THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 159

[2017 No. 127]

Birmingham J
Mahon J
Hedigan J.

BETWEEN

E.E.

RESPONDENT

AND

THE CHILD AND FAMILY AGENCY

APPELLANT

JUDGMENT of Mr. Justice Hedigan delivered on the 11th day of June 2018

1. This is an appeal against the judgment of the High Court delivered on 14th November 2016 and approved on 31st January 2017 following a reordering of the paragraphs and the Addition of a postscript. The order of the High Court was made on 28th November 2016 and perfected on 26th January 2017. The final order made was as follows:

> (i) That the order under s. 45 of the Courts (Supplemental Provisions) Act 1961 restraining publication of material tending to identify non-professional parties to the proceedings will continue on a permanent basis;
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> (ii) that the applicant be entitled to furnish a copy of this judgment (and/or such further judgment, if any, as may be given in the proceedings) and/or as appropriate to any other papers in the proceedings to a court dealing with family law proceedings relating to him and/or his minor child;
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> (iii) a declaration that the respondent is obliged to set aside the First Instance Examination Report herein and to allow the applicant's appeal to the appeal panel in the event of the respondent failing to provide the applicant with the right to cross-examine the complainant within two months of the perfection of the order;
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> (iv) an order that the stay granted previously be varied to provide the respondent be restrained from any further action in relation to the investigation or from relying on the first instance decision and recommendations until the right to cross-examine, as aforesaid, is afforded, or further order.

The hearing was a telescoped hearing in which the application for leave and the review itself were heard together.

The Background

2. The Respondent was born in 1974. He is the father of two children by two different women with whom he had relationships which have now ended. The older of these, who shall be referred to as "older child", was born in 1995. The younger child, who will be referred to as "younger child", was born in 2004. The relationship that he had with "older child" was initially a very distant one. It became close following her admission to hospital for appendicitis when she was about six years old. The close nature of this relationship all but ended when she was 12 years old. The respondent had a much closer relationship with "younger child" who was born in the middle of a 4-year relationship with her mother, from 2002 to 2006. Following the end of that relationship, the respondent had regular access to "younger child" during the week and overnight at weekends. On 4th April 2013, "younger child's" mother contacted the HSE as a result of complaints made to her by "older child" that the respondent had regularly sexually abused her in a non-contact manner during the time when she was 8 to 12 years old. As a result of the complaints made to her, "younger child's" mother refused all unsupervised access by the respondent to their child, "younger child". The initial complaint to the HSE was not immediately pursued, but in July 2013, following an unannounced visit to "younger child's" mother's home, it was pursued and an investigation was initiated by the Child Family Agency (CFA). The CFA's investigation was conducted pursuant to s. 3 of the Childcare Act 1991 (the 1991 Act). "older child" was born in November 1995 and the CFA investigation commenced in November 2013, shortly before she turned 18 years. As a part of that investigation, "older child" was interviewed by specialist interviewers at St. Clare's Unit, Temple Street Hospital. The first instance investigation concluded with a report on 11th November 2014 (the first report) which found that the respondent had committed child sexual abuse and recommended that he not have any unsupervised contact with children. The respondent was not initially provided with the report of St Clare's. The respondent was offered an appeal against the first instance decision which he immediately indicated he wished to take up. Terms of reference for an appeal were adopted by the CFA in June 2015 and two independent social workers were appointed as the 'appeal panel' in September 2015. The respondent was provided with the St. Clare's report in October 2015. He met with the CFA's appeal panel in December 2015 and requested the opportunity to cross-examine "older child". On 22nd January 2016, the CFA's appeal panel produced a report containing provisional conclusions rejecting the respondent's appeal and asking for any comments he wished to make. In February 2016, the respondent's solicitor wrote to the CFA's appeal panel seeking cross-examination of "older child". By letter dated 14th March 2016, the CFA's appeal panel refused this request, but invited the respondent to submit written questions which would be conveyed to "older child". The 14th March 2016 letter enclosed the CFA's 2014 policy in respect of investigations pursuant to s. 3 of the 1991 Act. The respondent had not previously been furnished with this policy document. On 4th May 2016, the respondent's solicitor wrote, threatening judicial review if cross-examination (as opposed to written questions) was not afforded. On 13th May 2016, the CFA appeal panel wrote to the respondent's solicitor seeking more time to consider the 4th May 2016 letter. Follow-up letters on 22nd June 2016 and 23rd June 2016 were not replied to by the CFA appeal panel. On 6th July 2016, the respondent's solicitor wrote to the CFA Office of Legal Services seeking cross-examination of "older child", and again warning of the judicial review proceedings. On 12th July 2016, the CFA Legal Services Department replied, stating that the conduct of the CFA appeal panel was not a matter for the CFA and asserting that written questions would be sufficient to meet the requirements of fair procedures.

3. The respondent applied for leave to seek judicial review on 25th July 2016. The court ordered that the CFA be put on notice and the matter proceeded to a telescoped hearing in November 2016. Judgment in the respondent's favour was delivered on 14th November 2016. Further submissions from the parties were invited and an approved version of the judgment containing a postscript was subsequently made available. The appeal proceedings were stayed.

Grounds of Appeal

4. (i) The application for judicial review is premature because the appeal process has not been concluded;

(ii) the High Court embarked upon its own inquiry into the merits of the case before the CFA;

(iii) the High Court raised five separate issues not raised by the parties and proceeded to rule upon them;

(iv) the High Court made findings in relation to the scope of child sexual abuse. Such issues were not raised by either of the parties;

(v) the High Court made unwarranted criticism of the CFA and named individuals without their having notice and an opportunity to reply;

(vi) the High Court made rulings in relation to *in camera* family law proceedings before the District Court where only the applicant was present in the High Court and in the absence of the moving party in those District Court proceedings;

(vii) the High Court made findings of fact going beyond any issues raised in the affidavits, thus giving the appellant no opportunity to reply;

(viii) the High Court erred in its order of cross-examination where it had not been sought during the investigative stage of the inquiry;

(ix) the High Court erred in restraining any further investigation until cross-examination was afforded;

(x) the applicant/respondent was out of time to challenge the finding of 11th November 2014;

(xi) the High Court erred in not finding that there was no absolute right to cross-examination, especially where

(a)the applicant/respondent did not seek cross-examination during the inquiry;

(b) the internal appeal process is not *de novo*;

(c) he was invited to forward any questions and

(d) the complainant refuses to submit to cross-examination and

(xii) the order made was so vague that the CFA does not know how to comply.

Notice of Opposition

5. (i) The respondent commences with an overall traverse;

(ii) the High Court made no orders other than those limited to the fair procedures matters raised by the applicant in his pleadings;

(iii) the findings in relation to the scope of child sexual abuse were made *obiter dicta*;

(iv) no objective bias could be apprehended, and in any event, no factor external to the hearing which could give rise to such apprehension was identified;

(v) the High Court did not make any findings or determination in regard to the ongoing family law proceedings in the District Court. Observations by the judge in relation to the delay caused to the resolution of those proceedings were properly made;

(vi) findings of fact were properly made on the basis of facts outlined in the affidavits filed in court by both sides;

(vii) the High Court acted within jurisdiction in granting the reliefs and

(viii) the High Court was correct in finding that the respondent had a right to cross-examine and that forwarding a list of questions did not vindicate that right.

The Submissions of the Appellant

6. As a preliminary issue, it is submitted that the application for judicial review is premature. The overall proceedings are at an advanced stage. A draft decision of the appeal panel has been circulated. The applicant has been refused cross-examination, but has been requested to furnish any questions he wished to ask the complainant. He was informed that upon receipt of the answers to his questions, the appeal panel would revert to him. The panel was not shutting the door on him. The appellant relies on the most recent authority on the point which is that of *Rowland v. An Post* [2017] IESC 20. In that judgment, Clarke J established that the threshold permitting the court to intervene was at a very high level:

"*. . . the court must be satisfied that it is clear that the process has gone wrong, that there is nothing that can be done*

to rectify it and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law. In any case where the plaintiff cannot establish that the case meets that standard it will ordinarily be inappropriate for the court to intervene at that stage but rather the process should be allowed to continue to its natural conclusion at which stage it can, if any party wishes it, be reviewed."

It is submitted that this case falls squarely within the type of process that should not be judicially reviewed prior to the conclusion of the process.

7. Turning to the substance of the appeal, it is submitted that the net issue concerns the question of cross-examination. The applicant, the respondent, was legally represented at the CFA investigative phase of the inquiry. Various letters were written on his behalf. The investigation continued over almost 12 months and it was obvious from the start that he denied the allegations his child, "older child", was making. He did not, however, seek to cross-examine her during the investigative phase. Nor did he or his legal advisers at the time make any complaint about the fairness of the procedure. The only complaint made at that stage concerned the delay in the process. This request to cross-examine was only made to the appeal panel whose task it was to review the investigation. Moreover, the situation that now presents itself is that the complainant refuses to undergo cross-examination by the respondent. It is further submitted that the requirements of fair procedures will vary from case to case. This particularly so in the investigation of child sexual abuse. In cases of such sensitivity, the question of whether cross-examination of child victims should be restricted or even allowed is one that needs to be considered in accordance with the principles of fair procedures and in a proportionate manner. The appellant notes the complainant was still a child when she first complained. In this regard the appellant relies upon *TR v. CFA* [2017] IEHC 595. The learned High Court judge, in his judgment herein, makes clear that his order requires only that "older child" be cross-examined by counsel on behalf of the respondent. He, in turn, is impecunious, cannot afford counsel and has no entitlement to free legal aid for such a purpose. Thus, the form of the cross-examination ordered by the High Court is vague and probably impossible. It is suggested in the judgment that it could be a roundtable-type confrontation or via video. It is submitted that the order is so vague that it is impossible to comply with it. Moreover, the CFA has no express statutory power to compel a person to attend for cross-examination. There is no power to hold an oral hearing because to do so the Oireachtas would have to give the CFA the power to compel witnesses and to administer oaths. The appellant relies on *Martin v. The Data Protection Commissioner* and *Galvin v. Chief Appeals Officer.*

8. The appellant submits that the court embarked upon its own inquiry into the merits of the complaint and did so despite the wish of the respondent to restrict the application for judicial review solely to the issue of cross-examination. Nothing but this ground was pursued by the respondent and no submissions were made upon any other issue. Neither party wished the court to go beyond the one single issue as to whether the respondent should be allowed to cross-examine the complainant. The court, therefore, embarked upon a private inquiry with no pleadings, evidence or submissions to assist it. It thereby exceeded its jurisdiction. In his judgment, the learned High Court judge identified five issues which he wished to pursue in the case. None of these had been raised by either party. Neither party wished to or would pursue those issues. Both parties simply wished the court to decide whether the applicant had a fundamental right to cross-examine the complainant in the circumstances of this case.

9. The appellant submits that the hearing was not conducted properly or fairly. The first example of this was the learned High Court judge's embarking upon a private inquiry as described above. The second was the inappropriate and unjustified criticism of the CFA. In particular, the appellant takes grave exception to the criticism levelled against Ms. Oakes, Ms. Donnelly and Ms Phelan. These, the appellant submits, are outrageous, unjustified criticisms without any foundation whatever. They are not based upon any complaint made by the respondent.

10. The appellant submits that the respondent is out of time to seek relief in respect of the finding by the CFA that he posed a sexual risk to children. This finding was contained in the first report dated 11th November 2014 and leave was sought on 25th July 2016. The judge described this submission as an "elephant trap". He considered that if applicants for judicial review do not take up an appeal, but seek judicial review, they will be condemned as acting prematurely. If, on the other hand, they do appeal, then they will be condemned as out of time to challenge the investigative stage decision. The appellant submits that established jurisprudence supports the proposition that if an applicant does seek to judicially review a decision made at an early stage of an inquiry, then they are just as bound by the time limits for judicial review as any other applicant.

The Submissions of the Respondent

11. The issues to be decided are submitted to be the following:

(i) Was the High Court correct in finding the respondent was entitled to cross-examine "older child" before the CFA investigation panel?

(ii) Did the respondent "waive" his right to cross-examine "older child" by not raising it at the investigation stage?

(iii) Whether the High Court order can be overturned on grounds of bias;

(iv) whether the applicant should have been refused on the basis of delay and

(v) whether the application for judicial review was premature.

12. Taking the above in order, the respondent submits that the decision of the High Court was that, as a matter of fair procedures, the respondent was entitled to cross-examine the complainant before any findings were made against him by the CFA. The respondent neither sought nor did the High Court make any finding of an absolute right to cross-examine a complainant in such as case as herein. The decision was based upon the facts of this case and in respect of this specific complainant.

13. The respondent submits that the CFA was, under natural and constitutional justice, obliged to afford the respondent fair procedures in their investigation. The respondent relies upon the "Barr" principles as outlined in *MQ v. Gleeson* [1998] 4 IR 85, and as distilled in *I v. HSE* [2010] IEHC 159. It is submitted that by failing to afford the respondent the right to cross-examine the complainant herein, it failed to comply with these principles. The respondent further relies upon the judgment of O'Neill J. in *PDP v. Board of Management* [2010] IEHC 189, as authority for the proposition that the respondent must be afforded a right to cross-examine the complainant, his accuser. The High Court decision herein was squarely based upon that judgment which, it is submitted, is based on facts indistinguishable from those herein. The respondent further relies on the decision of McDermott J. in *WM v. CFA* [2017] IEHC 587, which was delivered after judgment herein. The learned High Court judge therein found that while an oral hearing and cross-examination were not required in every case, it may be appropriate where there is an adult complainant. Absent a reason relating to the welfare of children or child protection issues or the mental health and welfare of the complainant, the level of fair procedures envisaged by O'Neill J. was the appropriate standard. The respondent submits that the specific factor grounding the right

to cross-examine in *PDP* was founded, not upon the conduct of the previous investigation, but upon the fact that the complainant was an adult.

14. The respondent submits that the offer to him to furnish a list of questions cannot meet the requirement for fair procedure as cross-examination would. The learned High Court judge, he notes, found some of the allegations made by the complainant involved significant elements of interpretation. Whilst if she was still a child, such a list of questions might suffice, it would not, in the circumstances of this case.

15. The respondent submits that the CFA Policy and Procedures for Responding to Allegations of Child Sex Abuse and Neglect adopted in September 2014 makes repeated reference to the suspected abuser having the right to fair procedures. It makes reference to the possibility to bring a legal representative. It makes reference to the possible request to question a complainant. In the High Court, the CFA accepted that the policy did allow for some form of cross-examination. There may be circumstances in which cross-examination may be allowed. The decision on this question must be fair, reasonable and proportionate. The fact that the complainant is an adult may weigh more heavily in permitting cross-examination than if the complainant is a child. The extent and mode of the exercise must be considered. The respondent relies in this regard on the decision of McDermott J. in *TR v. CFA* [2017] IEHC 568.

16. In regard to the failure of the respondent to seek cross-examination at the investigation stage, he argues that this does not preclude his raising the matter again at the review stage. The respondent submits that this is, in reality, a claim of waiver of an important right. As such, it is inappropriate in proceedings such as these. Moreover, only a fully informed waiver will suffice and this would require a high level of knowledge on the part of the party in question. Whilst the respondent did have legal advisers at the time of the investigation, they were provided on a private practitioner basis in relation to his District Court access proceedings. It is submitted that although these advisers did pursue issues of delay in the s. 3 investigation process, they were not acting for him in relation to it. The respondent only obtained advisory legal aid for the review stage. The respondent's lack of knowledge of procedure was demonstrated by his handing in to the review panel the attendance notes of his consultations with these advisers together with his counsel's opinion. The respondent was a man with minimal understanding of his rights and should not be considered to have waived his right to cross-examine the complainant. The respondent further submits that the CFA appeal panel is *ad hoc*. Its parameters are set by the CFA's 2014 policy and the terms of reference for each such panel. Thus, it must be open to it, in reviewing the fairness of proceedings at the investigation stage, to consider the respondent's failure to cross-examine the complainant as an unfairness that they needed to address.

17. As regards the allegations of objective bias on the part of the learned High Court judge, these, the respondent submits, relate to the use of certain turns of phrase in the judgment and to the court's invitation to consider the five possible issues, which invitation was not taken up by either party. The respondent submits that it is settled law that a factor establishing a risk of objective bias must be external to the decision making process. He relies upon the judgment of Fennelly J. in *O'Callaghan v. Mahon (No. 2)* [2008] 2 IR 514 at 672.

18. As to delay in challenging the decision of the s. 3 investigation, the respondent notes the request for cross-examination was made in writing on 14th March 2016. Judicial review proceedings were warned on 4th May 2016, and on 13th May 2016, the appeal panel sought time to consider this request. They did not reply to further letters of 22nd and 23rd June, warning that the appeal panel would be held responsible for any delay. The leave application was moved on 25th July. This was, it is argued, well within time to challenge the appeal panel's refusal. The real point made is that the respondent cannot challenge the earlier decision of the investigation panel. It is submitted that this is contrary to recent jurisprudence on the issue. This holds that whilst judicial review of a first instance decision is possible, applicants will ordinarily be expected to avail of an appeal if one is available. *Mara (Nigeria)(Infant) v. Minister for Justice, Equality & Law Reform* [2014] IESC 71, a judgment of Charleton J. is relied upon. Moreover, if the CFA appeal panel is really an independent process, then its decisions must be standalone ones open to challenge. The panel is capable of righting any wrongs in the context of fair procedures open to the respondent. Here, they have decided to refuse cross-examination of the adult complainant and that, it is submitted, is a denial of the respondent's right to fair procedures.

19. The prematurity objection by the appellant is rejected by the respondent. He requested cross-examination and it was refused. In answer to the argument of the appellant based upon the judgment in *Rowland*, the respondent submits cross-examination has been refused and an inadequate alternative has been proposed. Written questions cannot redeem the process. In *Rowland*, Clarke J. was considering a possible future challenge by the applicant if no cross-examination was permitted. It was not clear that cross-examination would in fact be denied, and thus, the application was premature. Here, cross-examination has been refused despite the respondent's constitutional right to it. The case, thus, is one which has gone irredeemably wrong and prematurity does not arise.

The Decision of the Court

20. The High Court judgment at para. 1 summarises accurately the only issue in the case brought before the High Court as follows:

> *"The central issue in this telescoped judicial review application is whether the right to fair procedures of a respondent to a Child and Family Agency child sexual abuse investigation includes the right to cross examination, through counsel, a complainant of full age and capacity who is available but unwilling to attend for that purpose."*

21. The judgment proceeds to identify five issues that the learned High Court judge considered arose and sought to have a further hearing and submissions on these matters. None of these five issues were raised by either of the parties and upon delivery of the High Court judgment both sides made it clear that they did not wish the Court to deal with them. In this Court, senior counsel for the respondent also emphasised that the only issue raised is the right to cross examination. It must be noted that the respondent had not questioned the neutrality of the CFA nor had he raised any complaint of unfairness by it to him. He made no complaint of unfairness against the CFA, the persons involved in the first report nor the review panel involved herein. Moreover the definition of child sexual abuse was not addressed by the parties in pleadings or submissions nor was any complaint made about the clarity of what was upheld. Indeed the respondent seems all too clear about what was upheld which is the reason why he is so anxious to cross examine the complainant. Ultimately the High Court judge accepted that none of these issues would be pursued. The High Court order therefore confined itself to the single issue that the parties wished to litigate and ordered that in the circumstances of the case the applicant had a right grounded in constitutional guarantees of fair procedure to cross examine the adult complainant herein. Failing appropriate arrangements being made for such cross examination the first report would be set aside and the appeal to the appeal panel would be allowed. The judgment did not find that there was an absolute right to cross examine a complainant in all investigations conducted under s. 3 of the 1991 Act. It based the applicant's right to cross examine herein squarely on the judgment of O'Neill J. in *PDP v. Board of Management of a secondary school and HSE* [2010] IEHC 189 which also concerned an investigation into allegations of child sexual abuse conducted pursuant to s. 3 of the 1991 Act. O'Neill J. found the initial investigation was flawed and ordered a new investigation. He held that as the complainant had become adult, fair procedures required that he be made available for cross examination.

The CFA process of investigation
22. The respondent is a body corporate with perpetual succession having been established by virtue of the Child and Family Agency Act 2013. In accordance with schedule 1 of that Act, the functions of the Health Service Executive pursuant to the Childcare Act 1991 were transferred to the Child and Family Agency. Accordingly the respondent is the statutory authority with responsibility for the care and protection of children which said obligations include a duty to *"support and promote the protection of children."* Following complaint being made to the CFA, Deirdre Donnelly, a professionally qualified social worker with the Agency investigated the matter. She met with "older child" and her mother on the 26th July 2013. "older child" gave specific details of alleged abusive incidents by the respondent. She detailed how she and her mother confronted him with these details. "older child" subsequently provided a written account of her allegations. The respondent was interviewed by Ms. Donnelly on the 6th November 2013. He denied the allegations. He was supported at this meeting by his sister. He was given written details of the allegations. When asked if he needed time to consider the details, he declined on the basis that he was already aware of the allegations, save for one incident of being seen by "older child" masturbating in his bedroom with the door open, which he stated could have happened by accident. He denied every other incident. He and his sister said that "older child" was fabricating the allegations through jealousy of her half sister "younger child" and out of spite. They made what Ms. Donnelly described as broad suggestions that "older child's" mother had been abused by a maternal male family member. They said nobody in the family believed her. The respondent emphasised that he wished to clear his name and to resume unsupervised access to "younger child". He stated that he was very distressed and had contemplated suicide. A statement was made by "older child" to the Gardaí. She was referred to St. Clare's Unit in Temple Street Children's Hospital. The primary purpose of this unit is to provide an opinion on the occurrence of child sexual abuse. "older child", her mother and the respondent were interviewed by this unit between January and March 2014. "older child" provided the same core information with expanded details. Her mother confirmed that "older child" had spoken to her about some of the alleged incidents from age 10 to 11 onwards. The respondent gave the same responses as he had to Ms. Donnelly. St. Clare's Unit concluded that "older child's" complaints were credible.

23. On the 26th September 2014, Ms. Donnelly notified the respondent of her provisional conclusion that the complaints were sustained. By letter dated the 2nd October 2014 she confirmed this in writing and at his request faxed a copy of her report to his solicitors. This report was dated the 30th September 2014. This report explained why this provisional conclusion was reached. It analysed the information given by "older child" and found it to be clear and consistent in both core and peripheral detail. No motivation was demonstrated for fabricating allegations. Her account to Ms. Donnelly initially, to St. Clare's Unit and to the Gardaí were consistent. Her mother confirmed disclosures of abuse from her at age 10 and "older child's" paternal aunt confirmed that "older child" had also made disclosure of abuse to her own daughter.

24. The respondent was informed in writing that he could respond in writing or at a further meeting within 14 days. Any response would be investigated as appropriate before a final determination was made. Absent a response, the CFA would proceed to a final determination. If the conclusion was adverse, he was informed that he would have the opportunity to appeal. He was also warned of the possible need to disclose such conclusion to relevant third parties such as family and/or employer. The possible need to consider the respondent's contact with "younger child" and other family minors would also possibly need consideration. He was advised that he would be given advance warning of any contact with such third parties. By letter of the 7th October 2014 the respondent's solicitors indicated that they were no longer acting for him in relation to the assessment. No response was received from the respondent. Ms. Donnelly spoke to him again on the 11th November 2014 and informed him that as no further submissions had been made she would be finalising her report. This final report was sent under cover of a letter dated the 11th November 2014. He was advised of his right to appeal within 28 days and he did so. At no stage during the investigative process did the respondent make a request to cross examine the complainant. Save in respect of an absence of cross examination, later requested, no challenge is made to the procedures followed in this investigative stage of the process.

The appeal panel
25. By telephone on the 11th November 2014 and by an undated letter received on the 2nd December 2014, the respondent indicated that he wished to appeal the assessment report. Ms. Liz Oakes and Ms Suzanne Phelan were appointed by the CFA as an independent review panel. Ms. Oakes has postgraduate qualifications from TCD and UCD and has experience in child protection and welfare. She is chief executive officer of Families for Children Adoption Agency. She is experienced in court procedures. Ms. Phelan is a graduate of UCC and has worked extensively in the area of child protection. She has worked as an independent child welfare consultant conducting independent case reviews. She is the independent chair for Tusla National Special Care Referrals Committee. She is currently engaged with local government in developing their policies and procedures in relation to their statutory responsibility for child protection. This panel followed the Tusla Child and Family Agency Policy and Procedure for Responding to Allegations of Child Abuse and Neglect 2014. This policy provides an elaborate framework for such reviews. It provides for the subject of the complaint to have full knowledge of the complaints against him and the opportunity to respond thereto. It provides for the possibility of cross examination. Save for the cross examination point, no issue is taken with the procedures followed by the review body.

26. On the 17th August 2015 Ms. Carroll, solicitor, wrote to the CFA in relation to the review panel process and sought on the respondent's behalf to cross examine "older child". By letter dated the 28th August 2015 the CFA responded arguing that as the appeal was not *de novo*, no right of cross examination arose. This was refuted by Ms. Carroll by letter of the 8th September 2015. When she subsequently met with the respondent on the 4th and the 9th November 2015, she advised him of his right to cross examine "older child". At this meeting she furnished him with counsel's opinion supporting this claim and with copies of her attendance of the 4th November. The attendances suggest that her advice was to use these to support his case for cross examination before the panel. The respondent attended with his sister for interview with the panel on the 20th November 2015 but unfortunately Ms. Phelan had been involved in an accident and was unable to attend. The meeting was rescheduled to the 14th December 2015 and the respondent and his sister attended again on that date. He submitted the opinion of counsel dated the 2nd July 2015 and the attendance by his solicitor dated the 4th November 2015. He asked to be allowed to cross examine the complainant and he relied upon the arguments set out in counsel's opinion for that right.

27. In its draft report dated the 22nd January 2016 the review panel concluded that; the investigation, assessment and conclusion adhered to relevant legislation, national policy, standards and regulations, the investigation was in line with Children First National Guidelines and Child Protection and Welfare 2011, the assessment of "older child's" credibility was conducted in line with current professional norms and ethics of the social work profession. As to fair procedures requirements, the panel considered that CFA responded appropriately, they conducted an assessment and brought the final conclusion to the attention of the respondent. They informed him of his right to appeal and the formal appeal process adhered to the 2014 Policy and Procedures contained therein. They therefore proposed to uphold the findings of the assessment by the CFA. By letter dated the 22nd January 2016 the applicant was sent a draft copy of the final report of the appeals panel. He was invited to make any written statement or submissions within 28 days. By letter dated the 19th February the applicant's solicitors replied. They reasserted the right to cross examine and submitted their attendance of the 9th November on the respondent. Ms. Carroll complained in this letter about the reliance by the appeals panel on a policy document that had not been furnished to the respondent and also took issue with the decision to refuse cross examination of the complainant. An exchange of correspondence followed between March and July in which the appeals panel indicated their wish

to finalise this appeal and Ms. Carroll insisted on the right of the respondent to cross examine the complainant. This correspondence concluded with a letter from the CFA dated the 12th July 2016 indicating that it was a matter for the Appeals Panel as it was independent of the CFA. The letter reiterated the CFA's view that cross examination does not automatically arise in every assessment undertaken by the agency and any subsequent appeal. It noted the offer to put specific questions to the complainant and expressed its view that fair procedures had been accorded to the respondent. On the 25th July 2016 these proceedings commenced with an application for leave to seek judicial review focused solely on the refusal to allow the respondent cross examine the complainant.

28. The first issue to be dealt with is the alleged prematurity of this application for judicial review. This is an issue that has arisen in many applications in the judicial review list over many years. It is difficult for any court to dismiss a claim for judicial review on this ground since the case has usually been pleaded in the required manner with written and oral submissions made, great effort and indeed expense has been involved. On practical grounds it is always tempting to a court of judicial review to proceed and hopefully resolve the matter albeit that if the challenge succeeds it will usually end up in a quashing of a decision and a referral back to the deciding body to hear the matter again. Yet for the Court to proceed where the application is premature, it will be usurping the function of the respondent body which is actually charged with the task of doing so. The principles which should guide the Court in resolving the issue of prematurity in judicial review applications have been recently very helpfully outlined by the Supreme Court in the case of R*owland v. An Post* [2017] 1 IR in the judgment of Clarke J. with whom O'Donnell and McMenamin JJ. concurred. It was held by the Supreme Court in dismissing the appeal:

> *"(i) that a court should only intervene in an ongoing process where it is clear that the process has gone irremediably wrong and that it was more or less inevitable that any adverse conclusion reached would be bound to be unsustainable in law. Where a plaintiff could not establish that the case met that standard it would ordinarily be inappropriate for a court to intervene and instead the process should be allowed to continue to its natural conclusion, at which stage it could be reviewed,*
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> *(ii) that a decision maker in a disciplinary process had a significant margin of appreciation as to how the process was to be conducted, subject to any specific rules applying by reason of the contractual or legal terms governing the particular process. Therefore the exact point at which parties were entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions was to be decided by the decision maker in question, provided that the procedures adopted did not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned,*
>
> *(iii) that there was no reason in principle why procedures could not be put in place to refine the issues in order to determine the precise extent of the materials that are required to be disclosed and the precise requirement for cross examination that might be needed in order that the process as a whole would be procedurally fair. Unless the entitlement to obtain information or attest evidence was afforded at a stage that was so late that it could be said that the person whose interests were in potential jeopardy had suffered an irremediable detriment, the timing of when information was given or cross examination allowed would not, in and of itself, breach the rules of constitutional justice."*

29. Thus the questions for the Court in determining this issue are:

> (i) has the process herein gone irremediably wrong;
>
> (ii) will any adverse conclusion thus reached be bound to be unsustainable in law.

This helpful judgment further provides that in considering these two key questions the Court must have regard to the fact that the decision makers herein have a significant margin of appreciation as to how their investigation process is to be conducted. This includes determining the precise requirement for cross examination that might be needed to ensure procedural fairness. Moreover the rules of constitutional justice may be quite case specific even though the general principles were that a person has a right to know the case made against him and a reasonable opportunity to test and address it. The first of these questions is somewhat difficult to answer because, through these proceedings, the applicant has stopped the process which is on the brink of conclusion. The review body maintains its position that it will not facilitate cross examination of the complainant by the applicant. Moreover we now know that the complainant will not consent to be cross examined and the applicant cannot apparently do so in accordance with the only method approved by the learned High Court judge i.e. through counsel. Yet the CFA is bound to act to conclude this investigation of sexual abuse because of its duty to protect children. The state of play is that the review body has asked the applicant to furnish a set of questions in lieu of cross examination and has undertaken to revert to him with any answers it receives. Thus although on the brink of conclusion, the review is actually very much alive. It is conceivable that the answers to questions by the complainant and the response of the applicant thereto could change the review body's decision as to whether it will uphold the conclusions of the CFA assessment. The applicant does not argue that there is a constitutional right to cross examine in every case involving an adult complainant. He argues that there is however in the circumstances of this case. In this way the first question raised crosses over into the second. If the review body maintains its position on cross examination after it receives written questions from the applicant and answers from the complainant and considers any response thereto by the applicant, can it then be successfully argued that such decision would be bound to be unsustainable in law. I do not think so. If the CFA is to be allowed any margin of appreciation as to how it conducts a process which must be concluded fairly and in the interest of all and in the public interest, I would have thought that margin would have to be a wide one in the circumstances herein. Bearing in mind the specific case herein and the problems raised in relation to cross examination, the offer of written questions, reversion to the applicant on the answers thereto and consideration of the applicant's responses would at least arguably meet the requirements of constitutional justice in this case. In my judgment the high probability would be that in the circumstances of this case, taking account of the impasse reached on the cross examination issue together with the duty on the CFA to conclude such an investigation, any determination made by them would be sustainable at law. Certainly it could not be said to be bound to be found unsustainable. This being so, the answer to questions 1 and 2 taken together is that, as the proposed *modus operandi* of the review group on the question of cross examination cannot be condemned as sure to lead to a decision unsustainable in law, then the process has not gone irremediably wrong.

30. In *I. v. HSE* [2010] IEHC 159 it is emphasized that judicial review in ongoing CFA investigations should be rare:

> *"I share the views expressed by Butler-Sloss L.J. in Regina v. Harrow LBC ex parte D [1989] 3 W.L.R. 1239 that judicial review in this type of case should be very rare and limited to points of principle that need to be established. 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. The principles referred to as the "Barr principles" are well established and, based upon them, it is, in my view, perfectly feasible for the respondent to carry out an investigation of this kind with full regard to the applicant's right to fair procedures and to a fair trial."*

These views reflect the widespread acceptance that the investigation of child abuse is a particularly sensitive and difficult one. For both sides involved the process can be agonising and the results devastating. They should be conducted in one single set of proceedings and as expeditiously as possible to minimise these consequences. That is why parties should be advised that any investigation must be completed. It is only after completion, including the appeal process, that an application for judicial review should be considered. It has been suggested that where there is a two-stage process including an investigation and an appeal stage as herein, that an applicant for judicial review might be precluded from challenging the findings of the investigation stage by a plea of delay where an appeal has been taken. In the light of current jurisprudence as outlined above this is an unsustainable proposition. Where the courts have established that parties must conclude such a process as herein before seeking to judicially review it, the date from which time starts to run for the purposes of seeking judicial review must be the date on which the appeal process is finally concluded. Following such conclusion, the entire process may be reviewed if appropriate. For all these reasons, I find that the application for judicial review must fail because it has been made prematurely. In the light of this finding, there is no need to deal with any of the other grounds of appeal.

31. However, although the above disposes of the appeal, it is necessary to deal with one further matter. This is the criticism made of the CFA and of Ms. Connolly, Ms. Oakes and Ms. Phelan in the High Court judgment. Mr. McDermott, senior counsel for the CFA, in his submissions to this Court, expressed trenchantly the outrage of Ms. Oakes, Ms. Donnelly and Ms. Phelan at the criticism directed against them in the High Court judgment. He has submitted that the criticisms were grossly unfair and made in the absence of any such complaints by the applicant. Had such complaints been made by the applicant, these three would have responded vigorously in their affidavits. As it was, these complaints, he argues, were plucked out of the air without any notice thus depriving them of the opportunity to vindicate their good name and professional reputation. The questioning of the neutrality of the CFA was not raised by the applicant in pleadings or submissions written or oral. When raised of its own motion by the Court, the applicant refused to make such a complaint against the CFA.

32. It is clear from his judgment that the learned High Court judge ranged far beyond the one issue that was raised by the applicant i.e. the right to cross examine the adult complainant herein. He embarked thus upon a perilous journey unaided by any pleadings, evidence or submissions oral or written directed at these issues which he wished to raise. He quite correctly accepted after delivering his judgment that he could not proceed with these other issues where neither of the parties wished him to do so. However he had, in his judgment where he raised these issues, already made some highly critical conclusions about the CFA, its neutrality and *modus operandi*. These were made despite no such complaints being made by the applicant. He further made some very harsh criticism of Ms. Oakes, Ms Phelan and Ms. Donnelly despite the fact that the applicant had no such complaints to make. This was inappropriate and unfair.

33. The first complaint against Ms. Donnelly is of describing the allegations "dramatically" as being ones, if founded, that could "impact on the safety and wellbeing of children". I see this as little more than a statement of the obvious by Ms Donnelly. She is next criticised for notifying the applicant in a very short letter of the bare bones of the complaint and then when she met as requested in that letter, giving him the full list of allegations. I see nothing intrinsically unfair in this. She gave him the opportunity to take time to consider these and meet another day. He however stated he did not need this as he was already aware of the allegations. It is eminently arguable that it is better to meet a person in the position of the applicant face-to-face when presenting such grave allegations. A letter could go astray or end up being read by someone else. Moreover, acting this way may mitigate the shock of presenting such allegations for the first time by the CFA. The letter, short as it was, did in fact put the applicant on notice of the allegations made. In any event he was, as he stated, already aware of them. The further criticism of Ms. Donnelly for cautioning the applicant about his request to her to send the report to his solicitor seems a classic case of something that may well be explained were she to have had the opportunity to do so. She knew he was already advised by a solicitor so it certainly was not an attempt to keep him away from legal advice. A more obvious explanation is simply that it was advice to see the report and read it first before asking for it to be sent to his solicitor. This was very sensible and very sensitive advice and clearly given in his own interest. Ms. Donnelly is also criticised that she concluded her report without furnishing the applicant with either the policy and procedures document or the St. Clare's Report. As however can be seen from correspondence exhibited, Ms. Donnelly replied on the 13th December 2013 to the applicant's solicitor's letter of the 29th November 2013 informing the CFA that they acted for the applicant. In this reply Ms. Donnelly explained the timeframe of such an assessment as was ongoing and the delays inherent such as a waiting list at St. Clare's Unit. She also directed them to the key documents outlining the procedure and informed them that if they had any difficulty accessing these she would assist. As to not furnishing the St. Clare's Report, as became clear, this could not be done without the Unit's consent and they, very properly, would not consent unless the complainant did. Ms. Donnelly is further criticised in that she did not reveal in her first affidavit dated the 1st November 2016 that she had made contact in May 2016 with the complainant to ascertain if she would be prepared to submit to cross examination and she had refused. She swore a supplementary affidavit two days later stating that she had done this in an effort to find a practical way of resolving the threatened court proceedings. It should be noted that the hearing in the High Court was on the 4th and 8th November. Thus the Court and the applicant were notified of this fact and aware of it before the hearing commenced. Ms. Donnelly apologised for not including this information in her first affidavit. There is nothing to suggest this was anything other than an innocent oversight. I cannot think of any reason why her approach to the complainant in May 2016 would be concealed. It was a very sensible and practical thing to do as it might indeed have obviated the need for court proceedings as she stated in her affidavit.

34. The most serious criticism, and the one to which senior counsel for the CFA took the gravest exception was the statement that an issue arose as to whether the treatment by her and the CFA of statements made by the complainant's mother about her own history of childhood sexual abuse "is suggestive of an attempt by Ms. Donnelly to sweep under the carpet allegations of unspecified allegations [sic] which for all one can know may be child rape or criminal sexual assault . . . in the service of her pursuit of allegations of an apparently much milder nature, not involving any sexual or even physical contact, or any criminal offences, against the child's father." I have redacted the reference to the identity of the alleged perpetrator. I agree with counsel for the CFA that the criticism is inappropriate and unjustifiable. Neither the High Court nor this Court has any knowledge of what action if any was taken by the CFA on foot of these statements by the complainant's mother. The relevant parties may or may not have believed her. Moreover, as noted in this part of the High Court judgment, the complainant's mother did not wish the alleged perpetrator to be identified in the report. There are any number of different reasons why this allegation might not be pursued if such is in fact the case. To suggest, however, that Ms. Donnelly, whose professional career is centred upon the protection of children from sexual abuse, was engaged in concealing such abuse is unjust and is a suggestion based solely upon highly dubious speculation.

35. The complaints made against Ms. Oakes is that in the draft final report she dates the commencement of the appeal as the 15th June 2015 when in fact the appeal was lodged over six months before. However, as noted in the judgment, this is probably the date of the "Terms of Reference" document signed by Lorna Kavanagh on the 15th June 2015. Apparently relying on this, her affidavit is described as evasive and the draft report of the 22nd January 2015 is described as misleading. What is referred to here is at most a misunderstanding of the significance of particular dates. The appeals panel might very well consider that the process commenced when it received its terms of reference. The applicant might consider it commenced when he lodged his appeal. The terms "evasive" and "misleading" are inappropriate. Had Ms. Oakes been given notice of this concern, a simple explanation would in all probability have

been proffered and likely would have sufficed.

36. The complaint made against Ms Oakes and Ms Phelan is that the appeals panel took advantage of the applicant's naivety in accepting from him his counsel's opinion and solicitor's appearance document which outlined his answers to the allegations made against him in the first assessment report. This was also referred to as "sharp practice". If there was anything remotely prejudicial to the applicant in the documents he handed in, there might be some basis for this criticism. However the applicant was not going to have legal assistance at his appearance before the Appeals Panel. He did however have his solicitor advising him and she had wisely obtained counsel's opinion on *inter alia* the arguments for cross examination. It is clear from her attendances of the 4th and the 9th November that the solicitor's advice was to refer to counsel's opinion to support his argument for cross examination. However it is very understandable that, as a lay person, he would still have difficulty doing that. In fact the course he adopted was the wisest one. The opinion is an excellent one. The argument for cross examination is very well made therein. The fact the argument was not accepted does not take from the fact that by handing in the opinion he was putting forward his case for cross examination better than he ever could himself. Nothing in the opinion prejudiced him in any way. The attendances of his solicitor are a detailed refutation on a paragraph-by-paragraph basis of the adverse findings in the first report. They thus put forward his defence on the merits better than he could have ever done himself. Nothing in the attendances were in any way prejudicial to him. I might observe that in circumstances where a person could not have legal representation at such a hearing but does have advisory legal support, handing in such documents to assist making the defence is probably an ideal model. Not everyone is a good advocate in their own cause. It should also be noted that if the panel had refused to accept the documents being proffered to it by the applicant they might well have been challenged for a breach of fair procedures. The Appeals Panel are not lawyers albeit that they have experience in conducting such investigations. In my view their acceptance of the documents proffered was quite correct and did nothing but assist the case being made by the respondent.

37. The criticisms to which I have referred above obliged me to examine in minute detail all of the documents submitted in this case. Having done so, the only faults I can find in the process of investigation and appeal is that, firstly, it seems to have taken too long. I can readily appreciate the difficulties inherent in both the nature of such investigation and the usual lack of resources with which so much of our vital national services are afflicted. It hardly needs stating that every effort should be made to resolve these investigations as soon as possible consistent with doing them thoroughly and fairly for all. They inevitably create huge emotional problems in family relationships and all the personal torment that flows therefrom. The sooner they are concluded the better. The second fault I can identify is that the 2014 policy document was not furnished immediately to the applicant upon his appeal. It was not in force during the first investigative stage but came in just at the time of issuing that first report. His solicitors had been referred to the procedures governing that process. The new 2014 policy document was ultimately made available to the applicant but the best practice would undoubtedly have been for immediate furnishing. Nothing prejudicial flowed from this however as the appeal appears to have been conducted in exact accordance with the 2014 policy. No complaint was raised by the applicant in that regard.

38. For the record it is important to state that following my detailed consideration of this case, I consider the investigation and the appeal process were carried out in accordance with the codes of practice applicable to those processes at the time. I consider that Ms. Donnelly, Ms. Oakes and Ms. Phelan conducted these procedures in a thoroughly professional manner that conformed to the highest ethical standards. The two reports produced are models of their kind. It is therefore no surprise that no complaint relating to the procedures followed was raised by the applicant either during the High Court hearing or before this Court, save only the refusal of cross examination.

39. I would allow this appeal because the application for judicial review was made prematurely.