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THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 54

Court of Appeal Record No 2021/232

Haughton J.

Collins J.

Barniville J.

BETWEEN

D.K.

Applicant/Respondent

AND

P.I.K.

Respondent/Appellant

(ACCESS TO TRANSCRIPT OF JUDGE'S MEETINGS WITH CHILDREN)

JUDGMENT of Mr Justice Maurice Collins delivered on 9 March 2022

PRELIMINARY

1. The right of children to have their views taken into account – the right to be heard - in proceedings that directly affect them is now widely recognised. It is reflected in the fundamental law of the State. Article 42A.4.2 of Bunreacht na hÉireann (inserted by the Thirty-First Amendment of the Constitution (Children) Act 2012) provides (*inter alia*) that provision “*shall be made by law for securing, as far as practicable, that in all proceedings [concerning the adoption, guardianship or custody of, or access to, any child] in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.*”¹
2. The child’s right to be heard is also enshrined in the Charter of Fundamental Rights of the European Union² and in the UN Convention on the Rights of the Child³.

¹ Even prior to the Thirty-First Amendment, there was authority to the effect that Article 40.3 guaranteed the right of children of sufficient age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child: per the High Court (Finlay Geoghegan J) in *FN v CO* [2004] 4 IR 311, at para 29.

² Article 24(1) of the Charter provides (*inter alia*) that children “may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.”

³ Article 12(1) of which provides for the right of children to express their views freely in all matters affecting them and Article 12(2) of which provides that “... *the child shall in particular be provided the opportunity to be*

3. While there is significant international consensus at the level of principle that children should be heard, as this appeal illustrates difficult questions may nevertheless arise in practice as to how that ought to be done and the conditions in which it should take place.
4. The proceedings here are for judicial separation. There are three children of the marriage, E (a girl now 15 years of age), L (a boy aged 12) and I (a girl aged 10). DK (the father) is an Irish national. PIK (the mother) is a national of D. The family has resided in a third country, I, for many years. DK and PIK's marriage broke down some time ago. PIK issued family law proceedings in I in 2017, but in 2019 the court declined jurisdiction for reasons which it is not necessary to recite. Subsequently, these proceedings for judicial separation were issued by DK.
5. In 2019 PIK removed the children to D (the State of her nationality) without the consent of DK. After proceedings were brought by DK under the Hague Convention, PIK returned the children to I and they have resided there since. Custody of the children is shared by DK and PIK on a week on, week off basis.
6. In February 2020 PIK applied in the judicial separation proceedings for orders directing that the children be returned to her primary care, regulating DK's access to them and

heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." Ireland ratified that Convention in 1992.

permitting her to permanently relocate the children to D. In addition, PIK sought an order pursuant to section 32 of the Guardianship of Infants Act 1964 (as amended) (“*the 1964 Act*”) appointing an expert to determine and convey the wishes of the children. As explained below, a section 32 order was made in advance of the hearing of the motion and the only relief ultimately pursued at the hearing was that of relocation. That being so, I shall refer to this application as the “*relocation application*.”

7. DK opposed the application. After a 5 day hearing in June 2021, the High Court (O’ Hanlon J) refused the application for the reasons set out in her lengthy judgment delivered on 23 July 2021 ([2021] IEHC 516). In essence, the High Court concluded that the proposed relocation was not in the best interests and welfare of the children.
8. As her judgment records, the Judge met with each of the children. While the Judge refers to her interactions with the children as “*interviews*”, I prefer to refer to them as meetings. The meetings all took place on 8 July 2021 - after the conclusion of the hearing and before judgment was given - face-to-face in the courtroom, in the presence of the registrar. The Judge met each of the children separately. Neither DK or PIK nor their legal representatives were present. The meetings were recorded by the Digital Audio Recording (DAR) system and, on the direction of the Judge, a transcript was prepared and put on the court file in a sealed envelope (Judgment, para 123). The circumstances in which these meetings took place is discussed in more detail below.
9. PIK subsequently appealed the refusal of the relocation application to this Court and that appeal is listed for hearing on 4 April 2022.

10. After the Judge gave her Judgment, PIK applied for access to the DAR of the meetings with the children (she also sought the DAR of the hearing itself but that aspect of the application is not relevant to this appeal). The application came before the Judge on 30 July 2021. DK opposed the application and it was refused.

11. PIK appealed that refusal. The net question presented by the appeal was whether the Judge was justified in refusing access to the transcript of the meetings. The appeal came on for hearing on 6 December 2021. Having heard the submissions of counsel for each of the parties, the Court announced that it was allowing the appeal and it directed that the transcript of the meetings should be furnished to the solicitors for each party, subject to the condition that they may be used only for the purpose of the judicial separation proceedings (including the appeal from the refusal of the relocation application). The Court indicated that it would give its reasons at a later date. This judgment sets out my reasons for allowing the appeal.

THE COURSE OF THE PROCEEDINGS IN THE HIGH COURT

12. It is necessary at this stage to say something more about the course of the proceedings in the High Court.
13. As I have mentioned, one of the reliefs sought by PIK in the relocation application was an order appointing an expert pursuant to section 32 of the 1964 Act.
14. Section 32 is an important provision which was referred to extensively in argument before us. It was inserted into the 1964 Act by section 63 of the Children and Family Relationships Act 2015. Section 32(1) provides that in proceedings to which section 3(1)(a) of the Act applies - any proceedings in which the guardianship, custody or upbringing of, or access to, a child is in question - the court hearing the proceedings may, by order, do either or both of the following:

“(a) give such directions as it thinks proper for the purpose of procuring from an expert a report in writing on any question affecting the welfare of the child;

or

(b) appoint an expert to determine and convey the child’s views.”

Such an order may be made by the court of its own motion or on application to it. In deciding whether to make an order, the court must have regard to the views of any party to the proceedings or any person to whom they relate (section 32(2)) and section 32(3) sets out certain factors to which the court must have regard in particular in deciding

whether to make such an order. In argument, counsel for PIK placed particular reliance on Section 32(4) and so I shall set out in full:

“(4) A copy of a report under subsection (1)(a) may be provided in evidence in the proceedings and shall be given to

(a) the parties to the proceedings concerned, and

(b) subject to subsection (5), if he or she is not a party to the proceedings, to the child concerned.”

Section 32(5) then sets out the factors to which the court is to have regard when determining whether a section 32(1) report should be furnished to the child. Sub-section (6) provides for the duties of the expert which include furnishing to the court a report *“which shall put before the court any views expressed by the child in relation to the matters to which the proceedings relate.”* For present purposes the final aspect of section 32 that warrants notice is sub-section (7) which provides that the court or a party may call as a witness in the proceedings an expert appointed under sub-section (1).

15. Section 47 of the Family Law Act 1995 (*“the 1995 Act”*) should also be mentioned in this context. It confers on the court a power to direct the procuring of an expert report on any question affecting the welfare of a party to the proceedings or any other person to whom they relate in (*inter alia*) proceedings under the 1964 Act or under the Judicial Separation and Family Law Reform Act 1989. Again, such a report *“shall”* be given to

the parties and may be received in evidence (section 47(3)) and the court or a party may call the person who prepared the report as a witness (section 47(5)). While section 47 does not expressly provide for the appointment of “*an expert to determine and convey the child’s views*”, the power conferred by that section would certainly seem to be broad enough to encompass an appointment for that purpose.

16. In any event, on 20 May 2020 the High Court (Jordan J) made an order appointing an assessor for the purpose of preparing a section 32 report in relation to the children, with the costs to be discharged equally by the parties. The order did not refer specifically to section 32(1)(a) or (b). There followed a series of orders appointing replacement assessors. It may be that difficulties arose in carrying out the assessment because of the fact that the children reside outside of Ireland. Along the way, the orders began to refer to section 47 rather than section 32. However, nothing appears to turn on that for the purposes of this appeal. Ultimately, by order made on 22 October 2020 Dr Fiona Moane, a clinical psychologist, was appointed as assessor for the purpose of preparing a section 47 report.

17. In due course, Dr Moane furnished what the Judge described as a “*comprehensive report*” (Judgment, para 123). That report was not put before the Court for the purpose of this appeal but it is apparent from the Judgment that Dr Moane made a number of recommendations including, it appears, a recommendation to the effect that, in the event that the parents could not agree to live in the same country, the Court ought to allow the relocation of the children to D (Judgment, para 88(4)). Dr Moane’s report was provided to the parties and she gave evidence at the hearing and was cross-examined (Judgment,

paras 66-87). It seems from the Judgment that her evidence tended to support the position of PIK.

18. The issue of whether the Judge should meet one or more of the children seems first to have arisen on 29 June 2021 (the penultimate day of the hearing) prompted by E making it known to both her parents that she wanted her voice to be heard.⁴ It was discussed further the following day (the final day of the hearing) and again on 6 July 2021 when the proceedings were in for mention. The views of each parents were canvassed. Each expressed their views thoughtfully and with manifest regard for the potential impact of any such meeting on the children. DK appeared to favour the Judge speaking with E. PIK was more doubtful but expressed the view that, if the Judge was to speak to E, she should also speak to L. For her part, the Judge expressed the view that, if she heard one of the children she should hear them all. Neither party objected to the Judge meeting any or all of the children and each accepted that it was ultimately a matter for the Judge to decide whether or not to do so.

19. Unfortunately, there was no discussion as to the parameters within which the suggested meetings should proceed or their precise purpose. Neither party raised any question as to the basis on which any meetings should proceed. That question was not raised by the Judge either. The High Court (Abbott J) had previously offered guidance about judges meeting with children in *O' D v O' D* [2008] IEHC 468, [2013] 3 IR 189. Putting aside the detail of that guidance for the moment (and I shall return to it), its over-riding

⁴ Day 4, pages 37-38.

message is the need for clarity in advance of any such meeting. Unfortunately, the Judge was not referred to *O' D v O' D* before deciding to meet the children. If she had, it seems likely that the issue giving rise to this appeal could have been avoided.

20. The Judge met with the children on 8 July 2021. She then gave her Judgment on 22 July 2021. There was no further hearing between 8 July and 22 July. Her Judgment is not, of course, the subject of this appeal. For present purposes, it is sufficient to note the following aspects of it:

- The Judgment refers extensively to the Judge's meetings with the children and to the views expressed by them (Judgment, paras 100 – 113).
- The Judgment records that the Judge had, ascertained the views of the children “both by virtue of Dr Moane's comprehensive report and by the court interviewing the children individually” (Judgment, para 123)
- The Judgment makes it clear that the Judge rejected the evidence of Dr Moane in a number of significant respects and in particular rejected her recommendation that, if the parents could not agree to live in the same country, PIK should be permitted to relocate the children to D.
- In reaching the conclusions that she did, including her decision to reject the evidence of Dr Moane, the Judge appears to have placed reliance on (*inter alia*) the views expressed by the children at her meetings with them. This was accepted by

counsel for both parties at the hearing of this appeal, though they differed as to the extent of such reliance and about the significance of the meetings to the ultimate outcome of the relocation application. However, what is significant for the purposes of this appeal is the undisputed fact that the Judge relied on what was said to her during the meetings with the children in reaching the decision she did.

21. PIK then applied for the transcript of the DAR of the 8 July meetings. Her application was heard on 30 July 2021. Her counsel submitted that fair procedures required that the DAR be made available to her. In response, the Judge indicated her view that it had been a “*private interview*” with the children where they had “*to feel safe to speak*”. That view was supported by counsel for DK who submitted that it was important that the privacy of the children should be protected and suggested that it would not be in the best interest of the children to provide access to the DAR. In response, counsel for PIK made reference to *O’ D v O’ D* and stated that there had been no suggestion that the children would be speaking to the court in confidence and that the children had not sought such confidence. The Judge in response stated that it was clear to the children that it was a “*safe place for them to give their view*” and stated that she had a discretion under section 65 of the Court Officers Act 1926 whether to release court records.⁵⁵ Counsel for PIK continued to press the case for disclosure, suggesting that the transcripts were “*important information*” and submitting that her client had an entitlement “*to know the case and to know the evidence that was used and that was ...*

⁵⁵ Neither party placed any reliance on the provisions of section 65 of the Courts Offices Act 1926 in this appeal and accordingly no further reference will be made to it.

relied on". The Judge then indicated that she did not think that it would be in the best interests of the children to allow access and that concluded the application.

22. During the hearing on 30 July 2021, it appears to have been common case that the Judge had relied on what had been said to her by the children in reaching the decision she did. As is apparent from the previous paragraph, counsel for PIK expressly suggested as much, without demur from the Judge. Indeed, in the course of the hearing the Judge herself referred to her meetings with the children as "*the last piece of evidence*" in the case.⁶

⁶ Transcript of 30 July 2021 at page 8, line 20.

APPEAL AND ARGUMENT

23. PIK's first ground of appeal (the only one relevant to this judgment) asserts that the Judge erred in law in refusing to release the DAR and/or transcripts of her interviews. Reference is made to the fact that, in refusing the relocation application, the Judge rejected the recommendations of the Court-appointed assessor who had interviewed the children and prepared a report for the Court and it is said that the Judge substantially based her judgment on the interviews conducted by her. The refusal to release the DAR of those interviews amounts (so it is said) to a denial of fair procedures which prejudiced PIK in the preparation of her appeal from the Judge's substantive judgment refusing the relocation application.

24. In his notice, DK says that the refusal of access to the DAR and/or transcripts of the Judge's meetings with the children was within the discretion of the Judge and that refusing access was in the best interests of the welfare of the children. DK also emphasised that the transcripts would be available to this Court when hearing PIK's appeal from the refusal of the relocation application.

25. In her written submissions, PIK says that the refusal of access to the transcript of the meetings prejudices her appeal on the relocation application and amounts to a denial of fair procedures. Fair procedures required that all evidence relied on by a court be known and available to the parties. Reliance was placed on the decision of the Supreme Court in *State (D and D) v Groarke* [1990] 1 IR 305 as authority for that proposition. Here, it

was said, while the Judge may have been entitled as a matter of principle to reject the evidence of Dr Moane, her decision to do so was “*influenced greatly*” by her meetings with the children and it was necessary that the “*basic evidence*” on which that decision was based would be available to the parties for the purposes of the appeal. Reference was also made to the decision of the European Court of Human Rights (ECtHR) in *McMichael v United Kingdom* (1995) 20 EHRR 205. Referring to *O’ D v O’ D*, it is said there was no agreement that the children’s interviews with the court would be in confidence and it is suggested that refusal of access to the DAR is not consistent with the guidelines set out by Abbott J in that case.

26. Ms Browne SC argued the appeal for PIK. She did not appear in the High Court. She brought the Court to section 32 of the 1964 Act. She explained that section 32(1)(b) creates a specific mechanism for ascertaining the views of the child and emphasised that section 32(4) expressly provides that a copy of any report under that subsection has to be given to the parties. Thus there was no question of such a report being withheld from the parties on grounds of confidentiality or privacy.⁷ Equally, Ms Browne said, a report prepared pursuant to section 47 of the 1995 Act had to be given to the parties. A report under section 32(1) or section 47 was, she said, the primary means whereby the child is heard in family law proceedings. She disputed the suggestion that direct meetings between judges and children were becoming more common. Children did not

⁷ In fact, section 32(4) refers only to a report under section 32(1)(a) and section 32 is silent on the entitlement of the parties to see any report prepared by an expert appointed under section 32(1)(b). I will come back to this point and explain why I think that nothing turns on it.

have any absolute right to meet with the judge and in this context Ms Browne referred to Council Regulation (EU) 2019/1111. That Regulation will repeal and replace Brussels II *bis* as and from 1 August 2022. The recitals to that Regulation made it clear that there was no “*absolute obligation*” to hear the child.⁸ A judge should not meet with a child on a confidential basis, at least without the prior agreement of the parents. There had been no such agreement here nor had the children requested confidentiality. In any event, Ms Browne said, a meeting between judge and child was not, or ought not to be, an evidence-gathering process. Here, Ms Browne submitted, it was apparent from the Judge’s Judgment that she had relied to a significant extent on what the children had said to her, and her impression of them, as a basis for rejecting the evidence of Dr Moane. She asked rhetorically how PIK could properly present her appeal from the Judge’s decision to refuse the relocation application without sight of the transcript.

27. In DK’s written submissions, the issue in the appeal is identified as “*whether a child can confidentially express their views on their own custody, access and living arrangements to a judge without either or both parents being made aware of same.*” Reference is made to the practice of the Court of Chancery hearing custody applications and of the Queen’s Bench hearing *habeas corpus* applications involving children to interview the child or children concerned and a number of decisions, including *In re*

⁸ This was clearly a reference to Recital (39) of Council Regulation (EU) 2019/1111. Article 21 of the Regulation is also relevant. Article 21(1) requires Member State courts to provide the child “*with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body.*” That language closely reflects Article 12(1) of the Convention on the Rights of the Child and makes it clear that no particular means of hearing the child is mandated.

Elliot [1893] 32 LR Ir 504, *In re Story* [1916] 2 IR 328 and *In re Frost Infants* [1947] 1 IR 3, are cited as illustrations of that practice. The historic practice - so it is said - is that such an interview was a private interview, with no party having access to the notes or transcripts from it. Furthermore no purpose would be served by releasing the transcript here as it would be “*wholly inappropriate*” for the children to be cross-examined on their statements or for witnesses to be called in rebuttal or for submissions to be made as to the weight to be given to their views. The children had not been witnesses and what they had said to the Judge was not “*evidence*” within the normal understanding of that term. Proceedings under the 1964 Act were not ordinary adversarial or *inter partes* proceedings and were quasi-investigatory. The statement by the children of their views was completely different to the expert evidence at issue in *State (D and D) v Groarke*. The submissions take issue with any suggestion that PIK’s fair procedure rights were infringed and suggest that the process of a judge meeting privately with a child to ascertain their views was held to be constitutional by the Supreme Court in *In re Frost*. It is suggested that releasing the transcripts would have a chilling effect. It is said that it would be “*very easy*” to resolve the appeal on the basis that PIK had acquiesced in what had occurred but the Court is invited to go further and to hold that as a matter of policy and to give effect to Article 42A of the Constitution an appellate court should never direct the release of the notes of a confidential interview between a child and a judge.

28. Mr Sheehan BL argued the appeal for DK. Neither he nor his instructing solicitors acted in the High Court. His oral submissions placed significant reliance on the Supreme Court’s decision in *In re Frost*. He said that in light of that decision there could not be

a serious objection on constitutional grounds to the practice of confidential judicial interviews with children and the position had been copper fastened by Article 42A. The right of a child to express their views confidentially to the court overrode the due process rights of parents. As regards the approach to meetings with children taken in England and Wales, it was said that the public policy considerations in that jurisdiction differed from those animating the courts here and it was suggested that the English courts gave a weight to Article 6 ECHR that would not be appropriate here having regard to Article 42A. Other jurisdictions took a different view, such as the state of Ohio. Mr Sheehan took issue with the suggestion that section 32 of the 1964 Act and/or section 47 of the 1995 Act represent the primary means for hearing the child. Those sections had been enacted because, historically, courts did not have the power to appoint an expert or assessor in family law proceedings. The absence of any express statutory provision permitting a judge to meet with a child had no significance as the power to do so was well-established at common law. A child's interaction with an expert was circumscribed and a child might be reluctant to express their real views about their parents to an expert in circumstances where that would be disclosed to the parents, thus emphasising the importance of direct and confidential access by the child to the judge. If there was any conflict between the rights of the child and the rights of the parents, the latter had to go "*by the wayside*".

29. In her reply, Ms Browne said that it is a fundamental principle that parties in family law proceedings should see and be permitted to comment on any material relied on by the court and considerations of confidentiality and/or privacy could not justify a departure from that position. She disputed Mr Sheehan's contention that the rights and interests

of the parents might have to yield to the interests of the child. Our justice system, she said, is adversarial not inquisitorial and the parties were entitled to test all material put before the court regarding child welfare.

ISSUES AND DISCUSSION

The Child's Right to be Heard in Proceedings Under the 1964 Act

30. Section 25 of the 1964 Act (inserted by the Children Act 1997) provides that in any proceedings in which the guardianship, custody, upbringing of or access to a child is in question, the court concerned “*shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter.*” In determining what is in the best interests of the child (which, by virtue of section 3 of the 1964 Act, is the “*paramount consideration*” in such proceedings) section 31(2)(b) requires the court to have regard to (*inter alia*) “*the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise).*” “*Wishes*” and “*views*” are clearly used interchangeably in this context.
31. The 1964 Act does not prescribe the manner in which those “*wishes*” / “*views*” are to be ascertained, a position reflected in the language of section 31(2)(b) (“*or otherwise*”). It does, however, provide a specific and developed mechanism for doing so in the form of section 32. In contrast to the Child Care Act 1991 (as amended), the 1964 Act does not make any express provision for joining the child as a party.⁹ Section 28 of the 1964

⁹ In care proceedings under the Child Care Act 1991 (as amended), section 25 provides that the relevant court “*may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so, order that the child be joined as a party to, or shall have such of the rights of a party as may be specified by the court*” either in

Act (inserted by section 11 of the Children Act 1997) makes provision for the appointment of a guardian *ad litem* in proceedings under (*inter alia*) section 11, where the court concerned is “*satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child to do so*”. However, section 28 has yet to be commenced. Children may give evidence in proceedings under the 1964 Act. Part III of the Children Act 1997 contains a number of provisions intended to facilitate the giving of evidence by children, including provision (in section 23) for giving evidence by way of written statement where giving oral evidence would not be in the interest of the welfare of the child (subject to the interests of justice). Any evidence given by a child, whether orally or by way of written statement, would, of course, be available to the parties. However, even where the burden of giving oral evidence can be mitigated or avoided, inviting children to give evidence in this context is still open to the objection that it “*would involve them in an unacceptable manner in the marital disputes of their parents*”: per Keane CJ in *RB v AS (Nullity: domicile)* [2002] 2 IR 428 at 456.

32. As I have said, section 32 of the 1964 Act provides a specific mechanism for ascertaining the views of the child and putting those views before the court. It is the

respect of the entirety of the proceedings or such issue or issues as the court may direct. There appears to be no equivalent to section 25 applicable to guardianship/access proceedings but it is unnecessary for the purposes of this appeal to consider whether and/or in what circumstances a court hearing such proceedings, might nevertheless have power to join a child as a party if it considered that to be appropriate to vindicate the rights of the child. In the event that a child was joined as a party, then any submissions made or evidence given on their behalf would take place in the presence of the other parties.

only specific mechanism for doing so provided for in the Act (other than the uncommenced guardian *ad litem* procedure). Section 32(1)(b) provides for the appointment “*of an expert to determine and convey the child’s views*”. Section 32(10) provides for the making of regulations specifying the qualifications and experience of an expert appointed under the section. Regulations have in fact been made under section 32(10) – the Guardianship of Infants Act 1964 (Child’s View Expert) Regulations 2018¹⁰ - which impose specific and significant requirements for appointment as an expert under section 32(1)(b) in terms of both qualifications and relevant experience in dealing with children and adolescents. That clearly suggests an understanding on the part of the Oireachtas of the complexities that may be involved in reliably ascertaining the views of the child on difficult and disputed issues relating to their custody and related matters such as access. It is not (or may not be) a simple matter of asking the child and then recounting what they say in response. If it were, section 32 might simply have provided for the admission of the child’s statement of views in proceedings under the Act. Instead, section 32(1)(b) envisages that the expert will bring to bear his or her expertise so as to “*determine*” the views of the child.

33. As I have already noted, section 32 does not expressly provide that a section 32(1)(b) report shall be given to the parties. Section 32(1)(b) in fact makes no reference to a “*report*”. It is section 32(6)(c) that imposes an obligation on an expert appointed under section 32(1)(b) to furnish a “*report*” to the court “*which shall put before the court any views expressed by the child in relation to the matters to which the proceedings relate.*”

¹⁰ SI No 587 of 2018

The reference to putting the views of the child “*before the court*” in itself suggests that the report will be made known to the parties. Furthermore, section 32(7) provides that an expert appointed under subsection (1) – which clearly includes an expert appointed under section 32(1)(b) – may be called as a witness by the court or by any party. In the absence of any limitation in section 32(7) – and there is none – it would seem to follow that an expert directed to give evidence under section 32(7) can be asked about any section 32(1)(b)/section 32(6)(c) report prepared by them and the views expressed by the child explored with them. That presumably is the underlying rationale for section 32(7). The fact that an expert may be appointed under section 32(1)(b) on the application of a party reinforces that view, as does the fact that section 32(7) makes the parties responsible for the fees and expenses of an expert appointed under section 32(1). It seems implausible to suppose that the Oireachtas could have intended that a section 32(1)(b) report would not be available as of right to the parties, particularly when it seems clear that reports under section 32(1)(a) and under section 47 of the 1995 Act (reports which have to be provided to the parties) may put the views of the child before the court. Denying a party access to a section 32(1)(b) report would also raise potentially significant constitutional questions.

34. However, it does not seem necessary to express any definitive view on that issue here and in the absence of argument directed to that issue, it would not be appropriate to do so. Mr Sheehan did not take issue with Ms Browne’s assertion that a section 32(1)(b) report has to be provided to the parties (though he strongly disputed the inference that Ms Browne invited the Court to draw from that fact). In any event, as I have already explained, the order appointing Dr Moane was in fact stated to be made under section

47 of the 1995 Act, her report was in fact provided to the parties and it was no doubt explored at length with her during her evidence.

35. What can be said about the 1964 Act is that there is not a hint in its detailed provisions of any legislative intention that issues such as those raised by the relocation application could, or should, be determined by reference to evidence not disclosed to the parties or any suggestion that the Oireachtas contemplated that a court hearing proceedings under the Act might ascertain the views of the child on a confidential basis and then rely on those views to reach a decision, without those views being disclosed to the parties or the parties having an opportunity to comment on them.

Meeting the Child

36. The 1964 Act contains no provision for a judge to meet with the child or children affected by proceedings under the Act. However, there was no suggestion in the High Court, or before this Court on appeal, that the Judge here was not entitled to meet with the children. Neither was there any suggestion that any of the children were not capable of having and communicating their own views or lacked sufficient maturity for that purpose. The contrary is abundantly clear from the transcript of the meetings.
37. There is nothing in the material before the Court that indicates how prevalent the practice of judges meeting with children in proceedings is, such as the proceedings here. Writing in 2017, one commentator suggested that the (limited) available evidence

suggested that it was “*a rare occurrence.*”¹¹ It is clear nonetheless that the practice is long-established. The “*power of the Court to consult the wishes of the child*” was expressly recognised by section 4 of the Custody of Children Act 1891 (an Act which applied in Ireland) and the law reports disclose many instances where that power was exercised, including the three cases relied on by DK, *In re Mary Elliott (an infant)* (1893) 23 Law Reports (Ireland) 504, *In re Story, Infants* [1916] IR 328 and *In re Frost, Infants* [1945] IR 3. Many other instances are identified in *Shatter’s Family Law* (4th ed; 1997), paras 13.90-13.91.

38. In *In re Mary Elliott (an infant)* the Queen’s Bench Division “*in pursuance of our duty, and in accordance with precedent*” interviewed the subject of a *habeas corpus* application, a girl about to turn 16, to ascertain her wishes as to whether she wished to return to her (Protestant) family or remain under the charge of the (Catholic) nuns operating the industrial school in which she had previously been detained. She evidently wished to remain with the nuns and while the court made it clear that it would not be “*governed by her ideas on this subject if our own views did not correspond with them*”, it regarded them as “*sound and reasonable*” (at page 508).
39. *In re Story, Infants* [1916] IR 328 was another *habeas corpus* application, brought against a backdrop of parental conflict as to the religious upbringing of their two

¹¹ Aoife Daly, “The Judicial Interview in Cases on Children’s Best Interests – Lessons for Ireland” *Irish Journal of Family Law* (2017). This article gives a very helpful introduction to the vast international literature on the issue of judges meeting with children in family law proceedings.

children, a boy and a girl. It was heard by a Divisional Court. Addressing the position of the 11 year old boy, Gibson LJ stated that he did not consider it necessary to “*see the boy*”. He then went on to identify the difficulty that doing so could involve. Where “*the Court consists of several judges – disconcerting and alarming as such an assemblage might be to a child – the judges may each form different impressions; and the interview being of a domestic, private character, there is no note of what has taken place.*” The Court of Appeal, he went on, had also adopted the practice of speaking with the children (referring here to *Andrews v Salt* LR 8 Ch App 622) and that court might disagree with the result announced below. “*Possibly*”, he continued, “*the difficulty might be mitigated if a note was kept by the primary judge for confidential use in the proceedings before the Court or on appeal*” (at page 347).

40. Mr Sheehan placed much reliance on Gibson LJ’s reference to the “*private character*” of the interview and his suggestion that a note might be prepared for “*confidential use*” in any subsequent proceedings or in any appeal.

41. The last authority relied on by counsel for DK in this context was *In re Frost, Infants* [1945] IR 3. Again, this was a *habeas corpus* application concerning the children of a marriage where the parents were of different religions. It is not necessary to say anything more about the facts, which were complex. It is evident from the judgments that the High Court judges (again a Divisional Court was involved) had met with the children (other than the youngest, who was only 6). On appeal, it was said by the mother that, while the High Court was entitled to interview the children, such an interview should not have been used to discover the wishes of any of the children but “*only for*

the purpose of ascertaining whether the distinctive doctrines of the Church of Ireland had taken strong hold of their minds.”¹² That was disputed by the respondent. Given DK’s reliance on *In re Frost*, I shall set out *in extenso* the passage from the judgment of the Supreme Court (given by Sullivan CJ) which addressed this point:

“There was, as I have said, no controversy in this Court as to the principles which, prior to the enactment of the Constitution, governed the rights of a parent to the custody of his infant child. Mr. Ryan did, however, challenge the procedure followed by the High Court in interviewing the children. At one stage of his argument, as I understand it, he contended that the Court had no right to interview the children for any purpose, but at a later stage his contention was that the Court should not have asked Charles Victor, who was over fourteen years of age, whether he wished to remain in the Home where he was. Neither of these contentions can in my opinion be accepted. The right of the Court hearing an application for habeas corpus to interview the infants concerned is recognised in the judgments of Ashbourne L.C., FitzGibbon L.J. and Holmes L.J. in In re O’Hara. In his judgment, FitzGibbon L.J. said: — “From the time of King, C., in Ex parte Hopkins, the Court of Chancery has exercised its discretion in seeing young children, not for the purpose of obtaining their consent, but for the purpose, and as one of the best modes, of determining what is really for their welfare, though the Common Law Courts, as a general

¹² At page 15.

rule, would not inquire, as between parent and child, as to the child's consent, below the age of fourteen for a boy, or sixteen for a girl.”

In the case of The People (Attorney-General) v. Edge, this Court found it necessary to consider the practice on applications for habeas corpus in respect of infants, and every member of the Court was satisfied that, as a general rule, such applications were refused if the infant concerned was a boy over fourteen years of age who consented to remain where he was at the time when the application was made. That being so, it was obviously desirable, if not essential, that the High Court should ascertain whether Charles Victor consented to remain in the Home.” (at page 25; footnote references omitted)

42. I do not consider that these decisions materially assist the arguments advanced by DK on this appeal. As already noted, no issue arises here as to the Judge’s entitlement to meet with the children. As for the observations of Gibson LJ in *In re Story*, doubtless they reflect the then practice of the courts but no issue arose in *In re Story* as the appropriateness of that practice and the issue arising on this appeal was not addressed, still less decided, by the court. As we shall see, more recent authority strikes a quite different note. The same points can be made in relation to *In re Frost*. With respect, the suggestion that, in light of that decision, there could not be a serious objection on constitutional grounds to the practice of confidential judicial interviews with children is, in my view, wholly misplaced. No such issue was discussed or decided in *In re Frost*. The Supreme Court’s consideration of the Constitution was limited to a very brief discussion of whether Articles 41 and 42 affected the common law “*rule*” that the father

had the right to determine the religion in which his children should be educated (see at page 29). It is unnecessary here to discuss the Court’s conclusions on that issue or the subsequent judicial treatment of *In re Frost*.

43. In *RB v AS (Nullity: domicile)* [2002] 2 IR 428, Keane CJ (Denham and Murphy JJ concurring) observed that it “*has long been recognised that trial judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers ...*” Depending on the age of the children concerned “*such interviews may be of assistance to the trial judge in ascertaining where their own wishes lie...*” (at page 456). However, Keane CJ also emphasised that “*as a matter of principle, the only evidence which a trial judge, in family law proceedings as in other proceedings, can receive is evidence on oath or affirmation given in the presence of both parties or their legal representatives.*” (*ibid*). While that statement has to be qualified somewhat in light of the provisions of Part III of the Children Act 1997, its essential core point does not require any qualification – family law proceedings, including proceedings under the 1964 Act, are, as a matter of principle, to be determined only on evidence given in the presence of the parties and/or their legal representatives. That is the position as regards other forms of proceedings and family law proceedings are no different in that respect.

44. I now turn to the important decision of the High Court (Abbott J) in *O’D v O’D* [2008] IEHC 468, [2013] 3 IR 189. The judgment explains that, motivated by the “*imperative of the Brussels II bis Regulation*”, Abbott J had begun to talk with children in family law proceedings. The judge noted that the section 47 report procedure was the usual

way in which that imperative was observed (section 32 of the 1964 Act had not been enacted at that stage) but, he said, he had in the past found that procedure could be too cumbersome, expensive, intrusive or time consuming. In certain cases, therefore, he had decided “*to briefly speak with the children to ascertain their views, subject to agreeing terms of reference for this procedure with the parents, who are parties to the family litigation*” (para 10). He had met with the children in the case before him in order to hear them in advance of making a decision on any further formal assessment and after doing so, the judge “*reported back to the parties in court*” (para 12). Later in his judgment, Abbott J returned to the issue of judges meeting with children, stating that:

“[16] It is important to explain the approach of the court as regards talking with children in these cases. The Brussels II bis Regulation requires that judges are trained in the work of hearing cases regarding parental control, and I am fortunate that since my appointment as judge, I have had the opportunity of training relating to this area through networking and conferencing with judicial peers, lawyers, academics and professional experts, both nationally and internationally. I have taken a number of guidelines from such training when speaking with children, which are as follows:-

1. the judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches;

2. the judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge's own experience;

3. the principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children;

4. the judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all) determinative of the ultimate decision of the court;

5. the judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand;

6. the court should at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the court

to seek expert advice from the s. 47 procedure, unless of course such qualification is patently obvious;

7. the court should avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it to them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view, is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.”

45. The Judge was not referred to *O' D v O' D* when the issue of her meeting with the children arose near the conclusion of the trial. That is highly regrettable. No “*terms of reference*” for the proposed meetings were discussed or agreed. There was no discussion of their precise purpose and parameters. The question of whether the meetings should proceed on a confidential basis – assuming that there were circumstances where that might properly be done - was not addressed by the parties or by the Judge. The Judge did not indicate that it was her intention to meet the children confidentially and the parties were not asked to agree to a meeting(s) on that basis and did not do so. The subsequent dispute about access to the DAR, and the appeal that followed to this Court, arose directly from the failure to address these issues in advance of the Judge meeting the children here.

46. In England and Wales, *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (“*the Guidelines*”) have been produced by the Family Justice Council and approved by the President of the Family Division. They can be found at [2010] 2 FLR 1872. It has been said that they “*exist to ensure that when a judge meets a child, the purpose of that meeting and the expectation of all who are party to it are clear both to the child and to the parties to the proceedings*”: *London Borough of Brent v D* [2017] EWHC 2452 (Fam), [2018] 1 FLR 784, para 48. To that extent, there is an obvious overlap between the Guidelines and the guidance offered by Abbott J in *O’D v O’D*. The Guidelines also address the issue of confidentiality, stating (at para 6) that, in the event that the meeting takes place prior to the conclusion of the proceedings, “*the judge should explain to the child at an early stage that a judge cannot hold secrets. What is said by the child will, other than in exceptional circumstances, be communicated to his/her parents and other parties*”. That point is further underlined by the statement in the same paragraph that the “*parties or their representatives shall have the opportunity to respond to the content of the meeting, whether by way of oral evidence or submissions.*” The Guidelines do not offer any guidance as to what might constitute “*exceptional circumstances*” such as might justify a decision not to communicate what was said by the child to his/her parents. But, in any event, it is clear from para 5 of the Guidelines (referred to in the next paragraph) that whatever is said by the child, whether communicated to the parents or not, should not be treated as evidence in any event.
47. There are other aspects of the Guidelines, particularly its emphatic injunction that the child’s meeting with a judge is not for the purpose of gathering evidence (para 5), that

may well be relevant to the substantive appeal from the judgment and order of the High Court but which is not necessary or appropriate to consider further here. That aspect of the Guidelines has been considered in several decisions of the Family Division and of the Court of Appeal of England and Wales, including *Re KP (Abduction: Child's Objections)* [2014] EWCA Civ 554, [2014] 2 FLR 660, *London Borough of Brent v D* and *B v P (Hague Convention: Children's Objections)* [2017] EWHC 3577 (Fam), [2018] 1 WLR 3657. Again, while those decisions may be of relevance in the substantive appeal, they do not bear directly on the issue presented in the appeal the subject of this judgment.

48. Given that the substantive appeal of PIK remains to be heard by this Court, it is important this judgment avoids going beyond what is reasonably required to explain the decision already announced by the Court. The sole issue in this appeal was whether PIK was entitled to have access to the transcript of the Judge's meetings with the children for the purposes of her appeal from the refusal of the relocation application. Issues as to whether the Judge erred in meeting with the children and/or erred in placing reliance and/or excessive reliance on what they said to her in the course of her meetings with them in deciding the relocation application as she did, are not within the scope of this appeal and nothing in this judgment should be taken as indicating any view on those issues. They are important issues but ones for another day.

49. The question presented here is a relatively narrow one: having regard to the accepted fact that the Judge relied on what was said to her by the children in refusing the

relocation application. Whether PIK was entitled to sight of the transcript of the meetings in advance of, and for the purposes of, her appeal from that refusal?

50. In my view, that question admits of only one answer in the circumstances of this appeal.
51. The starting point is to recognise that the relocation application raises issues of enormous significance for both PIK and DK and for their three young children. Refusal of the application would have profound consequences for PIK (just as the granting of the application would have profound consequences for DK). The Judge refused the application. PIK had a constitutionally-enshrined right to appeal that refusal to this Court and she exercised that right in a timely way. That right is real and substantive: PIK has a right to an effective appeal that accords with fundamental norms of justice and fair procedure embedded in the administration of justice under the Constitution.
52. The principle that a litigant “*should be able to see and hear all the evidence which is seen and heard by a court determining his case*” has been said to represent “*an irreducible minimum requirement of an ordinary civil trial*” (*Al Rawi v Security Service* [2010] EWCA Civ 482, [2012] 1 AC 531, para 30)
53. In *AP v Minister for Justice and Equality* [2019] IESC 47, [2019] 3 IR 317, Clarke CJ (Dunne and O’ Malley JJ agreeing) noted that it did not appear “*that there is any provision in Irish law which would allow a court, making a substantive decision on the merits, to have regard to information which is not available to both sides of the case*” (at para 41). In the following paragraph, he expressed the view “*that, in judicial*

proceedings, a court cannot have regard, in coming to its ultimate conclusion on the merits, to materials or evidence which were not generally available to the parties” (at para 42). Clarke CJ had earlier noted that, in the area of public law decision-making, affected persons were entitled to be heard and “*will ordinarily be entitled to be informed of any material, evidence or issues which it might be said could adversely impact on their interests in the decision-making process*” (at para 22, citing (*inter alia*) the decision of the Supreme Court in *State (Williams) v Army Pensions Board* [1983] IR 308)

54. The judgment of O’ Donnell J (as he then was) (Dunne, O’ Malley and Finlay-Geoghegan JJ agreeing) in *AP* is to the same effect. At para 111, he noted that “*it had not been sought in Irish law to provide for any procedure which would permit evidence to be given in proceedings which would not be available to one of the parties.*” Instead, he went on, “*the law, through the medium of the decided cases, sought a variety of ad hoc measures to try to achieve a difficult balance between the competing interests, while maintaining the principle that, in any court decision, the administration of justice cannot be based on evidence which is not disclosed to the parties.*”
55. According to O’ Donnell J, it must be recognised “*that fundamental issues are involved if it is contended that a person can be the subject of an adverse decision on a matter of significance to them based upon materials not disclosed to them, and where the reasons for that decision are similarly withheld*” (para 131). He noted the absence of any legislation in this jurisdiction providing for a closed material or special advocate procedure, while also agreeing with Clarke CJ (and with Hogan J in the Court of Appeal

in *AP*) that “*there are, to put it at its lowest, serious doubts whether it would be permissible to provide that, certainly in respect of court proceedings, a court could proceed upon material which was not available to be considered or challenged by or on behalf of one party*” (para 132).

56. *AP* is therefore authority for the “*principle that, in any court decision, the administration of justice cannot be based on evidence which is not disclosed to the parties.*” That is so even in extreme cases, where the security interests of the State are at issue. While the Supreme Court in *AP* did not rule out the possibility that some form of closed materials/special advocate procedure might be provided for by the Oireachtas, it also recognised that there appeared to be limited scope for doing so under the Constitution.
57. These principles apply to the determination of appeals to this Court as they apply to determinations of disputes at first instance in the High Court (or any other court). Each involves the administration of justice under the Constitution and each accordingly requires adherence to the basic ground rules of constitutional adjudication.
58. Are family law proceedings, or at least proceedings involving children, in a different category, as counsel for DK suggested in argument?
59. The observations of Keane CJ in *RB v AS (Nullity: domicile)* [2002] 2 IR 428 (cited in para 42 above) indicate otherwise. *RB v AS* involved (*inter alia*) an application for custody under the 1964 Act. Proceedings under the 1964 Act appear to involve a *lis*

inter partes, even if the nature of the proceedings and the matters to which the adjudicating court must have regard, differ from ordinary civil litigation. As already noted, the 1964 Act makes the best interests of the child “*the paramount consideration*” and the court must have regard to the views of the child in determining where those interests lie. But the court is nonetheless engaged in adjudicating upon the respective rights and obligations of contending parties in civil proceedings (an adjudication that engages interests of the most fundamental nature).

60. Even if proceedings under the 1964 Act are not “*fully adversarial*” – and in this context it is notable that section 32 confers on the court a power to appoint an expert “*of its own motion*” and then permits the court to call that expert as a witness – I am not persuaded that, as DK submitted, they are to be regarded as “*quasi-investigatory*” or non-adversarial in character. It appears to me that such proceedings are, in essence, adversarial in nature, involving a *lis* between the parties, albeit one that falls to be determined within the specific framework of the 1964 Act, including the statutory injunction to treat the best interests of the child or children as “*the paramount consideration.*”

61. Fortunately, however, the issue of how proceedings under the 1964 Act are properly to be characterised in this context is not one that requires resolution here. Even if (contrary to the views expressed above) custody/access disputes under the Act ought properly to be treated as being akin to child protection or wardship proceedings, that would not lead to any dilution of the principles articulated in *AP*. The principle that a court cannot, in making a substantive decision on the merits in adversarial proceedings, have regard to

information that is not available to both parties “*is not ... to be seen as weakened by the fact that the process in question is inquisitorial rather than adversarial in nature.*”: per O’ Malley J (for the Supreme Court) in *AC v Cork University Hospital* [2019] IESC 73, [2020] 2 IR 38 (para 378 of the report). In *AC*, O’ Malley J concluded that the circumstances in which the order taking AC into wardship had been made breached her constitutional right to fair procedures. One of the grounds for that conclusion was that the order had been made on the basis of a report of the medical visitor, and an affidavit from the HSE, that had not been disclosed to AC (para 376).

62. It is clear, accordingly, that the principles set out in *AP* apply to these proceedings and to PIK’s appeal to this Court from the refusal of her relocation application by the High Court.

63. It may be that some departure from those principles can be justified in the particular circumstances of a given case. That is the approach that has been taken in England and Wales: see for instance decisions such as *In re K (infants)* [1965] AC 201, *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593 and *In re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60, [2013] 2 AC 66. Whether, having regard to *AP* and *AC*, such an approach is open to an Irish court may be open to question. But even if such an approach is open here, it is clear that any departure from the fundamental principle of disclosure in this context would require compelling justification. There is no such justification here in my view.

64. To require PIK to present her appeal without sight of the transcript of the meetings would require her to demonstrate that the Judge erred in refusing the relocation application in circumstances where she and her legal representatives were not fully aware of, and was therefore unable to comment on, material that was clearly relied on by the Judge in reaching that decision. PIK accepts that the High Court was, as a matter of principle, entitled to depart from the recommendations of Dr Moane (correctly so, having regard to *McD v L* [2009] IESC 81). However, that does not exclude a challenge to the Judge's decision on the basis that the Judge's conclusion was against the weight of the evidence before her and/or that the evidence was not properly addressed or assessed by the Judge. There may, of course, be high hurdles to any such challenge, having regard to the principles established by *Hay v O' Grady* [1992] 1 IR 210. Arguably, that is particularly so here having regard to the fact that the Judge's decision as where the best interests of the children lie must clearly be given significant weight on appeal. Even so, the Judge's decision is not beyond this Court's powers of review under Article 34. However, in the event that PIK was denied access to the transcript of the meetings, an already difficult task would become much more difficult and PIK's constitutionally protected right of appeal to this Court would be significantly undermined, if not wholly frustrated.
65. Furthermore, such a scenario would involve this Court deciding the substantive appeal based on "*closed*" evidence. PIK could refer to what was said by the Judge in her Judgment as to the import of what was said to her by the children, but would not be in a position to critically review those statements, and the inferences drawn by the Judge from them, by reference to what the children actually said.

66. It is no answer to say - as it is said on behalf of DK - that whatever was said by the children to the Judge is not “*evidence*” in any strict legal sense. That may well be so, but the fact is (as DK accepts) that the Judge relied on that material and, far from conceding that the Judge erred in doing so (whether on the ground that the material did not constitute legally admissible evidence or otherwise) DK’s position is that the Judge was entitled to do so. In my view, DK cannot assert that the Judge was entitled to rely on what was said to her by the children in deciding the relocation application (in other words, entitled to give evidential weight to what was said) while at the same time maintaining that what was said by the children did not constitute “*evidence*” in the strict legal sense, with the implication that the approach that would otherwise apply to the disclosure of “*evidence*” is somehow inapplicable here.
67. Neither is it an answer to say, as DK also says, that the transcript would be available to this Court and that this Court would therefore be in a position itself to review the Judge’s Judgment in light of what is contained in the transcript. In the first place, that argument ignores the fundamental rights of PIK as a litigant in this Court. Secondly, and separately, it profoundly misunderstands the role of this Court in hearing appeals. The Court is not a tribunal of inquiry or a board of inquisition. Its function is to determine appeals in accordance with law. Whether any given appeal is heard in open court (as most appeals are) or heard *in camera* (as appeals in family law proceedings generally are), it proceeds on the basis of material that is available to *all* of the parties. Submissions are made by the parties by reference to that material. The Court considers those submissions and gives its judgment on that basis. It cannot, as a matter of

principle, receive or act upon material that the parties have not seen or had an opportunity to engage with in their submissions. To do so would be fundamentally inconsistent with basic precepts of the administration of justice under the Constitution.

68. DK also contends that no useful purpose would be served by the disclosure of the transcript of the meetings as it would not be appropriate for the children to be cross-examined. That, in my view, is a *non sequitur*. Disclosure of the transcript does *not* imply that the children or any of them are (or ought to have been) liable to cross-examination. Disclosure of the transcript *will* permit PIK and her legal representatives to review it and to form a view as to whether what was said by the children was in any way at odds with the evidence of Dr Moane as to their views and as to what was in their best interests and/or whether what was said by the children supported the relevant findings made by the Judge and the ultimate conclusion that she arrived at. That in turn has the potential to influence their arguments to this Court on the substantive appeal. It may be that, ultimately, little or nothing may turn on the meetings and it may be that disclosure of the transcript will have little or no impact on the appeal. The Court is not in a position to make any prediction in that respect given that it does not have the same information as the parties as to the other material that was before the High Court and the picture presented by that material. What the Court can say – and in my opinion it is more than sufficient for present purposes – is that the Judge in her Judgment appeared to give significant weight to what she was told by the children. That this Court is not in a position to make any independent assessment of the precise significance of the material, does not take away from the entitlement of PIK and her legal representatives to review it and make whatever submissions by reference to it as appears appropriate.

69. As to the argument made by DK that, having regard to the provisions of Article 42A of the Constitution, the rights of parents must go “*by the wayside*” in the event that they conflict with the rights of the child, that is as far as I am concerned entirely unpersuasive. Article 42A is undoubtedly a hugely significant recognition of the status and rights of children in the basic law of the State. However, there is not a hint in the terms of Article 42A that it was intended to give rise to any such hierarchy as between parents and children (nor do I accept that the proceedings here involved a conflict between parents and children). Equally, nothing in Article 42A suggests that the child’s right to be heard was to be at the expense of the rights of parents as litigants, or was intended to alter the nature of proceedings involving children, and/or the role of the court in such proceedings, in a significant, indeed dramatic way, such that (if DK is correct) such proceedings can henceforth be determined on the basis of a combination of material available to the parties in the ordinary way and material that the trial court gathers in a parallel confidential process, which is not disclosed to the parties but which, in the event of an appeal, is to be made available in a sealed envelope to the appellate court for its private review. Article 42A simply will not bear that weight.
70. As for the argument that it is necessary that judges should be able to meet with children confidentially because children may be reluctant to express their “*real views about their parents*” in any other circumstances, and in particular may be reluctant to do so to an expert in circumstances where that will be disclosed to their parents, that is an entirely hypothetical argument without any apparent foundation in the facts here. It was not suggested to the Court that there was any evidence that the children here had been

reluctant to engage with Dr Moane or make full disclosure of their views to her because that would involve onward disclosure to their parents. The children did not seek to meet with the Judge on that basis and none expressed any concern to the Judge about the disclosure of their views to their parents.

71. In *O' D v O' D*, Abbott J suggested that a court could meet with a child on a confidential basis, provided that the parents agreed. For the purposes of this appeal, it is not necessary to consider whether that is correct or not. Much may depend on the purpose and scope of the proposed meeting. Here, in any event, there was no agreement that the meetings with the children would be confidential. If there had been, and if the meetings had proceeded on that basis, difficult issues of waiver and/or acquiescence might have arisen. As it is, those issues do not arise. Had the Judge given any form of commitment to the children that their meetings with her would not be disclosed – regardless of whether she ought to have given any such commitment or not – the Court would have had to give careful consideration to the consequences of making an order inconsistent with that commitment. Again, that scenario does not arise. The Judge, quite correctly, gave no such commitment. Finally, it cannot be ruled out that, in the course of a meeting between a court and a child, some particular statement or revelation is made by the child that, because of its nature, arguably ought not to be disclosed to the parties. Again, however, no such issue arises on the facts here.

72. Having reviewed the transcript of the meetings, the Court concluded that there was no basis for any concern that its disclosure to the parties would cause any harm to or impact adversely on the children or any of them or that it would not be in their best interests.

73. *AP* and *AC* clearly indicate that to have required PIK to present her appeal in circumstances where she and her legal representatives had not had sight of material that was clearly relied on by the Judge in reaching the decision the subject of the appeal would have been fundamentally unjust and contrary to the basic ground rules of the administration of justice under the Constitution. In these circumstances, and in the absence of any relevant countervailing factors, the Court concluded that the order sought by PIK should be made.
74. Article 6(1) ECHR supports that conclusion: see the decision of the ECtHR in *McMichael v United Kingdom* (1995) 20 EHRR 205 (Application 16424/90) at para 80. Article 6(1) applies to proceedings before this Court on appeal. *McMichael v United Kingdom* also suggests that the non-disclosure of material in proceedings involving custody/access may amount to a breach of the rights of a parent under Article 8 ECHR. However, it is not necessary to consider the Convention further given the conclusions I have reached on the basis of Irish law.

CONCLUSIONS

75. As explained at the outset of this judgment, the Court has already given its decision on this appeal and made an order for the disclosure to the parties of the transcripts of the Judge's meetings with the children. This judgment has set out the reasons why I concluded that it was appropriate to make that order.
76. There remains the issue of the costs of this appeal. The appeal was strenuously opposed by DK. That opposition has been unsuccessful. Given that PIK has been "*entirely successful*", section 169(1) of the Legal Services Regulation Act 2015 gives her an entitlement to an award of costs against DK, subject to any order otherwise that this Court might make. The parties have already incurred significant costs in the proceedings thus far. But further costs were incurred in this appeal and the real question is whether PIK should have to bear those further costs herself or whether she should be permitted to recover those costs from DK. In my provisional view, it would not be appropriate that PIK should have to bear those costs and, accordingly, I would be minded to make an order directing DK to pay the costs of PIK, such costs to be the subject of adjudication in default of agreement. I would be minded to put a stay on that order pending the determination of the substantive appeal (though, in reality, such a stay may be of little practical consequence). If DK wishes to contend for a different order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results

in an order in the terms I have suggested, DK may be liable for the additional costs of such hearing: In default of receipt of such application, an order in the terms proposed will be made.

Haughton and Barniville JJ have authorised me to indicate their agreement with this judgment and with the order proposed.