THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 716

[Record No.:2021/1010 JR]

BETWEEN

D.M (A MINOR SUING BY HER MOTHER AND NEXT FRIEND P.C.)

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENTS

AND

R.K.

NOTICE PARTY

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 20th day of December, 2022

INTRODUCTION

1. These proceedings relate to the obligations on the Child and Family Agency [hereinafter "the Agency"] to conduct an investigation in respect of notified complaints of child sexual abuse and the rights of complainants in that process. No challenge to the vires of the Agency to conduct an investigation arises. Rather the case made is that the Agency has failed to discharge the duty imposed on it under s. 3 of the Child Care Act, 1991 (as amended) [hereinafter "the 1991 Act"] by closing its file on the complaint made on behalf of the Applicant in reliance on the report of the Appeal Panel established in accordance with its Policy and Procedures for Responding to Allegations of Child Abuse and Neglect (2014) [hereinafter "the 2014 Policy"] which, reversing an earlier finding of the Agency, found the complaint "*unfounded*". The decision to treat the s. 3 assessment as at an end and close the file was made notwithstanding concerns raised on behalf of the Applicant about the appeal process and the soundness of the conclusions arrived at in that process.

BACKGROUND

2. The Applicant was born in March, 2013. When she was about three and a half years old, in November, 2016, she made a disclosure of sexual abuse, *viz.* touching of the genital area and digital penetration by the husband of her minder [hereinafter "*the identified man*"]. The Applicant's complaint was assessed at St. Clare's Unit at Children's Health Ireland on behalf of the Agency and she was interviewed by specialist Gardaí. The Social Work Assessment Team appointed by the Agency concluded that on the balance of probability the Applicant had been subjected to sexual abuse by the identified man and her allegation was "*founded*".

3. On his subsequent trial on criminal charges related to this abuse in 2019, the identified man was acquitted.

4. The identified man appealed against the Agency's finding that the allegation against him was founded in accordance with the provisions of the 2014 Policy which provides for a non-statutory appeal process for persons against whom it is concluded that allegations of abuse are founded. The Agency nominated an Appeal Panel and prescribed its terms of reference (recorded in the subsequent report of the Appeal Panel at para. 2.2) as follows:

> *"To examine the professional decision making process leading to a conclusion that abuse and/or neglect occurred and to reach and new and impartial decision based on the evidence provided.*
>
> *To make a determination as to whether fair procedures were adhered to at all stages of the assessment process.*
>
> *To make recommendations as is appropriate.*
>
> *To provide a report to Tusla Legal Services Office within the timescale prescribed"*

5. The identities and qualifications of the two members of the Appeal Panel were set out in its report. From the description given, both are experienced social workers with specialisation in child protection and welfare matters and investigation or enquiry experience.

6. In its report dated 15th of January, 2021, the Appeal Panel concluded that the finding of the Social Work Assessment Team that the allegation of abuse was "*founded*" in the Applicant's case could not be upheld because of an identified failing in the professional decision making described as follows at para. 4.3 of the Report:

> *"The Panel accepts that as set out by the Social Work Department, [name of child]'s initial disclosure was spontaneous. The issue as highlighted by [name of clinical psychologist] is the suggestibility of a child of this age and the leading questions used in the Garda interview may have contaminated the evidence. The Panel agrees with [name of psychologist]'s assertion that it is likely that this contamination compromised the St. Clare's assessment process and validation."*

7. The report from a psychologist referred to and relied upon by the Appeal Panel was a report which had been prepared for but not relied upon in the defence of the criminal proceedings. This report was not available to the original assessment team and was therefore not considered when the original finding of "*founded*" was made. It appears that the author of the report has not been subjected to examination in respect of his report. It is unclear from the redacted report of the Appeal Panel whether they were made aware that a separate report had been obtained by the Director of Public Prosecutions [hereinafter "the DPP"] or whether they made any attempt to procure it.

8. Although it is unclear when the psychologist's report was provided to the Appeal Panel or what opportunity was provided to the Social Work Team or St. Clare's to respond to it (the report of the Appeal Panel in evidence before me is heavily redacted), the report, in its unredacted parts, notes that there was a meeting with the Social Work Team in July, 2020 and submissions received at the end of August, 2020 with further queries being addressed in December, 2020. For their part, St. Clare's Unit have communicated to the Applicant's parents that they had not been contacted in relation to the Appeal Panel since April, 2020 which may have been before or after receipt of the psychologist's report.

9. It is clear from the report that the Appeal Panel had available to it, *inter alia*, the transcript of the Garda Specialist Interview in November, 2016 and the redacted St. Clare's Report dating to May, 2017 following from an earlier assessment. It is also clear that the

Appeal Panel met with the Social Work Team and the identified person for the purpose of the appeal and received submissions from them. The nature of these submissions or all of the relevant dates are not recorded in that part of the report that is unredacted. The Appeal Panel went on to record its conclusion at para. 6.0 of the Report as follows:

> *"6.1 The Panel cannot uphold the Social Work findings that [name of child] was subject to sexual abuse by [name redacted] as we agree with [name of psychologist] that the Garda Interview contaminated the evidence to such a degree that this contamination compromised the St. Clare's assessment process and validation.*
>
> *6.2 In the Panel's view this is a very good example of the importance of joint Social Work/Gardai assessment of child abuse disclosures to minimise the risk of contamination of evidence in particular when dealing with very young children when a speedy focussed and skilled response to assessment is crucial in gathering evidence."*

10. The report of the Appeal Panel was not immediately made available to the Applicant's parents. Following correspondence on their behalf it was finally furnished in redacted form on the 28th of May, 2021.

11. By letter dated the 27th of July, 2021, a complaint was made on behalf of the Applicant in relation to the conclusion arrived at by the Appeal Panel, the matters on which it relied and the information available to it. It was requested that the appeal be re-opened and a review conducted. In particular, it was pointed out that the psychologist's report relied upon had been prepared in the context of the criminal trial and the DPP had commissioned its own report which rejected the psychologist's conclusions. It was indicated that neither report was ultimately relied upon and neither were tested by cross-examination. A concern that the Appeal Panel had not contacted St. Clare's, the Applicant's parents or the DPP in the context of the appeal was expressed.

12. By email dated the 3rd of September, 2021, in response to the request dated 27th of July, 2021 that the Agency re-open the appeal and conduct a review of the matter, the Agency advised:

"The Child and Family Agency has a duty to ensure that any action taken in relation to an alleged abuser is, where possible, done in accordance with natural justice and fair procedures. The Child and Family Agency has a duty to determine whether there may be a risk to a child and assess any such risk. The Child and Family Agency has complied with these duties in this case. The Appeal Panel heard an appeal. The Appeal Panel are independent and have concluded their function in this matter. The section 3 process has concluded."

13. In correspondence with St. Clare's Unit following receipt of the Appeal Panel Report, the Applicant's parents were advised that St. Clare's Unit had last been contacted in relation to the appeal process in April, 2020 and had not been informed of the outcome of that process. This correspondence is exhibited on behalf of the Applicant in these proceedings.

14. By further letter dated the 3rd of November, 2021, detailed complaint was made on behalf of the Applicants about the Agency position that the process had concluded including in particular:

"(i) that the determination of whether allegations of abuse are founded is a function of the CFA and it not one that may be permissibly delegated to a non-statutory entity, such as the Appeal Panel in this case,

(ii) the CFA, in the exercise of its statutory functions, is not, and cannot be lawfully or properly, bound by the conclusions of any such non-statutory panel insofar as the discharge of its statutory functions by reference to the Child Care Act 1991 section 3 is concerned,

(iii) it may not lawfully hide behind the decision of such a panel in discharging its duty under section 3,

(iv) it is not, and cannot be, bound by the Appeal Panel's findings into the future and prohibited form investigating matters further, if reasonably considered warranted, in any particular case, and

(v) it could not rely on the Appeal Panel's report as determinative of whether the allegation of abuse by [D.M.] are founded,"

15. It was further complained that in concluding that its s. 3 duty in this case had been discharged, and that nothing further was required of it, the Agency had fallen into error, in law and fact, and was in breach of its statutory duty. The Agency was called upon to comply with its statutory duty by reference to s. 3 of the 1991 Act and to complete a proper and fair assessment of the allegations made by the Applicant in the changed evidentiary situation that existed.

16. By email dated the 18th of November, 2021, the Agency replied by repeating the terms of the earlier letter and adding:

> *"The Agency has complied with its obligations under s. 3 of the Child Care Act, 1991".*

17. With reference to the circumstances in which a fresh investigation had been carried out in *WM v. CFA* [2017] IEHC 587, a case relied upon on behalf of the Applicant in correspondence, it was pointed out that this case concerned a situation in which a determination made by the Agency had been quashed thereby allowing a fresh investigation. It was further stated:

> *"in this case an independent appeal panel has discharged its function and consequently there is no basis for the Agency to carry out a fresh investigation."*

18. The letter continued:

> *"the Agency lawfully appointed an Appeal Panel and it is fully within the statutory gift of the Agency to appoint an Appeal Panel and accept the decision of the Appeal Panel. It is noted that in FA v. CFA [2018] IEHC 806, MacGrath J. used the 2014 Policy and Procedures as the benchmark for analysing the scope of the appeal/review provided (see paragraphs 144-145). The Court acknowledged the power of the Agency to create the Appeal Panel."*

19. The Agency pointed out that the Applicant was not privy to all relevant information generated during the course of the s. 3 process. It was pointed out that the process was

confidential and that it would not be appropriate to engage in correspondence about the merits of the process.

20. Notwithstanding the Agency's stated position that the s. 3 process had concluded and it had complied with its obligations, the Applicant's parents became aware in November, 2021 from an email from the Private Secretary to the Minister for Children, Equality, Disability, Integration and Youth which was disclosed to them that, notwithstanding the reported outcome of their Assessment Process and the criminal trial, the Agency had submitted a notification to the Garda Vetting Bureau informing it of a *bona fide* child protection concern.

PROCEEDINGS

21. An application for leave to proceed by way of judicial review was moved on foot of papers filed on the 29th day of November, 2021. At the request of the Agency the identified man was joined as a Notice Party to the Proceedings. Although the Applicant is very critical of the report of the Appeal Panel, no relief is sought in these proceedings in respect of that report (any such challenge would have been out of time when these proceedings were commenced). Despite this, strong criticism is made of the report of the Appeal Panel in these proceedings. Most particularly it is contended that the Appeal Panel strayed beyond and/or failed to comply with its terms of reference by relying on a report of a clinical and forensic psychologist which had not previously been considered by the Agency and without setting out the response made or offered by the Agency to the said report and without affording the sexual assault assessment unit at St. Clare's Unit any opportunity to respond and that the Appeal Panel's decision to proceed to determine the complaint "*unfounded*" was unreasonable in all of the circumstances.

22. Whereas the criticisms of the report of the Appeal Panel are not relied upon to seek relief from the Court in respect of the report, it appears that they are identified instead as a basis for challenging the subsequent refusal of the Agency to re-open the appeal and review the case on the asserted basis that the s. 3 assessment process has concluded. The gravamen of the Applicant's complaint in these proceedings is therefore that the Agency cannot stand over the findings and conclusions of the Appeal Panel and are obliged to re-examine or continue with

an examination of the case in discharge of its s. 3 duties. The grounds of challenge advanced insofar as the impugned decision is concerned might be summarised as follows:

A. The determination of whether allegations of abuse of a child are founded is a function of the Agency pursuant to s. 3 of the 1991 Act and may not permissibly be delegated to a non-statutory appeal panel, there being no statutory or other lawful basis for any such delegation;
B. The Agency may not lawfully bind itself by the appeal panel's findings and preclude further investigation where reasonably considered warranted and the conclusion that the s. 3 process is at an end is unlawful;

23. Statements of Opposition were filed both by the Agency and the Identified Man. A time issue is raised on the basis that a challenge to the Report of the Appeal Panel was not brought in time. The Applicant's *locus standi* to maintain the proceedings is also put in issue and it is contended that no legally recognised right or interest of the Applicant is affected by the conclusion reached or alternatively that the Identified Man's right to fair procedures prevail having participated in a lawfully conducted and now concluded process. Objection is taken to an attempt to impugn the outcome of the investigation without having successfully challenged the decision of the Appeal Panel. It is contended that these proceedings amount to an impermissible collateral challenge to the outcome of the assessment process conducted by the Agency pursuant to its functions under the 1991 Act.

24. The Agency further relies on its compliance with the terms of its 2014 Policy as evidence of its discharge in a proportionate and fair way of its obligations under the 1991 Act. It is contended that the Policy, including its appeal process, does not constitute a delegation of functions under statute or otherwise. The Agency maintains that it has discharged its duty to assess the allegation made and its assessment power has been exercised in a reasonable and proportionate manner. It is accepted that the Agency sent a notification to the Garda Vetting Bureau pursuant to s. 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act, 2012 but it is maintained that the said notification did not impact on the separate s. 3 process concluded by the decision of the Appeal Panel.

25. The thrust of the Notice Party's Opposition focusses on the scope of the duty created by s. 3 of the 1991 Act which is directed to a duty to investigate a child protection concern for the purpose of protecting children from risk. He contends that it is not the purpose of the investigation to determine truth or to make findings of guilt or innocence. It is contended that the Applicant has no justiciable interest in the investigation, as she is not a child at risk. It is contended that no duty is owed to the Applicant as a complainant in the assessment process. The Notice Party relies on discretionary considerations as a bar to relief including his *bona fide* engagement in the process, the length of time it has taken to conclude the process and attendant stress, the delay between the report of the Appeal Panel and the institution of proceedings and the fact that he has also undergone a criminal trial and been acquitted. Finally, the Notice Party maintains that if the procedures adopted by the Agency are found to have been flawed, he will contend that s. 3 does not permit of the making of findings but merely imposes a duty to identify children who are not receiving adequate care.

STATUTORY SCHEME

26. No express statutory provision has been made for the investigation of allegations of child abuse by the Agency. In the absence of a statutory scheme clearly directed to the investigation of complaints relating to child welfare, the discharge of a statutory function to identify children at risk and promote their welfare found in s. 3 of the 1991 Act (as amended) has been relied upon as the basis for imposing statutory duties on the Agency to conduct an investigation in respect of reports of child abuse notified to it. Section 3 of the 1991 Act (as amended) provides:

> *"3.(1) It shall be a function of Child and Family Agency to promote the welfare of children who are not receiving adequate care and protection.*
>
> *(2) In the performance of this function, the Child and Family Agency shall—*
>
> *(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children;*

(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise—

(i) regard the welfare of the child as the first and paramount consideration, and

(ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and

(c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family.

(3) The Child and Family Agency shall, in addition to any other function assigned to it under this Act or any other enactment, provide child care and family support services, and may provide and maintain premises and make such other provision as it considers necessary or desirable for such purposes, subject to any general directions given by the Minister under section 69."

27. Notwithstanding the absence of an express and developed statutory provision for investigating allegations of child abuse, the Children's Act, 2015, which provides for mandatory reporting where grounds for believing that a child has been, is being or is at risk of being harmed, requires notification of complaints to the Agency (s. 14 of the 2015 Act) for the purpose of assessment (see the use of the language of "assessment" in s. 16 of the 2015 Act). Section 16 of the 2015 Act provides with regard to the assessment by the Agency of reports under that Act as follows:

"(5) Subject to the provisions of this Act and the Child Care Act 1991 , the procedures for carrying out an assessment arising from a report under section 14 shall be such as the Agency considers appropriate in all the circumstances of the case.

(6) For the purposes of performing its functions under this Part, the Agency shall have the same powers as it has under the Child Care Act 1991 or any other enactment in respect of children who are not receiving adequate care and protection.

(7) The powers conferred on the Agency by this Part in respect of reports under section 14 are without prejudice to the powers conferred on it under the Child Care Act

1991 or any other enactment in respect of reports received by it, otherwise than under section 14 , concerning a child who is not receiving adequate care and protection."

28. By virtue of s. 18 of the Children First Act, 2015, the Agency is a scheduled organisation for the purpose of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 (as amended). That Act makes provision for the protection of children by providing for the establishment and maintenance of a national vetting bureau database system. Section 19 of that Act provides:

".— (1) Where, following an investigation, inquiry or regulatory process (howsoever described) in respect of a person, (including an investigation, inquiry or regulatory process initiated but not yet concluded before the commencement of this section) a scheduled organisation, has as a result of the investigation, inquiry or regulatory process, a bona fide concern that the person who is the subject of that investigation, inquiry or regulatory process, may—

(a) harm any child or vulnerable person,

(b) cause any child or vulnerable person to be harmed,

(c) put any child or vulnerable person at risk of harm,

(d) attempt to harm any child or vulnerable person, or

(e) incite another person to harm any child or vulnerable person,

the scheduled organisation shall, as soon as may be, for the purposes of providing specified information to the Bureau, notify the Bureau in writing of that concern and shall state the reasons for it.

(2) Notwithstanding the generality of subsection (1), where in the course of exercising its powers under the Child Care Act 1991 , the Health Service Executive has, in respect of a person, a bona fide concern that the person may do any of the matters referred to in paragraphs (a) to (e) of subsection (1), the Health Service Executive shall, as soon as may be, for the purpose of providing specified information to the Bureau, notify the Bureau in writing of that concern and shall state the reasons for it.

(3) The scheduled organisation shall, in relation to the person in respect of whom it has a concern under subsection (1) or (2), as the case may be, notify the person of the fact of that concern and of its intention to notify the Bureau of it….

….

(9) For the avoidance of doubt it is hereby declared that the obligation imposed on a person by subsection (1) or (2) to disclose specified information to the Bureau is in addition to, and not in substitution for, any other obligation that the person has to disclose that information to the Garda Síochána."

29. Separate reporting obligations arise under the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 which require notification of An Garda Síochána in prescribed circumstances.

POLICY & PROCEDURES FOR RESPONDING TO ALLEGATIONS OF CHILD ABUSE & NEGLECT AND REPORTING CONCERNS TO THE NATIONAL VETTING BUREAU

30. The Respondent published the 2014 Policy in September, 2014. It is understood that the 2014 Policy has been more recently updated but the 2014 version applies in respect of the assessment of the allegations the subject of these proceedings.

31. The terms of the 2014 Policy document are instructive insofar as they provide guidance as to what the assessment process is designed to achieve. It is stated in respect of Glossary and Terms in an introductory section to the 2014 Policy that the terms "*founded*" and "*unfounded*" are intended to reflect whether or not it has been established on the balance of probabilities that child abuse has occurred. The glossary of terms to the 2014 Policy 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 2014 Policy reflects that a person against whom allegations are made has the right to fair procedures, albeit this may sometimes need to be secondary to the protection of children at risk. It is stated at paragraph 1.4:

"Conclusions following assessment by a social work office are based upon the balance of probability. Social work services have a different function to An Garda Siochana and the Office of the Director of Public Prosecutions who seek to prove beyond reasonable doubt that a criminal offence has been committed."

33. Paragraph 2.3 provides:

"On occasions allegations may be made against individuals who do not have direct care of the child who made the allegation. In such situations a determination has to be made in respect of the likelihood of the allegation being true and the potential ongoing threat to the child or any other children in contact with the alleged abuser."

34. The 2014 Policy repeats at paragraph 3.1(f) that from a child protection and welfare perspective a determination has to be made by social work professionals on the balance of probability. The 2014 Policy sets out in considerable detail the process to be followed in assessing the complaint through various stages. It provides for the communication of provisional findings to an alleged abuser before final conclusions are arrived at. While provision is made to communicate findings to an alleged abuser, no similar provision is made in respect of complainants. Paragraph 29 of the 2014 Policy provides for appeals at the option of the alleged abuser only. It appears that the complainant does not have a right of appeal under the 2014 Policy.

35. When an appeal is sought, the 2014 Policy provides for the nomination by the Agency of an Appeal Panel comprised of two individuals with the required expertise who are independent and external to the Agency. The 2014 Policy provides in express terms for the

Appeal Panel meeting the social work personnel involved in making the initial assessment and the alleged abuser but not the complainant. It is expressly envisaged that the alleged abuser may provide an expert report (paragraph 29(3)(b)). The 2014 Policy envisages provision of a draft Appeal Panel report to the alleged abuser to provide an opportunity to make representations before finalising the report. No similar provision is made for the complainant who has no entitlement under the 2014 Policy to receive a draft report or make representations in respect thereto prior to finalisation.

36. While the alleged abuser is to be informed of the outcome and provided with a copy of the final report (29.13), the 2014 Policy is silent regarding notification to the complainant. The 2014 Policy does not state that the report of the Appeal Panel is "*final*" and does not specify the circumstances, if any, in which an assessment might be re-opened or continued following the findings of the Appeal Panel.

37. The Agency has also developed Policies and Procedures in relation to the notification of a bona fide concern to the National Vetting Bureau. This Policy is entitled *Tusla Policy and Procedures for Submission of Specified Information Notification* [hereinafter "*the Vetting Notification Policy*"] and is revised from time to time. The Agency's *Vetting Notification Policy* at material times was furnished to me during the hearing. It is clear from this policy documentation that a lower threshold for notification than the balance of probabilities applies when notifying under s. 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act, 2012.

38. Under the *Vetting Notification Policy* document in force at the material time a reported concern which is assessed as "*ostensibly credible*" should be reported. It is expressly stated in the *Vetting Notification Policy* that a report of a concern is not reliant upon decisions of "*founded*" or "*unfounded*" being reached with regard to alleged harm/abuse. It notes that a "*bona fide*" concern is a lower threshold than the threshold used to determine a balance of probabilities under the Child Abuse Substantiation Procedure which was followed in this case. The Agency's Policy document places express reliance in this regard on the statutory responsibilities resting on the National Vetting Bureau to observe fair procedures in respect of any decision to disclose information relating to a bona fide concern. It is noted that an "*unfounded*" outcome does not equate to "*no concern*".

DISCUSSION AND DECISION

39. A number of preliminary issues arise from the terms of the Opposition shown to these proceedings insofar as it is contended that the proceedings are out of time, that the Applicant lacks standing and that the proceedings constitute an impermissible collateral challenge to the Report of the Appeal Panel.

Out of Time

40. The objection that the proceedings are out of time only arises when one characterises the proceedings as a challenge to the Report of the Appeal Panel rather than a challenge to the decision of the Agency to refuse to re-assess or further investigation the complaint. As the relief sought is directed entirely to the refusal of the Agency to re-assess the complaint or re-open the investigation, I am satisfied that this decision was communicated within three months of the commencement of proceedings such that an extension of time would not be required to maintain these proceedings.

41. Even if proceedings have been instituted in compliance with the requirements of the rules of court, delay in instituting proceedings can be a factor which impacts on the exercise of discretion. If I were to find with the Applicant at the conclusion of these proceedings, the terms of the relief, if any, to be ordered by me in this case could be affected by the passage of time since the complaint was made and the delivery of the report of the Appeal Panel issued in light of the impact of this delay and the relief being ordered on the identified man (see *State (Cussen) v. Brennan* [1981] I.R. 182) who has been joined as a Notice Party in the proceedings. I am very mindful that he has been subjected to an ongoing process of one type or another for several years.

Locus Standi

42. In *M. Q v. Gleeson* [1998] 4 I.R. 85 Barr J. stated that the function of the Health Board (predecessor to the Agency) as a child protection agency differed fundamentally from the prosecutorial function of An Garda Síochána and the DPP. He noted that there are many circumstances which may indicate that a particular person is likely to be or to have been a child

abuser but there may be insufficient evidence to establish the abuse in accordance with standards of proof required in a criminal or civil trial but as Barr J. stated (pp.100-101):

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

43. Simons J. observed in *J v. CFA* [2020] IEHC 464 with regard to the role of the Agency in assessing complaints as follows (para. 43):

> *"In truth, the role is inquisitorial. Whereas it may be necessary for the Agency to reach a conclusion on the credibility of an allegation of child sexual abuse, its principal focus must always be on the protection of children. It is not the Agency's role to vindicate the complainant nor to sanction the alleged abuser. A complainant has a separate remedy by way of civil proceedings for damages, and any sanction for the alleged abuser is a matter for the criminal justice system."*

44. In this conclusion, Simons J. echoes similar findings made by McDermott J. in *WM v. CFA* [2017] IEHC 587 where he quashed findings arrived at through a flawed process (pre-2014 Policy) but concluded that it was open to the Agency in the exercise of its child protection duties to carry out a fresh investigation of the complaints made presuming that any such fresh investigation would be carried out with due regard to fair procedures. In his judgment in that case, McDermott J. observed at (para. 73):

> *"The court is not satisfied that the procedures required in a child protection assessment of risk which is largely investigative in nature should approach those of a criminal or civil trial. It is now well established that this process and the power, jurisdiction and duty of the respondent are of a different kind and have a different purpose to the determination of rights or liabilities in civil proceedings inter partes or the*

investigation and prosecution of criminal charges. The purpose and duty of the respondent in child protection matters is to investigate and make a timely assessment of risk to children whose welfare is paramount (per Butler-Sloss L.J. in Regina v. Harrow LBC [1990] 3 All ER 12 at pp 16-17). If the respondent decides in the course of or as a result of its investigation that it is proper to inform An Garda Síochána of any allegation of child sexual abuse, the investigation will be carried out by the Gardaí and the laying and prosecution of any criminal charges will be dealt with by the Director of Public Prosecutions and determined by the courts. Similarly, if child protection proceedings are deemed necessary or custody and/or access proceedings in which child protection issues arise and fall to be addressed, the proceedings will be conducted in courts established under the Constitution. The full panoply of rights guaranteed under Articles 34, 38 and 40.3 of the Constitution will be afforded the alleged abuser in any such proceedings."

45. It is in this inquisitorial context, one where the duty of the decision maker is to promote child welfare and protect the child from risk through the conduct of a reasonable investigation, that the *locus standi* of the Applicant falls to be determined. It is also important to not lose sight of the fact that the Applicant has not sought to quash the findings of the Appeal Board, albeit maintaining that the conclusions arrived at cannot be safely relied upon. Thus, I am concerned not with the Applicant's *locus standi* to challenge the Appeal Board findings but rather her standing to challenge the decision of the Agency that its duties under s. 3 of the 1991 had been discharged in reliance on the report of the Appeal Board.

46. Both the Agency and the Notice Party contend that the Applicant lacks *locus standi* to maintain these proceedings on the basis that her role as complainant or witness does not make her a party affected by the outcome thereby vesting her with standing to challenge a refusal to further assess her complaint. Although the 2014 Policy is silent regarding the procedural rights of the complainant and does not provide for a right of appeal or a right to be notified of the outcome, it is clear that in this case the Applicant's parents have been furnished with a copy of the Appeal Panel's report, if belatedly and following representations. The question of the complainant's rights in the process is notably under-developed. No other case was identified before me as a precedent for a complainant challenging the outcome of the assessment process or a refusal to re-open an investigation or assessment.

47. It seems to me that the question of *locus standi* in a challenge to the discharge of s. 3 duties by a complainant is fact specific and depends on the nature of the claims advanced in the proceedings and the claimant's factual nexus with that claim. Were it the case that the complainant remained at risk or suffered injury because of a failure to fully and properly investigate a complaint made, it could scarcely be said that he or she would not have *locus standi* to maintain proceedings for damages where an actionable breach of duty is identified and pursued.

48. Admittedly, the situation of the Applicant here is more remote in that in the particular circumstances of the case (which are non-familial) the Applicant is not at continuing risk through ongoing contact with the identified man and the investigative function is principally engaged because of a potential risk to other children coming into contact with the identified man Furthermore, the process is not an adversarial process in which the complainant is involved as a moving party, albeit in some instances complainants might be required to attend as witnesses.

49. None of the authorities identified by the parties are on all fours with this case but these cases are nonetheless of assistance in identifying the general principles which should guide me in deciding the question of the Applicant's *locus standi*. In *Waterville Fisheries Dev. Limited v. Aquaculture L.A.B.* [2014] 1 IR 684 Hogan J. stated (para. 13):

> *"13. .... It has been emphasised on many occasions that the locus standi rules are, in reality, flexible rules of practice which are ultimately concerned with the conservation and proper use of judicial power: see, e.g., the classic judgments of Henchy J. in Cahill v. Sutton [1980] I.R. 269 and that of Walsh J. in The State (Lynch) v. Cooney [1982] I.R. 247. Viewed thus, the locus standi principles are accordingly concerned with the underlying reality of the litigant's interest."*

50. In *H v. DPP and the Commissioner of An Garda Siochana* [1994] 2 I.R. 589, a case concerning the duty to prosecute or to give reasons for a decision not to prosecute, the High Court (Barron J.) concluded that the applicant, as the mother of the alleged victim, was a person who had the necessary *locus standi* to bring the proceedings. He arrived at this conclusion notwithstanding that the DPP in that case was not settling any question or dispute or deciding

any rights or liabilities. His findings as to the victim's mothers standing was not overturned on appeal.

51. I note that a different conclusion was reached by Kelly J. in *Shannon v. McGuinness* [1999] 3 I.R. 274 when he decided that the injured parties in a criminal prosecution lacked *locus standi* to challenge a decision by a District Court to dismiss a prosecution brought by the DPP and in respect of which the DPP did not wish to proceed, although he proceeded to consider the substantive issue anyway lest he was wrong in this view.

52. It is difficult to reconcile these two decisions but, in any event, the position of a complainant in criminal proceedings is not the same as that of a complainant in a child welfare investigation. Indeed, the law in relation to victim's rights in respect of criminal matters has been the subject of specific legislation since these two decisions (see the Criminal Justice (Victims of Crime) Act, 2017 transposing the EU Victims' Directive (Directive 2012/29/EU), tending to further distinguish the rights of a victim of crime in the criminal process from those of the child complainant in the Agency's in its process responding to allegations of child abuse.

53. In *De Burca v. Wicklow County Council & Ors.* [2009] IEHC 54, the High Court (Hedigan J.) upheld the right of a complainant who made a complaint under the Ethical Framework for the Local Government Service established by Part XV of the Local Government Act, 2001 to maintain proceedings by way of judicial review challenging findings made in a report in that process as flawed by reason of an error of law. While the decision that the complainant had *locus standi* was informed in part by criticisms against the Applicant contained in the report and her interest as a public representative in ensuring that ethical standards in public office are maintained was also relied upon, the court considered that the applicant's standing was "*considerably enhanced*" by the fact that she was the complainant who had initiated the investigative process even if she did not then further participate in the process. He concluded (para. 59) that:

> *"if the complainant in such circumstances were not permitted to challenge a purportedly erroneous report into allegedly unethical practices, the question would arise as to whether anyone could."*

54. He found that the applicant had a "*sufficient interest*" in and connection to the subject matter of the proceedings to satisfy the requirements of Order 84, rule 20(4) of the Rules of the Superior Courts 1986.

55. In this case, the Applicant is the complainant in a statutory process. Whilst the purpose of the process is not to determine rights *inter partes* and has been found in earlier cases not to amount to a vindication of a victim's rights, it seems to me that the Applicant has an interest in ensuring that her complaint is processed in accordance with law. Indeed, the observations of Butler-Sloss LJ in *Regina v. Harrow London Borough Council, ex parte D* [1990] 3 All E.R. 12 (quoted by MacGrath J. in *FA v. CFA* [2018] IEHC 806) made in respect of the statutory framework in operation in England merit repetition:

> *"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)*

56. The force of these comments is in the recognition that the assessment process is part of a protection package for a child and the process is concerned not only with the rights of the accused person but also with the welfare of the child. In *F.A. v Child and Family Agency* [2018] IEHC 806, the task of the Agency, charged as it is with very weighty and serious duties under s. 3 of the 1991 Act, was acknowledged as not an easy one, particularly in relation to the investigation and determination of whether an allegation of child abuse of a sexual nature is founded or unfounded. As MacGrath J. observes in *F.A.*, 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. He observed that in line with the requirements of Article 42A of the Constitution, the paramount consideration in the s. 3 process is and must be that of the welfare of the child.

57. As recognised by the Supreme Court, albeit in the context of constitutional challenge to legislation, in *Mohan v. Ireland* [2021] 1 I.R. 293, "*interest*" is a deliberately broad term, extending beyond legal rights. In *Mohan* it was concluded that it was sufficient if a person was affected in a real way in his or her life. I consider that the Applicant, as a victim of alleged abuse, has an interest in ensuring that public agencies with a legal mandate to promote her welfare and to protect others from similar abuse properly discharge that mandate. Further, as acknowledged in *Lancefort Ltd. v. An Bord Pleanala* [1999] 2 I.R. 270 (Keane J.), there is a public interest in ensuring that public bodies obey the law which mitigates a narrow approach to recognising the interest of the Applicant as a child complainant.

58. In this case, the Applicant was very young at the time of the alleged events such that her interest in her account being accepted as truthful is not as weighty as it might be in the case of an older child or an adult. Assessing disclosures from young children is immensely challenging and a finding of "*unfounded*" would not necessarily or even usually reflect on the honesty of a young child, albeit this might not always be how it is perceived by that child or the child's family. Furthermore, as noted above, the Applicant's interest in these proceedings is attenuated by the fact that she no longer has any contact with the identified person and he is not a family member such that she is not a child at present or future risk of abuse from him. That is not to say, however, that she is unaffected by an understanding that a report of abuse which she made was assessed seriously and lawfully.

59. The assessment process being part of the protection package for a child who has made an ostensibly credible disclosure of abuse, it would not in my view be correct to say that the child is a "*disinterested*" party in the assessment process. To varying degrees, depending in part on the age of the child, the child has an interest in whether he or she is believed. The fact that the process is concerned to some extent with whether the complainant is believed is reflected in the language of the 2014 Policy which refers to a balance of probabilities standard and refers to the findings as being a determination of the likelihood of the allegation being true.

The child may also consider the identification of protective steps for him or her or others in that process to be some validation of his or her position. I can take judicial notice of the widely known fact that many victims of abuse are motivated to ensure that what has happened to them does not happen to anyone else. Knowledge on the part of a victim of abuse that they have done their best to prevent a recurrence of abuse against others cannot be dismissed as of no interest because it is not "*vindication*" in the traditional sense of an award of damages or a conviction. Indeed, it seems to me that even a finding of unfounded lawfully made at least affords a victim the knowledge that they have done their best to protect others from the same abuse and ideally also a sense that they have been heard in that process. Where the welfare of the child is the paramount consideration in accordance with the constitutional mandate under Article 42A, it does not seem to me to be a tenable proposition that the child at the heart of the process does not have an interest in ensuring the lawful discharge of the Agency's duties in that process.

60. It is important also to recall the policy behind restrictive standing rules. The policy is not to close out people who have a bona fide interest in a process and who have participated in that process in the expectation that it will be lawfully conducted. The policy is to guard against the abuse of important remedies and the dangers of giving free rein to cranks and busy bodies. The Applicant is not a meddlesome bystander or an officious person of straw with nothing to lose by clogging up the courts with ill-founded or vexatious challenges. She is the child complainant of sexual abuse at the heart of the assessment process. The process is part of the "*protection package*" put in place by the State to provide for children who make disclosures of abuse.

61. I am quite satisfied that the Applicant has sufficient interest in the issues raised in these proceedings to establish the necessary *locus standi* to maintain them.

Is the refusal to re-assess the complaint pursuant to s. 3 of the 1991 Act unlawful?

62. The statutory function of the Agency in promoting the welfare of children who are not receiving adequate care and protection has been interpreted in a number of judgments of the High Court as imposing an obligation on the Agency to inquire into complaints of child sexual abuse and to ensure that such inquiries comply with the requirements of fair procedures (see *M.Q. v. Gleeson* [1998] 4 I.R. 8 and the *"Barr Principles"* identified by Barr J. in that case).

The nature of the duty was elaborated upon in *P. (D.P.) v. Board of Management of a Secondary School* [2010] IEHC 189 where O'Neill J. stated as follows at para. 5.5 of his judgment.

> *"Whilst the applicant's professional status, that is, as a teacher in a secondary school, having contact with children, clearly gave rise to a particular, easily identified, child care consideration, the power to intervene and investigate under s.3(1) should not be confined to those situations where the person suspected as being a danger to children has a particular access or relationship [with] identified or identifiable children. Persons who have a tendency to abuse children in this way can and do develop many varied and often insidious means of access to children. It would be contrary to the obvious purpose and objective of s.3(1) of the Act of 1991 to confine the power given in s.3(1) of the Act of 1991 to those 15 situations in which the person suspected had already an established access to a child or children. Thus, I am satisfied that the power given in s.3(1) of the Act of 1991 is activated when a credible complaint of child sex abuse is received by the [health board], as it then was, or currently the Health Service Executive. If the allegation is found to be established after appropriate investigation, it is then a matter for the statutory authority in whom s.3(1) powers are vested to select the appropriate means to protect any children it finds to be at risk from the predatory behaviour of the abuser in question. Needless to say the statutory authority must in its investigation observe the norms of natural justice and fair procedures."*

63. A broad interpretation of s. 3 has been endorsed in a number of more recent judgments, including, in particular, *W.M. v. Child and Family Agency* [2017] IEHC 587; *T.R. v. Child and Family Agency* [2017] IEHC 595; and *F.A. v Child and Family Agency* [2018] IEHC 806, all cases referred to in argument before me. As MacGrath J. acknowledges in *FA v Child and Family Agency* [2018] IEHC 806, the task of the Agency, which is charged with very weighty and serious duties under s. 3 of the 1991 Act, in relation to the investigation and determination of whether an allegation of child abuse of a sexual nature is founded or unfounded is a difficult one. 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 and whose interests are paramount in accordance with Article 42A of the Constitution but 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. A balance must be struck between the competing rights of the parties involved in any such investigation conducted within the rubric of s. 3 of the 1991 Act.

64. The broad interpretation of the s. 3 duty to investigate complaints of child abuse endorsed in a series of cases (not limited to those referred to above) has not been without controversy as clear from the decision of Humphreys J. in *C.D. v. Child and Family Agency* [2020] IEHC 452 where, having cited *M.Q. v. Gleeson* [1998] 4 I.R. 85, he observed as follows (para. 17):

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

65. I agree with the sentiment expressed in this passage. It is my view that the lack of a detailed statutory framework governing the conduct of investigations and prescribing procedural safeguards both for complainants and accused persons in the form of a clear statutory process has contributed to the issues before me in this case. In the absence of a statutory framework which provides for the rights of both the complainant and the accused person but in view of the very serious issues which arise, the Agency is obliged to adopt elaborate measures to ensure fair procedures in the processes used by it to investigate allegations of child abuse. It is clear that the Agency has sought to ensure that such inquiries comply with fair procedures, as identified and developed through the case-law. It has done this in the absence of proper statutory guidance as to the conduct of an investigation and the rights of the parties in that process by publishing detailed policy documents to assist social workers in carrying out such inquiries. As part of the procedures adopted in recognition of the weighty

rights and interests at play, the Agency has sought to provide an appeal pathway as an element of the alleged abuser's fair procedure rights which the Agency is obliged to respect within the ambit of its duty to promote the welfare of children and protect children at risk.

66. If there were a clear statutory pathway for investigation and appeal, the issue which arises in these proceedings as to the extent to which a decision on appeal is determinative and the scope of the continuing duty on the Agency under s. 3 of the 1991 Act would likely be more easily disposed of. The problem which arises is, in my view, exacerbated by the fact that the investigative powers of the Agency are sourced in the same general provision which requires the Agency to promote the welfare of children who are not receiving adequate care and attention. The failure to provide expressly for a statutory investigation process including provision for an appellate jurisdiction together with specific provision as to the finality or otherwise of decisions made in the investigation process adds to an undesirable lack of clarity and certainty as to the process for the parties.

67. The Agency relies on its adherence to the 2014 Policy in this case to contend that its s. 3 duty has been discharged. It is clear that the 2014 Policy in its terms has been informed by case-law through which the requirement for fair procedures in the assessment process has been developed and entrenched. It is indeed apparent from the terms of the 2014 Policy that a central focus of the 2014 Policy is to achieve a proper balance between protecting children at risk whilst also observing the right to be treated fairly of accused persons in line with principles endorsed by the jurisprudence of the High Court in this area. The 2014 Policy, including as to the appeal process thereby provided, has itself in turn been the subject of judicial scrutiny in a number of cases and is not itself challenged in these proceedings. In *T.R. v. Child and Family Agency* [2017] IEHC 595 McDermott J. observed at para. 81:

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

68. In *F. A.*, MacGrath J. similarly acknowledged (para. 138) that the basic principles set out in *MQ* and as stated by Hedigan J. in *I v. HSE* [2010] IEHC 159 are reflected in the 2014 Policy. He went on to recognise that the 2014 Policy is flexible in that all cases will not necessarily require the same investigative procedures and an investigation may vary depending

on the circumstances. Although the terms of reference of the Appeal Panel established in *F.A.* were different to the terms of reference in this case, MacGrath J. considered the provisions of the 2014 Policy as part of the process the Agency has put in place to ensure procedural fairness in that case. He was concerned in *F.A.* with the seemingly restrictive interpretation of their terms of reference which the Appeal Panel adopted in that case in refusing to hear further evidence.

69. The relevance of the decision in *F.A.* for present purposes is the clear endorsement given to a wide role to the Appeal Panel who, it was concluded, should not properly be precluded from itself interviewing the child. It is, of course, implicit in this conclusion that the Agency were entitled to establish an Appeal Panel with a broad mandate. MacGrath J. relied in arriving at his decision on earlier comments of Humphreys J. in *E.E.* [2016] IEHC 777 where he observed, with regard to the 2014 Policy, that when establishing an appeals body (at para. 99):

> *"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 and then rely on any ineffectiveness of that mechanism (e.g. 'merely a review')"*

70. It is clear from *E.E.*, *F.A.* and *T.R.*, that the Courts have approved an expansive appeals model in the context of the 2014 Policy and have considered that the Appeal Panel should properly have the powers necessary to conduct a meaningful appeal in accordance with the requirements of fair procedures including as to permitting cross-examination in appropriate cases.

71. I am satisfied that the Agency is under an obligation to promote the welfare of children under s. 3 and that this obligation is established as including an obligation to investigate and assess allegations of abuse in order to determine whether risk to children exists that require protective measures to be implemented. The Agency is not only entitled to develop policies and procedures to achieve this aim but in the absence of a statutory procedure, is obliged to do so in discharge of its duty to ensure that the assessment respects the fair procedures rights of the alleged abuser. The Agency is also entitled to provide an independent appeals mechanism

within these procedures. In so doing, the Agency is not delegating its statutory responsibility but merely putting in place a procedural framework to ensure that the statutory responsibility is discharged with due regard to the requirements of fair procedures.

72. While it is not directly before me insofar as the decision of the Appeal Panel is not impugned in these proceedings, it is nonetheless appropriate to observe given the level of criticism levelled at the decision of the Appeal Panel during the hearing before me, that no proper basis exists for contending that the Appeal Panel exceeded their terms of reference by receiving the expert report of a psychologist. The terms of reference adopted, in line with the 2014 Policy, gave the Appeal Panel a mandate to receive and consider this evidence. They were not confined in their deliberations to the material which had been available to the Social Work Team engaged in the initial assessment. They could, if they thought it necessary to ensure fairness or a proper decision, have sought to question the expert or invite a response to same (and it appears that submissions were invited from the social work team) whilst remaining within the ambit of their terms of reference.

73. In my view, the Appeal Panel in this instance was perfectly entitled to receive expert evidence which had not previously been considered and to arrive at its own conclusions following an independent assessment of the evidence. While neither the Applicant nor the Court has full access to the material which was available to the Appeal Panel, it is important to recall that the members of the panel were experts in their own right who in this instance were capable of evaluating the expert opinion provided regarding the risk of contamination in the light of their own reading of transcript of the Garda interview (which I have not seen) and arriving at an independent and considered conclusion, which is what they appear to have done.

74. The specific question which is provoked by these proceedings, however, is whether the conduct of an assessment in accordance with the 2014 Policy, as occurred in this case (noting no direct challenge to the report itself, its compliance with the 2014 Policy in these proceedings or indeed the 2014 Policy itself), discharges the Agency from further duties under s. 3 of the 1991 Act and specifically from an obligation to further investigate the complaint. It is argued that the Agency cannot delegate its function or bind itself to the decision of the Appeal Panel.

75. It seems to me that it is important to acknowledge as a starting point that s. 3 of the 1991 Act clearly relates to more than the conduct of an assessment process. The duty to assess

or investigate a complaint is implied into a much broader and more general statutory duty to identify children at risk and to promote their welfare. I am satisfied that it could never be said at a level of principle that, having concluded an investigation, the Agency had no further duties under s. 3 to the child complainant or children generally. The s. 3 duty is clearly more extensive in its ambit than the duty to conduct of the investigation into a complaint from a child protection perspective. That said, the focus of these proceedings is on the investigative or assessment process and the Applicant's complaint is that this process has not been concluded in a manner which discharges the Agency from its duty to assess the complaint.

76. As for the role of the Appeal Panel, the provision of an Appeal Panel is a means by which the Agency seeks to provide for fair procedures in the assessment process because the Appeal Panel is independent of the social workers who conducted the initial assessment. The existence of an appeal panel of this nature is an important procedural safeguard. The establishment of an appeal panel should not, however, be seen as a delegation of duty but rather as an exercise by the Agency of its power to require fairness in the decision-making process as part of the discharge by it of its duties. The appeal panel derives its jurisdiction from its terms of reference which are set by the Agency. Notably, the Agency in this case has never said that the decision of the Appeal Panel is final and binding but, on the other hand, the requirements of fair procedures are such that those findings must be accorded weight. The establishment of an appeal panel would be entirely meaningless if the Agency could ignore the conclusions duly arrived at where they contradicted the earlier views of its social workers. An accused person, vindicated on appeal, would have good grounds to challenge as unfair a process whereby a meaningless appeal had been provided for because the Agency considered itself free to ignore the findings arrived at on appeal, absent good reason.

77. It seems to me that the real issue in this case is not whether the Agency has unlawfully delegated its investigative function, which I am satisfied it has not, but rather whether it has lawfully concluded that its s. 3 duty has been discharged in view of the process already engaged in and the conclusions of the Appeal Panel such that there is no requirement to review or re-open the investigation.

78. In *J. v. Child and Family Agency*, Simons J. was required to consider whether to restrain further investigation of a complaint of historic child abuse where a decision had been made to discontinue the investigation but this decision had not been notified to the alleged abuser. The

issue arose in circumstances where the Agency had sought to re-open the investigation after a delay of several years. It was contended in argument, as recorded in the judgment, that it was implicit in the decision to close the file recorded internally that the Agency must have been satisfied that the alleged abuser presented no risk to any child. Weight was placed on the fact that no new material had been put before the Agency which could possibly justify the Agency reaching a different decision than previously arrived at.

79. For its part, the Agency submitted in *J. v. Child and Family Agency* that pursuant to s. 3 of the 1991 Act, it was under a statutory obligation to resume its investigation. They relied in this submission on the decision in *P. (D.P.) v. Board of Management of a Secondary School* [2010] IEHC 189 where the High Court (O'Neill J.) refused to make an order prohibiting the Health Service Executive ("HSE") from continuing an investigation into allegations of child sexual abuse against a school teacher. This was so notwithstanding that the court had held that there had been a "*litany of failures*" on the part of the HSE (and its predecessor, the regional health board) to adhere to the requirements of fair procedures in its conduct of its investigation into the allegations made against the applicant. In that case the Court held (para. 19):

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

80. In *J. v. Child and Family Agency*, Simons J. found on the facts of that case that when the social worker team made a decision to close the file in respect of the complaint, this decision was lawful as it represented a reasonable and proportionate response to the peculiar circumstances of the complaint. He was satisfied that the Agency had thus discharged its obligations under s. 3 of 1991 Act. As a matter of principle, however, Simons J. concluded (paras. 65-66):

> *"Given the breadth of the discretion afforded to the Agency under section 3 of the Child Care Act 1991, I am satisfied that, as a matter of law, it is open to the Agency to commence a fresh investigation of the complaint. Put otherwise, the Agency is not estopped, by its initial decision to close the file, from commencing a fresh investigation.*
>
> *I cannot accept the contrary argument on behalf of the applicant that it is not permissible to reopen an investigation of a complaint which has previously been closed. As is apparent from the case law discussed at paragraph 36 and onwards, section 3 has always been given an expansive interpretation and the protection of children is the paramount consideration. It would be inconsistent with this case law to apply a "bright line" rule to the effect that the existence of an earlier decision—which might, for example, have been reached on the basis of incomplete information—always operates as a bar on any further investigations."*

81. He added (para. 73):

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

82. The decision in *J. v. Child and Family Agency* is clear authority, with which I respectfully agree, for the proposition that s. 3 of the 1991 Act permits further investigation but does not require the Agency to endlessly investigate and reinvestigate complaints of child sexual abuse. Indeed, an important point of distinction between *J. v. Child and Family Agency* and this case is that in *J. v. Child and Family Agency* the earlier investigation had not resulted

in findings. The identified man in this case is therefore in a different position to the alleged abuser in *J. v. Child and Family Agency* because a concluded process including an appeal process has been pursued and exhausted in this instance. The 2014 Policy is silent on the matter. It neither says the decision of the Appeal Panel is final and the matter cannot be the subject of further investigation, nor does it expressly reserve onto the Agency the power to further investigate the complaint at the conclusion of the appeal process. No attempt is made in the 2014 Policy to identify the circumstances in which a further investigation might occur.

83. I am satisfied that the Agency's duties under s. 3 are not limited to the process envisaged under the 2014 Policy, albeit that it may rely on that policy in seeking to properly protect the fair procedure rights of the alleged abuser in an investigative or assessment process in discharge of its duties. The Appeal Panel is appointed to discharge its terms of reference as set by the Agency but the duty on the Agency extends beyond the Appeal Panel's terms of reference. The duty on the Agency to protect children from risk is an ongoing duty and fresh action may be required in discharge of that duty depending on the facts of a given case and the information available to the Agency. Indeed, the notification of a *bona fide* concern to the National Vetting Bureau, as occurred in this case notwithstanding the finding that the complaint was unfounded, is further action which is properly connected in my view with the Agency's discharge of its functions under s. 3 of the 1991 Act.

84. The notification of a *bona fide* concern is not inconsistent with an "*unfounded*" finding, as appears to be suggested on behalf of the Applicant, because the threshold for a "*bona fide*" concern is different to the threshold used to determine a balance of probabilities finding. It would be wrong to equate the existence of such a *bona fide* concern with an incomplete or unsatisfactory investigation. The fact that the threshold for a *bona fide* concern is different to that of a *founded* concern is clearly explained in the *Vetting Notification Policy* which was referred to during the hearing. While the threshold to establish a *bona fide* concern is lower than the balance of probabilities threshold applied to founded/unfounded findings, it is also the case (acknowledged in the *Vetting Notification Policy)* that a complaint may be founded but still not give rise to a *bona fide* concern. In such circumstances the *Vetting Notification Policy* requires that the rationale for a conclusion that a notification is not required must be documented on file and endorsed by the Line Manager.

85. It seems to me that it is a matter for the Agency to decide whether the process culminating in the decision of the Appeal Panel represents a proper discharge of its duties under s. 3 of the 1991 Act to assess or investigate or whether it is necessary to conduct a further investigation in view of new information or identified issues with the process such that the conclusion of the Appeal Panel is considered unsafe by the Agency. It seems to me that the principle established in *Eviston v. DPP* [2002] 3 I.R. 260, in the context of a criminal prosecution where a decision not to prosecute had been made, to the effect that the Director was entitled as a matter of principle to review an earlier decision not to prosecute and to arrive at a different decision, has some persuasive force in this different context.

86. In circumstances where the 2014 Policy is silent on the question of further investigation and where the duties under s. 3 are general in nature, it seems to me that the accused man is not entitled to preclude further investigation, unless he can point to features of the case which render any fresh investigation or assessment unfair. In *Eviston*, the fact that the applicant had been advised of a decision not to prosecute but without being advised that this might be reviewed and in circumstances where there was no identified basis for the decision, combined to lead the Court to conclude that the was unfair. The absence of any identified basis for the different decision being arrived at was material to the Supreme Court's decision to restrain a prosecution in that case.

87. I am satisfied that the Agency has a power to re-investigate or further investigate, always in accordance with the requirements of fair procedures, where it is necessary to do so in the proper performance of the duty to protect children. In deciding whether to re-investigate in this case, it is my view that regard should properly be had to the position of the identified man who has been the subject of a criminal trial and a protracted Agency investigation. In deciding whether or not to further investigate in this case, the Agency was entitled to have regard to the findings of the Appeal Panel and the reason for their decision (in this instance the contamination of evidence undermining the reliability of the child's account) and consider whether matters arose of sufficient weight and substance (for example, through the availability of fresh information) which could reasonably warrant the re-opening of the investigation or some further steps, not least having regard to the interests of the identified person in achieving finality.

88. In re-opening or further investigating a case where there has been a concluded process in accordance with notified procedures, the Agency is required to be satisfied that it would be neither unreasonable nor disproportionate to do so having regard to steps already taken including the rights of the alleged abuser in the process and the overarching duty on the Agency to promote child welfare and protect children. For so long as it is possible that further information or a flaw in the process is identified which makes it appropriate to re-open an investigation, it seems to me that the identified person/alleged abuser should have no expectation, absent special circumstances dependant on the facts of the case, that the result of the appeals process means that the Agency has no further concern arising out of the complaint and will never revisit it.

89. Where the Agency decides, following due consideration, that matters such as would make it reasonable and proportionate to warrant further investigation do not exist, it is lawful for the Agency to refuse to re-open and to treat its s. 3 duties as discharged. This is certainly so where there has already been an investigation in full compliance with the 2014 Policy, absent new information which must be investigated as part of a reasonable discharge of duty. It goes without saying that in the event that the Agency were to conclude that further investigation was warranted for child protection reasons and not unreasonable and disproportionate, any such investigation would require to be conducted in accordance with the requirements of natural and constitutional justice.

90. My role on an application for judicial review such as this is restricted. The Courts have typically been 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 therefore no part of my function to assess the merits of the decision taken, the findings made, or the conclusions achieved, or to intervene merely because I believe I might come to a different conclusion having assessed the evidence. Nevertheless, as observed by MacGrath J. in *F.A.*, 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.

91. The letters of the 3rd of September and the 18th of November, 2021 set out the Agency's position in this case. It is patently not the Agency's position in these letters that it had no power

to further investigate the complaint because it was bound by the findings of the Appeal Panel. In the said letters the Agency identified that it was under a duty to determine whether there is a risk to a child and assess that risk but must do so in a manner which accords with natural justice and fair procedures. It is clearly stated in the correspondence from the Agency that the Agency has complied with its duties under s. 3 namely, its duties to determine whether there is a risk to a child and assess that risk in a manner which accords with natural justice and fair procedures in this case. The Agency does not resile from the fact that the duty rests with the Agency.

92. While it is true that the letter of the 18th of November, 2021 differentiates this case from *WM* by contrasting the quashing of a decision in that case with the situation in this case where there is a concluded investigation conducted in accordance with the 2014 Policy, it is important to note that it is also stated that there is no basis in this case to carry out a fresh investigation. Asserting that there is no basis to carry out a fresh investigation does not equate to a statement that there is no power to do so. The letter of the 18th of November, 2021 further reflects that it is open to or "*within the statutory gift*" of the Agency to accept the decision of the Appeal Panel but there is a distinction between the Agency accepting the decision of the Appeal Panel and being bound by it. At no time does the Agency state that it is bound by the decision made by the Appeal Panel and has no power to further investigate and the correspondence cannot properly be construed in this manner.

93. As noted above, the report of the Appeal Panel in this case is not the subject of challenge in these proceedings but it is criticised by the Applicant. The Agency's power to re-investigate is not limited to circumstances where findings have been quashed. Insofar as the Agency has a power to decide to further investigate because of some established irregularity with the manner in which the Appeal Panel arrived at its decision or a demonstrated concern which it considers supports such action, this power falls to be exercised in a reasonable and proportionate manner. No irregularity or concern has been demonstrated on behalf of the Applicant in this case which would render a refusal by the Agency to exercise its power to re-investigate unsustainable. I have not been persuaded that it was an unreasonable exercise of statutory discretion for the Agency to conclude that there is no basis for further investigation in this case and no proper basis for interfering with the decision of the Agency challenged in these proceedings has been made out. In particular, I note that the decision of the Appeal Panel in this particular case in relation to a contamination risk, a risk which is accepted not only by

the psychologist retained by the accused man but also the very qualified members of the Appeal Panel, is a conclusion which, if factually sustainable as being reasonably open (and it has not been demonstrated that it is not), is unlikely to be cured by new information or further evidence.

CONCLUSION

94. I am satisfied that the Agency retains a discretion under s. 3 of the 1991 Act to investigate the complaint further but it is not under a statutory obligation to do so. It is open to the Agency to establish an Appeal Panel as part of the procedure it adopts to ensure fairness in the assessment process. There is no evidence in this case that the Agency considered itself bound to accept the decision of the Appeal Panel and precluded from any further assessment of the complaint. Were this the basis for the decision, I consider that it would be wrong in law having regard to the continuing nature of the duty on the Agency under s.3 of the 1991 Act. The statutory power to continue to investigate child sexual abuse following the conclusion of an investigation conducted in accordance with its established procedures must be exercised in a reasonable and proportionate manner.

95. In circumstances where it has not been demonstrated that the Agency has unlawfully delegated functions under s. 3 of the 1991 Act nor unreasonably or improperly decided not to further assess the complaint, I must refuse the relief sought.

96. This matter will be further listed to deal with consequential matters or matters arising unless the parties advise the court within fourteen days of the date of delivery of this judgment of their agreement that such listing is not required and that orders may be made on consent.