THE COURT OF APPEAL - UNAPPROVED

Neutral Citation Number [2023] IECA 298
Appeal Record Number: 2022/286

Donnelly J.
Ní Raifeartaigh J.
Binchy J.

BETWEEN/

TOM MCGRATH

APPLICANT/
APPELLANT

- AND –

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 8th day of December 2023

1. This appeal concerns an issue of statutory interpretation.

The statutory provision concerned is s.14(1)(a) of the Children First Act 2015 ("the 2015 Act"). The long title to the 2015 Act, in material part, states that it is:

> "*An act for the purposes of making further and better provision for the care and protection of children…. to require certain persons to make reports to the Child and Family Agency* [i.e. Tusla] *in respect of children in certain circumstances…."*

2. Part 3 of the Act deals with mandatory reporting, and s. 14(1) provides:

"*14.(1) Subject to subsections (3), (4), (5), (6) and (7), where a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person, that a child -*

(a) has been harmed,

(b) is being harmed, or

(c) is at risk of being harmed,

he or she shall, as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to the Agency."

3. "Child" is stated in s.2 of the 2015 Act to have the same meaning that it has in s.2 of the Child Care Act 1991 ("the 1991 Act"). Section 2 of the 1991 Act defines "child" as meaning "a person under the age of 18 years other than a person who is or has been married."

4. "Harm" is defined as meaning:

"*in relation to a child -*

(a) assault, ill treatment or neglect of the child in a manner that seriously affects or is likely to seriously affect the child's health , development or welfare, or

(b) sexual abuse of the child."

5. "Mandated Person" is defined in schedule 2 to the 2015 Act, and is very broad in its scope, including, as it does, *inter alia*, registered medical practitioners, registered nurses, physiotherapists, occupational therapists, dentists, psychologists, psychotherapists, social care workers, social workers, teachers, gardaí and guardians *ad litem* appointed under the 1991 Act.

6. The appellant, who is the director of counselling within the respondent's organisation, holds a professional doctorate in counselling psychology and is also an Associate Fellow of

the British Psychological Society. The appellant and the respondent are in disagreement as to the scope of s.14 1(a) of the 2015 Act. The appellant contends that the word "child" as used within s.14 1 (a) of the 2015 Act refers only to a person who is a "child" – as defined in the 2015 Act, at the time that the mandated person referred to in s.14 (1) receives, acquires or becomes aware of the information referred to in that section. The respondent, on the other hand, contends that, properly construed within the context of the statute as a whole, and its objectives, the word "child" includes any person who has been harmed when a child, even though that person may now be an adult. This disagreement between the parties as to the scope of s.14 (1) (a) of the 2015 Act came to a head following upon the publication by the respondent, on 14th November 2019, of a document entitled the HSE Child Protection and Welfare Policy (the "Policy").

Background

7. As one might expect from the title, the Policy is a detailed and comprehensive document in the introduction to which the following is (*inter alia*) stated:

> "*Every HSE staff member has a responsibility and duty of care to ensure that children/young people availing of, or attending a HSE service, are safe and protected from harm (physical/emotional/sexual abuse or neglect). With the full commencement of the Children First Act 2015, there are legal obligations for certain staff known as mandated persons.*
>
> *The HSE Child Protection and Welfare policy sets out the roles, responsibilities and procedures assigned to ensure the effective management of child protection and welfare concerns in the HSE. It is one of a number of policies on procedures in the HSE that contribute to safeguarding children and young people. This policy should be used in conjunction with all other relevant HSE policies, as necessary.*"

8. The Policy, which runs to 92 pages, is divided into eight sections and contains four appendices. Section 8 provides general reporting information as well as guidance to assist staff with some of the complexities that may arise in relation to managing child protection or welfare concerns.

9. Section 8.2 is under the heading of "Disclosures of retrospective abuse". The first paragraph of this section states:

> *"Some adults may disclose abuse that took place during their childhood. Such disclosures may come to light when an adult is attending counselling, receiving palliative care, or is being treated for psychiatric or other health issues. Service users should be informed at the outset of contact with a service, as appropriate, that if any child protection issues arise, including disclosures of retrospective abuse, that this information must be passed on to Tusla where there are reasonable grounds for concern that abuse occurred, as there may by a current or potential risk to children (identifiable or not)."*

10. On 16th December 2019, the National Counselling Service ("NCS"), which I understand to operate within the organisational structure of the respondent, published a document entitled: *Proposal for Implementation of the HSE Child Protection and Welfare Policy in the National Counselling Service"*, (the "NCS Proposal"). This document expresses concerns about the directions given by the respondent to counsellors in the Policy, insofar as counsellors are required by the Policy to report information received from adults about incidents of abuse in their childhood. The NCS expresses concerns about the impact of such mandatory reporting on its clients. It expresses the view that it is very likely that vulnerable clients who need the services of the NCS will no longer avail of those services if they are informed that any disclosure by them of childhood abuse must be reported to Tusla, even if they do not provide any information identifying the abuser. The result, according to

the NCS, will be not just an increased risk of harm to those NCS clients, but also an increased risk to children. According to the NCS, children will be less protected rather than more protected by such a requirement because, as a result, fewer adults will avail of NCS counselling services, and this in turn will (the NCS claims) inevitably reduce the extent of existing reporting of historic childhood abuse to Tusla rather than increase it. The NCS maintain that when their clients (i.e. adults who experienced childhood abuse) address reporting in the context of a safe therapeutic relationship, they are more likely to engage with Tusla, and this increases the likelihood of a positive outcome in terms of child safeguarding.

11. The NCS Proposal recognises that the 2015 Act lays down legal obligations for mandatory reporting, but the NCS in effect contends that the respondent, in its directions to counsellors and therapists as set forth in the Policy, has gone further than the 2015 Act requires, to the determinant both of children who may be at risk of abuse, and adults who are in need of its services.

12. In order to address these concerns, the NCS recommended the following to its counsellors and therapists:

- In line with the Children First Act and HSE Child Protection and Welfare Policy NCS Counsellors/therapists will report all current concerns to Tusla where they have reasonable grounds (see appendix 1) to suspect harm or risk of harm to any child currently under the age of 18 child (sic) from physical, emotional, sexual abuse or neglect.
- NCS counsellors/therapists will report all retrospective disclosures of childhood abuse (physical, sexual, emotional abuse and neglect) as soon as practicable where there is identifiable information about the person(s) who is the subject of the allegation of abuse.

- NCS counsellors/therapists will report all retrospective disclosures of childhood abuse as soon as practicable where there are reasonable grounds for concern to suggest that a child is currently at risk from the person who is the subject of the allegation even if this person is not identified by the adult complainant. This is in line with the purpose of the Act which is to mitigate past, current and future harm to children currently under the age of 18.
- If no reasonable grounds for concern regarding current risk to a child are identified and no identifiable information is provided about the person who is the subject of the abuse allegation, NCS counsellors/therapists will work with the client to encourage their engagement with Tusla and identification of the person who abused them. This will optimise the opportunity to protect children as it would allow a full assessment by Tusla of potential risk arising from the client's past abuse.
- In circumstances where the adult is vulnerable to psychological distress, self-harm or suicide as a result of reporting the concern, the counsellor/therapist will seek an informal consultation with Tusla with a view to considering how best to support the adult who discloses, whilst ensuring the welfare of any child who may currently be at risk of abuse.

13. Following upon the publication of the NCS Proposal in December 2019, the respondent had concerns that it did not properly reflect the obligations created by s.14 (1)(a) of the 2015 Act. Accordingly, the respondent sought and obtained legal advice on the issue, and, in the light of the advice so obtained published, on 8th December 2021, an interim standard operating procedure (the "ISOP") to guide NCS staff on the operation of the Policy. The ISOP, which also bears the date of 30th November 2021, was circulated widely within

the organisation of the respondent on 13th December 2021, including to directors of counselling in the NCS. A memorandum enclosing the ISOP stated:

> *"An NCS position statement on the implementation of Children First was issued in December 2019. Due to the risk of resulting non compliance with Children First this position statement is now rescinded on the basis of the attached legal advice. Please see attached an interim standard operating procedure (SOP) to guide NCS staff on the operation of Children First going forward."*

14. In the introductory section of the ISOP, it is stated that the position adopted by the NCS in the NCS Proposal was not compliant with the Policy, in so far as it only required the reporting of retrospective childhood abuse where identifiable information about the person who is the subject of the allegations is disclosed to the counsellor or therapist concerned, or if a current risk to a child or children is identified. It is stated that the requirement for identifiable information in order to meet the threshold for a retrospective abuse referral is "no longer valid". In section 3, the ISOP sets out an updated procedure for counsellors and therapists in cases involving new client referrals. This procedure sets out in some detail the steps to be followed as regards informing service users about how confidentiality in counselling is managed, and the limitations to confidentiality in terms similar to the Policy. NCS counsellors and therapists are required to inform service users (at the outset of counselling) of their obligation to pass on to Tusla any information disclosed about harm suffered by the service user as a child in the past, and to afford the service user the opportunity to discontinue with the counselling if he or she does not wish to do so in such circumstances.

15. In summary, the dispute between the parties revolves around the scope of application of s.14(1)(a) of the 2015 Act, and specifically whether or not that sub-section requires a mandated person to report to Tusla information received by a mandated person from a

person, who is now an adult, concerning harm (as that word is defined in the 2015 Act) suffered by that adult whilst a child (as that word is defined in the 2015 Act).

16. Following upon the circulation of the ISOP, the applicant sought leave to issue these proceedings by way of judicial review.

The proceedings

17. By order made on 30th May 2022, the appellant was given leave to issue the within proceedings. By notice of motion dated 7th June 2022, the appellant seeks , *inter alia*, following reliefs:

(1) An order of *certiorari* "quashing the policy set out in the HSE NCS interim procedures for NCS staff for the implementation of the HSE Child Protection and Welfare Policy (2019), as amended on 30th November 2021 and/or the direction of the respondent implementing that policy as communicated by the memorandum dated 13th December 2021, in relation to the ambit of the reporting obligations on mandated persons within the meaning of section 14 of the Children First Act, 2015.

(2) A declaration by way of application for judicial review that the HSE NCS interim procedures for NCS staff for the implementation of the HSE Child Protection and Welfare Policy (2019) as amended on 30th November 2021 is based on an error of law and for that reason the said policy and/or the direction of 13th December 2021 implementing the same is *ultra vires,* contrary to law, irrational, void and/or of no effect.

18. The motion was grounded upon a short affidavit of the appellant sworn on 3rd May 2022. In his affidavit, while acknowledging that the interpretation of the 2015 Act is a matter for the court, the appellant avers that the revised policy of the respondent (as provided for in the ISOP) is without international precedent and goes far beyond what has been

considered best practice heretofore. He avers that in his professional opinion, the entitlement of adult survivors of childhood abuse to be treated as adults should not be set aside unless the court considers that this is clearly necessitated by the 2015 Act.

19. In his statement of grounds, having set out the background to the proceedings, the appellant relies upon the following grounds in support of the reliefs sought:

(1) The terms of s.14(1) of the 2015 Act do not require the mandatory reporting to Tusla of information received from an adult of something that happened to them as a child. If the information received by a counsellor/therapist gives rise to a perceived risk, outside the scope of s.14, the mandated person can make a referral to Tusla, but section 14 does not require reporting of same;

(2) Section 2 of the 2015 Act provides that the word "child", wherever appearing in the said Act, has the same meaning as in s.2 of the Child Care Act 1991, which defines "child" as a person under the age of 18 years, other than a person who is or has been married. The proviso contained in the definition of "child" relates to the status of the person as an adult, or "deemed" adult on foot of their marital status;

(3) The entitlements of adult survivors of childhood abuse to be treated as adults has been set aside because of an incorrect interpretation of "child" for the purposes of the 2015 Act;

(4) The respondent has erred in the manner in which it has interpreted and applied s.14 of the 2015 Act in respect of the true import of the section including the meaning and construction of the word "child" in its revised instructions.

(5) By reason of the foregoing, the NCS interim procedure is *ultra vires* and unlawful in light of the 2015 Act and void as it is based upon an incorrect interpretation of reporting obligations provided for by s.14 of the 2015 Act.

20. The statement of opposition of the respondent was verified by an affidavit sworn on 12th July 2022 by Ms. Marion Martin, HSE Children First lead. The respondent opposes the application for judicial review on the grounds that s.14(1)(a) of the 2015 Act, properly construed, requires that mandated persons notify Tusla where an adult discloses past harm suffered as a child, where that harm falls within the definition of harm as set out in s.2 of the 2015 Act. It is also pleaded that the Policy reflects the proper construction of s.14(1)(a) of the 2015 Act, and that the NCS Proposal did not comply with the mandatory reporting requirements set out s.14(1)(a) of the 2015 Act.

21. The respondent denies that it has erred in the manner in which it has interpreted and applied s.14 of the 2015 Act in respect of the true import of the section including the meaning and construction of the word "child".

22. The respondent recognises the valid concerns of counsellors, such as the appellant, in relation to the effect of the mandatory reporting obligations set out in s.14(1)(a) of the 2015 Act may have on adults who wish to use its service, but pleads that the 2015 Act does not provide that counsellors be treated differently to any of the other classes of persons who come within the definition of mandated persons.

23. The respondent says that the 2015 Act places an obligation on mandated persons to notify Tusla of retrospective disclosures of childhood abuse and it is thereafter for Tusla to investigate those notifications as it deems appropriate. It is pleaded that the respondent has properly interpreted the 2015 Act and the mandatory reporting obligations set out in s.14(1)(a) of the 2015 Act.

Judgment of the High Court

24. At para. 35 of her judgment, the Trial Judge identified the crucial question, as she saw it, that is raised by the proceedings in the following terms:

"*The crucial question for me might be put as follows: what is required of the mandated person if he or she believes or has reasonable grounds to suspect that a 19 year-old boy or a 59 year old man (a "former child") was harmed 2 years or 42 years earlier, when he was aged 17? Does that belief or suspicion trigger the mandatory report to TUSLA required by s.14(1)(a)? It is my view, for the reasons elaborated upon hereinafter, that it does.*"

25. The Judge identified two possible interpretations arising from a literal reading of s.14(1)(a), those being:

(i) that a report is required where past harm has occurred to a person as a child irrespective of their current age; or

(ii) that a report is only required in instances where past harm has occurred to a person who is currently a child.

26. The Judge concluded that the first interpretation, being broader and providing for a more extensive reporting obligation, is the one that sits most comfortably with the use of different tenses and the crafting of reporting provisions to be applied in different situations apparent throughout s.14 and also with the purpose of the 2015 Act discerned from the Act as a whole. The Judge held that while the literal interpretation of the section is clear and unambiguous, the broader interpretation of the section is also the one which sits best with the purpose of the 2015 Act and the intention of the legislature as expressed in the Long Title of the 2015 Act which is to make:

"further and better provision for the care and protection of children…to require certain persons to make reports to the Child and Family Agency in respect of children in certain circumstances."

27. The Judge considered the use of different tenses as between sections 14(1)(a), (b) and (c). She observed that s.14(1)(a) is drafted in the past tense and clearly captures where a

person, as a child, suffered harm. In the Judge's opinion, the fact that other provisions in the 2015 Act clearly refer to existing children does not mean that section 14(1)(a) must be interpreted so as to read the past tense of "a child has been harmed" as only applying provided that the person harmed still remains a child.

28. For this reason, the Judge rejected an argument that an absurdity would arise if s.14(1)(a) created a reporting obligation in a given set of circumstances, and yet the same information would not give rise to a reporting obligation if disclosed under s14(2)(a) (presumably because it is disclosed by an adult and not a child), and information about the same relationship may also be excluded from reporting under s.14(3) of the 2015 Act. These provisions, the Judge said, are intended to apply to different situations. Moreover, the Judge said, the fact that a reporting obligation might arise under more than one provision of s.14 if the separate statutory criteria under each provision are met, does not give rise to an absurdity or an inconsistency.

29. This is an appropriate juncture at which to set out the remaining sub-sections of section 14 to which reference is made by the Trial Judge in the course of her judgment, and upon which she placed some reliance. Sub-sections 14(2)-(5) of the 2015 Act provide as follows:

> "*14. (2) Where a child believes that he or she—*
>
> *(a) has been harmed,*
>
> *(b) is being harmed, or*
>
> *(c) is at risk of being harmed,*
>
> *and discloses that belief to a mandated person in the course of the mandated person's employment or profession as such a person, the mandated person shall, subject*

to subsections (5), (6) and (7), as soon as practicable, report that disclosure to the Agency.

(3) A mandated person shall not be required to make a report to the Agency under subsection (1) where—

(a) he or she knows or believes that—

(i) a child who is aged 15 years or more but less than 17 years is engaged in sexual activity, and

(ii) the other party to the sexual activity concerned is not more than 2 years older than the child concerned,

(b) he or she knows or believes that—

(i) there is no material difference in capacity or maturity between the parties engaged in the sexual activity concerned, and

(ii) the relationship between the parties engaged in the sexual activity concerned is not intimidatory or exploitative of either party,

(c) he or she is satisfied that subsection (2) does not apply, and

(d) the child concerned has made known to the mandated person his or her view that the activity, or information relating to it, should not be disclosed to the Agency and the mandated person relied upon that view.

(4) A mandated person shall not be required to make a report to the Agency under subsection (1) where the sole basis for the mandated person's knowledge,

belief or suspicion is as a result of information he or she has acquired, received or become aware of—

(a) from—

(i) another mandated person, or

(ii) a person, other than a mandated person, who has reported jointly with a mandated person pursuant to subsection (6)(b),

that a report has been made to the Agency in respect of the child concerned by that other person,

(b) pursuant to his or her role, as a member of staff of the Agency, in carrying out an assessment as to whether a child who is the subject of a report or any other child has been, is being or is at risk of being harmed, or

(c) pursuant to his or her role in assisting the Agency with an assessment as to whether a child who is the subject of a report or any other child has been, is being or is at risk of being harmed.

(5) Subsections (1) and (2) apply only to information that a mandated person acquires, receives or becomes aware of after the commencement of this section irrespective of whether the harm concerned occurred before or after that commencement."

30. The Judge found support for her conclusions summarised above in s.14(4) which uses a mix of past tense and present tense when excusing double or multiple reporting. She opined that s.14(4) applies in respect of reports in relation to "a child who has been harmed"

where the person is no longer a child but was one at the time the suspected harm occurred as much as it does to a report in respect of suspected or believed harm which is past, current or apprehended in respect of a current child.

31. The Judge found further support for her conclusions in s.16 of the Act in the context of the statutory role of Tusla. Section 16 of the 2015 Act confers a wide range of powers upon Tusla to take such steps as it considers requisite in light of a report received from a mandated person, and to request from a mandated person such information and assistance as it may reasonably require in the light of the report received. The Trial Judge noted a link between the statutory powers conferred on Tusla under the 1991 Act, for the purposes of exercising its child protection function, and the powers conferred on it by s.16 of the 2015 Act in which, she observed, reference is repeatedly made to Tusla being vested with powers equivalent to the 1991 Act.

32. The Judge considered the statutory duties and functions of Tusla and concluded that the wider interpretation of s.14(1)(a) of the 2015 Act is consistent with those statutory duties. She observed that if s.14(1)(a) is interpreted as contended for by the appellant, this would result in cases of historic child abuse disclosed by adults not being reported to Tusla (save in those cases where the nature of the disclosure was such as to provide reasonable grounds for believing or suspecting that a current child is being harmed, or at risk of being harmed, which the appellant agrees must be reported) and this would lead to a gap in the State's reporting mechanisms. Accordingly, where the language of s.14 supports a broader interpretation, the Judge concluded that it would be wrong for her to adopt the narrower interpretation. The Judge referred to the decision of McGuinness J. in the Supreme Court in *Western Health Board v. KM* [2001] IESC 104 [2002] 2 IR 493 in which McGuinness J. held that, in interpreting provisions of the Child Care Act, 1991, the correct approach to the construction of this type of legislation is *"widely and liberally as fairly can be done".*

33. The Judge held that having regard to what she referred to as the statutory duty on Tusla to investigate complaints of historic child abuse, s.14(1)(a) could not properly be construed as requiring a report only in incidences where past harm has occurred to a person who is still a child. She noted that in considering the appellant's argument, it should be recalled that information disclosed to a mandated person and reported to Tusla may take on a different complexion when considered in the light of other information that Tusla holds in its capacity as the State agency with statutory responsibility in this area. The mandated person may not be aware of other information Tusla holds. Accordingly, the mandated person is not in a position to assess properly or fully the information disclosed to them from a wider protection perspective. Furthermore, the mandated person is not necessarily qualified to assess information to determine risk satisfactorily – that is the role of Tusla.

34. The Judge drew support for her conclusion that a wide interpretation of the reporting obligation is the proper one from the approach taken by the courts in other areas involving special provision for children. In this regard the Judge referred to the decision of this Court (Birmingham P.) in *DPP v. EC* [2020] IECA 292, which concerned reporting restrictions under the Children Act, 2001, as well as an earlier decision of Birmingham J. (as he then was) in the High Court, in *HSE v. McAnaspie* [2012] 1 I.R. 548, [2011] IEHC 477 which concerned the definition of a "child" in the Child Care Act, 1991. As regards the latter case, the Judge said: *"A mandated person who becomes aware that a 19-year-old was the victim of sexual abuse when aged 15, will know that "a child has been harmed" within the meaning of s.14(1)(a). In the words of Birmingham J. in HSE v. McAnaspie, "the fact that an individual reaches the age of eighteen years,… does not rewrite history" and does not mean that the person, as a child, was not harmed."*

35. The Judge also places some emphasis on the fact that the 2015 Act does not create a distinction between professionals such as the appellant *i.e.* counsellors and therapists, and

other persons who are also mandated persons subject to the reporting obligations of the s.14 of the 2015 Act. The Act does not exempt counsellors or therapists making a mandatory report in circumstances where the making of such a report may, in the opinion of the counsellor, cause harm to the service user. If a distinction is to be drawn between counsellors and others and as between different situations in which abuse may be disclosed, then this is a matter for the Oireachtas, and in this regard the Judge drew support from the following observations of Clarke J. in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46 [2016] 1 IR 92 , where he held at p.109 :

> *"The court cannot be asked to rewrite legislation. The court cannot be asked to include provisions which the Oireachtas may have omitted, but where there might be legitimate debate as to whether the Oireachtas would have included same (or in what form same might have been included)".*

Notice of Appeal

36. There are nine grounds of appeal. Not all were pursued at the hearing of this appeal, and those that were pursued may be summarised as follows:

(1) The Trial Judge erred in finding that s.14(1)(a) of the 2015 Act requires that a mandated person must notify Tusla where an adult discloses past harm suffered as a child (where the harm falls within the definition of "harm") set out in s.2 of the 2015 Act;

(2) The Trial Judge erred in law in failing to have appropriate regard to and apply the definition of the word "child" as found in s.2 of the Child Care Act 1991, as required by s.2 of the 2015 Act;

(3) The Trial Judge erred in failing to have proper regard to the Long Title of the 2015 Act and in particular the objective of the legislation disclosed therein being:

"To require certain persons to make reports to the Child and Family Agency in respect of children in certain circumstances" rather than in respect of adults:

(4) The Trial Judge erred in failing to have regard to the literal interpretation of the term "child" as provided for in the 2015 Act and further failed to have proper regard to the statutory context in which the said provision appears;

(5) The Trial Judge erred in relying upon the terms of s.16 of the 2015 Act in circumstances where the terms of that section support the appellant's arguments;

(6) The Trial Judge erred in holding that if the contentions advanced on behalf of the appellant were correct this would run counter to the purpose of the legislation and give rise to a gap in the State's reporting mechanisms.

37. The respondent's notice is a traverse of the appellant's notice of appeal. There is no cross appeal on the substantive issues, but there is a cross appeal on the matter of costs, the Trial Judge having made no order as to costs in the court below.

Submissions

Submissions of appellant

38. The appellant places great emphasis upon the definition of "child" as set out in the 2015 Act and submits that the Trial Judge erred in failing to have regard to that definition. It is submitted that the word must be given the same meaning throughout the Act, in accordance with its definition in s.2, but that in interpreting s.14(1)(a) as she did, the Trial Judge, in effect, interpreted the word so as to include adults, contrary to its definition.

39. The appellant submits that the terms of sections 14(1) and 14(2) are two sides of the one coin, with s.14(1) dealing with information coming into the hands of a mandated person otherwise than directly from a child (as defined in the 2015 Act) while s.14(2) is aimed at a circumstance where the information comes directly from the child. In each case, in order to

trigger the mandatory reporting obligation, the object of the information provided must be a child within the meaning of the 2015 Act.

40. The appellant also places great emphasis upon what is described as the "proviso" within the definition of "child" i.e. that a child means a person under the age of 18 years "other than a person who is or has been married". The exclusion of a person who is married reflects the fact that at the time of the enactment of the 2015 Act, it was possible for persons under the age of 18 years to marry, provided that an exemption was granted (from the prohibition against marriage under that age) pursuant to s.31 of the Family Law Act 1995. It is submitted that, when considered in light of the proviso, the interpretation of s.14(1) as found by the Trial Judge would result in significant anomalies. So, for example, if a person receiving counselling is aged 75 years, and discloses in the course of that counselling that she or he was harmed whilst under the age of 18, but at the time of the harm she or he happened to be married, then there would be no obligation to notify Tusla, because the proviso clearly excludes that person from being regarded as a "child" at the time of the harm.

41. However, if that person, aged 75 years, was not married at the time of the harm, then there would, on the basis of the interpretation contended for by the respondent, and approved of by the Trial Judge, be an obligation on the mandated person to report it to Tusla. The appellant submits that this disparity of treatment could have no social justification, is anomalous, and only arises under the respondent's interpretation of s.14(1)(a).

42. The appellant submits that s.14(2)(a) has been drafted in such a way as to exclude, deliberately, reports by adults, and it would be an absurdity if having drafted s.14(2)(a) on that basis, there would nevertheless be a mandatory obligation to report historic incidents of harm suffered by persons who are now adults, when they were children, pursuant to s.14(1)(a).

43. The appellant also submits that as a matter of proper grammar, the legislature has chosen to use the present perfect passive ("has been") rather than the past continuous form ("was") , and this choice of tense is consistent with the interpretation offered by the appellant rather than that offered by the respondent.

44. Likewise, it is submitted, the wording of ss.14(2) and 14(3) both clearly intend to refer to a child under the age of 18 (other than a person who was or is married) at the time of the knowledge, belief or suspicion of the mandated person.

45. The appellant submits that the Trial Judge was incorrect in finding that s.16 supports the interpretation of the section that she favoured. Section 16, it is submitted, throughout refers to a "child" which has the meaning ascribed to it in the definition section of the 2015 Act. It is submitted that s.16 correctly assumes that all reports made under s.14(1) will have, as the subject of the report, a "child" within the meaning of the 2015 Act, and not an adult who at some point in the past has been a child.

46. The appellant submits that the Trial Judge failed to have proper regard to the content of the Long Title to the 2015 Act. While she did indeed refer to the Long Title which discusses the reporting requirement in respect of "children in certain circumstances", it is submitted that the Trial Judge appears to have interpreted the Long Title as requiring certain persons to make reports to Tusla "in respect of adults in certain circumstances".

47. Counsel for the appellant submitted that the Trial Judge misinterpreted the decision of Barr J. in *M.Q. v. Robert Gleeson, the City of Dublin Vocational Education Committee, Francis Chance and the Eastern Health Board* [1998] 4 I.R. 85 ("*MQ*"). *MQ* was relied upon by the Trial Judge in support of an observation that she made that Tusla has a statutory duty to investigate historical allegations of child abuse, which the Trial Judge in turn relied on to support her conclusion on the interpretation of s.14(1)(a). In *MQ*, Barr J. held:

"I have no doubt that in the exercise of their statutory function to promote the welfare of children, health boards are not confined to acting in the interest of specific identified or identifiable children who are already at risk of abuse and require immediate care and protection, but that their duty extends also to children not yet identifiable who may be at risk in the future by reason of a specific potential hazard to them which a board reasonably suspects may come about in the future."

The appellant agrees that this passage is a correct statement of the law, but submits that it does not have the meaning accorded to it by the trial judge , and specifically it does not impose a free standing obligation on Tusla to investigate all allegations of historic child abuse.

48. The appellant also submits that the Trial Judge erred in holding that it is not for a mandated person to conduct a risk assessment, and that this is a matter only for Tusla. It is submitted that s.14(1)(c), which refers to the risk of a child being harmed, clearly requires a mandated person to conduct some assessment of risk in order to know whether or not information received by the mandated person triggers a reporting requirement under that subsection.

49. As to the reliance placed by the respondent (and the Trial Judge) on *DPP v. EC* [2020] IECA 292, in that case this Court was required to consider an application brought by several news organisations that were seeking to lift reporting restrictions on criminal proceedings brought against the deceased child's mother, who was charged with the murder of her daughter. That order had been made pursuant to s.252(1) of the Children Act 2001. The argument that was made in that case was that s.252(1) was about protecting living children and could have no application in circumstances where the child concerned was deceased.

50. Section 252 of the 2001 Act (which has since been amended) at the time provided as follows:

"*252 (1) Subject to subsection (2), in relation to any proceedings for an offence against a child or where a child is a witness in any such proceedings -*

(a) no report which reveals the name, address or school of the child or includes any particulars likely to lead to his or her identification, and

(b) no picture which purports to be or include a picture of the child or which is likely to lead to his or her identification,

shall be published or included in a broadcast.

(2) The court may dispense to any specified extent with the requirements of subsection (1) if it is satisfied that it is appropriate to do so in the interests of the child."

51. The applicants in that case argued that s.252 was open to interpretation in a way which would achieve the objective of protecting the rights of the child and at the same time allow for reporting. In rejecting this argument, Birmingham P. held, at para. 13:

"In my view, it is so clear as to be almost beyond argument that the court proceedings involving Ms. C are court proceedings in respect of an offence against a child. In my view, it is not possible to interpret this section as not including a deceased person who was a child at the time of death. Neither, in my view, is it possible to exclude proceedings relating to offences committed against a child, as a child, if they come on for hearing after the child has attained his or her majority."

52. It was submitted by the appellant that it is apparent from the judgment of Birmingham P. that counsel made an important concession to the effect that the trial of the adult in that case was a trial relating to "proceedings for an offence against a child", as referred to in s.252(1) of that Act. While Birmingham P. held that it was not possible to interpret the section as excluding a deceased person who was a child at the time of death, he did so against

the background of that concession, and in the submission of counsel in these proceedings, it would have been possible to argue differently i.e. that the statutory definition of a child in that case did not include a deceased child. That being the case, it was submitted that *EC* was decided *per incuriam.*

53. It was submitted on behalf of the appellant that the respondent in these proceedings contends for contradictory interpretations of the word "child", and that this is contrary to the principles of statutory interpretation which emphasise a consistency of interpretation of words throughout the provisions of a statute. In this regard the appellant relies upon the judgment of Murray J. in *Heather Hill v. An Bord Pleanála* [2022] IESC 43. I will return to that important judgment in due course.

54. Finally, it was submitted on behalf of the appellant that there are very many measures, statutory and otherwise, designed for the protection of children including guidelines addressing the professional responsibilities of counsellors and therapists. In the context of these proceedings, it is submitted that what is at issue is the treatment of information relating to children (as defined in the 2015 Act) which comes to the attention mandated persons, including counsellors and therapists. It is submitted there was no intention on the part of the Oireachtas to expand the reporting obligations provided for in the Act so as to require reporting of historical incidents of harm that surface in discussions as between persons who are now adults, and their counsellors or other mandated persons.

Submissions of respondent

55. In its submissions, the respondent places great emphasis upon the purposes of the 2015 Act, as expressed in its Long Title. The respondent cites the same extract from the Long Title as was cited by the Trial Judge at para. 12 of her judgment that being:

"An Act for the purposes of making further and better provision for the care and protection of children … to require certain persons to make reports to the Child and Family Agency in respect of children in certain circumstances …".

56. The respondent submits that the mandatory reporting provisions of the 2015 Act form part of a coherent suite of measures which are designed for the protection of children, including the 1991 Act, under which Tusla is charged with the responsibility, *inter alia*, of identifying children who are not receiving adequate care and protection and coordinating information from all relevant sources relating to children. In that context, it is submitted, it has been held that in *J v. Child and Family Agency* [2020] IEHC 464, Simons J. held in the High Court that:

"One of the statutory functions of the Child and Family Agency ("the Agency") under the Child Care Act 1991 (as amended) is to promote the welfare of children who are not receiving adequate care and protection. This statutory function has been interpreted in a number of judgments of the High Court as imposing an obligation on the Agency to inquire into complaints of child sexual abuse (including historical abuse)."

57. The respondent also relies in this regard upon the judgment of Barr J. in the High Court in *MQ*.

58. In contending for a broad interpretation of s.14(1)(a), the respondent refers to the judgment of McGuinness J. in *Western Health Board v. KM* [2001] IESC 104 [2002] 2 IR 493 wherein the McGuinness J. stated, at p.24:

"I would therefore accept the submission of the respondent that the construction of the Act of 1991, as a whole, should be approached in a purposive manner and that the Act, as stated by Walsh J., should be construed as widely and liberally as fairly can be done…."

59. As with the appellant, the respondent relies upon the judgment of Murray J. in *Heather Hill v. An Bord Pleanála* [2022] IESC 43, and quotes extensively from that judgment, in particular insofar as it relates to the interpretation of section 5 of the Interpretation Act 2005. I will come back presently to the passage relied upon by the respondent in this regard.

60. The respondent relies upon decisions interpretating the definition of "child" in other legislation where "child" is also defined as meaning a person under the age of 18 years. In this regard, the respondent relies upon the decision of this Court (Birmingham P.) in *DPP v. EC* [2020] IECA 292 and also the decision of the High Court (Birmingham J., as he then was) *Health Services Executive v. McAnaspie* [2011] IEHC 477. I have already addressed *DPP v EC* above, and the analogy with the issue in these proceedings upon which the respondent relies is obvious.

61. In *McAnaspie*, the court was required to consider whether or not s.31(1) of the 1991 Act, which provides that: *"No matter likely to lead members of the public to identify a child who is or has been the subject of proceedings under Part III, IV or VI shall be published in a written publication available to the public or be broadcast",* could apply to a deceased child.

62. Birmingham J. held (at para.16)

> *"In the first instance it may be noted that this provision deals with children who are or have been the subject of proceedings as distinct from children who are or have been in care. The prohibition is in relation to matters identifying a child/person who has been the subject of proceedings. The fact that an individual reaches the age of eighteen years, marries or dies does not rewrite history and does not mean that they, as a child, were not subject to care proceedings. Accordingly, I do not believe that this section requires any strained interpretation of the word "child"".*

63. Here again the analogy with the issue in these proceedings is obvious. In both *EC* and *McAnaspie*, the fact of the death of the child did not disapply the relevant statutory provision, which was directed to the protection of a child. The respondent submits that this analogy disposes of the appellant's submission that, as a matter of grammar, the term "has been harmed" should be interpreted so as to mean that the "child" referred to in s.14(1)(a) must remain a child, in order for the mandatory reporting obligation to apply.

64. In regard to the arguments of the appellant based upon "the proviso", the respondent submits that this argument is a red herring that neither subtracts nor adds to the core point of the temporal application of s.14(1)(a). The respondent submits that it is unsurprising that the 2015 Act would adopt the same definition of "child" as that used in the 1991 Act, and that the reference back to the 1991 Act in the 2015 Act illustrates the context in which the provisions of the 2015 Act are to be interpreted i.e. the protection of all children.

65. Furthermore, the respondent submits that the fact that persons who are under 18, and married, are excluded from the definition of child does not give rise to an anomalous outcome. It is no different from a 19 year old being excluded for the purposes of the Act, because that person is not a "child" as defined either.

66. The respondent submits that the error of the appellant's submissions is illustrated by para. 52 of his written submissions where it is stated: *"The purpose of the 2015 Act is to protect children, individuals under the age of 18 years of age with certain qualifications, not necessarily to protect all persons who by definition were once children and who have moved on with their lives in the exercise of their constitutionally protected autonomy as human persons".* The respondent submits that this is to miss the point of mandatory reporting, which is concerned not only with the protection of children, both identified or identifiable, but also with the protection of "children not yet identifiable who may be at risk in the future" (per Barr J. in *MQ*).

67. So far as section 16 is concerned, it is submitted that this section is designed to support Tusla's child protection function and should not be interpreted as limiting when reports must be made by mandated persons. In this regard, it is relevant to observe that section 16(1) refers to "any other child". Furthermore, section 16 of the Act is directed to *Tusla*, and not to a mandated person.

68. The respondent submits that the Trial Judge was correct in stating that a mandated person may not be aware of other information held by Tusla, and that it is for Tusla to assess the information provided from a wider child protection perspective.

69. Counsel for the respondent agreed that s.14(1)(b) and (c) must refer to a person who is currently a child, who holds a belief that he or she has been harmed, is being harmed or is at risk of being harmed. However, he submitted that where an adult makes a disclosure of abuse that occurred when he or she was a child, it falls within s.14(1)(a). He submits that the use of the past tense in s.14(1)(a) overcomes any potential inconsistency in the interpretation of the word "child" as between sub-section 14(1)(a) and sub-sections 14 (1)(b) and (c). That said, counsel accepted in response to questions from the court (but without conceding the point) that there is some substance to the suggestion that the interpretation contended for on behalf of the respondent impliedly involves the insertion of additional text to the actual wording of s.14(1)(a).

70. Finally, the respondent placed some emphasis on the fact that in other child protection legislation there are defences available for non-compliance with disclosure obligations imposed by statute. Specifically, the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act, 2012 (the 2012 Act"), creates an offence of failing to disclose information to An Garda Síochána where a person knows or believes that certain offences have been committed by another person against "a child", and that person has information which might be of material assistance in securing the

apprehension, prosecution or conviction of that other person. However, the 2012 Act provides a defence to a person who has not disclosed information to An Garda Síochána where the child concerned made known his or her view that he or she did not want the commission of an offence, or information relating to it to be disclosed to an Garda Síochána. It also affords a defence to members of certain professions including psychologists, where the designated professional is providing services to the child in respect of injury caused as a result of the offence and where the designated professional forms the view that the information should not be disclosed to An Garda Síochána. In contrast, however, no such defences are provided under the 2015 Act to any professional. It is submitted that this omission is consistent with the interpretation that the mandatory reporting framework was to address specific harm or risk to specific children and to children generally and whether the information disclosed related to past, present and future harm or risk.

Discussion and decision

A Reformulation of the Question

71. At para. 24 above, I quoted from para.35 of the judgment of the Trial Judge where she posed what she referred to as the crucial question that is raised by these proceedings. While I do not disagree that the answer to the question formulated by the Trial Judge must provide a resolution to the central issue raised by these proceedings, I would favour a different formulation of the central question raised by the proceedings, being one that is more focused on the wording of s.14(1)(a) of the 2015 Act. That central question is raised by paragraph 15 of the statement of grounds in which it is stated: "The terms of s.14(1) of the Children First Act 2015 do not require the mandatory reporting to the Child and Family Agency of

information received from an adult of something that happened to them as a child." That ground has its genesis in the Policy which states clearly, at para.8.2 thereof, that disclosures of retrospective abuse [made to counsellors, by adults availing of NCS services] "must be passed on to Tusla where there are reasonable grounds for concern that abuse occurred, as there may be a current or potential risk to children (identifiable or not)." This requirement was repeated in the ISOP. Both the Policy and the ISOP are the product of an interpretation by the respondent of s.14(1)(a). It seems to me therefore that the crucial question for determination in these proceedings is best formulated by direct refence to s.14(1)(a) itself, in the following terms:

> "*Does the phrase "a child…. has been harmed" as it is used in s.14(1)(a) of the Children First Act 2015 include a person who was harmed as a child, but who is no longer a child as defined by s.2 of the said Act at the time of the making of the relevant disclosure to the mandated person?"*

The Correct approach to questions of Statutory Interpretation

72. At paras. 36 and 37 of her judgment, the Trial Judge set out her approach to the question of interpretation. At para. 36 she said that the overriding duty of a court, when asked to construe any piece of legislation, is to try to ascertain the true will and intention of the Oireachtas, firstly on the basis of a literal approach. It is only when a literal approach leads to an absurdity that recourse may then be had to an alternative approach as provided for in s.5 of the Interpretation Act, 2005. At para. 37, she continued:

> "*While policy issues have been identified in these proceedings, it is not for the Court to assess the policy behind the legislation. Absent a constitutional challenge the Court cannot depart from the application of the legislation derived from a literal*

interpretation of that legislation (construed constitutionally and in compliance with obligations under the European Convention on Human Rights and EU law), where there could be a basis on which the Oireachtas might have chosen to legislate in the manner in which a literal construction of the relevant provisions would require (see *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27). *This is so no matter the weight attaching to the countervailing policy considerations identified by the parties in proceedings before the Court*."

73. It was on that basis that the Trial Judge then proceeded to address the interpretation of s.14(1)(a). Having identified two alternative interpretations for s.14(1)(a) at para. 38 see para. 25 above), the Trial Judge then reached the following important conclusions:

"*39. Of the two interpretations, the first is the broader and provides for a more extensive reporting obligation. It seems to me that the first interpretation is the one which sits most comfortably with the use of different tenses and the crafting of reporting provisions to be applied in different circumstances throughout s.14 and also with the purpose of the 2015 Act as discerned from the Act as a whole.*

40. It does not seem to me that s.14(1)(a) of the 2015 Act can reasonably be interpreted as imposing a reporting obligation only where the information disclosed relates to harm to a person who is still a child. The use of different tenses between s.14 (1) (a), (b) and (c) should not be ignored. Section 14(1) (a) is drafted in the past tense and clearly captures where a person, as a child, suffered harm. The fact that other provisions in the 2015 Act clearly refer to existing children does not mean that s.14 (1)(a) must be interpreted so as to read the past tense of "a child has been harmed" as only applying provided the person harmed still remains a child. If anything, the fact that the present tense is used in s.14(1)(b), s.14(2) and s.14(3)

merely reinforces the intentionality of the use of the past tense in s.14(1)(a) in that it is clear that each of these provisions are directed to different situations."

74. Neither party has suggested that the Trial Judge erred in the manner in which she approached the issue of interpretation. However, both parties rely upon the judgment of Murray J., speaking for the Supreme Court in *Heather Hill* (judgment in which was handed down after the judgment of the Trial Judge in these proceedings), in which he conducted a root and branch review and analysis of the relevant authorities, and the inter-relationship of the principles established by those authorities with section 5 of the Interpretation Act 2005. *Heather Hill* received detailed consideration by this court in *DPP v Czeluzniak* [2023] IECA 159 in a judgment of Ní Raifeartaigh J. in which, at paras. 52-60 she provided the following very useful summary of the principle conclusions reached by Murray J.:

"52. As this case concerns a matter of statutory interpretation, I will start by noting the comments of Murray J. in the Supreme Court decision in Heather Hill Management Company v. An Bord Pleanála [2022] IESC 43 on the correct approach to statutory interpretation, both at common law and under the Interpretation Act 2005, as this is an authoritative and recent statement of the framework within which to conduct the exercise in the present case. The judgment delivered by Murray J. represented the unanimous decision of the Supreme Court in that case (O'Donnell C.J, O'Malley J., Woulfe J., Hogan J. and Murray J.).

53. At para 105 of his judgment, Murray J. described the more modern authorities on statutory construction as moving away from an approach which he described as "a narrow and literal construction that eschewed, in the case of seemingly precise and unambiguous language, any broader consideration of legislative context"". Having referred to Board of Management of St. Molaga's School v. Minister for Education [2010] IESC 57, [2011] 1 IR 362 as an example of this "narrow and

literal" approach, he went to refer to more recent decisions which, he said, emphasised that that "background" and "context" should play a proper role in the analysis: The People (DPP) v. Brown [2019] 2 IR 1]; Minister for Justice v. Vilkas [2018] IESC 69, [2020] 1 IR 676; Dunnes Stores v. The Revenue Commissioners [2019] IESC 50, [2020] 3 IR 480; Bookfinders Ltd. v. The Revenue Commissioners [2020] IESC 60; and The People (DPP) v. AC [2021] IESC 74, [2021] 2 ILRM 305.

54. He said that the judgment of McKechnie J. in Brown provided a good summary of this approach, and summarised the essential points made in Brown as follows:

(i) The first and most important port of call is the wording of the statute itself, with those words being given their ordinary and natural meaning.

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include 'the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including Law Reform Commission or other reports; and perhaps the mischief which the Act sought to remedy'.

(iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language.

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted.

55. As Murray J. pointed out, ambiguity can arise not merely "because on its face the text is clearly susceptible to more than one meaning" but also from the context:

"it may also be contextual, so that seemingly clear words can, when placed in situation, bear a construction not always evident from the language alone".

56. Murray J. said that McKechnie J. had envisaged a two-stage inquiry i.e. one which consider, first, the "words in context", and only secondly, purpose, "if there remained ambiguity". However, Murray J said, the better approach was to regard both context and purpose" as part of a single continuum rather than as separated fields to be filled in". In that regard, he considered to be correct the Attorney General's submissions in the Heather Hill case that "the literal and purposive approaches to statutory interpretation are not hermetically sealed".

57. Murray J. said that the modern authorities showed that "in no case can the process of ascertaining the 'legislative intent' or the 'will of the Oireachtas' be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted".

58. While thus emphasising the need for a contextual approach, he did, however, caution against it being used as a licence for judges simply interpreting legislation to align with what appeared to them as a sensible outcome. In this regard, he referred to "an obvious danger in broadening the approach to the interpretation of legislation in the way suggested by the more recent cases - that the line between the permissible admission of 'context' and identification of 'purpose', and the impermissible imposition on legislation of an outcome that appears reasonable or sensible to an individual judge or which aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand, becomes blurred".

59. He then made four points as follows (paras 113-116):

First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington [2001] IESC 60 [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.

Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276).

Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its

members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown. However …the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language.

60. Murray J then went on to discuss the interaction of these principles with s.5 of the 2005 Act. After a detailed review, which it is not necessary for present purposes to set out, he concluded that s.5(1) in essence sets out the same interpretative approach as had been separately arrived by the courts in the recent authorities he had discussed. Thus, there is alignment between the statutory and the non-statutory principles of interpretation. It may be noted that he made clear, in the course of that discussion, that the decisions in Dunnes Stores, Bookfinders and Brown "strongly suggest" that contextual material can be consulted in construing 'penal' statutes (see para 126 of his judgment)."

75. At para.123 of *Heather Hill*, Murray J. briefly discusses the antecedent question as to whether or not a statutory provision is ambiguous at all, as follows:

> "*....in identifying ambiguity or for that matter obscurity, regard is to be had to the overall statutory context as defined by McKechnie J. in Dunnes Stores [i.e Dunnes Stores v Revenue Commissioners* [2019] IESC 50, [2020] 3 IR 480]. *This will involve a consideration of the words in the section, the section when viewed in light of the Act, the Act when viewed in the light of any relevant history, the well-established canons of construction and, if necessary, the purpose of the provision*."

76. At para.128, he held, inter alia;-

> *"While the meaning of the language used in a provision remains the focal point of any exercise in statutory interpretation, textual or contextual ambiguity or obscurity as well as the production of absurdity or undermining of an identifiable legislative intent will enable the taking into account of broader considerations to ascertain and implement the legislator's intention.*"

77. The statutory provision under review in *Heather Hill* was s.50B of the planning and Development Act 2000. Murray J. concluded that s.50B "means precisely what it says" and at para. 214 he held:

> "*The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to the context of the section, of the Act in which the section appears, the pre-existing relevant legal framework and the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this*."

78. Having regard to the conclusions of Murray J. in *Heather Hill*, it might be argued that the Trial Judge erred in holding that "*Absent a constitutional challenge the Court cannot*

depart from the application of the legislation derived from a literal interpretation of that legislation." The appellant did not make that case, and I think rightly so, because it is apparent from her judgment that the approach overall of the Trial Judge to the issue of interpretation before her was correct and broadly in line with the requirements identified by Murray J. in *Heather Hill,* in that it is clear that the Trial Judge went further than just a consideration of the literal meaning of the words in s.14(1)(a), giving consideration, as she did, to the context of the section, to other sections of the 2015 Act, to the 2015 Act as a whole, its object and the wider context and background within which it was enacted.

Analysis – s.14(1)(a) in Context

79. It is apparent from the above that it is not enough for a court, in considering whether or not a statutory provision is ambiguous, simply to declare that the section is without ambiguity and yields to one meaning only. It is necessary for the Court to consider the "*words in the section, the section when viewed in light of the Act, the Act when viewed in the light of any relevant history, the well-established canons of construction and, if necessary, the purpose of the provision*." Nonetheless, it is clear, as Murray J. also said at para.128 of *Heather Hill* that "*When interpreting a statute ….* [there is] *no room for doubt but that the words used in the legislation are the primary reference point in the exercise*."

80. Section 14(1)(a) of the 2015 Act, in material part, provides: "*where a mandated person knows, believes or has reasonable grounds to suspect on the basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person that a child (a) has been harmed*….". The words of the section itself are, as Murray J. said, the first port of call in its interpretation. Putting aside

for one moment the statutory definition of "child", it is apparent, as a matter of ordinary grammar, that the "child" referred to in the phrase is the object of the phrase, and, in the absence of an appropriate definition or other qualifying language, or unless the context of the section otherwise requires such a construction, the word "child" cannot be interpreted so as to include an adult who suffered harm as a child. Therefore the phrase *"a child has been harmed*" can only apply to a person who is a child at the time that the mandated person receives or acquires or becomes aware of the information referred to in the section. Contrary to the submissions of the respondent, and indeed the reliance placed by the Trial Judge on the use of the past tense in s.14 1(a), the fact that the harm referred to is harm that occurred in the past is inevitable, and cannot and does not alter this construction. To find otherwise, so as, in effect, to include adults, is to deprive the word "child" of its ordinary meaning in the phrase in which it appears.

81. If there was any doubt about this, however, it is removed by the statutory definition, imported from the 1991 Act, that a "child" means "a person under the age of 18 years other than a person who is or has been married." I agree with the submission made on behalf of the appellant that when considering the meaning of the section, or for that matter, any other section within the 2015 Act where the word "child" appears, it is useful to substitute the definition for the word itself. In doing this, one is left in no doubt as to the meaning of the phrase. In order to arrive at the interpretation ascribed to the phrase by the respondent, which found favour with the Trial Judge, it is necessary to insert additional text either into the statutory definition of a child, so as to include an adult who suffered harm as a child, or, alternatively to add additional text to section 14(1) itself. This is obviously a matter for the Oireachtas, and not for the Courts.

82. It follows therefore that there is no textual ambiguity or obscurity in the phrase "a child has been harmed" as it appears in s.14(1)(a) the 2015 Act. Nor is there any contextual

ambiguity, in the sense in which Murray J. described it i.e., that placed in their context, the words "*bear a construction not always evident from the language alone*". On the contrary, the interpretation contended for by the respondent gives rise to the word "child" being accorded two different meanings within the same section of the 2015 Act, in spite of it having a very specific statutory definition.

83. The Trial Judge, in my view, fell into error in failing to place sufficient emphasis on the statutory definition of "child", and also in concluding that the use of the past tense in s.14(1)(a), in contrast to the remaining subsections of s.14(1) and s.14(2) indicated an intention to include those who had suffered harm in the past, but who had since passed into adulthood. This led the Trial Judge to proceed on the basis that the section was open to more than one interpretation, which, as the above analysis I hope makes clear, is not the case.

84. Nor does this interpretation give rise to any absurdity, and indeed I did not understand the respondent to argue that it does, although the appellant argued, with some justification, that the interpretation contended for by the respondent gives rise, if not to absurdity, then certainly to anomalies. (See, for example, paras. 40 and 41 above.)

Undermining of Legislative Intent?

85. I turn now to consider briefly section 14(1)(a) in the light of the 2015 Act as a whole, and whether or not the interpretation that I have concluded is correct is, in the words of Murray J., in *Heather Hill* "undermining of an identifiable legislative intent".

86. There is no disagreement amongst the parties as to the intentions of the legislature in the enactment of the 2015 Act and at the risk of repetition, the Long Title of the 2015 Act, insofar as is material, states that it is an Act to make: "further and better provision for the

care and protection of children…. to require certain persons to make reports to the Child and Family Agency in respect of children in certain circumstances." The intention of the 2015 Act is thus very clear, and there is an obvious connection between mandatory reporting as provided for in the Act, and the protection of children.

87. The Trial Judge concluded that the interpretation of s.14(1)(a) contended for by the appellant will result in a gap in the mandatory reporting that the legislation intends, and therefore is undermining of "the reporting requirements of historic abuse" by which I understand the Trial Judge to mean that the mandatory reporting of such harm or abuse is one of the objectives of the 2015 Act. I would make two points about this.

88. First, there is disagreement between the parties as to which interpretation will in fact give rise to more reporting of retrospective abuse, and this is manifestly not an issue that falls for determination here. Indeed if the question can be answered at all, it can probably only be answered after a great deal of research by appropriate persons or bodies.

89. While the Trial Judge reached a conclusion that the interpretation of the legislation contended for by the appellant would give rise to less reporting by adults of incidents of abuse suffered in childhood, thereby resulting in a gap in reporting structures, she appears to have arrived at this conclusion based on an assumption. The assumption may well have been reasonable insofar as, if the appellant's interpretation is accepted, there may be instances where adults availing of counselling services will not agree to the reporting to Tusla of information disclosed by them. However, that assumption ignores the possibility, signalled by the NCS in the NCS Proposal (see para. 10 above), that if the respondent's interpretation is accepted, there will be people who might otherwise have engaged in counselling and eventually consented to the onward reporting of historic abuse to Tusla, who will withdraw entirely from counselling upon being informed of the mandatory reporting requirements. As I have already indicated, this is not an issue that can or should

be determined by these proceedings. I make the point only so as to demonstrate that it cannot be said with any confidence, and it should not be assumed, that one interpretation will be supportive of, and the other be undermining of, the intention of the legislation.

90. Secondly, it is apparent that to require mandatory reporting of historic harm which has been disclosed by an adult who was a victim of childhood harm or abuse to a mandated person is a significant matter, and is one that may have a profound impact on those victims. As such, it would represent a significant change in the law, and if that were the intention of the Oireachtas one might reasonably expect it to have been clearly expressed, either in the long title or in the main body of the 2015 Act, or both, rather than that the intention should have to be gleaned by a strained exercise of statutory interpretation. This begs the question, as was put by one of the members of the court to counsel for the appellant, whether or not the absence of any such clearly expressed obligation in the 2015 Act was a deliberate choice by the Oireachtas. In reply to this question, counsel for the appellant said that this cannot be known one way or another, and he suggested the Trial Judge posed the same question at para. 54 of her judgment. In fact, however, the Trial Judge put the issue somewhat differently in that paragraph, saying that the problem which has been identified in these proceedings arises from a failure, deliberate or inadvertent, to include provisions in the legislation to address the situation of counsellors working with adult survivors of childhood abuse, and it was at this point that the Trial Judge, citing the judgment of Clarke J. in *Irish Life and Permanent Plc v. Dunne*, held that, since the Oireachtas had not done so, it was not open to the court to distinguish between counsellors and therapists on the one hand, and other mandated persons prescribed by the 2015 Act on the other hand.

91. In this I am in complete agreement with the Trial Judge, but the passage cited from the judgment of Clarke J. in *Irish Life and Permanent Plc v. Dunne* has a much greater relevance to these proceedings, for the reason that the interpretation of s.14(1) (a) contended

for by the respondent effectively requires the Court to re-write the legislation so as to "*include provisions which the Oireachtas may have omitted, but where there might be legitimate debate as to whether the Oireachtas would have included same"* in circumstances where it is by no means clear that the Oireachtas intended what the respondents contend for is the true interpretation of s.14(1)(a).

92. On the foregoing analysis, the plain meaning of s.14(1)(a), which does not require the insertion of any additional text, which accords the word "child" its precise statutory meaning, which is consistent with all other sections of the 2015 Act, and does not give rise to any anomalies or absurdities, can be seen to be consistent with the 2015 Act as a whole, and is not undermining of an identified legislative intent. In contrast, the meaning contended for by the respondent requires a reading in of additional text to s.14(1)(a), without which the word "child "does not have a meaning that accords with its statutory definition, carries a different meaning to all other sections of the 2015 Act in which the word "child" appears, and results in anomalies, whatever about absurdities. This can hardly be said to be consistent with the 2015 Act as a whole.

Other Arguments

93. So far as the cases of *McAnaspie* and *DPP v. EC* are concerned, I agree that on one reading of those authorities, they are supportive of the interpretation contended for by the respondent. However, the context in each of those cases was very different in that neither of those cases involved children who had passed into adulthood, whereas the whole point about the issue raised in this case is that it will only arise in circumstances in which a person wishing to disclose the harm suffered by them, whether in the context of counselling or otherwise, is an adult, and it may well have profound consequences for persons so affected.

94. Regarding the dictum of McGuinness J. in *Western Health Board v K.M.*, if this was a finely balanced exercise between two equally competing interpretations, I would accept that

what was held by McGuinness J. would tip the scales in favour of the respondent's interpretation, but as is apparent from the foregoing, there is not, in my view, any ambiguity in s.14(1)(a) such as to engage that principle.

95. Insofar as the Trial Judge relied on other provisions within s.14 itself and s.16 as being supportive of her conclusion, I am not persuaded that those provisions give much support to either argument. What can be said, however, is that one outcome of the conclusion reached by the Trial Judge is that the word "child", must have a different meaning in s.14(1)(a) than in the remainder of s.14(1) , s.14(2) and all of the rest of the 2015 Act, notwithstanding that it is defined in the 2015 Act and should have the same meaning throughout. The argument advanced by the respondent against this conclusion – that the meaning of the word "child" remains constant, and that it is the tense of the phrase or sentence in which the word appears that captures adults (i.e. adults who suffered harm in their childhood), does not withstand scrutiny, for the reasons already discussed.

96. The respondent placed some reliance on the defences provided under the 2012 Act in respect of a failure to comply with the disclosure obligations created by that Act, which the respondent submitted is in contrast to the 2015 Act which does not provide any defences in respect of a failure to comply with the reporting obligations created by s.14. With respect, however, this submission is misconceived, for the simple reason that the 2015 Act does not make it an offence for a mandated person not to comply with the reporting obligations in that Act, and needless to say therefore the question of providing or not providing a defence does not arise. Nonetheless, the obligations created by the 2012 Act do require some consideration here in order that this judgment does not create any doubts about the obligations created by that Act. In doing so, however, I should stress that what follows was not subject to argument at the hearing of this appeal.

97. Section 2 of the 2012 Act makes it an offence for any person not to report to An Garda Síochána knowledge or belief that that an offence "has been committed by another against a child", where the person concerned "has information that he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person". "Child" is defined more broadly in the 2012 Act, than in the 2015 Act, insofar as the definition in the 2012 Act does not exclude a child who is or was married, and is stated to mean simply any person who has not attained 18 years of age. While at first glance the obligations created by the two acts are similar, the phraseology and context in which the obligations are created are different. As already discussed, the obligation imposed by s.14(1)(a) of the 2015 Act arises at the moment that a mandated person receives the information giving rise to the knowledge, belief or suspicion referred to in the section, provided that the person who has been harmed is a child at that point in time. As has already been said, this is apparent from the use of the words "*on the basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person"*. The obligation in the 2012 Act on the other hand, is not framed around the moment in time when a person receives information, but rather is engaged by the knowledge that an offence has been committed against a child in the past, and it is clear in my view that this refers to *any* time in the past.

98. Before concluding, I think that it is important, for the avoidance of any doubt, to emphasise that, notwithstanding the interpretation of s.14(1)(a) which I have favoured above, a mandated person who, as a result of information received from an adult (in the course of the mandated person's employment or profession) has formed a suspicion on reasonable grounds that a child is at risk of being harmed, must report that suspicion to Tusla. That obligation is clear from s.14 (1) (c), and indeed is recognised by the third bullet point of the NCS Proposal referred to at para. 12 above.

99. On the other hand, however, the circumstance described in the proposal made by the NCS at the second bullet point of the NCS Proposal, i.e. where an adult who has been a victim of harm in childhood discloses to a mandated person the identity of the person alleged to have caused the harm, is not subject to a mandatory reporting obligation, as the legislation stands, in the absence of any current risk to a child. Needless to say, however, where the adult providing such information consents to its being reported to Tusla, then the mandated person can and should do so.

100. Finally, I have throughout this judgment, deliberately refrained from drawing any distinction between counsellors and therapists on the one hand, and other categories of mandated persons on the other. While the appellant did not suggest that counsellors or therapists are in some special category, his submissions were, understandably, targeted at the implications that the respondent's interpretation of s.14(1)(a) would have for those seeking out the services of NCS counsellors. In turn, this led the respondent in its submissions to argue forcefully that the legislation does not differentiate as between categories of mandated persons, and applies equally to them all, as indeed it does.

101. In conclusion:

1) There is no ambiguity about who is a "child" as the word is used in the phrase "a child … has been harmed", as that phrase appears in s.14(1)(a) of the 2015 Act. It refers only to a person who, at the time that the mandated person receives or acquires or becomes aware of the information_referred to in the section , is a child as defined in the 1991 Act and cannot in any circumstances include persons over the age of 18 years;

2) The Trial Judge fell into error in concluding that s.14(1)(a) of the 2015 Act requires mandated persons to notify Tusla where an adult discloses past harm

suffered as a child where that harm falls within the definition of "harm" as set out in s.2 of the 2015 Act.

3) This interpretation of s.14(1)(a) is consistent with the 2015 Act as a whole, does not give rise to any anomaly or absurdity and nor is it undermining of the legislative intention to protect children;

4) This interpretation does not obviate the obligation of mandated persons to report any reasonably held suspicions that a child is at risk of harm;

102. As to the appropriate form of relief, it seems to me that the orders sought in the proceedings are too wide as they could result, unnecessarily, in the quashing of the Policy as a whole. Accordingly I would invite the parties to agree on the appropriate form of order to be made as a result of the conclusions that I have reached above. If the parties are unable to reach agreement, then they should, within 14 days from delivery of this judgment, inform the registrar and the Court will reconvene to hear submissions on the most appropriate form of order.

103. As to costs, since the appellant has been entirely successful in this appeal, my preliminary view is that he is entitled to an order for payment of his costs by the respondent both in this Court and in the court below. If the respondent wishes to contend for a different order, then it should, within 14 days from the date of publication of his judgment, make written submissions to the court, not to exceed 1,000 words. In such event, the appellant, if he wishes to do so, should file replying submissions within a further period of 14 days.

104. As this judgment is being delivered electronically, Donnelly J and Ní Raifeartaigh J. have authorised me to confirm their agreement with it.