

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2022] IEHC 737  
[2020 No. 796 JR]**

**BETWEEN:**

**JPP**

**APPLICANT**

**AND**

**THE CHILD AND FAMILY AGENCY**

**AND**

**BY ORDER LIZ OAKES AND JOHN SMYTH**

**RESPONDENTS**

**JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 13th day of  
December 2022.**

1. Judicial review of the manner in which an administrative body or tribunal has come to a decision is a straightforward exercise. It is sometimes easier for a court than for the parties to a dispute to spot what has gone awry. Legal advisers for litigants may be too close to the action. Also, they may want a particular result for tactical reasons. The correct solution to a problem may be different to that which they propose. As has been observed by a distinguished jurist in another context, a court may see things in a different light.
2. The issue in this application for judicial review is whether social workers of The Child and Family Agency (TUSLA) carried out an assessment in an unfair manner. This assessment concluded that an allegation that JPP had sexually abused LK when she was a child was well-founded.
3. JPP has established that there was procedural unfairness in the conduct of this assessment. The provisional conclusion dated 8 January 2019 and the final conclusion dated 15 March 2019 will be set aside. This matter will be remitted for full reconsideration in accordance with procedures set out in a 2014 guidance document governing these assessments. This should be carried out by different social workers. As there is agreement, I will extend time to bring this application for judicial review against TUSLA.
4. The deciders reached what the relevant procedural rules describe as a “provisional conclusion.” This was adverse to JPP. They concluded that the evidence demonstrated on the balance of probability that JPP posed a potential risk towards children because it was likely that an allegation of sexual abuse levelled against him by LK was true. The procedural rules provide that an adverse “provisional conclusion” is final, unless the factual conclusions which underpin it are displaced.
5. The deciders drew their “provisional conclusion” when they should have been keeping an open mind. They should have canvassed JPP’s response to what LK stated to them in interview before proceeding to the next step. They promised to revert to JPP and

provide him with notes of their interview with LK for comment before making a "provisional conclusion." They did not honour this commitment.

6. After being notified of the "provisional conclusion" JPP's legal representatives requested that LK be made available for cross examination. LK declined to make herself available for cross examination. The deciding social workers proceeded to make a final determination against JPP.
7. JPP then initiated an appeal. Terms of reference issued in 2015 govern the conduct of these appeals. JPP refused to participate in any appeal otherwise than on his terms. He demanded a full *de novo* hearing on the merits with a right to cross examine LK. He did not engage with the appeal panel. His appeal was eventually treated as abandoned.
8. A court can interpret terms of reference in the context of some identified issue which has arisen during proceedings. A court may determine that proceedings have been conducted in a manner which is unfair or that an appeal process did not give an effective remedy to cure a previous invalid decision. A court cannot demand a re-write of ground rules governing an appeal for the benefit of those who refuse to engage in the process.
9. Refusal to participate in a process before an appeal tribunal may not be a prudent course. The terms of reference determine the nature and scope of any appeal. It does not automatically follow that refusal by an appeal tribunal to accede to a demand that it conduct proceedings in a particular way will result in an unfair process or an ineffective outcome.
10. TUSLA raised an objection that the members of the appeal panel were independent. JPP then obtained an order joining the members of the appeal panel in this application for judicial review. They were separately represented at the hearing. This objection and separate representation added expense which could perhaps have been avoided.
11. As this matter is being remitted to the deciders at first instance, it is not necessary for this Court to arrive at any conclusion on JPP's claim that the appeal panel did not afford him fair procedures.
12. In 2009, LK made a complaint that JPP had sexually abused her when she was a young child. She was 14 years of age when she made this complaint. Her first disclosure was to her mother. She was interviewed by a social worker. She made a statement to Gardaí. The matter was referred to the Director of Public Prosecutions who eventually decided not to prosecute JPP.
13. TUSLA had a statutory duty to investigate the allegation. This investigation did not start until 2018. At that stage LK was an adult. JPP was advised of this. He was supplied with copies of LK's statements to the Gardaí and to social workers.
14. No issue of substance arises from the fact that LK was not re-interviewed as the first step in the 2018 investigation. The 2009 interviews predated the 2014 document setting

out procedural rules governing the conduct of these assessments. The important point is that JPP and his legal adviser were told by the social workers that they intended to interview LK and her mother and would provide the notes of these interviews and give him an opportunity to respond.

15. The investigating social workers interviewed JPP in the company of his solicitor on 31 October 2018. They advised JPP's solicitor by letter dated 31 October 2018 that it was intended that LK and her family would be interviewed and that a copy of the notes would be provided, with "...an opportunity to respond before a provisional assessment conclusion is made."
16. It was important that JPP and his legal advisers be given copies of notes of the interview with LK and the other interviewees and that he have this opportunity to respond. No such opportunity was given to JPP. This was in breach of the commitment in the letter. The investigating social workers proceeded to their "provisional conclusion."
17. This decision was communicated in a letter dated 8 January 2019. This letter stated that "the provisional conclusion of the Social Work assessment is that the allegations made against JPP by Ms LK are founded." It gave the reasons for the "provisional conclusion" in seven paragraphs. Para. 7 stated as follows: "On the balance of probabilities, and based on the above information, it is the view of the assessing social workers that it is more likely than not that Ms K was sexually abused by Mr JPP."
18. The letter went on to state as follows:

"Mr JPP is now afforded an opportunity to respond to the provisional conclusion, should he wish to do so, either by way of meeting with us or in writing. Should you wish to respond to the provisional conclusion, please do so within 14 days of the date of this letter and no later than Wednesday 23rd January 2019. If your client responds to the provisional conclusion, any necessary further investigations will be carried out as appear appropriate in light of this response, before a final determination is made. If Mr JPP does not respond to the provisional conclusion, the Child and Family Agency will proceed to reach its final determination in relation to the allegations in the absence of any further input from your client. If, at the conclusion of the investigation, the conclusion reached is that the allegations are Founded and that Mr JPP may pose a potential risk to children, your client will be given the opportunity to appeal that conclusion."
19. This letter was accompanied by typed copies of notes of interview with LK and other interviewees. The assessing social workers also prepared a 14 page report titled "Provisional Assessment Conclusion." This was dated 21 December 2018. It contained a detailed appraisal and included the same seven paragraphs as "summary of evidence that supports a finding of 'founded'." It is unclear whether a copy of this document was provided to JPP. The letter dated 8 January 2019 did not refer to it.

20. The solicitors for JPP expressed dissatisfaction with the “provisional conclusion.” They pointed out in relation to one important disputed element of the allegations that JPP’s wife who might be able to contradict LK had died and that the delay by TUSLA in investigating prejudiced his position. They took issue with a finding that JPP had demonstrated during interview that he was not being fully truthful.
21. A subsequent letter demanded that LK be made available for cross examination. This letter also demanded disclosure of documents. The request for cross examination was initially refused by letter dated 11 February 2019. The investing social workers stated that cross examination was “not possible or permissible (sic)”.
22. This response concluded by stating as follows:
- “I am now required to proceed to the final assessment conclusion, taking into consideration the written correspondence received from you on behalf of your client and the points raised by him. In response to your letter received today and my response, I would be grateful if you could confirm by next Wednesday 20th February 2019 if you wish to arrange a meeting with your client to provide any further clarification to inform the final assessment conclusion. If Mr JPP wishes to meet with me, I would be grateful if you could please advise when would suit you to meet. I need to advise that should I not receive a response by the above date, a final assessment conclusion will be made taking into consideration the written submissions made and received from you.”
23. On 28 February 2019 the deciding social workers wrote to JPP’s solicitor advising as follows:
- “We have given further consideration to this request (to cross examine LK) in advance of reaching a final conclusion, and I have made contact with Ms K to inform her of this and to clarify if she consents to this request. Ms K has replied to states that she does not consent. I need to advise that Tusla cannot compel Ms K to be cross examined if she does not provide consent. I wish to advise, therefore, that Tusla will be proceeding to reach a final conclusion in the absence of cross examination. I would be grateful if you could please let me know by next Friday, 8th March 2019, if Mr JPP wishes to provide any further response or to meet to provide any further clarifications prior to reaching a final conclusion.”
24. This was followed by a letter from the deciding officers dated 15 March 2019 advising of the final conclusion. This stated that their assessment was informed by the view expressed by JPP through his solicitors that he was prejudiced by the delay in the investigation since the allegations were first made in 2009 and by the subsequent death of his wife who could not verify his account. The letter made clear that, apart from this, no new information had been received or considered since the provisional conclusion. It specified that this final conclusion was reached for reasons set out in seven numbered paragraphs. Para. 7 stated that: “On the balance of probabilities, when all the

information provided is considered in its entirety, it is the view of the assessing social workers that it is more likely than not, that Ms K was sexually abused by Mr JPP.”

25. This letter was accompanied by a copy of a 14 page “Final Assessment Conclusion” report dated 14 March 2019. Some of the reasons for the final conclusion differed from those given for the provisional conclusion. In light of the complaint by the solicitors for JPP, paragraph 3 of the initial reasoning was dropped and the death of Mrs P was referenced and considered. The fact that JPP continued to mind LK and her brother for two years after their cousin was returned to his mother’s care and a suggestion by JPP that the circumstances of this gave rise to a possible explanation for the complaint of abuse were considered. This explanation was discounted.
26. The letter dated 15 March 2019 and the report did not indicate whether the deciding social workers took into account the fact or circumstances in which LK declined to be cross examined. One of the deciding social workers has deposed that they robustly tested the account given by LK and her mother when they were interviewed. He has deposed that JPP did not raise any further issues that ought to be raised with LK when he was notified that the social workers were to meet LK with her mother and brother.
27. This court accepts that the social workers were doing their best to ensure fair procedures when they interviewed LK. JPP had not asked to cross examine her at that stage. However, JPP had a right to see the notes of the interviews and to be given an opportunity to make any relevant submissions before the “provisional conclusion” stage of the process. These submissions might include a request to put questions to LK and her mother.
28. TUSLA is obliged to investigate allegations of abuse against children in discharge of its obligations under the Child Care Act 1991 and the Child and Family Agency Act 2013. These investigations are carried out in accordance with guidance contained in the 2014 Document entitled “Policy and Procedures: Responding to Allegations of Child Abuse and Neglect.”
29. There are a number of stages in the assessment. Upon receiving a notification of an allegation in respect of a child a TUSLA social worker meets and interviews the complainant. The social worker also decides whether it is necessary to interview any other person who may have relevant information. A decision is taken on whether there is enough substance to the complaint to proceed to the next stage of the assessment. This is the first stage of the investigation.
30. If a decision is made to proceed further, contact is made with the alleged abuser. This is the second stage of the investigation. The alleged abuser is provided with details of the allegation, and the procedures. The alleged abuser is invited to attend an initial interview or make a written response.
31. The purposes of the initial interview include exploring the details of the allegation and the response of the alleged abuser. The social workers attending must explain that

following the interview and any necessary enquiries TUSLA will reach a preliminary conclusion as to whether the allegations against them are substantiated and then a final conclusion.

32. The procedures give detailed guidance on the conduct of the initial interview. The interviewee must be told that TUSLA will provide typed copy of the interview notes and any other relevant information. A legal adviser may attend the interview.
33. The next step in the process requires the social workers conducting the investigation to take stock of the current state of the investigation and proceed appropriately. This is set out in Para. 24 of the Policy and Procedures. It may be necessary to carry out a further assessment in the light of any information and response furnished by the alleged abuser. This may involve further interviews. It may be appropriate to re-interview the complainant and any other relevant witness to obtain their responses to issues raised in the interview with the alleged abuser. It may be necessary to request a further interview with the alleged abuser.
34. After the initial interview ("Post initial interview") the alleged abuser may request an opportunity to put questions to a complainant or other person about the allegations. This is set out in Para 24.1 (b). In dealing with these requests "...a balance should be drawn between the right of the complainant, the legal obligations of the Child and Family Agency under Section 3 of the Child Care Act 1991 and the need to afford fair procedures to the alleged abuser..."
35. Para. 25.4 follows a heading " 25.3 Provisional conclusion" and provides as follows: "Having provided an opportunity for the alleged abuser to make representation and having undertaken any follow up assessment enquiries, a provisional conclusion should be made about the likelihood of future potential risk posed towards children by the alleged abuser."
36. If there are further assessments or garnering of further relevant materials, the alleged abuser should be given an opportunity to review those materials and make a representation before any provisional conclusion is arrived at. At that stage the alleged abuser may provide further information or make a representation on the materials presented or seek to put questions to a complainant or other person. These "assessment enquiries" include further enquiry of the person being investigated where fairness requires that they be given an opportunity to comment on further information in advance of the "provisional conclusion".
37. The alleged abuser is entitled to see any further material obtained by the social workers. Fairness dictates that they be given an opportunity to respond to these materials in advance of the social workers proceeding to make a provisional conclusion. The terms of Paras 25.4 and 25.5 must be read together. It is clear from the latter that "no opinion" can be reached on the "provisional conclusion" "until all information is carefully assessed and the process with the alleged abuser has been completed."

38. Paras. 25.5, 25.7 and 25.8 set out the status of the provisional conclusion and the standard of proof which the decider must apply to the available material in reaching the provisional conclusion.
39. Paras 25.5, 25.7 and 25.8 provide as follows:
- “ 25. 5 Remember that the determination is based upon balance of probability. The detail and judged likelihood of the allegations being true will have to be weighed further. It is important that no opinion is reached as to the likelihood of the allegations being true until all information is carefully assessed and the process with the alleged abuser has been completed... 25.7 The social worker can reach either of the following provisional conclusions: Founded or Unfounded. 25.8 The social worker should inform the alleged abuser of the provisional conclusion and then advise them that they may respond by the specified date. The alleged abuser should be informed that if any new information is put forward by the alleged abuser, it will be considered, and if there is no new information, the provisional conclusions will be deemed to be the final conclusions by a certain specified date.”
40. Para 26.1 states that “The alleged abuser should be informed of the final conclusion of the assessment in writing.” This Paragraph goes on to state what the letter should advise the recipient about the appeal process and any further steps which may be taken as a result of the adverse finding.
41. The effect of these provisions is that what is described as a “provisional conclusion” of “Founded” is final, unless some new information from the alleged abuser dislodges the determination. The provisional conclusion shifted the onus to JPP to demonstrate that that the adverse finding was wrong and should be re-examined.
42. JPP was deprived of an opportunity to comment on the interview with took place between the social workers and LK and her mother or to seek to put questions to them in advance of the provisional conclusion. The promise in the letter of 31 October 2018 that JPP would be given this material and have an opportunity to respond before any provisional conclusion was drawn was broken. Any subsequent reassessment of evidential material by the makers of the adverse decision could not cure this error.
43. The fact that the deciding social workers assessed and tested the credibility of information provided by LK and her mother when they interviewed them did not justify them in depriving JPP of the opportunity to consider those interviews and make submissions or take any other course advised by his lawyers.
44. Much of the argument in this judicial review centred on the implications of the decision of LK to decline to participate in cross examination. Submissions focused on effect of absence of an opportunity of JPP to challenge LKs account of what happened by cross examining her.

45. These issues may arise when the inquiry relating to the allegations against JPP is resumed. The decision which resulted in procedural unfairness to JPP took at an earlier stage in the process. In order to get things back on track it will be necessary to recommence the process at the beginning. At that stage the issue of whether LK is willing answer questions in a cross examination or other format can be reviewed. Her reasons for any refusal to participate will be relevant.
46. There is no basis on which this Court can at this stage substitute itself for the deciders and determine in advance how they should carry out their task. This Court can only give some general guidance on how things might proceed. This Court does not know whether the procedural rules governing the process have been changed.
47. It does not necessarily follow that the consequence of LK's decision, if she maintains her position, will be that the assessment must be terminated or that there must be a finding in favour of JPP. Social workers conducting the assessment will take stock and decide on the appropriate manner of proceeding. This will include inviting and considering submissions from the JPP at an appropriate point.
48. As stated in the 2014 guidance, the "right of a complainant" must be considered. Is it demonstrated that there is a serious risk of adverse consequences for LK if questioning is permitted? It might be explored as to whether some accommodation can be made which would produce agreement by LK to allow questioning. This might involve video link or other facility.
49. Sometimes a person who is sought to be questioned may have little to offer. During the appeal process JPP sought to cross examine any person who provided information which the deciding social workers relied on in coming to their conclusions.
50. There is no absolute rule that a person who is the subject this type of assessment is entitled to confront a person who has made a disclosure or carry out a cross examination. For instance, an accused person may have already been given an opportunity to test allegations in another forum. There may be valid reasons for not facilitating questioning. It may be inappropriate to seek to require a person to answer questions for health reasons or age reasons or other reasons based on legitimate rights of that person.
51. Statements in judgments of the High Court relating to these inquiries indicate that, absent good reason, a person faced with an allegation of sexual abuse must be given an opportunity to test that allegation by putting questions to an adult accuser. Refusal by an adult to submit to questioning will not of itself be a good reason for dispensing with this requirement of procedural fairness. Lack of compellability of an adult cannot be relied on as a good reason for such a course. Unjustified refusal by an adult to participate in this part of the process is not a "right of the complainant" within Para. 24(1)(b) of the procedure.



52. It is the responsibility of the decision makers to put in place a process which achieves fairness. This process of putting questions to test the reliability of an allegation may not necessarily involve a right to conduct a cross examination in the traditional sense. The guidelines refer to "questioning."
53. An opportunity to put questions to an alleged victim need not be afforded where it is not requested at the appropriate stage in the process. A person facing allegations may be out of time to request a facility to put questions where that request is made after a provisional conclusion. The guidelines envisage that questioning will precede any provisional conclusion.
54. The fact finders are obliged to consider what weight should be given to an account of wrongdoing where a person accused has not been afforded an adequate opportunity to challenge that account by questioning. Weight to be given to any account of events is assessed in the light of all information available. This includes accounts of events and explanations given by a person accused of abuse. Social workers may test conflicting accounts when conducting interviews. This is part of their function as enquirers.