interest in having [the HSE] properly discharge its statutory duty under s. 3(1) of the Act of 1991. Notwithstanding its past failures in this investigation, this Court cannot assume that the future conduct of this investigation will involve any breaches of the applicant's right to fair procedures. On the contrary, the Court must assume that [the HSE] will comply with the provisions set out above to ensure respect for the applicant's rights. On that basis, I am satisfied that the correct balance between the vindication of the applicant's rights and the public interest in the discharge by [the HSE] of its statutory duty lies in favour of permitting [the HSE] to continue the investigation."

DISCUSSION

53. The principal issue for determination in these judicial review proceedings is whether this court should, in addition to quashing the impugned decision by way of an order of *certiorari*, make an order restraining the Agency from carrying out any further investigation of the alleged abuse said to have occurred in the summer of 1969.

54. Order 84, rule 27(4) of the Rules of the Superior Courts (as amended in 2011) provides that a court has a *discretion*, having quashed an administrative decision, to remit the matter to the decision-maker concerned with a direction to reconsider it and reach a decision in accordance with the findings of the court.

55. The principles governing the exercise of this discretion have been set out authoritatively in two judgments of the now Chief Justice when sitting in the High Court. In *Tristor Ltd. v An Bord Pleanála (No. 2)* [2010] IEHC 454, Clarke J. (as

he then was) emphasised that the overriding principle behind any remedy in civil proceedings should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act. The court should not seek to do more than that, but equally the court should not seek to do less than that. Clarke J. went on to say that the extent to which it may be possible to do so will depend on the facts and the legal framework within which any invalid decision may have taken place.

56. Clarke J. returned to discuss the remittal jurisdiction in *Christian v. Dublin City Council (No. 2)* [2012] IEHC 309.

> "It is not necessary for a court which quashes an order or measure made or taken at the end of a lengthy process to necessarily require that the process go back to the beginning. Where the process is conducted in a regular and lawful way up to a certain point in time, then the court should give consideration as to whether there is any good reason to start the process again. Active consideration should be given to the possibility of remitting the matter back to the decision-maker or decision-makers to continue the process from the point in time where it can be said to have gone wrong. […]"

57. In cases involving alleged child sexual abuse, the court's discretion under Order 84 is one which will almost always be exercised in favour of remittal. This is because the best interests of the child must be the paramount consideration in proceedings which have the purpose of preventing the safety and welfare of any child from being prejudicially affected. An order which restrained the Agency from fulfilling its obligations under section 3 of the Child Care Act 1991 would be inconsistent with that paramount consideration.

58. This is similar to the approach adopted in *P. (D.P.) v. Board of Management of a Secondary School* [2010] IEHC 189.

59. On the facts of the present case, however, the Agency has already discharged its statutory function and an order for remittal is not necessary to give effect to

section 3. More specifically, the Agency discharged its statutory function during the period 2013 to 2016. The complainant had been interviewed by a social worker and a detailed statement taken on 18 December 2013; the complainant had been offered, but declined, counselling; the complaint had been notified to An Garda Síochána; and the Director of Public Prosecutions ultimately made a decision not to pursue criminal proceedings. Against this background, the Agency had made a decision on 13 September 2016 to close its file in respect of the complaint. I accept the submission on behalf of counsel for the applicant for judicial review that it is implicit in this course of action that the Agency must have been satisfied that the applicant presented no risk to any child. Had the Agency thought otherwise, it could not have lawfully closed its file. The Agency had a detailed statement from the complainant since 18 December 2013, and it would have been in a position to put those allegations to the alleged abuser had it considered the allegations credible or such as to give rise to child protection concerns. It did not do so.

60. The approach taken by the Agency at that time is entirely understandable. The Agency had been faced with a complaint of alleged abuse said to have taken place almost fifty years previously. Without in any way diminishing the devastating effects that even a single incident of child sexual abuse can have on a victim, the fact that the complaint in the present case is confined to three isolated incidents which occurred more than half a century ago presents very real practical difficulties in assessing the credibility of the complaint. The complainant had only been able to describe one of the three alleged incidents, and even within that short account there are discrepancies as between the statement made to the

Agency in December 2013 and the statement made to An Garda Síochána in January 2014.

61. None of this should be understood as involving any criticism of the complainant. The traumatic effects of child sexual abuse are such that a victim will often be unable to recall precise details. Nevertheless, these factors do impose limitations on the ability of even a qualified social worker to safely make a finding, at a remove of some fifty years, that a complaint of alleged child sexual abuse is "founded".

62. The social work team at the time (2013 to 2016) appears to have been concerned as to the credibility of the complainant, and had expressly asked An Garda Síochána for its view on whether the account was credible. It seems that An Garda Síochána declined to share their views until such time as the Director of Public Prosecutions had issued directions on whether criminal proceedings were to be instituted. The Agency's case notes suggest that An Garda Síochána were contacted again, following the direction not to institute criminal proceedings in the latter part of 2015. It is unclear what response, if any, was received from An Garda Síochána.

63. It will be recalled that the making of the complaint predated the introduction of the "policy and procedures" document in September 2014. This appears to have led to some confusion in the approach adopted by the Agency before this court. It was suggested in submission, but not on affidavit, that the "policy and procedures" document should be applied retrospectively and that this necessitated a *second* interview with the complainant in order to fulfil the requirements of §17 of the "policy and procedures" document *(§17 First stage of assessment: meeting the complainant*). In truth, the complainant had already provided sufficient detail

for the Agency, if it had thought it warranted, to put the allegations to the alleged abuser. The invitation to the complainant for a further meeting seems to have been for the purpose of providing supports to the complainant.

64. At all events, the social worker team made a decision to close the file in respect of the complaint in September 2016. This decision was lawful: it represented a reasonable and proportionate response to the peculiar circumstances of the complaint. The Agency had thus discharged its obligations under section 3 of the Child Care Act 1991.

65. No explanation has been provided on affidavit for why it is that, having decided to close its file, the Agency subsequently commenced a fresh investigation into the complaint. Indeed, the Agency initially failed to disclose to the applicant and to the court that it had closed its file in September 2016. This event only came to light as a result of the diligence of the applicant's solicitor in pursuing a request for documentation. This occurred when the judicial review proceedings were at an advanced stage, but, pointedly, at a time *prior to* the Agency having filed its opposition papers. The decision to close the file in respect of the complaint is not addressed, still less explained, in the opposition papers or verifying affidavits. The social worker [name redacted], in his verifying affidavit, far from clarifying the circumstances, states that he does not understand what prejudice the alleged abuser could claim to have suffered by not having the documents in question until the beginning of the appeal process.

DECISION

66. Given the breadth of the discretion afforded to the Agency under section 3 of the Child Care Act 1991, I am satisfied that, as a matter of law, it is open to the

Agency to commence a fresh investigation of the complaint. Put otherwise, the Agency is not estopped, by its initial decision to close the file, from commencing a fresh investigation.

67. I cannot accept the contrary argument on behalf of the applicant that it is not permissible to reopen an investigation of a complaint which has previously been closed. As is apparent from the case law discussed at paragraph 36 and onwards, section 3 has always been given an expansive interpretation and the protection of children is the paramount consideration. It would be inconsistent with this case law to apply a "bright line" rule to the effect that the existence of an earlier decision—which might, for example, have been reached on the basis of incomplete information—always operates as a bar on any further investigations.

68. Nevertheless, a decision to close a file into a complaint is a significant event, and on the facts of the present case, the existence of the decision of 13 September 2016 should have been disclosed to the alleged abuser in the context of the further investigation. This is especially so given that the Agency was specifically asked to explain the lapse of time between (i) the complaint having been made in December 2013, and (ii) the alleged abuser having been contacted for the first time in May 2018. The written and oral responses of the Agency on this issue were, at best, evasive. (These responses have been detailed at paragraphs 18 to 23 above).

69. Whereas the decision to commence a fresh investigation was lawful, the manner in which that investigation has been carried out is unlawful. The purported outcome of the investigation in 2018 had been a provisional conclusion that the complaint was "founded". Tellingly, however, this decision had only been reached by applying a standard of proof *less than* the balance of probabilities.

70. The Agency now concedes that the incorrect standard of proof had been applied. It is also conceded that one of the two social workers who signed off on the impugned decision had not, in fact, been in attendance at the interview with the complainant. This is so notwithstanding that the decision-letter expressly states that the "emotional reaction" of the complainant was considered to be consistent with the abuse being described. The wording of the letter in this regard conveys the clear impression that both decision-makers had had the benefit of observing the complainant's demeanour. In fact, the senior social worker had never met the complainant.

71. The Agency also concedes that the letter of 13 September 2016 (which records the decision to close the file) was relevant, and should have been provided to the alleged abuser.

72. As the case law discussed earlier explains, the purpose of an order for remittal is to return the matter back to the decision-maker to continue the process from the point in time where it can be said to have gone wrong. On the facts of the present case, this would involve returning the matter to the decision of 13 September 2016, i.e. the decision to close the file in respect of the complaint. This was the last lawful step in the process. The manner in which the subsequent investigation was carried out was, for the reasons outlined above, fundamentally flawed.

73. In circumstances where this court has concluded that the Agency had discharged its obligations under section 3 of the Child Care Act 1991 and acted lawfully in closing the file, it would not be appropriate to make an order pursuant to Order 84, rule 27(4) *directing* the Agency to reconsider the complaint. Whereas the Agency certainly retains a discretion under section 3 of the Child Care Act 1991 to investigate the complaint further, it is not under a *statutory obligation* to do so.

The statutory power to investigate historical child sexual abuse; to make findings; and to publish those findings to an individual's family and employer; must be exercised in a reasonable and proportionate manner.

74. The cautionary words of Barr J. in *M.Q. v. Gleeson* [1998] 4 I.R. 85 bear repeating.

> "A health board ought always to remember that such complaints, if unfounded, have of their nature a potential for great injustice and harm, not only to the person complained of but perhaps also to the particular child or children sought to be protected and others in the family in question. A false complaint of child abuse, if incorrectly interpreted by a health board, could involve the destruction of a family as a unit by wrongfully having the children it comprises taken into care. It may also destroy or seriously damage a good relationship between husband and wife or long-standing partners."

75. The legislation does not require the Agency to endlessly investigate and reinvestigate complaints of historical child sexual abuse. The decision to close the file in September 2016 represented a reasonable and proportionate response to the peculiar circumstances of the complaint.

76. Accordingly, the impugned decision of July 2018 will be quashed *simpliciter*, without any remittal order directing the Agency to reconsider the matter. Thereafter, it is a matter for the Agency to decide whether to commence a further investigation. In the event that it decides to do so, any such investigation must be conducted in accordance with the requirements of natural and constitutional justice. This will require, at a minimum, that the chronology of the complaint from December 2013 onwards be considered. The Agency's own 2014 "policy and procedures" document indicates at §14 that an alleged abuser is entitled to raise the issue of delay where a complainant refuses to participate in the first stage of assessment. Any further investigation will also have to engage with the discrepancies as between the statement made to the Agency in December 2013

and the statement made to An Garda Síochána in January 2014. Finally, the question of whether the investigation can be fairly carried out in the absence of cross-examination of the complainant will have to be considered since this objection has specifically been raised by the applicant's solicitor in correspondence. (See, generally, *T.R. v. Child and Family Agency* [2017] IEHC 595, [99]). The possibility of cross-examination is adverted to in the revised policies and procedures document, *Child Abuse Substantiation Procedure*. The Agency recognises, however, the right of the person making a disclosure of child sexual abuse to refuse a request for cross-examination.

SUMMARY OF CONCLUSIONS AND FORM OF ORDER

77. The decision of the Child and Family Agency, made on 13 September 2016, to close its file into the complaint of historical child sexual abuse dating from 1969 was lawful. It represented a reasonable and proportionate response to the peculiar circumstances of the complaint. The Agency had thus discharged its obligations under section 3 of the Child Care Act 1991.

78. Whereas the *subsequent* decision to commence a fresh investigation was lawful, the manner in which that investigation has been carried out is unlawful. The Agency applied the incorrect standard of proof; one of the two decision-makers had never met the complainant; and the Agency failed to disclose the existence of the earlier decision to close the file in respect of the complaint. This much has now been conceded by the Agency.

79. In circumstances where this court has concluded that the Agency had discharged its obligations under section 3 of the Child Care Act 1991 and acted lawfully in closing the file, it would not be appropriate to make an order pursuant to Order 84,

rule 27(4) of the Rules of the Superior Courts *directing* the Agency to reconsider the complaint. Whereas the Agency certainly retains a discretion under section 3 of the Child Care Act 1991 to investigate the complaint further, it is not under a *statutory obligation* to do so. The statutory power to investigate historical child sexual abuse; to make findings; and to publish those findings to an individual's family and employer; must be exercised in a reasonable and proportionate manner.

80. Accordingly, the order of the court will be an order of *certiorari* quashing the impugned decision of 26 July 2018. The impugned decision will be quashed *simpliciter*, without any remittal order directing the Agency to reconsider the matter. Thereafter, it is a matter for the Agency to decide whether to commence a further investigation. In the event that it decides to do so, any such investigation must be conducted in accordance with the requirements of natural and constitutional justice. The parties have liberty to apply.

81. Insofar as the issue of the costs of these proceedings is concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

82. The default position under Part 11 of the Legal Services Regulation Act 2015 is that legal costs follow the event, i.e. the successful party is entitled to recover their legal costs as against the unsuccessful party. The court is, however, required to consider whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer. As noted earlier, the Agency did, in fact, make an offer to compromise the proceedings on certain terms by letters dated 20 December 2018 and 21 February 2019. The letters did not, however, identify the grounds upon which an order of *certiorari* quashing the impugned decision was being conceded. These were not identified until 18 August 2020.

83. The parties are requested to engage in correspondence with a view to agreeing the appropriate costs order. In default of agreement, short written legal submissions should be filed on the issue in the following sequence. The Agency should file it submissions by 2 November 2020. If the Agency wishes to rely upon the letters of 20 December 2018 and 21 February 2019, or upon the solicitor's affidavit filed on 24 January 2020, then the submissions should address the principles governing offers to settle proceedings. The applicant should file his replying submissions by 16 November 2020.

Appearances
Raymond Comyn SC and Sharon Brooks instructed by Collins, Brooks & Associates for the Applicant
Morgan Shelley instructed by Arthur Denneny for the Child and Family Agency

Approved
Garrett Simons