THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 165 JR]

BETWEEN

F.A.

APPLICANT

AND

CHILD AND FAMILY AGENCY, U.R. AND S.M.

RESPONDENTS

JUDGMENT of Mr. Justice MacGrath delivered on the 3rd day of May, 2018.

1. The applicant is a married father of four adult children. He was employed by the Health Service Executive as a care assistant working with adults with intellectual disabilities. The applicant and his wife have fostered several children since 2007, one of whom made an allegation of sexual impropriety against the applicant which is said to have occurred while she was in their care. The allegation was made a number of months after the child had left their care and was placed elsewhere.

2. The first named respondent, who investigated the allegation, has statutory authority and responsibility for the care and protection of children and the promotion of child welfare.

3. The second and third named respondents are members of the appeal panel established by the first respondent to conduct an appeal from the decision of the first respondent that the allegations of sexual impropriety made by the child against the applicant were founded. The appeal panel was appointed pursuant to the provisions of the first respondent's "*Policy and Procedures for Responding to Allegations of Child Abuse & Neglect*", (September, 2014), para. 29.4 of which describes it as being the responsibility of the area manager in consultation with the regional director of services to arrange the appeal panel, appoint a chair for the panel and provide terms of reference. The appeal panel which was convened in this case comprised of two individuals, the second and third named respondents, both of whom are experienced social workers with considerable expertise in child protection and welfare matters.

4. In this application for judicial review, the applicant seeks the following orders:-

(i) an order of *certiorari* quashing the determination of the second and third named respondents (therein and hereinafter referred to as "*the appeal panel*") appointed by the first named respondent, that the allegation of sexual impropriety made by a named third party was "*founded*";

(ii) an order of *certiorari* quashing the determination of the appeal panel concluding that the procedures adopted by the first named respondent in response to the allegations made by a named third party against the applicant were appropriate;

(iii) a declaration that the manner in which the respondents and each of them dealt with the allegations of sexual impropriety by a named third party against the applicant breached his right to fair procedures, natural and constitutional justice, and his constitutional right to a good name;

(iv) a declaration that in failing to interview the third party complainant about her allegations subsequent to her initial complaint and in failing to put to the complainant the applicant's position on the said allegations, the respondents acted unreasonably and unfairly and in dereliction of their statutory duty;

(v) a declaration that in failing to accord the applicant a full appeal on the merits that the respondents have failed to vindicate the applicant's right to his good name and constitutional fair procedures;

(vi) if necessary, an order remitting the matter back to the first named respondent.

5. Further reliefs were sought in the originating notice of motion including a declaration that the first respondent lacked *vires* or statutory entitlement to make findings that allegations of sexual impropriety against the applicant were well founded, and that the respondents were guilty of inordinate and blameworthy delay in the manner in which they dealt with the said allegations, including the manner in which they dealt with the applicant's appeal, to such an extent that the applicant's rights under the Constitution and the European Convention on Human Rights were breached. At the outset of the hearing, counsel for the applicant advised that those reliefs, which were sought in para. (iii) of the originating notice of motion (*vires*), and para. (vii) (delay) were not being pursued.

Background

6. The applicant, F.A. is a care assistant and works for the HSE. Between 2007 and 2014, F.A. and his wife V.A. fostered seventeen children. One child, N.T., who was born in 1999 was placed in foster care with the applicant and his wife between March, 2009 and December, 2013. On Wednesday, 25th June, 2014, N.T. made allegations of sexual impropriety against the applicant. These incidents were alleged to have occurred while she was living with them in or about the summer of 2013.

7. The allegations were made by N.T. during a car journey with her social worker A.B. who was taking her to an appointment for a counselling session with a therapist in CAMHS (Child and Adolescent Mental Health Services). This appointment had been arranged following the revelation by a friend of N.T. earlier that morning that N.T. had threatened to self-harm the previous evening. N.T.'s friend had been upset and expressed concern. A meeting therefore had been arranged with N.T.'s social worker, A.B.

8. When A.B. collected N.T. at 11.10 a.m. she found N.T.'s to be of low mood and very tired. N.T informed A.B. that she had been angry and had threatened to self-harm. On inquiry as to what may have triggered the thought of self-harm, N.T. stated that "*I don't*

know exactly what it is, it's a lot of stuff". She was happy with her then placement and expressed concern that she might have to leave it.

9. N.T. alleged that when she was thirteen and living in the applicant's home, he sexually harassed her. She stated that the applicant called it tickling, but she alleged that he had touched her private areas both inside and outside her clothing. N.T confirmed to the social worker that the applicant's wife was unaware of the incidents. One particular incident was alleged to have taken place when her social worker was on the premises. She alleged that the applicant came into her bedroom, woke her up by tickling her and that he touched her inappropriately. According to N.T., when she went downstairs, reference to being woken by tickling was made, and that when the social worker left, V.A. began shouting and swearing at her. The applicant is also stated to have shouted back at her saying that he did not touch her. A.B. prepared a memorandum which recorded that "*according to [N.T.] [F.A.] continued to deny tickling her and this developed into a 'big argument'*" and that after the argument, the applicant came into her bedroom and expressed sorrow for lying to his wife. N.T. informed the social worker that following this she self-harmed.

10. A.B. commended N.T. for making the disclosure and told her that she was required to report it to the Child & Families Team, who would then conduct an investigation. While N.T. appeared to be satisfied with this, she expressed concern about what the applicant's family would think of her. It is recorded that N.T. told the social worker that nobody would believe her as "*I was known as the liar in that house".*

11. N.T. met her counsellor shortly after midday. A.B. also met with the counsellor and informed her of N.T.'s disclosure and threat of self-harm on the previous evening. A.B. satisfied herself, however, that N.T. was not at the risk of self-harm nor was she actively suicidal. N.T. described herself as being relieved at making the disclosure.

12. In a replying affidavit sworn on behalf the first named respondent on 13th June, 2017, L.I., who is a principal social worker, since retired, but who had been employed by the Child and Family Agency, avers that A.B. was an experienced, professionally qualified social worker, competent in interviewing and that the account recorded by her was of sufficient concern and provided sufficient grounds to justify further assessment of whether there was a potential risk to children.

13. On the same day, A.B. advised her team leader P.R. of the allegations. P.R. completed a standard report form to the Principal Social Worker, Child Protection and Welfare. In the body of that report the following is recorded:-

> *"Child in care – [N.T.] reported to social worker [A.B.] today that she had been 'sexually harassed' by previous foster carer [F.A.]. [N.T.] disclosed that [F.A.] used to 'tickle her' – he would touch her breasts and vaginal area both inside and outside her clothes. This started when she was 13 years old. [N.T.] stated that this 'hurt' her and was 'sore'.*
>
> *[N.T.] moved from her foster placement with [V.A. and F.A.] in December 2013."*

14. The fostering team leader, A.L., was also made aware of the allegations on the same day. She in turn arranged to contact V.A. by telephone and advised her of the allegations and arranged an appointment with F.A. and V.A. for later that evening. L.I. avers that the purpose of this meeting was to advise them of the details of the alleged abuse and of the procedures to be followed in the assessment of the allegations.

15. Later that evening, A.L. attended at the applicant's home and informed him and his wife that "[*N.T.] has alleged that '[F.A.] sexually harassed me' and that he touched her genitalia".* L.I. avers that the full details were not disclosed to the applicant and his wife at that time as it was believed that providing full details could jeopardise a garda investigation, if that were to take place. A letter had been prepared by A.L., dated 25th June, 2014 addressed to the applicant and his wife and it was brought to the meeting.

16. The applicant and his wife were also informed that the allegation had been referred for independent review by a social worker attached to the team who was based in the same geographical area. The letter which was given to them stated as follows:-

> *"At the time of writing, I am currently fulfilling the role of Link worker to you and am therefore required to inform the following Social Work Team Leaders and Social Workers in writing of the allegation:*
>
> *1. [J.H.], Social Work Team Leader and [D.P.] Social Worker to the young person currently placed with you.*
>
> *2. [P.R.], A/ Social Work Team Leader and [A.B.] Social Worker for [named child], for whom you provide respite on a regular basis.*
>
> *3. [E.N.], A/Social Work Team Leader and [N.O.] Social Worker for [two named children], for whom you recently provided a respite placement.*
>
> *I enclose a copy of Your Service, Your Say Policy for your information and attention.*
>
> *A Foster Care Review will be convened after the investigation is complete."*

The letter also advised the applicant and his wife that A.L. would provide support and keep them apprised of the process. She further advised that additional support was available via the Irish Foster Carers Association.

Four investigations

17. As the applicant was both a foster carer and was employed as a care worker, the disclosure set in train a number of different investigations, the first of which is known as "*the initial investigation*". The investigations gave rise to the creation of copious memoranda, records and correspondence, which it is appropriate and necessary to refer to in some detail.

18. On 26th June, 2014, the first respondent opened an intake record. It was recorded therein that there had been no contact at that time between N.T. and F.A. since she had left his home in December, 2013. As part of this process, L.I. became involved. L.I. recommended that a strategy meeting should take place on the following day to clarify individual roles in the investigation. Information would be shared with the foster carers. The matter would be referred to An Garda Síochána. In her replying affidavit, L.I. avers that following the meeting on 25th June, 2014, the applicant and his wife did not seek any further information.

19. On 26th June, 2014, the child protection investigation was allocated to social worker J.M., who was tasked with conducting the initial assessment investigation. This was conducted under the supervision of B.G. The purpose of this investigation was to decide

whether the allegations were credible, which it so found. On the following day, 27th June, 2014, a formal garda notification was made.

20. On 1st July, 2014, a strategy meeting took place, at which A.B. provided a verbal account of N.T.'s disclosure. The record of the meeting states:-

> *"[N.T.]'s disclosure was agreed by all present as sounding like a very credible and true account of abuse. [N.T.] is currently safe and settling in a secure foster placement…"*

The memorandum records that N.T. was willing to make a statement to the gardaí and that she was to be interviewed by two specialist interviewers "*given her age and vulnerability*". A garda, and team leader B.G. were delegated to arrange for specialist interviewers, preferably with one social worker and one garda. It is also recorded that N.T. requested that A.B. be present during the interviews and that A.B. should be her main professional support throughout the interview process. A further recommendation was that discreet inquiries be made to assess whether other children who had been in respite care with the applicant's family may have experienced similar abuse. This document was signed off/approved by the social worker, J.M. on 4th July, 2014 and by the team leader L.I. (for B.G.) on 29th October, 2014.

21. L.I. has averred that arising from this meeting, recommendations were made that N.T. would make a formal complaint to the gardaí; that the children in care social worker A.B. was to support N.T. throughout the interview; that the applicant be advised of protocol as per the Barr judgment (referring to the principles set out in *M.Q. v. Gleeson* [1998] 4 I.R. 85 by Barr J.); that he was to be advised that his employer was required to be informed that A.L. was to keep the foster carers updated on the process and, that J.M. was to complete the initial assessment (referred to above) in respect of N.T. and that B.G. was to oversee that assessment.

22. This initial assessment appears to have concluded on 2nd July, 2014. As N.T. was a child in care and had a supporting social worker, there was no role for the child protection social work department, except to offer support in the interviewing process and to outline to the applicant the need for his employer to be informed. The initial assessment record, *inter alia*, notes the following under the heading "*Parent View*":-

> *"[F.A.] has denied the allegations and has said quietly to [A.L.] Fostering Link Worker that 'it's not true'."*

The record further notes:-

> *"From [N.T.]'s disclosure to [A.B.], Child in Care Social Worker, it is a credible account that suggests that this is a true and bona fide disclosure."*

23. On 22nd July, 2014, social workers who had been involved in N.T.'s care and had previous involvement with the fostering link workers to the applicant and his wife, attended a meeting. The minutes record that the applicant and his wife were devastated at the allegation, and that the applicant refuted it. He described how the allegation would destroy both him and his family. It is also recorded that A.B. stated that N.T. did not want to discuss the allegations with anyone. By then she felt settled and secure in her placement. She had performed very well in school according to her last school report.

24. N.T. made a statement to An Garda Síochána on 6th August, 2014. The applicant notified his employer. An agreement was put in place whereby the applicant was precluded from unsupervised contact with his grandchild.

25. The second investigation was undertaken because the applicant and his wife were foster carers. It was established to report on their suitability as foster carers in the future. The Foster Care Committee was notified of the allegation on 21st August, 2014. This inquiry went into abeyance pending the decision of the Director of Public Prosecutions as to whether a prosecution would take place. On 19th June, 2015 the gardaí advised the first respondent that there would be no prosecution.

26. As part of this process of investigation, J.M. was requested by the fostering social work department to complete an outcomes form. This is considered below.

27. A third investigation was necessitated by virtue of the fact that the applicant was employed as a carer by the HSE providing care for vulnerable adults.

28. The fourth, albeit short lived investigation, concerned the role of B.G. in completing a child care assessment. This apparently did not progress.

Procedures introduced in 2014 ("*the 2014 Policy and Procedures*")
29. In September, 2014, the first respondent published a new policy entitled "*Policy & Procedures for Responding to Allegations of Child Abuse & Neglect*" ("*the 2014 Policy and Procedures*"). As McDermott J. observed in T.*R. v. Child and Family Agency* [2017] IEHC 595 at para. 81:-

> *"The 2014 Procedure reflects the principles set out [by Barr J.] in M.Q. [v. Gleeson [1998] 4 I.R. 85]."*

Founded or unfounded
30. The term "unfounded" appears to derive from "*Children First: National Guidance for the Protection and Welfare of Children (2011)":-*

> *"5.5 Unfounded concerns*
>
> *5.5.1 When an assessment concludes that a concern or suspicion is unfounded, either initially or following any relevant appeals procedures, the files and records of the HSE Children and Family Services should reflect that fact.*
>
> *5.5.2 Where a notification of suspected abuse has been made to An Garda Síochána, the HSE should also notify An Garda Síochána of this conclusion.*
>
> *5.5.3 HSE staff may need to extend support to the family concerned and appropriate counselling services should be provided if required."*

31. The term is also employed in the 2014 Policy and Procedures in the context of provisional conclusions which may be reached by a

social worker when conducting an assessment of an abuse allegation. The terms "*founded*" and "*unfounded*" have a specific meaning. The glossary of terms of the 2014 Policy and Procedures, provides:-

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

32. The applicant maintains that he was not at any stage provided with details of the allegations despite having been at a number of meetings with representatives of the first respondent. He wrote on 15th July, 2014 seeking information from the first respondent regarding the allegations. This request was refused by letter dated 16th July, 2014 where it was acknowledged that it was a difficult time for him but he could not be provided with further details of the allegation.

33. By letter of 11th August, 2014 the applicant and his wife wrote to A.B. denying the allegations. Further correspondence exchanged over the following months in which the applicant and his wife made a number of points to representatives of the first respondent regarding "*your view that as [N.T.] is sticking to her allegation it makes it a credible allegation*"; seeking reassurances that N.T. would be interviewed by a specialist interviewer; stating that it was of the utmost importance that matters were viewed at from both sides and that "*to be a victim of a false allegation of this nature is terrible beyond belief*". The applicant and his wife expressed their view that it was easier for a victim to stick to their story, than to come out and admit they made a false allegation and have to accept the consequences of that.

34. On 10th November, 2014, J.M. wrote to the applicant and his wife advising them that because it was the conclusion of both initial assessments that there was no ongoing risk of harm, the cases involving N.T. and the applicant's grandchild were closed. This followed an agreement between the child's mother and father, V.A. and F.A. and their daughter, that the applicant would not stay overnight in the same house as any child and that he would have no unsupervised contact with children.

35. On 19th June, 2015, the gardaí advised that there would be no prosecution.

36. By letter dated 23rd June, 2015, the applicant and his wife were invited to a meeting with the social work team to explain the process which must be followed regarding their role as foster parents. V.A. responded on 7th July, 2015 seeking clarity of the process "*in a step by step manner".*

37. On 8th July, 2015, J.M. wrote to the applicant and his wife recommending that the applicant undertake a risk assessment before he could have unsupervised contact with children and informing them that she had been requested by the Fostering Social Work Department to complete an "*outcomes form*" based on her initial assessment. She also informed them that she would not be recommending that they foster again in the future, although any decision in this regard would lie with the fostering committee. She stated that the initial assessment conducted by her did not involve a conclusion on the abuse being founded or unfounded, rather, that a credible account had been given.

38. By letter dated 9th July, 2015 from the Alternative Care Department, the applicant and his wife were advised that:-

> • *"An outcome report is prepared by child and family and link social workers relative to the child protection investigation.*
>
> • *This report will be presented to the Foster care committee on Monday 17th August 2015.*
>
> • *You will be invited to attend this meeting and have the option of either meeting with the full committee or a subgroup of committee members.*
>
> • *The Foster care committee will make a recommendation regarding your status as foster carers.*
>
> • *This recommendation is forwarded to the Area Manager for decision within 10 working days from 17th August.*
>
> • *You will be notified of the Area Manager's decision approx 2 weeks later."*

39. Following a meeting with the alternative care department, the principal social worker of that department wrote to B.G. L.I. avers in her affidavit that the applicant and his wife were very anxious to know whether the allegations had been determined to be founded or unfounded. L.I. was then assigned to carry out the assessment of the allegations in accordance with the 2014 Policy and Procedures.

40. Further correspondence was exchanged between the parties in August and September, 2015. By letter dated 3rd August, 2015, R.S., chairperson, Foster Care Reviews, wrote to the applicant and his wife inviting them to a foster care review. A "*Foster Carer Review Form*" was enclosed. A meeting was scheduled for 28th September, 2015.

41. The final outcome report was shared with the applicant at a meeting on 6th August, 2015. He was permitted to read it, but not to take a copy. By email of 7th August, 2015, the applicant was advised that he could make a request to the freedom of information officer for a copy of the outcome report. The letter also noted that the only signed document containing the allegations was the statement to An Garda Síochána, which they were at that time unable to make available as N.T. had refused to allow to be released.

42. On 18th August, 2015 the applicant and his wife wrote to C.P., chairperson of the Foster Care Committee, insisting on fair procedures and requiring certain assurances and documentation to enable the applicant to respond. Certain documentation and information was sought and they sought clarification of entitlement to representation. The import of this letter was that in the absence of a fair hearing, including access to relevant documents, the applicant would immediately judicially review any decision.

43. C.P. responded by letter dated 24th August, 2015 informing them that the Foster Care Committee was notified about the allegation on 21st August, 2014 but that she could not discuss the queries raised because the investigation of such complaints was within the remit of the Children & Families Services, the principal social worker of which was L.I., and it was confirmed that she had been given a copy of F.A. and V.A.'s letter.

44. C.P. outlined the procedures employed by the Foster Care Committee. The envisaged procedure was that, following investigation

the committee would receive the final outcome report. If their approval status was to be reconsidered they would be invited to a special meeting of the committee, to discuss the reasons for the recommendation to change their approval status. They would be offered an opportunity to submit their views to the committee in advance of the meeting. They had a right to be accompanied by a support person. C.P. advised that if the recommendation was to change approval status, the foster carers would be informed of the right to an appeal hearing, which would be conducted by an independent foster care committee.

45. L.I. wrote on 1st September, 2015 stating that she would endeavour to gather the requested documents and forward them within two weeks. She also invited the applicant and his wife to meet with her and team leader, G.S. to discuss the conclusion of the Children and Family social work assessment. In response to this, V.A., by letter of 9th September, 2015, recorded their willingness to attend a meeting on 18th September, 2015 stating that it was of the utmost importance that J.M. should also attend.

46. The applicant's letter of 18th August, 2015 was replied to by L.I. on 14th September, 2015. L.I. noted that the final outcome report had been shared at the meeting on 6th August, 2015. She advised that she could inform the applicant of the information from the statement was used as part of the assessment process. The specific details of the allegations would be made available to the applicant in a separate letter. Having referred to the various obligations under the Child Care Act 1991 and the national guidelines, L.I. proceeded to outline the procedure to be afforded to F.A. to defend his good name. This included reference to the 2014 Policy and Procedures and the principles outlined in the judgment of Barr J. in *M.Q*.

47. I.P., principal social worker, Alternative Care, replied to F.A. and V.A.'s letter of 13th September, 2015, advising that the foster carer review would be held in advance of the foster care committee meeting and that a report would be prepared in advance of that meeting which they would have the opportunity to read. In compiling the report, the minutes of the foster carer review meeting and the outcome report would be presented to the Foster Care Committee.

48. By letter of 14th September, 2015, L.I. provided details of N.T.'s allegations of the alleged inappropriate contact:-

- At the age of 13 years, when living with the family, F.A. had touched her breast and her vaginal area.

- Around late July/early August, 2012, F.A. put his hand on her left leg and thigh and started rubbing up and down with his hand and he tickled her on her stomach and chest area. F.A. touched her breasts and made her fall into his lap. He used his other hand to hold her down. This happened in the sitting room.

- On a number of occasions, F.A. put his hands under and inside her bra.

- F.A. touched her lower pelvic area, outside and inside her pants. This is alleged to have occurred on the landing.

- F.A. tickled her toes to awaken her, and moved his hands up her body. He held her down with one hand and used the other hand to touch her breasts. This is alleged to have taken place in her bedroom.

The letter proceeded:-

> *"To date you have been denying all of the above allegations, however we are happy to take into consideration any additional responses you may wish to make that may have implications for determining the outcome of our assessment."*

49. A dispute arose as to whether the allegations had previously been notified to the applicant by B.G. and Y.T. on 7th July, 2014. Both F.A. and his wife stated that they were not informed of detailed allegations until 16th September, 2015. They maintain that the only information they had received up to that point in time had been supplied by letter of 25th June, 2014 whereby it was stated the *"[N.T.] has alleged that '[F.A.] sexually harassed me' and that he touched her genitalia".*

50. The applicant requested that the assessment should take into account a number of factors, including the positive relationship he enjoyed with his own children, and those fostered by him; that the Director of Public Prosecutions directed that there be no prosecution, the foster file; the outcome report; details of the child's history and mental health; her file; and a report from O.B. regarding the day that the child had informed her of the applicant's tickling her feet. The applicant also sought to have included in any assessment the case profile on the child's time in care.

51. The meeting was held on 18th September, 2015 but by letter of 24th September, 2015, V.A. protested that F.A. had been given no information about the allegation until shortly before the meeting and therefore could not challenge the accusation, even if he had been given the opportunity. She also requested that further information which she supplied be considered.

Provisional conclusion

52. On 29th September, 2015, L.I. notified the applicant of her provisional conclusion that the allegations against him were founded and that he "*may pose a risk to children*". The reasons provided were that:-

- the initial assessment concluded on 3rd July, 2014 that the child had given a credible account of sexual abuse;

- the outcome of that assessment was based on a combination of factors which the social worker analysed and on which she formed a professional judgment;

- the social work assessment made a determination on the balance of probabilities – a different burden of proof than that employed in criminal law;

- N.T.'s willingness to make a statement to the gardaí;

- the level of detail in her disclosure;

- the disclosure and subsequent statement to An Garda Síochána had a logical structure, was consistent and coherent and the information was presented in such a way that the event could be easily reconstructed;

- N.T. had disclosed "*in the first person and named people clearly*";

- there had been a great amount of detail in the disclosure regarding the description of places, persons, events and

actions which were connected with daily routines;

• conversations which N.T. referred to were reported in their original form and she had on occasion corrected herself would regard to details, "*which informs my opinion that [N.T.] wanted to be accurate";*

• N.T. was balanced as she spoke about her anger issues, self-harming and eating problems; she had given an honest account of the applicant and his wife, good and bad, while living with them;

• when the abuse was taking place, she was concerned that the applicant's wife would find out and the letter states that L.I. noted that N.T. was compassionate throughout;

• on the occasion that the child had spoken to V.A, informing her that F.A. had tickled her to wake her up, the child was of the view that she had disclosed the abuse to V.A., and she was hurt that she was not believed;

• at the time of her disclosure, N.T. was in a new foster placement and there did not appear to be an ulterior motive;

• the child had made great progress in every regard in her new placement and seemed happy – considering the extreme stress the child seemed to have been the experiencing the previous year, with self-harming and not eating, this had added to the credibility of the disclosure;

• the child had remained consistent in her description of events; and

• L.I. noted that "*we have seen a huge improvement in her well being*".

53. L.I. acknowledged that at the meeting on 18th September, 2015, the applicant had protested his innocence, had advised that N.T. had very complex needs, that she presented with serious emotional and behavioural problems (which contributed to the ending of the foster placement) and that this inability was compounded by the fact that two professionals from CAMHS had given two conflicting opinions with regard to N.T.'s eating disorder diagnosis. The applicant had also explained that when school closed for the summer in June, 2014 N.T. was faced with leaving her friends and commencing a new school placement the following September and that this loss could have caused her to make false allegations. The applicant stated that he and his wife were being blamed by N.T. for not keeping her and that such allegations were made to hurt him because of feelings of anger and rejection on her part. When she lived with the applicant's family, N.T. had regular contact with social workers and had a good relationship with them, and was encouraged to meet them privately. In explaining the reasons why the applicant believed the allegations were false, the letter recorded that he had outlined that N.T. would often travel home in his van, sitting in the centre front seat, which left little space for him to use the gear lever without touching her leg. The applicant stated his belief that if N.T. was frightened of him she would not have sat so close to him.

54. L.I. advised that in reaching the provisional conclusion, the first respondent had taken into account the meeting between N.T. and her social worker on 25th June, 2014, the meeting of 18th September, 2015 with the applicant, and a separate meeting with the applicant, his wife and daughter on the same day. She considered the overview of N.T.'s time with the family, which had been handed to her during that meeting. She relied on information recorded on the social work files, including N.T.'s child protection and child in care files as well as certain documentation on the fostering files. L.I. stated that she had a conversation with previous social workers, who had been involved with the child.

55. The minutes of these meetings were recorded. L.I., in what appears to be a challenge to the applicant's account, informed the applicant that N.T.'s presentation had improved in her new foster placement and that N.T. had been very consistent in detailing her account to the Child and Family Agency and the gardaí. While it was acknowledged that the applicant was a caring man, she had considered the possibility that something happened. At the end of the meeting it was suggested that if the applicant wished to contribute anything further, he should do so within the following week. Following this, L.I. would be in a position to arrive at her conclusion.

56. It is recorded that L.I. afforded the applicant an opportunity to respond in writing to the provisional conclusion or by further meeting, by 9th October, 2015. In the event of a response, any necessary further assessment would be carried out as appropriate before a final determination was made. If the applicant did not respond to the first respondent, it would proceed to reach a final determination. L.I. also informed the applicant that, if at the end of the assessment the conclusion was reached that the allegations were founded that he may pose a risk to children, "*you will be given the opportunity to appeal that conclusion"* (emphasis added).

57. On 13th November, 2015, the applicant's solicitor wrote to L.I. complaining that the procedures adopted by the respondent had not complied with the principles of natural justice and fair procedures. It was complained that the first respondent had not applied the 2014 Policy and Procedures, that the procedures adopted went beyond powers contained in s. 3 of the Child Care Act 1991. While the applicant was anxious to respond to the provisional finding, it was contended that he was fatally prejudiced in his ability to do so because he never had *"any sort of meaningful or adequate opportunity to respond to these allegations in the light of the fact that he did not have access to the material on which the complaint was based".* The initial assessment by J.M., and related outcome report, was not furnished to the applicant and he had:-

> *"…not been given an opportunity to engage with any of that detail other than the vague references contained in the bullet point list in your second letter of 14th September 2015 and the brief reference in one sentence in the letter of 25th June 2014 from [A.L.]."*

The applicant's solicitors noted that the child had not been assessed by a specialist social worker, or any social worker, as to whether it was appropriate to cross-examine her or to have her interviewed by an independent specialist to test her complaint. Concern was expressed that the fact that J.M. carried out both the initial assessment of risk, and an assessment as to the credibility of the complainant and that her role in the assessment of one compromised the other. Assurances were sought that a fair process would be undertaken by the first respondent, not involving any of the decision makers who had been involved up to that point in time.

58. Disclosure was also sought of all material upon which the complaint was based, including the child's statement to the gardaí, the notes taken detailing the child's complaint, the documents on which the initial assessment was made and the final outcome report. The right was reserved to explore whether it would be appropriate to have the child cross-examined and/or assessed and interviewed by an independent expert and the right to apply to court for judicial review of the provisional decision of the first respondent.

59. On 2nd December, 2015, L.I. provided a substantive reply supplying the applicant with documents that she relied upon on in

arriving at her provisional conclusion. She sought a response within a two week period, after which she stated that she intended to forward her final conclusion of the assessment to the applicant, having considered his response.

60. Numerous documents were attached to the letter of 2nd December, 2015 including report forms, case notes, minutes of meetings and assessments. The documents also included the garda statement and final outcome report.

61. Having received L.I.'s letter, on 15th December, 2015 the applicant's solicitors wrote stating that their position remained unchanged and expressing their grave concerns regarding the procedures adopted to date. They sought a new investigation and advised that in default of receiving confirmation on before 18th December, 2015 the applicant would proceed immediately by way of judicial review.

62. By letter dated 17th December, 2015, L.I. responded that she proposed to come to a final conclusion and would forward the outcome to the applicant. She also observed that neither the applicant nor his solicitor had provided a response to the provisional conclusion within the timeframe indicated. She also stated as follows:-

> *"…your client has a right to appeal any outcome to an external independent Appeal Panel who review the decision and will consider both the clinical decision reached and compliance with fair procedures."*

L.I. strongly suggested that the applicant exhaust the appeal process before embarking on judicial review proceedings but that if he wished to issue such proceedings they could be served on the solicitors whose address was provided.

63. By letter dated 18th December, 2015, the applicant's solicitors wrote that while the remedy of judicial review was an option, in the interest of all parties, the applicant had no desire to rush to court, unless necessary. The applicant was cognisant that the first respondent, a publicly funded statutory body, was obliged to protect, respect and vindicate his rights under the Constitution and European Convention on Human Rights and:-

> *"…trusts that even at this stage they will do so, and that court proceedings will not be necessary.*
>
> *Without prejudice to our client's right to institute such proceedings in relation to findings that have already been made or any finding which might be made in the future, by way of judicial review or otherwise…"*

The applicant's response to the letter of 2nd December, 2015 was also outlined. He made a number of points protesting the lack of fair procedures. These were itemised and included:-

- that documentation which should have been available from the outset was not furnished until 2nd December, 2015;
- that findings adverse to him were made without him having sight of the documents;
- the inadequacy of the time provided to consider the documents when they were supplied and to reply;
- the absence of expert professional determination as to the appropriateness of cross-examining the child;
- the absence of the right to cross-examine despite obvious factual disagreements;
- the lack of an oral hearing;
- the unfairness of the procedures adopted;
- the lack of a reply to a request about whether the complainant had ever been interviewed; and
- that the Child and Family Agency's Policy and Procedures on Responding to Allegations of Child Abuse and Neglect had not been adopted without good reason.

64. By letter of 7th January, 2016, L.I. accepted that the applicant had not been provided with the documents before the provisional conclusion was arrived at but recorded that he now had the documentation and additional documentation for some time. He was being afforded the opportunity to reply and an additional four weeks was provided in which to respond before a final conclusion was reached. L.I. also advised that, as the principal social worker, she was:-

> *"…professionally qualified to evaluate whether it would have been appropriate to cross-examine the accuser.*
>
> *Due to the fact that the accuser is a child and vulnerable, it would not be appropriate to subject the child to cross-examination. However if there are particular questions your clients want to put to the child in writing we can seek to obtain a response from the child. However, the Child and Family Agency has no powers of compellability."*

L.I. also recorded that the applicant and his wife had been invited and had attended meetings with the Child and Family Agency to discuss the allegations and to provide responses. She noted that at the first stage of the assessment, following the disclosure, social workers had inquired of An Garda Síochána if a specialist interview could be arranged. The complainant did not qualify for such interview due to her age. As the investigation commenced before the introduction of the 2014 Policy and Procedures, they were not used in the investigation. Nevertheless, the first respondent was adhering to the 2014 Policy and Procedures and was addressing every issue that was brought before them, to ensure adherence to fair procedures. While it was the first respondent's view that the applicant's right had been vindicated, L.I. invited the applicant to raise any concerns regarding factual inconsistencies, so they might be addressed. The purpose of the provisional conclusion was to permit the addressing of factual inconsistencies prior to the final conclusion being reached. Once again, L.I. advised of the right to appeal to an external independent appeal panel "*who review the decision and will consider both the clinical decision reached and compliance with fair procedures*". L.I. strongly suggested that the appellant "*exhaust the appeal process firstly before embarking on Judicial Review proceedings".*

65. By reply of 2nd February, 2016, the applicant's solicitors queried the suggestion that L.I. was professionally qualified to evaluate whether it was appropriate to cross-examine the child, something of which they had not been previously informed. They sought further details as to when the decision not to cross-examine the child had been reached. Also, the applicant's advisers submitted that RO, in arriving at her provisional conclusion, placed no weight on what they described as the accepted and obvious mental and emotional difficulties of the child. It was reiterated that the infirmities which had arisen in the initial process of investigation could not

be cured, as views had been formed by relevant decision makers. This had occurred before the applicant had been given the relevant documentation including N.T.'s statement to the gardaí.

66. On 12th February, 2016 L.I. replied that as the child was in the care of the first respondent, with a history of experiences which informed the social work department from the outset, it would be inappropriate to cross-examine her. She advised, however, if there were particular questions which the applicant wished to put to the child in writing, "*we can seek to obtain a response from the child*". It was stated that the emotional difficulties with which the child presented "*did not take from the credibility of her disclosure"*. The garda statement had not become available until 4th August, 2015, as the complainant, initially did not wish it to be made available to the applicant. L.I. repeated that there was the right to appeal the outcome to an external independent appeal panel who would review the decision made and consider the clinical decision reached and whether there had been compliance with fair procedures.

67. On 18th February, 2016, the first respondent furnished the applicant with the final conclusion, confirming the provisional conclusion that the allegations were founded.

The appeal
68. On 26th February, 2016 the applicant's solicitor indicated that he wished to appeal and sought details regarding the process. By letter of 3rd March, 2016, L.I. advised that the "*appeal offer*" was as outlined in para. 29 of the 2014 Policy and Procedures, that the appeal panel was independent of the Child and Family Agency and that the appeal panel would contact the applicant directly to arrange to meet with him.

69. Further letters exchanged and the appeal panel, consisting of the second and third respondents, was established. The applicant was so informed by letter dated 22nd April, 2016. An initial meeting was scheduled to take place on 25th May, 2016. By further letter dated 9th May, 2016, the appeal panel provided details and information, confirmed that fair procedures would be afforded and stated:-

> *"In relation to an appeal and the process an appeal is a new and impartial examination of the work undertaken by the social work team which reached the conclusion that abuse or neglect has taken place. It will examine the professional decision making informing the conclusion that abuse or neglect occurred and will establish whether fair procedures were applied. The Appeal Panel, my colleague [S.M.] and I in the process of our deliberations, will review all documentation and submissions and will arrange to interview relevant social work personnel; and also meet with [F.A.]."*

70. It was stated that it was open to the applicant to meet with the appeal panel, provide statements, make submissions, provide any data, documentation, information, or any expert report, and submit a statement by any person (including any expert) that was reasonably material to the appeal. A copy of the draft report would thereafter be provided to the applicant so that he might check it for accuracy. Once checked, the draft report was to be sent to a T.F. (of the first respondent), and it would detail the appeal panel's conclusions and recommendations. Following this process, the appeal panel would reach a conclusion and the applicant would be written to detailing the outcome of the appeals process and be provided with a copy of the concluding report.

71. On 17th May, 2016, the applicant's solicitors corresponded with the appeal panel requesting that it consider certain materials and inviting it to interview certain employees of the first respondent.

72. Present at the meeting of 25th May, 2016, were the applicant, his wife, his solicitor; and the second and third respondents. It is recorded that the applicant and his wife disputed the findings of the first respondent. They submitted that there was no recorded note of the meeting between the social worker and the child when she is said to have made the disclosure and that the disclosure was at odds with the garda statement. Further, it was asserted that at the initial meeting between the applicant and social workers, no specific details were given, something which did not happen until the garda statement was provided.

73. Certain matters were drawn to the attention of the appeal panel including that the initial assessment was conducted without the applicant's input, that V.A. was not interviewed as part of the assessment and that the social workers were selective regarding the information upon which they relied. The applicant took issue with the fact that no specialist interview had been undertaken. It was submitted that J.M. had undertaken assessments of both the child's credibility and F.A.'s credibility. L.I. had made adverse findings while she also determined that N.T. could not be examined. The appeal panel was requested to speak with E.N. and to take into account N.T.'s social and psychiatric history. One of the panel members, U.R., the second named respondent, queried what the child might have to gain by making such allegations. F.A. and V.A. felt that it was to get back at them and to gain attention. They stated that outbursts from the child often related to issues with her mother. They stated that after approximately one and a half years, the foster carers wished to end the child's placement as she was "*too dangerous*", but the social workers would not cooperate. Written submissions were made in support of these points by the applicant and his wife.

74. Certain delays were experienced in the completion of the appeal process due to ill health. The applicant does not make any particular point in relation to this delay, save to note that the delay in completion of the process was a cause of some distress to him.

75. The appeal panel met with a number of people including social workers, E.N., A.B., and also L.I.

76. On 13th October, 2016, the second respondent wrote to the applicant's solicitor enclosing minutes of meetings the appeal panel had with various social workers on 30th September, 2016.

77. In the note of the meeting on 30th September, 2016 with one of the social workers, E.N., it is recorded that E.N. was involved with N.T. between September, 2010 and May, 2014, until just before the disclosure. She informed the appeal panel that there were a number of crisis points in the child's placement. The record of the meeting contains the following:-

> *"[N.T.] was unhappy and they tried to work out why. But the allegation was the last thing [E.N.] would have thought. However she believes the disclosure".*

The memo also records that the applicant's family, particularly V.A., were frustrated with the child, that the family "*didn't like her any more*". Reference was also made to a review meeting with F.A., at which he banged the table. This note also records that on rereading her case notes for the appeal, she came across an entry for April, 2011 where it is noted that F.A. touched the child on the shoulder, and that N.T. had said *"you promised you wouldn't do that any more".* E.N. wondered in hindsight about the significance of this. Reference was also made to V.A. being "'*a bit cold' – harsh, rigid, regimented*" and one who was critical of CAMHS. The note included reference to a complaint by V.A. about the expense of having to give the child rewards and travel to/from CAMHS. The family had a purpose built house for fostering and that they were now at a loss, including financial loss. Somewhat cryptically is also

recorded that *"[E.N.] said her learning from the case was – hearing the voice of the child".*

78. The appeal panel met L.I. on 30th September, 2016. Its memo of interview with her records that she considered that the child did not need to be re-interviewed as she had already given a good and detailed disclosure. The memorandum also included the following:-

> • L.I. was a specialist interviewer, mainly for children with a disability.
>
> • The principal consideration was the risk to other children.
>
> • L.I. said that she considered J.M. as competent to do the initial assessment.
>
> • L.I. interviewed the child's friend and that "*she corroborated the allegation*" (although the means of corroboration is not stated).
>
> • When B.G. put the allegations to the applicant's family after the disclosure and before the garda statement, it was not very detailed. More information was provided in the garda statement.
>
> • The applicant's family were suffering a loss of livelihood.
>
> • Reference was made to the position of the grandchild.
>
> • L.I. decided to deal with all matters herself to make it easier for the applicant and his family. She read the records, met the applicant's family, met the child's friend and made her own assessment. Her conclusions were those set out in her letter. She did not interview N.T.
>
> • The child gave a credible account and it was "*compounded by the Garda statement".*
>
> • While L.I. met with the applicant as part of the assessment, he was "*ruled*" by his wife. V.A. was not interviewed as part of the initial assessment as it was considered not to be relevant.
>
> • L.I. felt that the child's evidence and demeanour was "*so telling - no need to go any further".*
>
> • The disclosure was "*considered credible*".
>
> • The applicant's wife was cold and rigid but that the applicant was more caring. They were "*well motivated, plus the final consideration*".
>
> • L.I. was not involved in N.T.'s original assessment.
>
> • The applicant's wife would not accept advice from social workers or doctors and had "*no insight*".
>
> • L.I. agreed that she could have "*talked more to them and their children – only one meeting – to demonstrate that they were being listened to".*
>
> • J.M. had seemed to the appeal panel reluctant to attend for interview, L.I. relaying that "*she may find [V] intimidating" (it seems that the 'V'* referred to was V.A.).

79. At the meeting between the appeal panel and A.B. on 30th September, 2016 it was noted that she was involved in the case from June, 2013 to June, 2015, initially as the child social worker, and then as social worker team leader. At first, N.T. was not eating, was fainting in school, and was not engaging with the family. Her mood was low and a psychiatric referral was arranged. The family were worried about self-harming. In December, 2013, N.T. wanted to leave her placement, which was terminated by mutual agreement. Within a month N.T.'s eating and weight improved. The memorandum also records that N.T. never felt part of the family, that the applicant's wife was cold and blamed the child for everything. V.A. was "*abrupt and matter of fact. Annoyed at CAMHS and the school and cross with [N.T.]".* A.B. informed the appeal panel that:-

> *"The disclosure came after a bad night when [N.T.] was feeling alone, and that no one cared - suicidal? She had a razor and told [H.H.] who helped to talk her through. She then told [A.B.] and was relieved after. At first she said [F.A.] 'sexually harassed me' and then went on to make the more explicit disclosure. [A.B.] has 'no doubt' about the credibility of the disclosure. [A.B.] said that she and the mental health professionals had been concerned about what impact would result from the disclosure but that in fact her mood improved and [N.T.]'s was subsequently closed in CAMHS".*

It is also recorded in this note that V.A. had never informed A.B. the child was sensitive to touch prior to the information being shared with A.L. "*On the contrary, she needed physical warmth and affection. She was the 'opposite of attention seeking'*". The family had downloaded information regarding N.T. on social media sites and had forwarded it to the social workers. Further information was transmitted to the appeal panel by A.B. that the child internalised and always blamed herself – such as using expressions like "*I'm a nuisance".* It was also difficult to get the child talking and her frequent response was "*I'm fine*". The appeal panel went on to note that A.B. "*questioned if she starved herself out of the placement with the family".* The family were annoyed that there was only one child placed with them at one point, their home having been built for fostering. The note records that "*School staff expressed relief for [N.T.]."* when she was removed from the family and that V.A. was rude to them when contacted. She was also rude to A.B. who described being belittled on one occasion.

Conclusion of appeal panel

80. A draft report was prepared by the appeal panel and furnished to the applicant on 19th October, 2016. It upheld the conclusions of the social work department of "*founded*", that N.T. was sexually abused by the applicant.

81. On 25th October, 2016, the applicant's solicitors, having received the draft final report, sought information, clarification and documentation including those relating to the appeals procedure. This letter was responded to on 27th October, 2016 confirming *inter alia*, that the procedure for appeals was as per the 2014 Policy and Procedures.

82. By letter of 16th November, 2016 the applicant's solicitor expressed displeasure at certain matters in the draft report and reiterated that L.I. had never met or interviewed the child. Concern was also expressed that the applicant's letter of submission dated

17th May, 2016 was not included in the documents stated to have been relied upon by the appeal panel. It was also argued that no explanation was provided as to how certain alleged inconsistencies and discrepancies were investigated or addressed, which, it was stated, could only be resolved by cross-examination or "*similar device*". The appeal panel was called upon to set aside the finding. The applicant reserved the right to apply to court if his concerns were not properly addressed.

83. On 2nd December, 2016, U.R. of the appeal panel forwarded a copy of the 2101 Policy and Procedures. In the letter to which they were attached, the following was stated:-

> *"4. It is the view of the Appeal Panel that in relation to [L.I.] interviewing [N.T.] we do not think it necessary for a decision maker to interview a child where they have been previously interviewed.*
>
> *5. In relation to documentation submitted to Appeal Panel dated 17th May all documentation submitted to the Panel was considered but in the view of the Panel they were not relevant to the assessment of the allegations. The Appeal Panel have reviewed and noted correspondence with Tusla dated 13.11.2015 and 3.03.2016.*
>
> *6. The scope of the Appeal Panel is to review the assessment and conclusion reached by the Social Work Department in relation to the allegations made and whether fair procedure were followed. Regarding the cross examination of the witness it was the view of the Panel this would not have resolved the matter in relation to the evidence already presented."*

84. The final report was furnished by letter dated 5th January, 2017 confirming and upholding the finding of the Social Work Department of "*Founded*" that N.T. was sexually abused by F.A.

85. These proceedings were instituted on 27th February, 2017.

The applicant's submissions

86. The central thrust of the applicant's written submission to the Court was that the respondents, in embarking on a process which had as its primary purpose the protection of children, ignored their obligations to the applicant. The appeal panel had lost sight of the fact that there was no risk of detriment to N.T. in the event of a conclusion of "*unfounded*", as N.T. had no contact with the applicant. The effect of the finding on the applicant was catastrophic. He had been determined to be a risk to children and remained restricted in access to his grandchildren and in his working life. Specific points made by and on behalf of the applicant by Mr. Harty S.C. include following:-

- the allegations made by N.T. were accepted by the Child and Family Agency as being true from the earliest point, without any attempt to test their veracity;
- L.I. signed off on the initial strategy meeting and she then purported to carry out the investigation as to whether the allegations were "*founded*";
- the determination regarding credibility and the truth of the allegation was made without any attempt to contact N.T.'s treating psychiatrist, eating disorder specialist, N.T.'s then foster parents or any third party;
- the determination was made without putting particulars of the allegation to the applicant;
- J.M., to whom the disclosure was made, did not swear an affidavit in the within proceedings, nor did she make herself available to the appeal panel;
- L.I. conducted the investigation, and also determined that a specialist interviewer would not be required because of N.T.'s age and the fact that she had no diagnosis of serious mental health illness;
- she had reached the above conclusion although N.T. was being treated by a psychiatrist at the time and there was nothing to suggest that L.I. had sought or accessed her medical or psychiatric records;
- L.I. reached this conclusion despite the fact that the strategy meeting had determined that such a specialist was necessary;
- L.I. then made a "*careful*" but unrecorded decision not to have an interview of N.T. carried out, on the basis that:-

  (i) N.T. had made a spontaneous disclosure to her social worker.

  (ii) A.B. did not pose leading questions.

  (iii) A child should not be interviewed unnecessarily, nor should he or she be over-interviewed.

  (iv) It would be contrary to good practice and may give the impression N.T. was not believed;

  (v) N.T. expressed a willingness to be interviewed by An Garda Síochána;

  (vi) The garda interview was independent from a social work interview.

- the applicant argues that at no stage in reaching this decision did L.I. consider that the allegations might not be true;
- he argues that there is no question of L.I. considering the impact which a failure to interview might have on the applicant;
- L.I.'s view was based on premises, which were unsupported by the records. Nowhere was it recorded that A.B. did not pose leading questions, and the disclosure only arose after questions were posed by A.B. to N.T.

87. It is submitted that L.I. failed to stress test the allegations. Mr. Harty S.C. argues that as part of his client's right to be heard,

the decision maker must be made aware of, and really entertain, the applicant's arguments so that they are fully and fairly considered. N.T. was fifteen at the time of the allegations, seventeen at the time of the "*final report*" and is now eighteen.

88. Although in oral argument the applicant did not pursue an entitlement to cross-examine N.T., nevertheless, in written submissions in support of the proposition that an accused person such the applicant has the right to cross-examine an adult accuser, reliance is placed on the decision of O'Neill J. *in P.D.P. v. Board of Management of a Secondary School* [2010] IEHC 189 at para. 5.16:-

> *"…the investigation could not progress in any meaningful way respecting the norms of natural justice, without affording the applicant an opportunity to confront his accuser R.K. in cross-examination. As the complainant is now twenty two years old, I am satisfied there is no good reason why he should not be made available for cross-examination…"*

Reference is also made to the decision of Humphreys J. in *E.E. v. Child and Family Agency* [2016] IEHC 777 where he stated at para. 70:-

> *"If a right to cross-examine is recognised as fundamental where merely the right to a good name is at issue, it is even more important where there are matters at stake that strike to the heart of an applicant's family relationships, such as a recommendation that he not be permitted unsupervised contact with his own child."*

89. While it is acknowledged that N.T. was not an adult at the time of the allegation or the investigation, she was a maturing teenager on the threshold of adulthood. It is nevertheless submitted that she should have been viewed differently from a younger child; and that the first respondent should have considered alternative methods of testing the allegations. Mr. Harty S.C. in his oral submissions stressed that he was not going so far as to argue that N.T. should be made available for cross-examination. Nevertheless he emphasised that the investigative process was wanting in fair procedures in that no attempt was made to stress test the allegation.

90. The lack of interview or questioning of N.T. by the respondent is highlighted. The applicant criticises the reasons offered by L.I. for not conducting an interview, and urges that the following conclusions can be drawn from this decision:-

> (i) There was no consideration of whether N.T. should be cross-examined or the allegations in some way "*stress-tested*".
>
> (ii) The decision not to conduct an interview (other than the one held in the car) was based entirely from the perspective of N.T.'s welfare and did not include any consideration of fair procedures being afforded to the applicant. One of the reasons why such an interview was not conducted was to avoid the impression that N.T. was not believed. It is submitted that this is clearly the very opposite of an impartial investigative process.
>
> (iii) There was no consideration of whether the first respondent would interview or otherwise stress test the allegations of N.T. after the statement was made to the gardaí, especially given what are submitted are different accounts provided to gardaí and to A.B.

91. It is also submitted that the first respondent did not conduct the investigation in a fair or impartial manner. A.B. was the only representative of the respondent to speak with N.T. about the allegations. As N.T.'s allocated social worker, she had built up a close relationship with her. The applicant also points to the absence of any independent corroborative evidence in L.I.'s provisional conclusion highlights a number of factors which the applicant submits largely do not support in any meaningful way the allegations made by N.T., including:-

> (a) N.T. was making progress in her new placement and that this added credibility to her allegation. It was submitted that it that was very difficult to see how this progress has any bearing on the allegations made.
>
> (b) N.T. gave "*an honest account of her time living with [F.A.] and his wife*". The applicant argues that it is difficult to understand L.I.'s basis for her view that N.T.'s account was "*honest*".
>
> (c) There did not "*appear to be any anterior (sic) motive for the disclosure*". The applicant submits that is difficult to see where this belief comes from, and that in addition, there is no mention that N.T., at the time of the allegation, had been self-harming as she would not see her mother on her birthday or that she had concerns regarding her current foster placement.

92. Reliance is also placed by the applicant on P.D.P. where O'Neill J. criticised the respondent for treating the complainant *"as if a client type relationship existed between her and the second named respondent"*. O'Neill J. had further warned against delegating the adjudicative role to another party, such as in this case to A.B. He stated at para. 5.11:-

> *"…the evidence in this case demonstrates that those persons charged with investigating the allegations on the part of the second named respondent impermissibly delegated their adjudicative role in determining the validity of the abuse claims to somebody else i.e. the applicant's personal counsellor, M.K., in circumstances when it must have, or should have been clear to them that the validation of R.K's claims could not be carried out by such a person, in the manner in which it was purported to be done. Manifestly, there was a wholly impermissible conflict of interest between M.K.'s role as the complainant's personal counsellor and the role of validation of R.K's claims."*

93. It is further argued the provisional conclusion was reached without having first provided the applicant with all the material on which the complaint was based, the garda interview of N.T. not provided being until 2nd December, 2015. The applicant asserts that this is contrary to the decision in P.D.P. where O'Neill J. held at para. 5.18:-

> *"In any future investigation all material on which the complaint is based would have to be released to him unequivocally for the purposes of the investigation."*

94. The applicant also takes issue with the suggestion that written questions might be used as a substitute for stress testing; and thinks it strange that L.I. was not willing to interview N.T. or have her allegations stress tested but was willing to put questions to her. He argues that this could not be regarded as an adequate stress test. Reference is made to the following paragraphs in *E.E.*, per Humphreys J. in support:-

> *"95. The agency has put forward the notion that by submitting questions which it could put to the complainant, the rights of the applicant could be protected. It has developed the submission by suggesting that the applicant is disentitled*

> *to relief for not having taken up this all-too-generous offer, or indeed that he is deprived of locus standi by having failed to do so and that his case becomes a jus tertii.*
>
> *96. This submission is unfortunately devoid of merit. The massive ramifications of the process engaged in by the agency, and its devastating potential effect on the relationship between the applicant and his younger child, are obvious. If the applicant has a right to cross-examine the complainant, the submission of written questions to be put by the agency would fall far short of justice. Such a procedure is no substitute for cross-examination, and the applicant's failure to take up that offer does not disentitle him from pursuing this application.*

It is argued that the obligation, at all times, was on the respondents to ensure that the investigation process was fair and in accordance with natural and constitutional justice, and that as was held in E.E. (at para. 74):-

> *"But to refer to fairness as 'à la carte' in the manner the agency seeks to do here … is to suggest a discretionary element to fair procedures which does not exist."*

95. An important aspect of the applicant's submission is that despite the appeal panel's mandate to, *inter alia*, "*reach a new and impartial decision on the veracity and reliability of such a conclusion based on the evidence provided*", it did not conduct any assessment of whether to interview N.T. or otherwise stress test her allegations. While it is not contended that N.T. be subjected to the same level of cross-examination as would occur in a criminal prosecution, it is submitted that a decision maker should undertake some reasonable level of testing the allegations with an open mind that the allegations may be false.

96. It is argued that the respondents failed to provide a full and proper appeal. The applicant relies on the fact that in a letter dated 29th September, 2015 L.I. stated that the applicant would be given an opportunity to appeal the conclusion, and that statement of a right of appeal was not in any way qualified or limited in its nature. The applicant relies on a letter dated 17th December, 2015, where L.I. wrote to the applicant's solicitor and stated:-

> *"…your client has a right to appeal any outcome to an external independent Appeal Panel who review the decision and will consider both the clinical decision reached and compliance with fair procedures.*
>
> *I would strongly suggest that your client exhaust the appeal process firstly before embarking on Judicial Review proceedings."*

This was repeated in the letter of 7th January, 2016.

97. The applicant also submits that the respondents are estopped from seeking to argue that he is barred from making complaint about the initial procedure. Mr. Harty S.C. contends that all of the unfairness in procedures which would have been remedied by provision of a proper appeal travelled unbroken because of the failure to provide an appropriate appeal hearing. He also submits that any properly constituted appeal panel whose remit was to review the procedures could not but have come to the conclusion that the procedures were unfair.

98. Although there are time issues in relation to remedies of *certiorari* (which remedies have not been claimed), it is argued that it is open to the Court to grant declaratory relief against the first respondent.

99. The second respondent in engaging in the process it did, restricted its ability to engage with the relevant facts. When the applicant's solicitor sought to complain of lack of fair procedures, the respondent called upon the applicant not to seek leave for judicial review but promised an appeal procedure in which the matters of complaint could be dealt with and rectified. Despite the promise of what is stated to be an unqualified right of appeal, neither the first respondent nor the second and third respondents envisaged that the appeal panel would in fact embark on a *de novo* investigation and in the circumstances the applicant is obliged to seek judicial review which, it is claimed, the respondent sought to deter by way of an offer of appeal.

100. It is submitted that not alone did the appeal panel not consider interviewing N.T., but it did not consider that it was entitled to interview N.T. itself, or gather new evidence other than that from the social workers involved. The applicant contends that the deficits in the investigation carried out by L.I. were mirrored and potentially amplified by the appeal panel in circumstances where the appeal panel limited itself to the material before L.I. and interviews with the social workers and the applicant. It is submitted that the appeal panel appeared satisfied that matters complied with "*contemporary norms*" rather than attempting to analyse the allegations against the applicant in accordance with his constitutional rights.

The respondents' submissions

101. Joint submissions were made on behalf of the respondents. The Agency and the appeal panel were represented by the same legal team and counsel. In oral submissions Mr. McDonagh S.C. particularly emphasised the absence of expert evidence. There was no expert evidence adduced by the applicant suggesting that the practices and procedures adopted by the respondents were inadequate or unlawful. Relying on *Fitzgibbon v. Law Society of Ireland* [2015] 1 I.R. 516, it is argued that the equivalent of curial deference should be afforded to the respondents and the appeal panel in particular.

102. It should be observed, however, that *Fitzgibbon* concerned a committee of the Law Society, known as the complaints and client relations committee, a specialist tribunal, exercising powers of a disciplinary nature within a legal framework defined by statute. Further, as Hamilton C.J. observed in *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 at p. 37:-

> *"…I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals..."*

In *Fitzgibbon*, McKechnie J, at para. 80, referred to the types of bodies that might attract such principle as including the Planning Board, the Competition Authority, the Controller of Patents and by extension, an arbitrator.

103. I do not interpret such decisions on curial deference as extending the principle to the appeal panel in this case, bearing in mind its stated remit under para. 29 of the 2014 Policy and Procedures. Indeed, while the members of the panel have an expertise in relation to child care and abuse investigations, an important function they enjoy under para. 29 is to ensure compliance with the principles of fair procedures, a function which the courts are equipped to determine in accordance with established legal principles. In passing, it should be noted that is not suggested that the members of the appeal panel in this case have any particular legal expertise. Therefore, while cases such as *I. v. HSE* [2010] IEHC 159 establish that a court should be slow to intervene, it does not appear to me that the principle of curial deference referred to in *Fitzgibbon* and the authorities therein cited, extends to the type of

body such as the appeal panel established by the first respondent as part of its appeals process and pursuant to its stated Policy and Procedures for Responding to Allegations of Child Abuse and Neglect.

104. The respondents contend that the time for challenging the first respondent's decision had long since passed. The applicant was legally advised and chose to appeal rather than apply for judicial review. It is argued that the applicant knew that it was a restricted form of appeal or review and he could not therefore now seek a *de novo* hearing. In so far as a right to cross-examine is concerned, the respondents submit that as the applicant did not seek the right to cross-examine during the process, he cannot be said to complain of an alleged failure to cross-examine at this stage.

105. In written submissions the respondents highlight the following:-

(i) The paramount duty of the first respondent under statute is the protection and the promotion of the welfare of children who are not receiving adequate care and protection. The Agency as a statutory authority has a continuing duty to discharge its statutory functions in an area of important public interest – the protection of children. In accordance with Schedule 1 of the Child and Family Agency Act 2013, the functions of the Health Service Executive pursuant to the Child Care Act 1991 were transferred to the Child and Family Agency. The duty of the Child and Family Agency under s. 3(1) of the Child Care Act 1991 relates to those children in its area who are not receiving adequate care and protection. This includes children, whether identifiable or not, who might be at risk from a prospective danger the nature of which is presently known, or reasonably suspected by the Agency. Section 3 of the Act of 1991, as amended, provides:-

> *"(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…*
> >
> > *(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."*

(ii) Particular protection for children is recognised under Article 42A.1 of the Constitution which provides:-

"The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

(iii) On becoming aware of the allegations made by N.T., therefore, the first respondent had an obligation to carry out a risk assessment in accordance with its policies and procedures, with the welfare of children as the first and paramount consideration. The respondents accept that while an individual against whom allegations of abuse are made has a right to fair procedures (as outlined in the Children First Guidelines), "*at times this right may need to be secondary to the protection of children at risk*", a principle which it is said, is accepted by the applicant.

(iv) The risk assessment concerns allegations of sexual abuse of a serious nature, which are notoriously difficult to investigate. It is submitted that the fact that such allegations are difficult to assess does not in any way absolve the first respondent from its very onerous statutory obligations.

(v) The onus on the first respondent goes far beyond carrying out a risk assessment where such serious allegations are made; they must also identify and essentially seek out children who may be at risk even where no allegations may have been made.

(vi) It is implicit in the first respondent's duties that they must carry out such assessments. To fail to do so would arguably be in breach of their obligations. The State is under a positive obligation to properly investigate allegations of child abuse. In this regard, the respondents rely on *E. v. United Kingdom* (2003) 36 E.H.R.R. 31 where the European Court of Human Rights ruled that "[*a] failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State*" to protect a child from torture or inhuman or degrading treatment.

(vii) Child welfare and protection policy is based on a legal framework provided primarily by the Child Care Act 1991 and the Children First Act 2015, and a number of key principles of child protection and welfare that inform both government policy and best practice for those dealing with children are outlined in Children First 2011 and the 2017 Children First document. These dictate that the best interests of the child should be paramount and that children have a right to be heard, listened to and taken seriously. The guidelines also provide that a proper balance must be struck between protecting children and respecting the rights and needs of parents/guardians and families. Where there is conflict, the child's welfare must come first.

(viii) In conducting the assessment the respondents follow the Child Care Act 1991, and the 2014 Policy and Procedures which at para. 29 outlines the appeal process. Prior to this, the applicable principles were those as set out in *M.Q. v. Gleeson* [1998] 4 I.R. 85, by Barr J.

106. It is submitted that the purpose of judicial review proceedings is not to review the merits of a decision or to act as an appeal from a decision. In *Bailey v. Flood* [2000] IEHC 169, Morris P. observed:-

> *"The function of the High Court on an application for judicial review is limited to determining whether or not the*

impugned decision was legal, not whether or not it was correct. The freedom to exercise a discretion necessarily entails the freedom to get it wrong; this does not make the decision unlawful. Consideration of the alternative position can only confirm this view. The effective administration of a tribunal of inquiry would be impossible if it were compelled at every turn to justify its actions to the High Court."

107. The respondent submits that while passing on a list of questions is not the same as cross-examination, nevertheless, the issue is whether passing on such list meets the particular circumstances which arose in this case.

108. It is submitted that the applicant bears the burden of proof. Reliance is placed on dicta of Hedigan J. in *I. v. HSE*, referred to in more detail below.

109. The respondents also submit that the applicant is strictly confined to the case on which he was granted leave, relying on dicta of Murray C.J. in *A.P. v. Director of Public Prosecutions* [2011] 1 I.R. 729 at para. 5 that:-

"In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought."

110. It is argued that thus, the relief sought by the applicant is confined to the following:-

(i) quashing the decision of the appeal panel;

(ii) declarations that the Child and Family Agency:

a. dealt with the allegations in a manner which breached the applicant's rights;

b. in failing to interview the complainant/put to the complainant the applicant's position acted unreasonably and unfairly;

c. in failing to provide the applicant with a full appeal on the merits breached the applicant's rights.

111. Accordingly, the respondents submit that the applicant is confined to the case upon which he was granted leave and matters raised in submissions for the first time cannot form part of his case, including:-

(i) the assertion that the allegations made by N.T. were accepted by the Child and Family Agency as being true from the earliest point;

(ii) the suggestion that there was something untoward about L.I. carrying out the investigation when she signed off on the initial strategy meeting;

(iii) the failure of the first respondent to contact N.T.'s treating psychiatrist or eating disorder specialist, N.T.'s foster parents or any third party and further, the allegation that L.I. never inquired into the complainant's mental health;

(iv) the complaint that J.M. did not swear an affidavit and the allegation that she did not make herself available to the appeal panel;

(v) the allegation that L.I. made a determination that a specialist interviewer would not be needed;

(vi) the allegation that L.I. made an "*unrecorded*" decision not to have an interview of N.T. carried out;

(vii) the allegation that at no stage did L.I. consider that the allegations might be untrue;

(viii) the allegation that at no stage did L.I. consider the impact the failure to interview might have on the applicant;

(ix) the complaint regarding the ongoing restriction on the applicant's access to children.

112. The respondents also submit that the applicant is out of time to seek the reliefs set out in paras. (iii) to (viii) in the statement of grounds in so far as they touch upon the actions of the first named respondent, in circumstances where the first respondent issued its final report on 18th February, 2016 and the applicant sought leave on 6th March, 2017. They argue that the applicant is therefore confined to challenging the decision of the appeal panel.

113. The respondents argue that as the applicant was legally represented during the underlying investigation as far back as 13th November, 2015 and when the first respondent produced its final conclusion in February, 2016, there was no reason why he could not have brought judicial review proceeding at that stage if he had some fundamental complaint to make.

114. The respondents argue that the applicant cannot litigate the fairness and validity of a particular process against a hypothetical background or based on asserting the interests of persons who are in a different position to him. The only factual background on which the constitutionality of the process can be considered consists of the particular facts of the applicant's case, namely:-

(i) The fact that the applicant did not seek cross-examination at any stage during the investigation and only sought it once a provisional conclusion had been issued;

(ii) The fact that the applicant has been given the opportunity to have questions put to the complainant.

(iii) The fact that the complainant in this case made the complaint whilst a child and was a child during the course of the investigation and risk assessment process carried out by the first respondent.

115. In relation to fair procedures, attention is drawn to the fact that the respondent is not purporting to determine or assess the veracity of a criminal offence, rather, it is acting in pursuance of its statutory obligations in circumstances where the relevant legislation, namely the Child Care Act 1991, enjoys the presumption of constitutionality. The respondent refers in this regard to the

decision of Barr J. in *M.Q. v. Gleeson* at p. 100:-

> *"There are many circumstances which may indicate that a particular person is likely to be (or to have been) a child abuser, but there is insufficient evidence to establish such abuse in accordance with the standards of proof required in a criminal or civil trial."*

Support for this proposition is also to be found in *I. v. HSE* where Hedigan J. held at para. 5:-

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

116. Thus it is submitted that the respondent is entitled to assess the veracity of the complaint, and to determine if it is credible. In doing so it is not purporting to finally determine the veracity or the credibility of the complaint as a civil or a criminal court might do. The respondents observe that throughout his submissions, the applicant seems to equate a finding of credibility with a finding of truth – which is incorrect. It is a preliminary screening process at the most basic level to ensure that prank or hoax allegations do not proceed to preliminary assessment.

117. The respondents also submit that there is no fixed menu as to what is required by fair procedures; it depends on the circumstances of the case and the stage of the process. In *Ms. A v. The Child & Family Agency* [2015] IEHC 679, Barrett J. held that:-

> *"There is no 'fixed menu' as to what is required by fair procedures. Though precedent is of assistance, when it comes to discerning the fair and unfair one enters the realm of the (somewhat) à la carte: all depends on the circumstances of the case and the stage that the process is at. So, for example, in W v. United Kingdom (1988) 10 EHRR 29, para. 64, the European Court of Human Rights indicated that in a case such as this the key question arising is whether 'the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests'."* (para. 25)

118. They also refer to Regina v. Harrow London Borough Council, *ex parte* D [1990] 3 All E.R. 12, where Butler-Sloss L.J. made the following general observations:-

> *"It would also seem that recourse to judicial review is likely to be, and undoubtedly ought to be, rare. Local authorities have laid on them by Parliament the specific duty of protection of children in their area. The case conference has a duty to make an assessment as to abuse and the abuser, if sufficient information is available. Of its nature, the mechanism of the case conference leading to the decision to place names on the register, and the decision-making process, is unstructured and informal.*
>
> *It is accepted by counsel for the mother that it is not a judicial process. It is part of a protection package for a child believed to have been the victim of abuse.* Unlike other areas of judicial review, the considerations are not limited to the individual who may have been prejudiced and the tribunal or organisation being criticised. In this field, unusually, there is a third component of enormous importance, namely the welfare of the child which is the purpose of the entry in the register. In proceedings in which the child is the subject, his or her welfare is paramount." (pp. 16 to 17) (emphasis added by the respondents).

119. The respondents argue that in following the written procedures set out in the 2014 Policy and Procedures, the process must be looked at as a whole (including the provisions for an appeal) when assessing whether or not it provides for fair procedures. The policy is designed to deal with a wide variety of circumstances and must be flexible. The policy provides for two distinct stages in the process, an investigation followed by an appeal. Regarding the investigation, para. 24.1 provides that where an alleged abuser requests an opportunity to put questions to a person, a balance should be struck between the right of the complainant, the legal obligations of the Agency and the need to provide fair procedures to the alleged abuser. It provides that *"the circumstances of each individual case should be taken into account"*. Paragraph 25.1 provides that where an alleged abuser provides information that requires further assessment, such as a key detail that has to be explored with the complainant, then this further assessment work should be completed before a provisional conclusion is reached by the social worker.

> *120. In support of its decision not to undertake a preliminary interview with N.T., the respondents rely on* Re M (Minors) (Sexual Abuse: Evidence) *[1993] 1 F.L.R. 822 where Butler-Sloss L.J. stated at p. 831 that:-*
>
> *"Generally it is desirable that interviews with young children be conducted as soon as possible after the allegations are first raised, should be few in number and should have investigation as their primary purpose."*

Reliance was also placed on *H v. H (A Minor)(Child Abuse: Evidence)* [1989] All E.R. 740 at pp. 752 and 767 where it was stated that:-

> *"Frequent, repetitive interviews with young, suggestible children, reminding them of what they previously said, would be likely to have decreasing evidential value*
>
> *[…]*
>
> *Where allegations are made spontaneously in early interviews, they are likely to be more convincing than those that occur later in so-called therapeutic interviews where the child may be being encouraged to vent its aggression against the father or other alleged abuser."*

121. The respondent submits that L.I. considered carefully and concluded that she did not believe it to be good practice to have a second interview conducted with N.T. by a social worker, before gardaí would interview her. It would not be in her best interests. This decision was careful, reasoned and properly made in the circumstances, and made with the child's best interests as the paramount consideration as required. That the decision was so made does not in any way support an assertion that the respondent failed to consider the applicant's rights in that decision. Such mere assertion does not prove on the balance of probabilities that no rational decision maker could possibly have dealt with the matter in this way.

122. Regarding any claimed right to cross-examine during the course of the risk assessment, the respondents question whether there is an automatic right to cross-examine in circumstances where at no stage during the investigation process did the applicant make a request to cross-examine. Such request was made several weeks following receipt of the first respondent's provisional conclusion. The respondent states that it was apparent that there was a conflict between what the complainant and the applicant was saying, and no reason has been advanced as to why the applicant did not seek to cross-examine the complainant during the actual investigation. The respondent states that it was against that particular factual backdrop that L.I. did not accede to the request to cross-examine the complainant but instead by letter dated 7th January, 2016 invited the applicant to forward any questions he had in respect of the complainant's evidence so that they could be put to her, and that to date he has declined to do so. The legal consequence of that lack of engagement is that the applicant has set the bar high for himself in this judicial review because he must, in effect, establish that no rational decision maker could possibly have dealt with the matter in that way. The respondents note that in her letter dated 7th January, 2016, L.I. emphasised that as a principal social worker she was professionally qualified to evaluate whether it would have been appropriate to cross-examine the accuser.

123. In respect of the right to cross-examine during the appeal process, the respondents, in written submissions, refer to the averment at para. 34(xii) of the affidavit of U.R. sworn on behalf of the appeal panel, where she explains that it did not make a professional determination not to interview the young person in that they considered the requests by the applicant to interview N.T., but came to the conclusion it was outside the terms of reference. It was their professional determination that the young person had already given a significant interview to the garda interviewer and it would not be appropriate to repeat the exercise. The respondent submits that the issue before the Court on this judicial review is whether the decision maker had an entitlement to make the decision it did, that it was acting within jurisdiction, not that the Court would have made a different decision. They submit that the 2014 Policy and Procedures dictates that a balance should be struck between the right of the complainant, the legal obligations of the Agency and the need to provide fair procedures to the alleged abuser. It is observed that that there is no absolute right that a complainant be made available for cross-examination in the context of the type of risk assessment that is being conducted in this case. The sole purpose of the investigation is to decide if the allegations are credible for the purposes of child protection steps that may require to be taken. It is submitted that the respondent does not purport to make the type of determination of fact that a court or a jury might make in a civil or a criminal case; the aim of the process is to provide an expeditious assessment of risk to children.

124. In *M.Q.*, Barr J. observed that:-

"… the abused child through fear, family pressure, age or mental capacity may be unable to testify against the abuser *or, in the case of repeated physical injuries sustained by a child, there may not be sufficient evidence to rule out accidents and to establish proof of abuse in law by a particular suspect. However, there may be evidence sufficient to create, after* reasonable investigation, *a significant doubt in the minds of competent experienced health board or related professional personnel that there has been abuse by a particular person. If such a doubt has been established then it follows that a health board cannot stand idly by but has an obligation to take appropriate action in circumstances where a person who the board reasonably suspects has indulged in child abuse is in a situation, or is planning to take up a position, which may expose any other child to abuse by him/her."* (pp. 100 to 101) (emphasis added by respondents).

It is argued that this suggests that the fact that a complainant would not be able to testify in a criminal case (which would involve cross-examination) does not mean that there cannot be a child welfare investigation. Barr J. further stated:-

> *"The board's assessment of the weight it attaches to each such allegation should be stated and should be objectively based. The purpose should be to create a fair, reasonable assessment of each complaint or finding about an alleged wrongdoer. This also necessarily entails reasonable investigation of each such complaint by the health board. In the ordinary course in serious cases the complaint should be put to the alleged abuser in the course of the investigation and he/she should be given an opportunity of responding to it. However, an exception in that regard may arise where the board official concerned has a reasonable concern that to do so might put the child in question in further jeopardy as, for example, where the abused child is the complainant. An obligation to offer an alleged abuser an opportunity to answer complaints made against him/her would arise in circumstances where the board contemplates making active use of the particular information against the interest of the alleged wrongdoer – such as publication to a third party, as in the present case, or embarking on proceedings to have a child or children taken into care."* (p. 101).

The respondents note that this simply speaks of putting the allegations to the alleged abuser and giving him the opportunity to respond; it does not say anything about a right to cross-examine.

125. In *P.D.P.*, O'Neill J. made certain findings in respect of the level of fair procedures that he believed were required, but he was not necessarily purporting to lay down those principles as ones that are required in every case. It is submitted that the reference to cross-examination by O'Neill J. arose in the context of the particular facts of the case. The respondents rely on *I.*, where Hedigan J. upheld the procedures of the HSE in conducting assessments.

126. The respondents submit that if this is wrong and if there is a conflict between *M.Q.* and *I.* on the one hand, and *P.D.P.* on the other hand, then the approach in the former two cases is to be preferred.

127. The respondents also submits that *E.E.* is distinguishable given the age of the complainant. They have never maintained that cross-examination would never be appropriate, rather that it is a decision for the professionals carrying out the assessment and one which is based on the particular circumstances of each case including the age and vulnerabilities of the child.

128. In the particular circumstances of this case, however, it is submitted that a fair, reasoned and rational decision was made as to why the complainant should not be cross-examined, and the onus is on the applicant to establish that no rational decision maker in such circumstances would have made such a decision. Further, in determining the extent of any alleged right to cross-examine, the Court should have regard to the mechanism of same. In relation to the allegation of a failure to disclose documents, the respondents state that it is dealt with at paras. 64 and 65 of L.I.'s affidavit. She avers that the applicant's solicitors wrote by letter dated 13th November, 2015 seeking for her provisional conclusion to be set aside and seeking disclosure of all material upon which the decision was based. She responded to the letter on 2nd December, 2015 enclosing the said documents and a further four weeks was granted to allow the applicant to consider same. They note that no request for documents was made before then. This allegation is also addressed by U.R. in regard to the appeals process at para. 13 of her affidavit where she confirms that all relevant documents were sent to the applicant by way of disclosure.

129. Emphasis is placed on the purpose of the appeal panel's report within its terms of reference as set out in U.R.'s verifying affidavit being to:-

- *"Examine the professional decision making process leading to a conclusion that abuse and/or neglect occurred and to reach a new and impartial decision on the veracity and reliability of such a conclusion based on the evidence provided;*

- *Make a determination as to whether fair procedures were adhered to at all stages of the assessment process;*

- *Make recommendations as appropriate; and*

- *Provide a report to Tusla Legal Service Office."*

130. It is argued that the appeals process is limited in nature in that it is an impartial examination of the professional decision making informing the conclusion reached; the appeal panel is therefore not tasked with making a new decision, rather it is a review of the previous decision making process and conclusion reached. The decision of the appeal panel was one that was made within jurisdiction, and within its discretion. It is submitted that the internal appeal process is not intended to be a full *de novo* investigation of the matter, rather a review of the investigation. The applicant had made out no legal basis as to how he is legally entitled to a full *de novo* appeal on the merits. They argue that it is rational and lawful for an appeal panel to take the view that it is not going to permit cross-examination in circumstances where it was never sought during the investigation and therefore does not come within its terms of reference, and further that in light of the significant garda interview, it would not be appropriate.

131. In so far as the applicant's plea that the respondent failed to afford the applicant an oral hearing is concerned, the respondents refer to *V.Z. v. Minister for Justice* [2002] 2 I.R. 135 where McGuinness J. stated at p. 161:-

> *"…I would accept the submission on behalf of the respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The applicant is not in the position of an accused person facing prosecution."*

132. I should observe that any suggestion that there should be an oral hearing was not something that was emphasised during oral submissions in this case.

Decision

133. There can be no gainsaying that the task of the first respondent, who is charged with very weighty and serious duties under s. 3 of the Child Care Act 1991, is not an easy one. This is particularly so in relation to the investigation and determination of whether an allegation of child abuse of a sexual nature is founded or unfounded. The failure to properly investigate an allegation of such nature may have devastating consequences for a child at the centre of the inquiry, or other children who may be at risk. The paramount consideration is and must be that of the welfare of the child. On the other hand, the advancement of an allegation of sexual abuse against the subject of an investigation may have serious consequences for him or her in his/her family life, employment relations and general reputation in the community.

134. A balance must be struck between the competing rights of the parties involved in any such investigation. The Constitution demands no less. Fair procedures dictate that the person against whom allegations are made is given adequate notice of them and that he or she should have the right to reply. The nature and extent of the right to reply, or to test the allegations in child sexual abuse cases, has been the subject of debate.

135. In this case the applicant does not consider it necessary to argue for an absolute entitlement to cross-examine N.T., the child making the allegation. He maintains that the want of fair procedures fundamentally arises from the failure of those in the decision making bodies to sit down with N.T. to assess her credibility. L.I. never spoke to N.T., nor did the members of the appeal panel. He maintains that there is an obligation on the respondent to at least stress test the allegations. A principal component of the applicant's complaint is that a decision appears to have been made early on in the investigative process that not only would the child not be cross-examined, but that she would not be confronted with the fact of the denial of the abuse by the applicant.

136. The applicant does not specifically contend, nor does he cite authority for the proposition that a person has a right to an appeal against a decision of an investigating body. Nevertheless he argues that once an appeal is afforded, as has been afforded by the respondent in this case, it must not be unduly restrictive, particularly where a decision may have been made to defer an excursion to the courts in respect of judicial review, and to engage in the process of appeal.

137. Given the delicate nature of the subject matter of the investigation process, the Court endorses the view expressed by Hedigan J. in *I. v HSE*, that it must be a rare occasion that a court should be requested to intervene by way of judicial review in such process. That the welfare of the child is of paramount consideration is recognised not only in the provisions of the Child Care Act 1991, but has been reiterated in the Children's First Act 2015. Hedigan J., agreeing with Butler-Sloss L.J. in *Regina v. Harrow London Borough Council, ex parte D* that judicial review in this type of case should be limited to points of principle that need to be established, stated:-

> *"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."*

138. Further, as McDermott J. pointed out in *T.R. v. Child and Family Agency* [2017] IEHC 595, the basic principles as set out in *M.Q.* and as stated by Hedigan J. in *I. v. HSE*, are reflected in the 2014 Policy and Procedures. McDermott J. noted at para. 81:-

> *"The cases which require intervention or assessment will vary. There are cases in which there is an immediate risk perceived based on a reasonable suspicion which require immediate communication to An Garda Síochána, and/or third parties and in respect of which it would be wholly inappropriate to give notice of the allegation or enter into a dialogue at that stage with the alleged abuser because of the dangers which that might pose to the child or children concerned."*

139. He also observed that the procedures adopted by the first respondent provide for such a case; and for cases where the complaint is more retrospective: where the investigation may be conducted within a more extended time frame. Thus all cases will not necessarily require the same investigative procedures and the investigation may vary depending on the urgency of the complaint and the circumstances of the child at the time of the complaint. Of significance is the imminence of any danger to the child.

140. In this case, it might be said that the complaint is of a retrospective nature, something which is reflected in the more extended timeframe which has been adopted in respect of the investigations.

141. The role of this Court on an application for judicial review such as this is restricted. The Court is concerned with the legality of the administrative act, investigative process, the means by which the decision, conclusion or determination has been arrived at, or

the reasonableness thereof. It is no part of the function of the Court to assess the merits of the decision taken, the findings made, or the conclusions achieved, or to intervene merely because it believes it might have come to a different conclusion having assessed the evidence. Nevertheless, it appears to me that if the investigation or decision making body misdirects itself as to the nature of its brief; acts, or fails to act, in a manner which is outside or contrary to its express or implied powers or procedures, a complaint based on such misdirection, action or inaction may form the basis upon which the Court might intervene.

142. To a certain extent many of the criticisms levelled at the initial investigation and assessment by the first respondent are historical in the context of the appeals structure put in place and followed by the applicant. In fact it may be that the appeal process, properly applied, corrects or redresses any alleged illegality in the initial decision making or investigative process.

143. An issue which this Court must address, therefore, is the extent to which, when the appeal process has been engaged, the person against whom allegations of abuse have been made, such as the applicant, is entitled to a reinvestigation, revisiting or re-examination of the complaint or whether, given the wording of the 2014 Policy and Procedures that he is entitled only to a restricted process review. An important issue, therefore, is whether, in this particular case, the appeal is effectively a limited one of review, where the appellate body must confine itself to a consideration of the procedures and the process, rather than to investigate or examine the allegation with a fresh eye, and if so, to what extent if any this Court might intervene with such decision and on what basis.

144. It is therefore appropriate that the structure which has been put in place be examined to inquire into the scope and breadth of the appeal or review provided. In argument before this Court, there was no consensus in relation to whether the appeal process outlined in the 2014 Policy and Procedures is one of review (such as might equate to judicial review and thus importing the principles applicable to such an application), whether it is a merit-based appeal or whether it is something in the middle, a hybrid. Significant time was devoted on the hearing of this application to a consideration of the meaning and import of para. 29 of the 2014 Policy and Procedures, which concerns appeals. Indeed, the position and arguments adopted by the respondents have not always been consistent. This is likely due to the wording of paragraph 29. The respondents have suggested, on the one hand, that it is a review procedure, not an appeal-based procedure, whereas at the same time appear to accept that the scope of the review goes somewhat beyond that of a process review as might be conducted by this Court on an application for judicial review.

145. The 2014 Policy and Procedures adopted by the respondent, on a proper interpretation thereof, in this Court's view, go beyond the concept of review as may be understood in a judicial review type application. Thus, para. 29 acknowledges without limitation the importance of the alleged abuser being afforded "*the option of appeal*". The appeal panel is required to *review* all documentation and submissions by virtue of para. 29.6; yet the same subparagraph dictates, in the conjunctive, that it will arrange to interview the *relevant social work personnel* and *the alleged abuser* [emphasis added]. The latter requirement is not one which is familiar to the judicial review process. Similarly, the appeal panel is mandated to write to the alleged abuser setting out clearly the details of any allegation being inquired into and the principles applicable to the conduct of the appeal. Paragraph 29.8 obliges the appeal panel to ensure that fair procedures are afforded to the alleged abuser and to afford him/her the opportunity to meet either alone or accompanied, at which such meeting he or she "*shall*" be entitled to a reasonable opportunity to make statements, make legal submissions, provide data, submit an expert report or to request that a statement be provided by any person who is reasonably material to the appeal. It is not therein suggested, expressly or by implication, that such material is confined to information, data or statements considered at the initial investigation stage.

146. Further, when one examines the contents of the memoranda of interviews conducted by the appeal panel with three social workers in particular, it is difficult to see how certain information in these statements could be relevant to a process which is confined to a review of whether fair procedures or the requirements of the respondent's procedures or protocols have been complied with. Thus, the notes of the meeting with A.B. on 30th September, 2016 contain information, some of which if at all relevant, appear central to an investigation of the substantive merits of the appeal rather than a review. It includes such matters as N.T. never feeling part of the family, V.A. being rude, cold and blaming N.T. for everything and A.B.'s stated conviction of "*having no doubt about the credibility of the disclosure"*. There is also a sentence to the effect that A.B. had questioned if the child had starved herself out of placement with the family. I find it very difficult to understand how this information could be in any way relevant to a review of the process, yet the inquiries which were made by the appeal panel and the information which was received by it in this regard, were taken into account by it in coming to its conclusion. In this regard I refer to paras. 1.5.6, 1.5.7 and 1.5.8 of the appeal panel's report. The consideration of such matters is in contrast with the consideration by the appeal panel of whether the child should be re-interviewed. Two alternative explanations are given for not considering whether this step should have been taken. In the letter of 2nd December, 2016, the appeal panel wrote at para. 4 that:-

> *"It is the view of the Appeal Panel that in relation to [L.I.] interviewing [N.T.] we do not think it necessary for a decision maker to interview the child where they have been previously interviewed."*

On the other hand, the replying affidavit of U.R. offers an alternative explanation of why this step was not taken. She avers at para. 33 that they did not interview the third party complainant "*as this does not come within the remit of the Panel as set out in the procedures*". The affidavit continues:-

> "*When the Appeal Panel met with the Applicant he and his solicitor specifically asked that [N.T.] be interviewed. The Appeal Panel considered this request in our subsequent deliberations but held that interviewing [N.T.] does not come within the remit of the Panel as set out in the procedures."*

Later in the affidavit this is apparently contradicted, at least in part, by the averment at para. 34(xii) that they made the professional determination not to interview N.T. on the following basis:-

> *"…we considered the request by [F.A.] to interview the young person but came to the conclusion that it was outside the Terms of Reference. It was also our professional determination that the young person had already given a significant interview to a Garda Interview and that it would not be appropriate to repeat the exercise".*

147. Nevertheless, and despite this latter averment, this Court can only come to the conclusion that the appeal panel effectively interpreted its terms of reference as excluding any real consideration of an interview with the child. I do not see anything in the provisions of para. 29 of the 2014 Policy and Procedures that excludes such consideration. The wording of para. 29 of the 2014 Policy and Procedures is effectively mirrored in the new 2015 Procedure document. The overriding requirement of the appeal process is that "*fair procedures are afforded to the alleged perpetrator*". It is difficult to see how fair procedures can be said to have been applied in the absence of a consideration of interviewing the child or otherwise stress testing her allegations. On the face of it, therefore, the appeal panel, in this Court's view, took an unduly restrictive view of its brief and in doing so misdirected itself, failed to comply with its own procedures and thus exceeded its powers. This is particularly so given the factual background that the complainant was never

made aware that her allegations were being denied or challenged; and the absence of a consideration and assessment of any response to such denials.

148. If the proper interpretation of the appeal process excludes such considerations, which I do not believe it does, then the sentiments of Humphreys J. in *E.E.* referred to below come sharply into focus. There, he was critical of the appeal procedures under the 2014 Policy and Procedures as interpreted by them in that case. He observed:-

> *"98. The agency submits that the applicant is out of time to impugn procedures in the initial investigation (respondent's submissions para. 16), while at the same time submitting that the appeal panel is merely a review and cannot be asked to invoke any procedure that could turn it into a* de novo *hearing.*
>
> *99. What is unacceptable about this submission is that it is the agency itself that has created the appeal mechanism. A public body must act in good faith; and must act at all times to vindicate the human, constitutional and ECHR rights of persons affected by its actions. It is simply not open to a public body to create an appeal mechanism, to encourage or at the very minimum offer the option of availing of that mechanism, and then rely on any ineffectiveness of that mechanism (e.g. 'merely a review') as a basis for contending that the first instance decision cannot now be challenged.*
>
> *100. To uphold the agency submission would be to allow the agency to push applicants into a procedural elephant trap, condemned to an allegation of acting prematurely if they fail to take up the appeal process, and to an allegation that they are out of time if they do appeal.*
>
> *101. Having established the appeal procedure, the respondent cannot be heard to rely on any way its ineffectiveness. Nor can the agency contend that an applicant loses any rights by availing of that appeal procedure. Any remedy that a court might fashion must have regard to that basic principle."*

Central to Humphreys J.'s determination in that case was his finding that the applicant had a right to cross-examine the complainant. In this regard, he was also critical of the offer by the respondent to submit questions that the agency might put to the complainant. He believed that such a submission was devoid of merit and concluded that if the applicant had a right to cross-examine the complainant, the submission of written questions to be put by the agency would fall short of justice.

149. In this case, however, the applicant does not insist on right to cross-examine. Indeed, it may very well be that any such right, if permitted, could have been curtailed to a significant degree. I endorse the observation of McDermott J. in T.*R. v. Child & Family Agency* at p. 55 where he stated:-

> *"99. It may be that in a particular case it is appropriate that an alleged abuser be given the right to cross-examine an adult complainant. This is particularly so where a decision may be made following the assessment undertaken and a finding that the allegations are 'founded' to notify a relevant third party of the investigation or conclusion. There may also be countervailing reasons as to why it would be inappropriate to permit such a right to cross-examine such as the mental capacity of the complainant. In each case it is my view that the extent of the right must be determined under paragraph 24.1(b). The decision to allow cross-examination must be fair, reasonable and proportionate. It should take account of the consequences of an adverse finding of 'founded' for the alleged abuser. It may be that the fact that the complainant is an adult should weigh more heavily with the decision-maker in permitting cross-examination than if the complainant is a child. The extent and mode of exercise of the right must also be considered. Clearly, the potential for the abuse of the right if the alleged abuser is unrepresented … must also be taken into account. Each case must be considered upon its own facts.*
>
> *100. In effect, I consider that to be the import of the judgments in P.D.P. and E.E. In this case an application under para. 24.1(b) would be premature having regard to the fact that the first stage of the assessment has yet to be completed. It only arises following the engagement by the alleged abuser with the respondent in respect of the allegations following which a request may be made to question the complainant or another witness."*

150. McDermott J. also referred in his judgment to a potential difficulty which may be encountered by the assessor in establishing an allegation as being founded, to the level of probability required, in the absence of an opportunity to cross-examine. He observed at para. 106:-

> *"In particular, the more serious the allegation the more cogent the evidence required to support it."*

151. Counsel for the respondent submits that the applicant has not sought to adduce expert evidence as a basis for the challenge to the procedures and policies adopted and the decisions of the experts in this case. While I accept that expert evidence may be cogent or persuasive; and indeed in certain cases the court may find itself compelled to a conclusion in the face of the presence or absence of expert evidence, ultimately, in my view, whether a respondent in a case such as this has acted in a lawful manner is a matter of legal interpretation which may be aided, or not, by such expert report or testimony. While the evidence of an expert as to whether to re-interview a complainant in the particular circumstances may be relevant to the courts' consideration of an allegation of lack of fair procedures, it appears to me to be a matter for the Court to determine whether the decision made by the appeal panel, not to re-interview because of its interpretation of its terms of reference, is a lawful one. Further, I do not believe that this case can be equated to *Fitzgibbon v. Law Society* or that it necessarily attracts the principles enunciated therein.

152. In my view, the appeal panel took an unnecessarily restrictive view of its terms of reference. It misdirected itself by failing to consider whether N.T. should be interviewed or whether it should consider putting to the complainant F.A.'s denials of the allegations and to ascertain her response thereto. This is one, but not the only means by which the complaint might have been stress tested. Thus, in my view, in failing to afford real consideration to the question of whether to put F.A.'s response to the complainant, because of the restrictive and, in the Court's opinion, incorrect view which it took of its terms of reference, it acted unlawfully and contrary to its own policy and procedures. Further, to adapt *dicta* of McDermott J. in *T.R.*, it is difficult to see how the conclusion of founded was established with the necessary level of probability in the absence of a consideration of the stress testing of the complainant's evidence. As McDermott J. observed, the more serious the allegation, the more cogent the evidence required to support it.

153. I do not accept that it was unreasonable for the applicant to expect more than a review type process when he decided to embark upon his appeal, something which at a minimum he was encouraged to do by the first respondent. By concluding as it did on this point it acted in breach of the applicant's rights of natural and constitutional justice; if not contrary to a reasonable expectation regarding the nature of the appeal process. In the circumstances, I believe that the decision of the appeal panel should be quashed. Given the sentiments expressed by McDermott J. that the 2014 Policy and Procedures effectively replaced the Barr protocols to

ensure fair procedures, a properly directed appeal is likely to cure any alleged inadequacies or illegalities in the initial investigation and reporting by the first respondent, the challenge to which decision by way of *certiorari* at least, is largely accepted by the applicant to be out of time and not a relief sought by them on this application.

154. I will hear the parties in relation to the order to be made.