From the Deputy Secretary, Social Services Policy Group/
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Our Ref:
Date: 16 May 2013

Dear Colleague

OUTCOME OF JUDICIAL REVIEW AGAINST THE DEPARTMENT'S CIRCULAR *HSS CC 3/96 (REVISED) SHARING TO SAFEGUARD – INFORMATION SHARING ABOUT INDIVIDUALS WHO MAY POSE A RISK TO CHILDREN*

1. The Department was recently a party to a Judicial Review (JR) challenge brought by an unadjudicated individual against the Northern Health and Social Care Trust's decision to share information about him under the Department's Circular, HSS CC 3/96 (revised). Following hearings earlier this year, a judgment was handed down on 11 March 2013 and a remedies hearing followed on 13 March 2013. The judge found against both the Trust and the Department.

2. The JR challenge specifically concerned the Northern Health and Social Care Trust's intention to share information relating to allegations of sexual abuse against the unadjudicated individual. The Trust proposed to share the information in accordance with the framework established by the Department's Circular (3/96 revised). Consequently, the challenge was brought against both the Department and Trust.

3. A copy of the full judgment is attached at **Annex A**. The purpose of this memo is to draw the attention of relevant agencies to the JR and to its conclusions. The conclusions can be found at Paragraph 73 of the judgment.

4. The Department is not withdrawing the Circular at this stage. However, in light of the judgment, the Department will review the Circular, determine the way forward and advise further in due course. In the meantime, you are asked to take account of the judgment and to note the interim considerations set out below.

INTERIM CONSIDERATIONS FOR PRACTITIONERS IN LIGHT OF THE JUDICIAL REVIEW JUDGMENT

5. You are asked to note in particular Paragraphs 43 and 67 of the judgment. Paragraph 43 deals with protections for the individual about whom information may

be shared; paragraph 67 deals with the basis on which a Trust can determine whether it is appropriate to share information with third parties.

Fair Adjudication Process

6. At Paragraph 43 of the judgment, the judge has set out the minimum protections required for a fair process. It states:

"It is suggested that for someone faced with the prospect of disclosure of information about him to third parties alleging he was guilty of sexual abuse then a fair process requires <u>at a minimum</u> the following protections:

(a) details of the allegations of sexual abuse which is complained of so that the accused can understand the allegations that are being made against him including, the nature of the abuse, where it is alleged to have taken place and the approximate dates when it occurred;

(b) those detailed allegations being put fairly to the person accused so he can understand what is being alleged against him;

(c) a reasonable opportunity for the accused to respond to those allegations preferable orally, but, at a minimum, in writing;

(d) an independent, open-minded decision-making body. "

Sharing of Information with Third Parties

7. At Paragraph 67 of the judgment the judge describes his interpretation of the circular in terms of the process that should be followed, prior to the sharing of information with a third party or parties. It states:

".....This balancing exercise between the respect for family and private life and the State's duty to safeguard its children from neglect and ill treatment is a troubling one and is likely to remain so for the foreseeable future. For the avoidance of doubt, my interpretation of the Circular is that before information is shared with third parties the trust must first consider the evidence and make findings of fact on the balance of probabilities. On the basis of those findings, the trust must then determine whether there is a "real" or "serious" risk of significant harm being caused by the un-adjudicated individual to a child/children. If the answer is that such a "real" or "serious" risk does exist, then it is entitled, inter alia, to share the information with the appropriate third parties."

Right of Appeal

8. Finally, you will note that there is currently no right of appeal to an independent appeal body against the decision to retain and/or share confidential information under the Circular. This issue will form part of the overall review of the Department's Circular. Any challenge to a decision to share/retain information under the Circular should be reported to the department by emailing Isobel.Riddell@dhsspsni.gov.uk.

Also, you may wish to seek legal advice if you have any concerns about applying the Department's Circular to any case in the interim.

SEÁN HOLLAND
Deputy Secretary, Social Services Policy Group

Annex A

Neutral Citation No: [2013] NIQB 33
NIQB 2

Ref:	**HOR8751**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**11/03/13**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

JR 57's Application [2013] NIQB 33

IN THE MATTER OF AN APPLICATION BY JR57 FOR JUDICIAL REVIEW

_____

HORNER J

INTRODUCTION

[1] This application concerns the sharing of information among various public bodies and third parties. The information at the centre of this application relates to the alleged sexual abuse of S by the applicant ("A"), her brother. He denies any suggestion that he sexually abused his sister, S. He attacks both the Department of Health and Social Services and Public Safety ("the Department") for the document that they have issued, namely Circular HSCC 3/96 revised (hereinafter called "the Circular") on which Northern Health and Social Care Trust ("the Trust") has sought to rely for the way they have dealt with the applicant, a non-adjudicated or un-adjudicated individual, that is someone who has not been charged or convicted of any offence involving abuse of children. Furthermore, the applicant attacks the decision of the Trust to share this information with others, and in particular third parties.

[2] At the heart of this judicial review lies the problem of how to balance the need to protect families from any disproportionate interference by the State while at the same time giving effect to the imperative to protect children from harm. It is a very difficult balancing exercise as many of these cases demonstrate. The task of the Social Worker who is in effect holding the scales is:

"usually anxious and often thankless. They are criticised for not having taken action in response to warning signs which are obvious enough when seen in the clear light of hindsight. Or they are criticised for making applications based on serious allegations which, in the event, are not established in court. Sometimes, whatever they do they cannot be right." See in Re H and Others (Minors) (Sexual Abuse: Standard of Proof) 1996 AC 563 at 592.

[3] At the outset it is only appropriate that I record my gratitude for the clear and comprehensive arguments, both written and oral, put forward by the counsel acting for all of the parties during the extended course of these proceedings.

FACTS

[4] The salient facts giving rise to the present judicial review can be summarised as follows. A is the brother of S. A is the identical twin of B. They all belong to a very large family. There are 14 children in the family, eight of them being full siblings and these include A, B and S. There are six half-siblings. The father of A, B and S no longer resides with their mother. He has been convicted of sexual abuse. The mother ("M") lives with their step-father ("SF"). The family have had and have very considerable involvement with the Social Services over the years because of, inter alia, childcare problems.

[5] Since the late summer 2010:

(i) S has been alleging sexual abuse by A from when she was aged six and A was aged ten. She claims that the abuse continued until she reached 15/16 years. These allegations were relayed to her social worker sometime at the end of August and the beginning of September 2010. They are first recorded in a document of 20 September 2010.

(ii) S claims that her sister C witnessed A sexually abusing her.

(iii) S also alleges that A had abused his sister C.

(iv) Both M and SF, their parents, were alleged to have been told about the abuse when she was 15 or 16 years old, but they dismissed her account summarily.

(v) S did not, and does not want to make a formal complaint about A's sexual abuse to PSNI.

(vi) However S has agreed that Social Services should be able to use the information as it sees fit.

(vii) The allegations of abuse made by S against A do not record the nature of the abuse, the approximate dates when the sexual abuse was alleged to have taken place or where precisely the sexual abuse occurred. Her allegations do include the claim that the abuse was the most significant event in her leaving the family home.

(viii) It would appear that S and her present partner were reported to the Social Services before S made any complaint of sexual abuse against A. It is probable that S thought A and his then girlfriend were responsible for the complaint as this is recorded at a meeting attended by S's social worker ("EC") on 5 October 2010. Thus there is a reason for S to try and seek revenge for the undoubted trouble A caused her and her partner.

(ix) The social worker, EC, who was dealing with S, is a former member of the PSNI and it is claimed is experienced in sexual abuse claims. She found S to be a credible witness and first offered two reasons why S's evidence was believable at a meeting of 16 March 2011. These were:

(a) the disclosure of the information as to the abuse itself; and

(b) she was receiving counselling from NEXUS, a body which specialises in dealing with the victims of sexual abuse.

(x) A claims to have been the subject of threats of violence and harassment as S's allegations of sexual abuse became public knowledge. A blames the Trust for this information coming into the public domain.

[6] On 16 March 2011 at a Sharing to Safeguard meeting, it was concluded that A was not to have any contact with any child under 18 unless there was prior approval from the Social Services. A letter was sent subsequent to this meeting to A and to his solicitors, so advising.

[7] On many occasions the Trust tried to get hold of the applicant to attend meetings to discuss the allegations made by his sister S. Many of these messages may not have got through to the applicant as the Trust readily concedes. The Trust was also in contact with his solicitors. The attempts made by the Trust to contact the applicant are fully set out in the first affidavit of Mr Devlin. I conclude that the applicant did know the Trust wanted to speak to him but that he refused to engage because he had no idea of what precisely he was being accused of and because rightly or wrongly he considered the Trust had made up its mind that he was guilty of whatever was being alleged against him by S.

[8] It would appear that members of A's family were led to believe that A's guilt was a foregone conclusion. Another sister ("CH") received visits at the beginning of September 2011 and was told by a therapeutic worker that because A's father was an abuser then A was necessarily one too. She had a daughter whom A visited and although she had no complaints about A's behaviour she was specifically advised that A was not to be near her children.

[9] As far back as 20 October 2010, Mr Taylor, Legal Adviser to the Trust, had been recorded as saying at a meeting of professionals in respect of A's family in general and the allegations against A in particular, the following:

> "Mr Taylor advised that the allegations do sound credible. The Trust has reasonable cause for suspicion, and while the investigation is ongoing A should have no contact with K. It is also noted that those with Parental Responsibility should be made aware of the allegations and take the appropriate protective steps."

But there was no on-going investigation. Indeed no investigation ever took place. During the 8 months that followed and which concluded in the final meeting of 1 August 2011 when a decision was taken about A's risk to children on the balance of probabilities (according to the Trust), no attempts had been made to find out the nature of the alleged abuse, the circumstances in which it had taken place and whether there was any person involved such as C who could provide corroboration or contradiction of the allegations made against A. This is especially important because at the meeting of 20 May 2011 attended by many of the social workers, including Mrs Davies, Head of Service and Chairperson, it is recorded:

> "Ms Gault noted that S had made reference to a sister C witnessing the abuse. S alleged that her sister was a victim, but **there is some uncertainty about this**." (my emphasis)

The reason for this uncertainty was never explored by the Trust.

[10] There have also been court proceedings which involved an application for a Non Molestation Order brought by A against S in respect of the allegations S has made. These proceedings ended with S giving A an undertaking not to discuss any information relating to the allegations concerning A with any other party except the Northern Health and Social Services Trust, PSNI and any other suitable Trust. In particular she gave an undertaking to A:

> "Not to incite or instruct any Third Party to intimidate, harass or pester the applicant."

[11] The Trust claims that it has acted both lawfully and reasonably. It claims that it has been following the advice and instructions given in the Circular issued by the Department. This Circular purports to provide advice as to how to deal with non-adjudicated individuals such as the applicant. The Trust claims that it made a decision about the sharing of the information relating to the sexual abuse allegedly suffered by S after giving the applicant every opportunity to engage in the process. The Trust claims quite correctly that the information it gave to him about what he is alleged to have done is exactly the same information that it had received from S. The Trust points out that in these proceedings A, through his counsel, has been well able to attack the credibility of S and the allegations she has made. There is no reason, the Trust claims, why A could not have done so when it was endeavouring to involve him in the process in the first half of 2011.

[12] On 26 August 2011 the Trust wrote to the applicant care of his solicitor, as follows:

> "As you are aware the Trust has been trying to make contact with you to advise that a Sharing to Safeguard meeting was to be held on 1 August 2011. The purpose of this meeting was to share information received between professionals to determine, based on the balance of probabilities, if you pose a potential risk to children and/or young people.
>
> I tried to visit you at your home on 4 August 2011 to provide you with feedback from the meeting; however, there was no response at the door. I left a card advising that I called and requested that you make contact with me. Although I have not heard from you directly I did receive an e-mail from your solicitor requesting that all future correspondence for you to be sent to your solicitor at the [X] Office, hence this letter being forwarded directly to your solicitor.
>
> I have been asked by Head of Service, Helen Davies to advise you of the outcome of the Sharing to Safeguard meeting. Based on the information available to the meeting, it was decided that, on the balance of probabilities, you may pose a potential risk to children and young people.
>
> The Trust would request that you engage with myself to provide information about what children you currently have contact with. The Trust would advise that you should not have any unsupervised contact with children/young people under the age of 18 unless agreed by Social Services and until a Risk Assessment has been completed.

> The Trust would like to offer you the opportunity to engage in a Risk Assessment and encourage you to respond to this letter and agree to meet with me to have an opportunity to discuss the above information.
>
> The Trust has reason to believe you may have contact with family members under the age of 18 years. It is a recommendation of the Sharing to Safeguard meeting that the parents of these children are informed of the recommendation that you not have (sic) unsupervised contact with these children for child protection reasons. We offer you the opportunity in the first stance to advise parents and family members of this recommendation and would be grateful if you can advise us when you have done so."

[13] Following this letter the applicant brought this claim for judicial review. In bringing the claim he was supported by his twin brother, B, who swore an affidavit on 12 September 2011 accusing S of lying and denying that the applicant had been guilty of any sexual abuse of her. He also pointed out the allegations she had made were having serious consequences for himself. This lends support to the claims made by A that as a result of the information about S's sexual abuse being publicised by the Trust to third parties, he was vilified by strangers in the street. He also claims of being prevented from seeing his former girlfriend and her son. In summary A claims that the sharing of information has had significant adverse consequences for him especially affecting his family and private life.

[14] SF has made an affidavit. In that affidavit he has denied that S had ever made any complaint about A's behaviour to him. He also raised a number of issues where S has been proven to be lying. She had falsely alleged both rape and assault against another third party. In addition she had tried falsely to create an impression on a social networking site that people had been stalking her.

[15] CH, A's half-sister, swore an affidavit setting out what the therapeutic worker employed by the Trust had told her and to which I have already referred. She also made it clear that S's social worker had spoken to her and specifically advised her that A was not to be near any of her children. CH had no complaint whatsoever about the behaviour of A with her children. It is of significance that the Trust has at no stage sought to interview CH. Nor, as I have recorded, has it sought to interview C who it is alleged by S had witnessed A's abuse of her and had also, it is claimed by S, been the subject herself of abusive behaviour by A. No reason is offered for the latter omission other than to say rather bizarrely that the social workers concerned felt that it was not "appropriate".

[16] The nature of the abuse alleged by S has been exhibited quite properly to the affidavit of Maurice Devlin, social work service manager with the Trust. It simply records that A's sister "disclosed that she was sexually abused by her older brother from she was approximately six years old until she was fifteen". No details of the nature of the abuse appear to have been disclosed by S. It is not known whether the abuse involved voyeurism, inappropriate comments, fondling, inappropriate touching or penetration. No satisfactory explanation has been provided to the court as to why S was not asked to provide details of the abuse she claims to have suffered at the hands of A or the circumstances in which this abuse occurred.

[17] The Circular provides at paragraph 1:

> "The safeguarding of children is not the preserve of one agency or professional. Good practice calls for effective co-operation between all agencies and individuals working to safeguard children. Some agencies have a statutory responsibility for the safeguarding of children, others have a duty of care. While the Circular has no statutory basis, the guidance it contains is regarded as essential for all agencies to consider in discharging their individual responsibilities so that they can identify and counteract risks for children posed by the behaviour of individuals in a consistent, structured and methodical way."

Paragraph 2 goes on to state:

> "The use of words such as **must** or **will** in this Circular are not to be interpreted as a requirement to do something but rather as a requirement to properly consider if the steps set out should be taken. Where child protection issues are considered to be involved matters set out in the Circular must be seen essentially as matters that should be considered in light of all facts and circumstances of the individual case and not matters that are required to be carried out. However, where an individual or agency decides not to act in accordance with this guidance, it will be assumed that they have had sufficient reason and will, if required, be able to explain and justify the decision and maintain a record."

Paragraph 4 states:

> "This Circular, therefore, also focuses attention on non-adjudicated individuals about whom an Agency has reasonable concerns from more than one source or a serious concern from one source, which lead them to believe that the child or the children is or is likely to suffer significant harm as a result of the individual's activities or behaviour. Past behaviour can often be a guide to future behaviour."

It then goes on at paragraph 5 to deal with the onus of proof on those who want to share information about unadjudicated individuals and makes it clear that this is "on the balance of probabilities" that a risk to a child (children) exists. It further states that the decision about such individuals will take place "in a confidential inter-agency forum and there will be notification to the individual concerned and the right to challenge the decision."

[18] Paragraph 7 draws attention to the need of the Trust to be aware of its obligation to comply with the requirements of the Human Rights Act 1998 and the Data Protection Act 1998.

[19] At paragraph 8 it does not purport to give guidance in respect of the assessment and risk management of individual offenders or those thought to pose a risk, as this is set out in more detail in PPANI guidance in respect of both sexual and/or violent offending and Co-operating to Safeguard Children (CtSC) and Regional Area Child Protection Committees (ACPC) Regional Policy and Procedures.

[20] At paragraph 13 it refers to the fact that the child's welfare must always be paramount and that it overrides all other considerations including the right to privacy or confidentiality. It also refers to the need to strike a proper balance between protecting children and respecting the rights and needs of parents, families and other individuals who may pose a risk to children.

[21] Under paragraph 14 it defines "individual, whether a man, woman or other young person who represents a risk or potential risk to a child/children" as meaning "any individual where there are reasonable concerns from more than one source, or a serious concern from one source, about the individual's behaviour/actions which may lead to the child suffering or being likely to suffer significant harm".

[22] Significant harm is defined as "ill-treatment or impairment of health or development".

[23] Paragraph 32 returns to the onus of proof and the reasonable concerns of more than one source or the serious concern from one source that lead to the conclusion that "on the balance of probabilities an individual poses a risk to a child or children …"

[24] Paragraph 90 again returns to cases that are not being dealt with under PPANI arrangements and where there are concerns about an individual from more than one source or a serious concern from one source.

[25] Paragraph 93 deals with any meeting arranged to carry out the risk assessment and management and states that this should be carried out after a view has been sought from the individual who poses the risk who, it is stated "will not be invited to attend the actual risk assessment meeting".

[26] Finally paragraph 124 states:

> "Information about unadjudicated individuals should be shared on a need to know basis (See Information Sharing Protocol). The individual should be notified of the action being taken to share information about him or her and of his/her right to pursue a complaint through the sharing Agency's complaints process. If after exhausting the internal complaints process the individual is still dissatisfied, he can write to the Commissioner for Complaints."

[27] There is no right of appeal, but the Trust asserts that a dissatisfied individual can make a complaint and if he does not consider it has been properly dealt with then he can make a further complaint to the Commissioner of Complaints. In this case by letter dated 6 September 2011 A was offered a meeting with Mrs Davies, Head of Service, following the meeting of 1 August 2011. The decision to share information as to A's alleged sexual abuse of his sister, S, had been taken at that meeting.

[28] It is true that following the alleged report of abuse in September 2010 no decision was taken to share it with any other person or body until September 2011 although it was registered with SOSCARE, an acronym for Social Services Client Access and Retrieval Environment, a client based database used throughout the five Health and Social Care Trusts in Northern Ireland at the end of March 2011. Apparently no other agencies outside the Trusts have access to the system. The affidavit of Mr Maurice Devlin on behalf of the Trust suggests that the access to what is registered on SOSCARE is limited. While all the social workers with the Trust who work in the Children's' Services have access to the system

and will be able to see the entirety of the information contained in the entry, accessing a record without a valid reason is considered a breach of Data Protection and an Incident Report would be completed in every instance. Across Trust access is limited to "Gateway Teams". This does give access to notes which include the words "Sharing to Safeguard". This should indicate to the viewer that the applicant had been involved in a Sharing to Safeguard process without indicating anything else. If any social worker wanted to obtain further information on the application then it would be expected that such a social worker would make contact with the key worker directly. Further, following the institution of the judicial review in September 2011, there has been no sharing of information. As I have stated as part of the judicial review proceedings there is in place an undertaking from the Trust agreeing not to share information pending the determination of this judicial review. It is not suggested that A has in any way misbehaved or abused any child in the meantime. I understand he continues to have contact with his other sister's children. Although an issue did arise in the amended Order 53 Statement it has been decided that this issue in respect of SOSCARE should be left for other proceedings. In this case the court is going to concentrate on the central issue namely the sharing by the Trust of allegations with third parties that A had been guilty of abusive behaviour with a minor and was a risk to their children. Different considerations apply to SOSCARE and I deliberately make no comment on this issue.

[29] In his affidavit of 17 April 2012 A attacks the credibility of S on a number of different grounds. These include:

(a) He says that her claim that alcohol was a common feature of her childhood is untrue.

(b) He says that the suggestion that he abused S when she was aged 6 and he was aged 10 does not make any sense. In any event, S is unsure whether it stopped when she was 15 years or 16 years. He points out that he left home when he was sixteen years old and in those circumstances the abuse could not have continued as S claims.

(c) He denies that any sister witnessed any sexual abuse of S by him. He claims that his other sister told social workers that S was lying when she suggested that she had also been abused by him.

(d) He denies that his mother was ever told of the alleged abuse.

(e) He points out that although S claimed she left the family home because her mother did not believe her, in fact she did not leave the family home until she was 18 years. On her own case at least 2-3 years must have passed from the last act of sexual abuse by A until she left the family home.

[30] The above is the briefest of summaries of the background circumstances to this particularly difficult and emotionally charged judicial review. While it does not claim to be comprehensive, it does set the scene for the arguments advanced on behalf of the various parties.

THE ISSUES

[31] The issues in this case can be conveniently summarised, and I stress summarised, as follows:

<u>As against the Trust</u>

(a) The decision of the Trust to share information about A's alleged abuse of S was ultra vires its powers.

(b) The Trust applied the wrong test in deciding whether to share information with others by failing to consider whether the applicant on the balance of probabilities posed an actual risk of causing significant harm to children.

(c) The Trust had not acted fairly and/or in breach of his Article 6 ECHR rights in determining that he did pose an actual risk of causing significant harm to children.

(d) The Trust had infringed A's Article 8 rights in that the decision to share information relating to the risk of committing significant harm was a disproportionate infringement of those rights and not in accordance with the law.

(e) The Trust's decision to share information was unreasonable in the Wednesbury sense and/or lacked any credible evidential basis and/or had failed to enquire into or inform itself about the details of the allegations made against the applicant and, in so failing, acted Wednesbury unreasonably and/or had taken matters into account that should have been ignored such as historical sexual allegations in the applicant's wider family.

<u>As against the Department</u>

(f) The Circular purports to confer additional powers on the Trust and is ultra vires.

STATUTORY FRAMEWORK

[32] In a typically well marshalled argument Mr Scoffield QC, for the applicant, has made an attack on the legal authority of the Trust to make the impugned decisions in respect of the sharing of information. His argument can be briefly summarised as follows:

(i) It is wrong to rely on the broad discretionary power within the Children's' (NI) Order 1995 ("the Order") given that different statutory arrangements have been specifically introduced to deal with the circumstances where someone is suspected of being a risk to children and with protection for those persons who are suspected being built into the statutory architecture: eg see Protection of Children and Vulnerable Adults (NI) Order 2003, Sexual Offences Act 2003, the Safeguarding Vulnerable Groups (NI) Order 2007 and the Criminal Justice (NI) Order 2008. These have all been the subject of democratic debate unlike the Circular.

(ii) Article 18 of the 1995 Order under the heading "general duty of authority to provide personal social services to children in need …" provides as follows:

> "(1) It shall be the general duty of every authority (in addition to other duties imposed by this Part) -
>
> (a) to safeguard and promote the welfare of children within its area who are in need …
>
> by providing a range and level of personal social services appropriate to those children's needs.

(2) For the purpose principally of facilitating its general duty under this Article, every authority shall have the specific powers and duties set out in Schedule 2."

Schedule 2 provides at para 5(1):

"Every authority shall take reasonable steps, through the provision of services under Part IV to prevent children within the authority's area suffering ill treatment or neglect."

Furthermore, Article 4(b) of the Health and Personal Social Services (NI) Order 1972 provides:

"It shall be the duty of the Ministry –

…

(b) to provide or secure the provision of personal social services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland;

and the Ministry shall so discharge its duty as to secure the effective co-ordination of health and personal social services."

Mr Scoffield QC claims that these powers under Article 18 (and the 1972 Order) are limited to social care and are reflected in the heading "Personal Social Services". Article 18 does appear under the subtitle "general duty of authority to provide personal social services for children in need, their family and others". Schedule 2 powers are provided for the purposes of social care only.

(iii) Article 18 and its related Schedule 2 powers are confined to the provision of personal social services and include matters such as day care, child minding services and accommodation (see Articles 19-21). This Article is not intended to deal with abuse.

(iv) Part VI which is entitled "protection of children" deals with emergency protection orders and the like. In other words if there was a power to make a Circular, and the Trust is a creature of statute, then such a power has to be found in Part VI and not Part IV of the 1995 Order. In Part VI such powers necessarily involve the court process.

(v) What the Department has done in producing a Circular cannot plausibly be said to be social care or to constitute "personal social services".

(vi) The decision of Weatherup J in Martin [2002] NIQB 67 was made before this Circular was produced and cannot be authority for the proposition that the Trust has a legal power to operate the detailed scheme set out in the Circular.

(vii) Insofar as Martin is authority for the proposition that the Department did have authority to make the Circular, then the decision is flawed.

(viii) Finally, he claimed that there was nothing in the Order that would permit the general disclosure of allegations of sexual abuse such as is proposed in this case.

[33] I consider that these arguments, however attractively framed, are misconceived. I accept the well-crafted submissions of Ms Murnaghan who appeared for the Department. In Martin, Weatherup J accepted that the Trust did have the right to disclose information about allegations of sexual abuse to third parties. He found that authority in Schedule 18 and Schedule 2 of the Order. (He also discussed Article 66 to which I shall return later in this judgment.) This decision was followed by Girvan J in Re Conlon's Application for Judicial Review [2005] NI 97 where it was held that there was "nothing in law to prevent the Department issuing guidance notes or guidance to trusts and other public bodies to assist them in fulfilling their statutory duties and functions". In his judgment Girvan J specifically said at paragraph 11:

> "There is nothing in law to prevent the department issuing guidance notes and its power to do so can be found in Articles 15 and 4(b) of the 1972 Order. Even apart from those statutory provisions it is open to the department to issue guidance to trusts and other public bodies to assist them in fulfilling their various statutory duties and functions. Nor is there anything unlawful in the department, trusts or other agencies establishing policies or practices to guide them in the carrying out of the statutory duties and functions."

[34] The phrase "personal social services" is a generic term. I am firmly of the view that the term "personal social services" is sufficiently wide to cover services and does cover both services which deal with children who have been abused and children who are at risk of being abused by adults. Accordingly, it follows that the sharing of information to prevent future child abuse can constitute "personal social services". One of those services is to take reasonable steps to prevent children being ill-treated.

[35] I also find that the Circular is for guidance only and it does not comprise of directions which must be followed by the Trust. While of course the words used in the document have to be construed in the context of the document as a whole, paragraph 2 of that Circular does help with the overall context when it says:

> "The use of the words such as **must** or **will** in this Circular are not to be interpreted as a requirement to do something but rather as a requirement to properly consider if the steps set out should be taken … However, where an individual or agency decides not to act in accordance with this guidance it will be assumed that they have had sufficient reason and will, if required, be able to explain and justify the decision and maintain a record."

As Dyson J held in R v North Derbyshire Health Authority ex parte Fisher [1997] ECHC Admin 675 at paragraph 12:

> "… It is important that the court should be slow to construe a document as a direction in the absence of clear words that that is what it is intended to be".

[36] Quite clearly if the Trust does not follow the guidance given by the Department and something does go wrong, the Trust will have to explain why it did not follow the guidance. But this in no way demands that the Trust slavishly follows the Circular, merely, that the Trust must have good reasons to depart from the guidance given by the Department.

[37] The Department and the Trust also rely on Article 66 as giving the Department the power to issue guidance as to the sharing of information. With respect, Article 66 is part of a well-defined process for the protection of children through the courts. Part VI is concerned with obtaining court orders, including orders for the emergency protection of children. It does not provide any authority for the production of guidance or advice or the need to retain and share information in respect of child abuse. The duty to investigate arises where the Trust "has reasonable cause …" and is a precursor to the Trust deciding whether to make an application to the court or whether the child's best interests require the Trust to exercise some of its other powers under the Order.

COMMON LAW PRINCIPLES

[38] It is important at the outset to look at the relevant common law principles before considering the behaviour of the Trust or the Department. However, it is clear that whatever principle of the common law is in existence, it will not be observed whenever it does not serve the ends of justice: see the comments of Lord Devlin in Re K (Infants) [1965] AC 201 at 238 where he said:

> "a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed."

These views were endorsed by Lady Hale in Re A (Child) (Family Proceedings: Disclosure of Information) [2012] UKSC 60 paragraphs 17-20.

[39] There are two accepted central rules of natural justice:

(a) the rule against bias; and

(b) the right to a hearing.

These rules are there to ensure that there is a fair process. What is fair will depend on the circumstances of each particular case. The courts have zealously guarded the right to determine what is fair in any particular circumstances: eg see R v Panel on Takeover and Mergers ex parte Guinness plc [1990] 1 QB 146 at 183-4.

[40] The rule that no man shall be condemned until he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice: see Supperstone, Goudie and Walker on Judicial Review (Fourth Edition) 11.2.1.

[41] The duty to be fair ensures that a court or tribunal can tailor its procedure to the particular decision that has to be made: see Lloyd v McMahon [1987] AC 625 at 702 where Lord Bridge said:

> "The so called rules of natural justice are not engraved in tablets of stone. To use the phrase which better expressed the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make on a statutory or other framework in which it operates."

[42] As Supperstone, Goudie and Walker say at 11.15.1:

> "… the decision to apply the rules to all decision-making functions means that there are now virtually no areas where individuals are affected where the courts have held that it is inappropriate to apply any procedural safeguards at all. The fact that if the decisions are administrative or disciplinary is no longer a justification for excluding the rules, as courts have recognised … ."

[43] It is suggested that for someone faced with the prospect of disclosure of information about him to third parties alleging he was guilty of sexual abuse then a fair process requires at a minimum the following protections:

(a) details of the allegations of sexual abuse which is complained of so that the accused can understand the allegations that are being made against him including, the nature of the abuse, where it is alleged to have taken place and the approximate dates when it occurred;

(b) those detailed allegations being put fairly to the person accused so he can understand what is being alleged against him;

(c) a reasonable opportunity for the accused to respond to those allegations preferable orally, but, at a minimum, in writing;

(d) an independent, open-minded decision-making body.

CONVENTION RIGHTS

[44] Although various Convention Rights were raised, these were not pursued with any enthusiasm apart from the claim that there had been interference with the applicant's Article 8 rights. It is true that Article 6 was raised but in a rather desultory fashion. The fact that A might apply to the RAF and that the SOSCARE entry might be used against A is more hypothetical than real. I do not consider it as being engaged. If it has, it does not really add in the circumstances of this case to his common law rights. The applicant's junior counsel also raised in further argument the applicant's Article 3 rights and relied upon the recent authority of XY v Facebook Ireland Ltd [2012] NIQB 96. I do not find on the facts of this case that the applicant's Article 3 rights are engaged or if they were that they have been infringed. If I am wrong and the applicant's Article 3 rights have been engaged and infringed, such a breach does not, I find in this case, add anything to the protections offered by Article 8 (see below).

[45] The applicant asserts that the retention and disclosure of information relating to his alleged sexual abuse of S constitutes a breach of Article 8 of the European Convention on Human Rights.

[46] Article 8 states:

> "(1) Everyone has a right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the existence of this right except such as is in accordance with the law and is necessary in a democratic society in the

> interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[47] It is not in dispute that the Article 8 rights of the applicant are engaged. Clearly the storing of such information must affect the right to respect for the private life of the applicant. Further disclosure of such information to third parties inevitably affects the right to respect for his private and family life. Therefore, in those circumstances, the actions of the Trust in retaining and disclosing information must be justified under Article 8(2) of the Convention. This requires the Trust to demonstrate that such interference as has occurred is shown to be in accordance with the law. Further, that it is necessary in a democratic society for one or more of the permitted aims, which in the present case is the prevention of crime or the protection of the rights and freedoms of others.

[48] As far as legality is concerned the Trusts rely on, inter alia, their powers under the 1995 Order. I have already commented upon this. The second limb involves the court in determining whether what was done was proportionate. It is therefore necessary for the court to ask itself whether:

> "(i) The (legislative) objective is sufficiently important to justify limiting the fundamental right;
>
> (ii) The measures designed to meet the (legislative) objective is rationally connected to it;
>
> (iii) The means used to impair the right or freedom are no more than is necessary to accomplish the objective."

See Lord Clyde in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 as adopted by the House of Lords in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532.

[49] In his judgment in the Martin case Weatherup J said at paragraph 27:

> "… when a Convention right has been engaged and a public authority is required to justify interference with a Convention right there is now a greater intensity of review than was formerly the case. The cases referred to above demonstrate that on the issue of disclosure of the type of information with which this case is involved there has in any event been a significant intensity of review of such decisions by the courts under the domestic law ground based on irrationality. However, the heightened intensity of review, whether in domestic law or under the Convention, will in turn require the public authority to provide to the courts such materials as are sufficient to enable the court to complete the appropriate review. Greater intensity of review may require consideration of a greater quantity of materials than would otherwise be the case."

[50] Weatherup J in his judgement at paragraph 29 referred to the comments made by Lord Steyn in R (Daly) v Home Secretary [2001] 2 AC 532 paragraph 27 where he set out two general matters in relation to the proportionality approach:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations."

[51] It is important to record Dyson J's comments in R v Local Authority and Police Authority in the Midlands ex parte LM [2000] 1 FLR 736 in a case which involved disclosure by police and social services of allegations of sexual abuse. The applicant owned a company which had a contract to transport school children. Although allegations had been made against the applicant of sexual abuse he had never been prosecuted. The applicant applied for judicial review because the police and social services refused to give undertakings not to make disclosure of the allegations to a local authority with which the applicant's company hoped to enter into a contract. The court allowed the application and quashed the decisions of the police and social services on the grounds that they had not approached the issues on the correct basis. Dyson J at page 747 identified three particular factors to be considered –

> (i) the belief of the authority as to the truth of the allegation;
>
> (ii) the interests of the third party in obtaining the information;
>
> (iii) the degree of risk posed by the person if disclosure is not made.

[52] He considered that arguments based on Article 8 overlapped with arguments on irrationality. He said that "if a decision to disclose is to survive scrutiny by the court for irrationality, substantial justification is required." (Page 750) He went on to say that the court would need to be persuaded that there is a "real and cogent evidence of a pressing need for disclosure." Girvan J in Conlon at paragraph 12 emphasised the importance of their being a "pressing need" before disclosure is made. He goes on to say:

> "Disclosure is exceptional and not the rule and requires a very careful analysis of the facts – a very sensitive balancing of the public interest in the need to safeguard the right of an individual to his private life."

[53] It is interesting to note that in the Martin judicial review Weatherup J did conclude after further material was furnished to the court that "a pressing need for disclosure was established".

THE CIRCULAR

[54] The history of the Circular and how it came to be in its present form when produced in 2008 is set out in some detail in the affidavit of Ms Eilis McDaniel of the Department. I can briefly summarise what she says as follows:

> "(i) The Circular originated in the Home Office Instructions to Governors (in England) by HM Prison Service in 1994. It provided guidance on how to deal with prisoners who were being released and who had committed offences against

children or young persons under 18 years of age in order to provide better protection for children who might be at risk.

(ii) Then there followed an English Home Office Circular, HSS, Interagency Guidance on the Release of Persons charged or held in connection with Schedule 1 offences against Children or Young Persons under 17 years of age. This was issued by the DHSS in October 1996.

(iii) This Circular was amended following the challenge of Mr Conlon in 2001 referred to above and which was finally determined in 2004. The present revised Circular was furnished in September 2008.

(iv) The present Circular took into account other developments which included legislation dealing specifically with managing the risk of offenders outside the criminal courts.

(v) The Circular was expected to deal with un-adjudicated individuals following references from a number of different sources. The Circular, it is claimed, "advocates an approach similar to that of the Home Office Circular, that is sharing of information for the protection of children based on a comprehensive assessment of risk to children".

[55] The Circular, I was informed by counsel for the Trust and the Department, requires the Trust to act "on the balance of probabilities". It offers advice about the approach which should be adopted to the "balance of probabilities". I find the advice contained in the Circular to be confusing and contradictory. The whole issue of when a Trust should intervene and retain and/or share information as to sexual abuse needs to be revisited. I deal with this in some detail later in this judgment.

[56] A fair criticism was made by Mr Scoffield QC namely that the Circular is not a bespoke document intended originally to apply to un-adjudicated individuals suspected of sexual abuse. It is a document in which the advice given about un-adjudicated individuals is, in effect, bolted on to advice given in respect of inter alia persons who had been convicted of offences of sexual abuse. This leads inevitably in some places to an unsatisfactory fit. There is force in these criticisms.

[57] In this case the applicant's Article 6 rights were not engaged. However there may be other cases in which the Article 6 rights of a person in respect of whom it is proposed to share information are engaged. This will be because the sharing of such information has the effect or the potential to affect an individual's employment. My preliminary view is that the Circular, while of course giving some general advice as to the need to take into account the Human Rights Act, should have in place a proper system of appeal to an independent body. The suggestion that the applicant has a right to complain and that if unsatisfied with the response to his complaint, to pursue it with the Commissioner of Complaints, is in my provisional opinion not a satisfactory system of appeal (if that is what it is intended to be).

[58] Finally, A was not given any reasons why the Trust had reached the conclusion it did and why it was going to recommend the sharing of this sensitive information with the parents of children with whom he had contact. Obviously, there is no statutory duty on the Trust to give reasons. It is true that the common law does not impose a duty in all cases to provide

reasons e.g. see Lonrho PLC v Secretary of State for Trade and Industry [1989] 2 All ER 609. It is fair to say that the tide is very much flowing in favour of the need for decision making bodies to give reasons for their decisions. Supperstone, Goudie and Walker on Judicial Review record at 11.53.5:

> "In Sudesh Madan v The General Medical Council [2001] EWHC Admin 322, the essential principle to emerge from the case is that adequate reasons must be given to inform the recipient of the basis for the decision that he be removed from the Register. For reasons expressed his conclusion will often not disclose the underlying basis for the decision."

[59] It goes on to point out that "there are increasing clear signs that the courts are developing, under the camouflage of the doctrine of fairness, a duty to give reasons". It certainly seems preferable that the Circular should advise the Trust to give reasons for any decision it makes about the retention and sharing of confidential information with third parties. In this case I am not surprised that no reason was given. The only explanation that the Trust could have offered was that the decision had been taken exclusively on the basis of general and unspecified allegations by S which had neither been scrutinised nor investigated.

The proof required to share information under the Circular

[60] At the outset of the judicial review I was told by senior counsel for the Trust on instructions that the Trust had at all times acted on the basis that the onus of proof in respect of the sharing of information was on the Trust and that the standard was "on the balance of probabilities" as required by the Circular. Accordingly my understanding from the original submission made by the Trust (and supported by counsel for the Department) was that before there was any sharing of information to third parties, the Trust had to be satisfied on the balance of probabilities that the un-adjudicated individual was probably going to inflict significant harm on a child or children. I was concerned that regardless of the facts of this case, such an approach imposed an unreasonably high threshold and could lead to cases in which the Trust failed to properly protect vulnerable children. Furthermore, I was concerned that it involved a misunderstanding of how the Circular should be interpreted.

[61] The balance of probability test as propounded by the Trust means that the Trust will act only if the risk of abuse is 51% or greater. But it will not act if a child is at a 50/50 risk of abuse or even if the risk is 49%. This seems not only arbitrary, but irrational. As Lord Nicholls said in Re H at page 585:

> "What is in issue is the prospect, or risk, of the child suffering significant harm. When exposed to this risk a child may need protection just as much when the risk is considered to be less that 50/50 as when the risk is of a higher order. Conversely, so far as the parents are concerned, there is no particular magic in a threshold test based on a probability of significant harm as distinct from a real possibility. It is otherwise if there is no real possibility."

[62] Furthermore, the use of the word "likely" must surely be, in the context of risk to children, not "on the balance of probabilities" but likely "in the sense of a real possibility". To quote Lord Nicholls again at page 584:

> "In every day usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not.

> This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am enquiring whether there is a real risk of rain, a risk that ought not to be ignored".

[63] I invited further submissions from the parties and their counsel after I had considered the authority of In Re H (and related cases). In particular, I wanted assistance on the proposition that the Circular in fact, properly construed, required a two stage approach. Firstly, the Trust had to establish the evidence it could rely on. This required proof on the balance of probabilities. Secondly it then had to decide on the basis of that evidence whether there was a serious or real risk of significant harm to a child or children.

[64] Lord Wilson In the Matter of J (Children) [2013] UKSC at paragraph 75 said:

> "My view remains that the need for the local authority to prove the facts which give rise to a real possibility of significant harm in the future is a bulwark against too ready an interference with family life on the part of the State."

Lord Hope said at paragraph 84:

> "… the golden rule must surely be that a prediction of future harm has to be based on facts that have been proved on a balance of probabilities."

[65] At the resumed hearing and after further consideration Mr Toner QC said that he had originally presented the Trust's case on the basis that there was a one stage process and that was making a finding on the balance of probabilities (see above). However, he did note that the minutes of the meeting of the Trust on 1 August 2011, when the decision to share the information was made, makes it clear that:

> "(a) The group had judged her evidence as credible; and
>
> (b) The meeting concluded on the balance of probabilities A may pose a potential risk."

He submitted that in fact the Trust did identify two strands and that the Trust applied the same standard of proof to both limbs, namely the balance of probabilities. Whether the Trust did adopt a two stage process as Mr Toner claims, the Trust certainly could not have applied the balance of probabilities to the evidence of abuse because the Trust had no idea of the nature of the abuse or of its circumstances. To find someone's evidence credible, that is capable of belief, does not necessarily mean that such evidence will be established on the balance of probabilities. Further the use of the word "may" in the Trust's conclusion suggests that it did not apply the balance of probabilities to the second limb either. However, I can understand how this might have happened given the confusing way in which the Circular has been drafted.

[66] Ms Murnaghan for the Department had urged that a single "balance of probabilities" test had to be applied in looking at the risk of abuse by A in the future. At the further hearing she helpfully provided the court with the decision of the Supreme Court in the matter of Re J (Children) [2012] EWCA Civ 1511. She submitted that there was in fact a three stage process:

"(i) Is there credible evidence of abuse?

(ii) Is that evidence established on the balance of probabilities?

(iii) Is there a real risk of significant harm in the future?"

I am not sure it matters whether it is a three stage test because it is axiomatic that the Trust is not going to consider any evidence if it rejects that evidence at the outset as being incapable of belief. I understood at the second hearing that the Department accepted that:

(a) The balance of probabilities burden applied to the finding of the facts;

(b) And that on the basis of those facts so found, the Trust then had to conclude whether there was a real risk of significant harm.

[67] I should pause to say that this vexed issue of what is the proper test has in respect of care orders, on which this Circular is undoubtedly modelled, troubled the House of Lords and Supreme Court on at least six occasions. This balancing exercise between the respect for family and private life and the State's duty to safeguard its children from neglect and ill treatment is a troubling one and is likely to remain so for the foreseeable future. For the avoidance of doubt, my interpretation of the Circular is that before information is shared with third parties the trust must first consider the evidence and make findings of fact on the balance of probabilities. On the basis of those findings, the trust must then determine whether there is a "real" or "serious" risk of significant harm being caused by the un-adjudicated individual to a child/children. If the answer is that such a "real" or "serious" risk does exist, then it is entitled, inter alia, to share the information with the appropriate third parties.

THE TRUST

[68] The applicant (and some members of his family) had been less than co-operative with the Trust. Various reasons have been offered for A's failure to engage with the Trust. It is not possible for me to determine the basis on which A failed to engage with the Trust. I also note that Mr Scoffield QC on behalf of A has very effectively made many points about the inadequacy of not just the process but the evidence and its inconsistencies and frailties. As I have said these points could have been made by the applicant or his solicitor. However, the fact that such a course was open to the applicant does not make the process a fair one. In fact, the process as operated by the Trust was fundamentally unfair to the applicant for a number of reasons.

(i) The applicant was not put on notice of the allegations against him. Indeed, the Trust could never give him notice of what he was alleged to have done to S because the Trust itself did not know. The social worker who had received the allegations had never asked S about:

(a) the nature of the abuse;

(b) when approximately it was meant to have taken place; and

(c) where it took place.

(ii) The Trust did not check with S's sister who had witnessed S being abused by A and who it is claimed had been abused herself. Again no explanation was offered for this omission.

(iii) The Trust made no serious attempt to seek evidence from A's twin brother B or from other family members to see if S's evidence was credible and consistent.

(iv) The Trust did not understand the basis upon which they should have acted. The Circular, as I have said, is confusing and misleading. Therefore it is not surprising that the Sharing to Safeguard meeting of 1 August 2011 reached an ambiguous conclusion when it stated:

> "This meeting concluded that on the balance of probabilities A may pose a potential risk to children."

This conclusion is also reflected in a letter to A which states:

> "You may pose a potential risk to children and young people."

[69] It seems to me that the Trust erred fundamentally in how they approached the issue of what had to be established against A before they shared information relating to him. Firstly, it did not engage in a fact-finding exercise. It contented itself with the vague and general allegation of abuse made by S. It made no attempt to test it or to find any other evidence. As Lady Hale said in In the Matter of J (Children) at paragraph 5:

> "Before turning to the facts and the arguments in this case, it should be emphasised that in the real world the issue hardly ever comes packaged in this simple way. There are usually many readily provable facts upon which an authority can rely to satisfy the court that a child is likely to suffer significant harm unless something is done to protect him. Cases in which the only thing upon which the authority can rely is the possibility that this parent has harmed another child in the past are very rare … Who can say what facts the court might have found relevant had the history been fully investigated in the usual way?"

(The same question should be asked on the facts of this case.)

Secondly, even the evidence which the Trust did have was not approached, as was claimed by its counsel, on the balance of probabilities. Instead the Trust seem to have proceeded on the basis that because it had a "serious concern from one source" that was credible, that was enough. But the Circular may have led the Trust astray. The fact that there are "reasonable concerns from more than one source" or "a serious concern from one source" about an individual's behaviour/actions does not establish that that individual has on the balance of probabilities committed abuse. This depends on the evidence. On whatever basis the Trust proceeded, it was simply not possible given the complaints made by S and as recorded by the Trust, for the Trust to have concluded on that untested evidence that S had been abused by A. Of course, what is recorded at the meeting of 1 August 2011 and repeated in the letter of 26 August 2011 is the conclusion that "on the balance of probabilities A may prove a potential risk to children". This contradictory conclusion purports to conclude that A may (possibly) cause children significant harm in the future on the balance of probabilities.

[70] Despite Mr Toner QC urging that these are the words of social workers, and not the words of lawyers, it is tolerably clear that they do not mean that the evidence available to the Trust established on the balance of probabilities that A is a risk to children. Indeed, on the basis of the evidence, such as it is, it would be impossible to say that A was a serious risk because even today no one knows what he is alleged to have done wrong to allow such a conclusion to have been reached. As Weatherup J said in Re Martin at paragraph 27 "this is the type of case that will require a greater intensity of review because a public authority is being required to justify interference with a Convention right."

[71] Further the actions of the Trust do not suggest that there was any pressing need for the retention of this information nor its disclosure to third parties. I have still not been provided with an explanation for the delay which occurred between the first meeting which was held in October 2010 following the allegations of abuse and the next meeting 5 months later in March 2011. On the evidence presented to the court there was a complete hiatus which even today remains unexplained. There was then a further substantial delay until a decision was made on 1 August 2011. I have certainly not been satisfied on the basis of the evidence adduced in this case that there was any pressing need for its disclosure to third parties.

[72] It follows that the decision to retain and to disclose that information about A to parents of children with whom A had contact clearly breached A's Article 8 rights. This disclosure was neither lawful nor proportionate. There was no pressing need for disclosure.

CONCLUSIONS

[73] On the basis of the evidence and the relevant legal principles I have reached the following conclusions:

(i) The Department had the necessary statutory power to issue guidance about the retention and disclosure of information relating to the risk of sexual abuse of children posed by un-adjudicated individuals.

(ii) The Circular produced by the Department was not an instruction which the Trust had to follow but a guide to assist the Trust.

(iii) As a guide for the Trust the Circular was inadequate in a number of different ways:

(a) It was confusing and contradictory about what had to be established on the balance of probabilities before the Trust could retain and/or share information with third parties about the risk posed by un-adjudicated individuals to children. The Circular should have clearly separated the procedure of assessing the evidence which required proof on the balance of probabilities and the process of then determining on that evidence whether there was "a serious risk" of significant harm being caused to a child. The advice about reasonable concern from more than one source or a serious concern from one source served only to confuse the Trust. It makes much better sense for the Trust to have been advised that it first had to find facts on the balance of probabilities before deciding whether on the basis of those facts it had found that there was a serious risk of serious harm being caused to a child or children by the un-adjudicated individual. Lady Hale's advice at paragraph 5 of her judgment in Re A should always be followed.

(b) It did not make clear expressly that a fair adjudication process had to take place before a decision was made to retain or disclose such information.

(c) It did not give any guidance as to what protection should be in place to ensure that the adjudication process was fair to all those involved.

(d) It did not advise that reasons should be given for any decision to retain and/or share such information.

(e) It did not give guidance as to the desirability of giving a disappointed un-adjudicated individual the right of appeal to an independent appeal body from the decision to retain and/or share confidential information.

(iv) The decision reached by the Trust was irrational in the Wednesbury sense. There was no evidence capable of permitting the Trust to have concluded A was guilty of sexually abusing his sister S and accordingly that he posed a serious or real risk that he would cause significant harm to his sibling's children.

(v) The decision to retain and share information relating to the applicant was a breach of his Article 8 right. There was no pressing need to disclose such evidence.

(vi) The Trust was guilty of procedural impropriety in that they did not put the applicant on notice of what case he had to meet, it did not give him the opportunity to be heard and it appeared to have reached a conclusion against the applicant before he had the opportunity of making his representations.

[74] I will hear the parties on the issue of what is the appropriate relief, given the conclusions which I have reached.