

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 149  
[2021 276 JR]

**BETWEEN**

**J.M. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND G.M.)**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA THE DIRECTOR OF THE JUVENILE  
DIVERSION PROGRAMME**

**RESPONDENTS**

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021 688 JR]

**BETWEEN**

**D.H. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND F.H.)**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA THE DIRECTOR OF THE JUVENILE  
DIVERSION PROGRAMME**

**RESPONDENTS**

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021 695 JR]

**BETWEEN**

**L.B. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND C.B.)**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA THE DIRECTOR OF THE JUVENILE  
DIVERSION PROGRAMME**

**RESPONDENTS**

**THE HIGH COURT  
JUDICIAL REVIEW**

2021 692 JR]

**BETWEEN**

**R.G. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND K.G.)**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA THE DIRECTOR OF THE JUVENILE  
DIVERSION PROGRAMME**

**RESPONDENT**

**JUDGMENT of Mr. Justice Mark Heslin delivered on the 1st day of February, 2022**

**Introduction**

1. Four applications seeking judicial review came before the court for hearing on 14 January 2022. Given the age of two of the applicants, the Court was asked to expedite delivery of this judgment. This has been done, although a consequence of same may well be the inclusion of repetition which might otherwise have been dealt with, had the parties not been so anxious, for understandable reasons, to obtain judgment at the earliest opportunity.

2. Although the individual facts are somewhat different, similar arguments are made in applications which relate to the proper interpretation of s. 23 (1) (a) of the Children Act 2001 ("the 2001 Act") which states: -

*"(1) A child may be admitted to the Programme if he or she—*

*(a) accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her . . .".*

### **The Juvenile Diversion Programme and its objective**

3. The "Programme" referred to is the Juvenile Diversion Programme which is provided for by Part 4 of the 2001 Act. Section 19 of the 2001 Act clearly sets out the objective of the Programme in the following terms: -

*"(1) The objective of the Programme is to divert from committing further offences any child who accepts responsibility for his or her criminal or anti – social behaviour from committing further offences or engaging in further anti – social behaviour.*

*(2) The objective shall be achieved primarily by administering a caution to such a child and, where appropriate, by placing him or her under the supervision of a juvenile liaison officer and by convening a conference to be attended by the child, family members and other concerned persons".*

I will presently look at more detail at further provisions in the 2001 Act as regards the Diversion Programme.

### **An outline of the applicants' cases**

4. At the hearing, the first three applicants were represented by Mr. Colman Cody SC, the fourth applicant was represented by Mr. Michael Delaney SC and Mr. Shane Murphy SC represented the respondents. I am very grateful to counsel for the written submissions which were provided to the court and for the oral submissions made with great clarity and skill by the respective counsel at the hearing. I have carefully considered all submissions made and will refer during the course of this judgment to the principal submissions. For present purposes it may be useful to set out, in summary, several of the main arguments.
5. Although there was a somewhat different approach adopted on behalf of the fourth named applicant, it was contended on behalf of all that the proper interpretation of s. 23 (1) (a) is to entitle the applicants and their legal advisors to be provided with all material contained in the Garda investigation file. The respondents submit that no such entitlement arises.
6. On behalf of the first three applicants it is submitted that to accept responsibility for criminal or antisocial behaviour is a condition precedent for the operation of the Diversion Programme. That being so, it is submitted that to admit responsibility for criminal behaviour is analogous to making a guilty plea in the context of criminal proceedings. It is also submitted that the applicants are unequivocally part of a trial process and should be

afforded the Constitutional protection of a trial in due course of law. It is submitted that the refusal to provide materials sought means that the rights of the applicants to be legally advised under s. 23 (1) (a) of the 2001 Act have been rendered meaningless. I will presently look in more detail at specific submissions made on behalf of the first three applicants.

7. Although the fourth applicant seeks the same relief as the first three, the mainstay of the fourth named applicant's argument concerns the right to fair procedures. Although, like the first three applicants, the fourth contends that the proper interpretation of s. 23 (1) (a) of the 2001 Act is that the applicant has a right to be provided with the material sought, it is also argued, with reliance on Article 38.1 of Bunreacht na hÉireann - which, of course, concerns the right to a trial in due course of law - that the applicant is entitled to the right to be provided with the material on the Garda investigation file, even if such a right is not found in s. 23.
8. The respondents argue that, properly interpreted, s. 23 of the 2001 Act does not confer on the applicants any right to be provided with the materials contained in the Garda investigation file. The respondents argue that the applicants' entitlement to legal advice is not rendered meaningless as a result of the applicants and their respective legal advisors not having sight of all such material contained in the Garda investigation file as they might deem necessary in the context of the provision of legal advice. As well as pointing to the fact that certain materials have already been provided to the respective applicants during their Garda interviews where their respective solicitors were present, the respondents submit that the provision of legal advice, per s. 23 (1) (a) of the 2001 Act with respect to the Juvenile Diversion Programme, is not a mechanism for the applicants and their solicitors to enable disclosure of all material in the Garda investigation file as the applicants or their solicitors may deem necessary, before any such file has even been transferred to the DPP and before any prosecutorial decision has been made. Such a right, submits the respondents, is not provided for in the relevant section and cannot be read into the section on a literal interpretation of same. It is also submitted that if a purposive approach is taken to interpretation, s. 19 of the 2001 Act makes clear that the entire objective of the Programme is "to divert any child who accepts responsibility for his or her criminal or anti – social behaviour from committing further offences or engaging in further anti – social behaviour". It is submitted that the object of the Programme, which carries out up to 20,000 Diversions in each year, is to divert children away from the criminal justice system. The submission is made by the respondents that a child who accepts criminal responsibility is not admitted to the Programme, it simply makes that child eligible for consideration for admission to the Programme. The respondents contend that no breach of fair procedures has occurred and that the applicants are not entitled to the reliefs sought.
9. In moving the application on behalf of the first three applicants, the focus, for the sake of efficiency, was on one set of pleadings, given that similar relief is sought by all applicants.

### **Relief sought**

10. The relief sought in the J.M. case, as can be seen from para. D of the statement of grounds dated 6 April 2021, is in the following terms: -
- "(1) A declaration that the respondents are required by law to disclose to the applicant's solicitor, all such material contained in the Garda investigation file concerning an allegation of rape and sexual assault against the applicant, as may be necessary to enable him to obtain proper legal advice for the purpose of Section 23 (1) (a) of the Children Act, 2001.*
- (2) An injunction directing the respondent to disclose to the applicant's solicitor the material on the Garda investigation file identified in para. 1 above.*
- (3) Such further or other relief as to this Honourable Court shall seem appropriate.*
- (4) The costs of these proceedings".*
11. The relief sought in the D.H. proceedings is in identical terms as can be seen from para. D of the relevant statement of grounds dated 14 July 2021.
12. The essential relief sought in the L.B. case is similar but not the same and it is appropriate to set out the relief claimed at para. (D) in the amended statement of grounds as filed on 30 July 2021 in the L.B. matter: -
- "(5) A declaration that the respondents are required by law to disclose to the applicant's solicitor, all such material contained in the Garda investigation file concerning allegations of a sexual nature including Section 4 rape as against the applicant as may be necessary to enable him to obtain proper legal advice for the purpose of s. 23 (1) (a) of the Children Act 2001.*
- (6) An injunction directing the respondent to disclose to the applicant's solicitor the material on the Garda investigation file identified in para. 1 above.*
- (7) An injunction prohibiting any further steps being taken in the Garda Diversion Programme pending the receipt of the relevant material and the provision of appropriate legal advice.*
- (8) An injunction restraining admission to the said Programme pending receipt of the relevant material and the provision of appropriate legal advice.*
- (9) Such further or other relief as to this Honourable Court shall seem appropriate.*
- (10) The costs of these proceedings".*
13. The relief sought in the R.G. case is in similar terms to that which is sought in the J.M. and D.H. matters.

**Factual background (J.M.)**

14. J.M. is a minor, born in 2004. On 9 November 2020, J.M. was arrested and interviewed on suspicion of rape in respect of a certain alleged incident involving a female child who was fourteen years of age or thereabouts at the alleged time. The child in question was the applicant's girlfriend at the time. In the course of the interview, extracts only from the complainant's specialist interview were put to the applicant. The applicant answered certain questions but in relation to the incident, he referred to his prepared statement in the most part, in which he admitted that sexual intercourse occurred but maintained that it was consensual at all times. On or about 20 January 2021, Gda. Paul Buckley, in his capacity as Juvenile Liaison Officer ("JLO") contacted the applicant's father and advised him that the applicant was being considered for inclusion in the Juvenile Diversion Programme, in respect of the alleged incident. To be considered for inclusion, the applicant would have to accept responsibility for his criminal behaviour with an admission of guilt to the offence of rape. The applicant sought legal advice in respect of same.

**The request made on behalf of J.M.**

15. On 16 February 2021, Messrs Tarrant & Tarrant solicitors for J.M. wrote to the JLO, Gda. Paul Buckley, making a request for documentation in the following terms: -

*"We act for J.M. (date of birth ...) who presented at [NAMED] Garda Station by arrangement and was interviewed by Gardai on the 9th November 2020. This interview was in relation to an allegation of rape allegedly perpetrated by our client on [a named individual] on the 10th day of August 2019.*

*We understand from the recent telephone conversations with you and also with our client's parents that you have been in direct contact with our client and/or his parents with a view to considering him for the Diversion Programme under the Childcare Act 2001. As you are aware, pursuant to s. 23 (1) of the Act, entitled "Admission to Programme", it specifically states at s. 23 (1) (a) that the criteria for admission to the Programme is that the child: -*

*"(a) accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her".*

*We are now formally writing to you and would be obliged if you would please confirm the following that: -*

*(1) The Director of Public Prosecutions has consented to our client's potential engagement in the Diversion Programme;*

*(2) The complainant's parents have also consented; and,*

*(3) You will furnish us with the following documentation so that we may be able to adequately advise our client in respect of the allegations made against him: -*

- (i) *Copy of the interview conducted with and/or copies of the statement taken from the child complainant [individual named];*
- (ii) *Copies of all statements made by the child complainant's family and any other witness and/or person questioned in respect of the investigation, whether the statements are to be relied upon or not, in their original unedited form;*
- (iii) *Copies of all Garda notebook entries in printed and handwritten form, whether they are to be relied upon or not;*
- (iv) *Copies of all Garda statements, both in their typed and handwritten form, whether they are being relied upon or not;*
- (v) *Copies of any medical evidence and/or medical records in respect of the complainant.*

*We await hearing from you as a matter of urgency before we are in a position to advise our client in respect of this matter".*

16. Before proceeding further, it seems appropriate to note that this was a request made in very broad terms for a wide range of documents including statements irrespective of "whether the statements are to be relied upon or not". A second observation which seems appropriate to make at this stage is that J.M.'s solicitors plainly took the view that all the documentation which they sought on behalf of the applicant was necessary, as they saw it, for them to be in a position to "adequately advise" their client. The foregoing seems to me to involve a subjective assessment on the part of the applicant's solicitor as to what was required in their view. To put it another way, it is conceivable that a different firm of solicitors might take the view that a *different* list of documents was necessary for them to be in a position to provide adequate advice. Indeed, it seems entirely conceivable, in principle, that a different firm might feel able to provide legal advice, in particular as regards the significance of s. 23 and the Programme, without having sight of *anything* on the list of material detailed in the 16 February 2021, i.e. based on the information already known to the applicant and their solicitor as a result of having attended the interview under caution.
17. On 16 February 2021, Gda. Buckley indicated that "*as the Juvenile Liaison Officer I am not in a position to furnish any statements, reports etc. in relation to this or any investigation*", and he suggested that the request for documents be forwarded through the relevant superintendent's office for his attention and that of the investigating garda.
18. On 10 March 2021 the relevant Superintendent responded to the 16 February 2021 request by writing to J.M.'s solicitors in the following terms: -

*"A Chara,*

*With reference to the above and your correspondence dated 16th February 2021, I wish to advise that this matter is still under investigation and An Garda Síochána cannot voluntarily discover the material and/or information sought in circumstances where it is generated during the course of a criminal investigation.*

*In relation to the Youth Diversion Programme, the aim of the Diversion Programme is to prevent young people between the ages of 12 and 18 years of age from entering into the Criminal Justice system.*

*When a young person comes to the attention of An Garda Síochána because of their alleged criminal or anti – social behaviour, they are required by law (s. 18 of the Children Act 2001) to be first considered for the Diversion Programme. In order to be considered for inclusion in the Diversion Programme, the young person must be under 18 years of age, accept responsibility for the offending behaviour, agree to be cautioned and, where appropriate, agree to the terms of supervision.*

*The director's decision on whether or not to admit a young person to the Diversion Programme is based on a number of factors, such as the nature of the offence, the impact of the offence on the community, the views of the victim, and the offending history of the young person.*

*If a child is deemed suitable for inclusion in the Diversion Programme, a JLO will be assigned to the child and they will administer a caution to the child. A caution may include a period of supervision where the JLO will continuously monitor the child's progress in line with the plan they have agreed upon to reduce the likelihood of the child reoffending.*

*In addition, where other needs are identified, the young person may be referred to a Garda Youth Diversion Project (if one is available in their area) or other clubs or project in their community.*

*If a child is deemed unsuitable for admission to the Diversion Programme, and again based on a number factors, such as the nature of the offence, a file may then be submitted to the Director of Public Prosecutions for directions.*

*Information in relation to the Youth Diversion Programme is available on [www.garda.ie](http://www.garda.ie)”.*

**Affidavit sworn by the applicant's father**

19. It is not necessary to refer in this judgment to every averment made in the various affidavits exchanged. I have, however, carefully considered all averments and exhibits and it seems appropriate to make reference to certain averments, as follows. In an affidavit sworn on 6 April 2021 J.M.'s father avers, at para. 5 that, prior to his arrest, J.M., his mother and his father had consulted with Ms. Yvonne Dunne solicitor in respect of the allegation. The foregoing seems to me to constitute evidence that the applicant in fact consulted with his parents and obtained legal advice and there was no impediment to so doing. This is further underlined by the averment made at para. 6, wherein J.M.'s father goes on to make the following averment with regard to the interview on 9 November 2020 by An Garda Síochána:

*"6. In the course of the said interview, certain material from the Garda investigation file, including selected extracts from the statement of the*

*complainant, were put to the applicant. My son answered certain questions but in relation to the incident he referred to his prepared statement for the most part in which he admitted that sexual intercourse occurred but maintained that it was consensual at all times. I was present during the interview, as was his solicitor, Yvonne Dunne. I beg to refer to a copy of the said statement . . ."*

#### **Statement of opposition**

20. Para. 20 of the respondent's statement of opposition dated 11 October 2021 makes clear that the two grounds upon which the respondents oppose the relief sought are as follows:

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- (i) *There is no basis to support the applicant's interpretation of s. 23 of the Children Act 2001.*
- (ii) *The substance of the material relied upon by the Decision maker to determine the applicant's eligibility for consideration for inclusion in the Garda Juvenile Diversion Programme has already been viewed by the applicant, his solicitor and his parent, and is known by him.*

21. Para. 26 goes on to refer to the interview of J.M. under caution on 9 November 2020 when he was questioned in the presence of his solicitor and father. Para. 27 pleads that the substance of the material relied upon by the decision maker to determine J.M.'s eligibility for consideration for inclusion in the Garda Juvenile Diversion Programme has already been put to him, his solicitor and his parent and is known by the applicant.

#### **Memo of interview under caution**

22. A verifying affidavit was sworn by Insp. Sylvester Hipwell on 5 October 2021 and the exhibit to that affidavit comprises a 3 – page statement of J.M. as well as a document comprising a "*Memo of interview of J.M.*" with respect to the interview on 9 November 2020, which records questions put and answers given. The typed memo concludes with a statement that it is a true reflection of the interview and the signature of J.M. is noted, the witnesses being named as J.M.'s father and Garda Aoife O'Gorman.

#### **Affidavit by J.M.'s solicitor**

23. Ms. Yvonne Dunne, solicitor for J.M., swore an affidavit on 17 December 2021 averring that Insp. Hipwell was not present during the interview conducted on 9 November 2020 and, therefore, cannot aver as to the details of what materials were put to the applicant in the course of his questioning. She avers at para. 4 of her affidavit that "*only a certain part of the specialist interview transcript was put to the applicant*". In relation to the averment made at para. 3 of Insp. Hipwell's affidavit to the effect that the applicant was offered the opportunity to hear, in full, two witness statements but elected not to hear same, she avers that the relevant question was put to the applicant in the following way:

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*"Q. They also made statements which will be included in the file. I can read them if you want. Would you prefer if I didn't?"*



A. Ye.”

24. Ms. Dunne goes on to aver that these were statements taken from friends of the complainant, neither of whom were present and/or witnessed the alleged incident and she goes on to aver that *“I could not therefore properly advise whether same amount, for example, to recent complaint were consistent with the complainant’s statement or the precise nature of said evidence”*.
25. At para. 6 she avers that given the lack of context in respect of the extracts from the complainant’s statement that were put to the applicant, she *“could not comment on the admissibility or otherwise of the evidence”* to enable her to provide *“full and proper legal advice to the applicant”*.
26. At para. 8, Ms. Dunne avers that she was never shown any material from the Garda investigation file, nor was the applicant and she avers that *“. . . only extracts from the complainant’s statement were put to the applicant”* and she avers *inter alia* as to *“the difficulties this has created in being able to appropriately advise the applicant”*.

**Certain comments given that no charges have been proffered**

27. At this juncture it seems appropriate to make a number of comments. It is common case that none of the applicants have been charged with any criminal offence. It is not suggested on behalf of any of the applicants that if, at some future point, they are ever charged with a criminal offence, they will be afforded anything *less* than the full panoply of fair procedures and rights consistent with statutory, constitutional and natural justice provisions. Furthermore, in the context of an accused facing charges, advice as to the *‘admissibility’* or otherwise of evidence touching on the relevant charge would clearly be of central importance. As a matter of fact, however, no charges have been put, and as matters stand it remains to be seen whether or not any criminal charges will ever be proffered.

**Certain facts which emerge from the evidence (JM)**

28. In my view there are a number of fundamentally important facts which emerge from an analysis of the evidence which is before the court in the J.M. case. Firstly, J.M. was undoubtedly made aware that a named individual had made allegations of rape against him. It is a fact that he was cautioned and informed that he was not obliged to say anything unless he wished to do so, but whatever he did say would be taken down in writing and may be given in evidence. J.M. was also made aware of the date the allegations relate to. All the foregoing is clear from a reading of a memo of interview under caution conducted on 9 November, 2020 and the 3-page written statement signed by J.M., dated 6 November 2020, which he appears to have prepared in advance of his interview by the Gardai. It is also clear from the affidavit sworn by J.M.’s father that his parents were aware that he was arrested and interviewed on suspicion of rape and are aware of the identity of the complainant. Similar comments apply with regard to J.M.’s solicitor who also avers *inter alia* that a certain part of the specialist interview transcript concerning the complainant was put to the applicant. In short, and despite not having

the material from the Garda Investigation file to which a right is asserted, there is no question of J.M., his parents or his solicitor not knowing;

- (a) the nature of the allegedly criminal behaviour;
- (b) when this is alleged to have occurred;
- (c) where it is alleged to have taken place; and
- (d) the identity of the person who makes the complaint against J.M.

I now turn to look at the factual background in respect of the second applicant, L.B.

**Factual background (L.B.)**

29. The applicant was born in 2004 and is a minor. On 21 September 2020, the applicant was arrested and interviewed on suspicion of s. 4 rape in respect of a certain alleged incident involving a male child, who was thirteen years old or thereabouts at the alleged time, over a period of two years. The child in question is the applicant's first cousin. Prior to his arrest, the applicant had prepared a statement. At para. 5 of her affidavit sworn on 19 July 2021, the applicant's mother avers that, prior to L.B.'s arrest, she and the applicant consulted with Mr. David Tarrant Solicitor of Tarrant & Tarrant in respect of the allegations. The applicant's mother was not present during his interview on 21 September 2020 but his solicitor, Ms. Yvonne Dunne of Tarrant & Tarrant Solicitors, was present during that interview. A copy of the typed statement of L.B. comprises exhibit "YD1" to Ms. Dunne's affidavit sworn 19 July 2021.
30. Exhibit "SH1" to the affidavit of Inspector Sylvester Hipwell, sworn 8 November 2021, comprises a copy of the typed memo of interview of L.B. It notes that L.B. was cautioned by Garda Aoife O'Gorman in the following terms: "*You are not obliged to say anything unless you wish to do so but whatever you do say will be taken down in writing and may be given in evidence. As you are aware this interview is being recorded and the DVD may be used in evidence.*" The memo notes *inter alia* that L.B. confirmed that he was aware of the reason for his arrest and understood the caution.
31. It is also clear from the contents of this memo that during the interview in the presence of his solicitor, L.B. was made aware of (a) the nature of the alleged criminal behaviour; (c) when the alleged criminal activity is said to have taken place; and (c) the identity of the person making the allegations against L.B. It is clear from the memo of the interview that a range of questions were put to L.B. in relation to the alleged criminal behaviour. In the course of the said interview extracts only from the complainant's statement were put to the applicant who answered certain questions but, in relation to the alleged incidents of rape, he at all times denied the allegations made against him.
32. In her affidavit sworn on 19 July 2021, Ms. Dunne, solicitor, who was present throughout the interview of L.B. under caution, makes averments including that "*D/Garda Hayes chose to sit to the side of the desk rather than behind it, meaning he was closer to the applicant when asking him questions.*" She goes on to make averments to the effect that

this, and leaning forward and staring at the applicant, constituted intimidating and inappropriate interview tactics.

33. At the beginning of January 2021, Garda Paul Buckley, in his capacity as JLO, contacted the applicant's mother and advised her that L.B. was being considered for inclusion in the Juvenile Diversion Programme in respect of the alleged incidents, but that the applicant would have to accept responsibility for his criminal behaviour to be considered for inclusion in the programme.
34. Garda Buckley spoke by phone with Ms. Dunne, solicitor, on 29 January 2021 and again on 10 February 2021. Ms. Dunne informed Garda Buckley that the applicant would not be attending a meeting until she obtained further information in relation to the allegations made against him and further information about the case.
35. By letter dated 22 February 2021, Ms. Dunne wrote to the Superintendent at the relevant garda station by email, copying Garda Buckley, JLO. A request was made for a copy of the statement of the complainant together with any other relevant statements in the following terms:-

*"We act for L.B. who presented at [NAMED] Garda Station by arrangement and was interviewed by Gardai on the 21st September 2020. This interview was in relation to an allegation of sexual assault by our client on [a named complainant].*

*We understand that Mr Paul Buckley JLO has been in direct contact with Ms G, our client's mother with a view to considering him for the Diversion Programme under the Childcare Act 2001.*

*As you are aware, pursuant to s. 23 (1) of the Act, entitled "Admission to Programme", it specifically states at s. 23 (1) (a) that the criteria for admission to the Programme is that the child:*

*"(a) accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her".*

*We are now formally writing to you and would be obliged if you would please confirm the following, that: -*

- (1) The Director of Public Prosecutions has consented to our client's potential engagement in the Diversion Programme;*
- (2) The complainant's parents have also consented; and*
- (3) You will furnish us with the following documentation so that we may be able to adequately advise our client in respect of the allegations made against him: -*

- i. *DVD and copy of the interview transcripts and copies of the statements taken from the child complainant [individual named];*
- ii. *Copies of all statements made by the child complainant's family and any other witness and/or person questioned in respect of the investigation, whether the statements are to be relied upon or not, in their original unedited form;*
- iii. *Copies of all Garda notebook entries in printed and handwritten form, whether they are to be relied upon or not;*
- iv. *Copies of all Garda statements, both in their typed and hand written form, whether they are being relied upon or not;*
- v. *Copies of any medical evidence and/or medical records in respect of the complainant.*

*We await hearing from you as a matter of urgency before we are in a position to advise our client in respect of this matter”.*

As can be seen from the foregoing, the request in the L.B. case was very similar in its terms and scope to the request which was made in the J.M. case.

36. The 10 March 2021 response which was made to Messrs. Tarrant & Tarrant by the relevant Superintendent was also in similar terms to the response (also of 10 March 2021) in the J.M. case which I quoted *verbatim* earlier in this judgment. In essence, in addition to providing details in relation to the aim, qualifying requirements and nature of the Diversion Programme, the relevant Superintendent stated *inter alia*:- *“I wish to advise that this matter is still under investigation and An Garda Síochána cannot voluntarily discover the material and/or information sought in circumstances where it is generated during the course of a criminal investigation.”* As is the position in the J.M. case, no charges have been proffered against L.B.
37. At para. 10 of her affidavit sworn on 19 July 2020, the applicant's mother makes the following averments:

*“10. I say that in or around the middle of March, I contacted Garda Aoife O’Gorman of Enniscorthy Garda Station to get an update in relation to the status of the case. I was informed that the case could not progress as we had not yet signed the form to ascertain whether L. would be a suitable candidate for the Juvenile Diversion Programme. She informed me in the strongest terms that it would have to be signed, that not signing the form was unduly delaying matters and that if it wasn’t signed now it would have to be signed in court either way. I felt very pressured to sign the form and was given the impression that I had no choice but to sign it. I didn’t want to delay the case as my son L. is still a juvenile and I very much wanted the matter dealt with whilst he still is a juvenile, so I agreed to sign the form. Further, I say that at no point during this conversation was I informed*

*that I should discuss same with my solicitor. Garda O’Gorman informed me that she would have Garda Buckley, the JLO, would be in contact with me.”*

38. The applicant’s mother goes on to aver that Gda. Buckley contacted her towards the end of March 2021 and she makes averments in relation to their conversation; averring that Gda. Buckley expressed himself unaware of the previous conversation between the applicant’s mother and Gda. O’Gorman; and that Gda. Buckley asked if the applicant’s mother was okay to sign the form without a solicitor present. The applicant’s mother avers *inter alia* that she was not asked whether she had discussed the matter with her solicitor or that she was entitled to seek advice prior to signing the relevant form and she goes avers that she found the process very stressful and did not understand it.
39. In her 19 July 2021, affidavit Ms. Dunne makes averments to the effect that she became aware of the foregoing in June 2021 and she exhibits correspondence which was exchanged between her office and the relevant Superintendent in relation to the issue. It seems to me that there is a clear conflict of fact which this court cannot possibly determine, given the following. In correspondence from An Garda Síochána dated 18 June 2021 it is stated *inter alia* that “*Garda O’Gorman explained the entire process including the JLO involvement with this case. Ms. G. then made contact with Garda Buckley, JLO, and was advised a number of times by Garda Buckley to speak with her solicitor. He then met with and engaged with Ms. G. and her son L.*” The applicant denies the foregoing and this conflict of fact is not one this court can resolve. However, it does not seem to me that the resolution of this conflict of fact is essential in order to determine the core questions which arise in the present proceedings which concern the extent of the rights asserted by L.B. to documentation and information from the Garda Investigation file in light of what the applicant contends is the proper interpretation of s. 23(1)(a) against the backdrop of constitutionally protected fair procedures rights.
40. The statement of opposition is in similar terms to that in the *J.M.* case and the legal grounds for opposing L.B.’s application are the same, namely, (i) the substance of the material relied upon by the decision maker to determine the applicant’s eligibility for consideration for inclusion in the diversion programme is known by the applicant, his solicitor and his parent and; (ii) there is no basis to support the applicant’s interpretation of s. 23 of the 2001 Act. As to the first of these grounds, reference is made to the 21 September, 2020 interview of the applicant by An Garda Síochána, under caution, following his arrest, which interview took place in the presence of the applicant’s solicitor and it is pleaded *inter alia* that “*the statement by the complainant involving the material substance to the allegations made by the alleged victim were put to the Applicant*”.
41. As I have previously observed, it is entirely fair to say that the applicant, his mother and his solicitor were made fully aware that a named individual, known to the applicant, had made an allegation of rape. The applicant, his mother and solicitor were made aware of when the complainant disclosed the allegation. They were also made aware of when the alleged criminal behaviour is said to have taken place (namely over a two year period from late 2016 until 2019). A range of very specific questions were also put in respect of

a range of specific allegations. In other words, there is no question of the applicant, his mother or his solicitor being unaware of the nature of the alleged criminal behaviour; the identity of the alleged victim; the period of time during which the alleged behaviour is said to have occurred; and the applicant's alleged role, according to the complainant. This can all be seen from the exhibited memo of the interview under caution, which was conducted on 21 September 2020.

42. The second of the exhibits to Superintendent Hipwell's affidavit comprises an undated form bearing what is stated to be the signature of L.B. and the signature of his mother, which form includes a pre-printed question "*Is the child accepting responsibility for this incident and the offences referred?*" below which there is a 'box' next to the word "NO" which has been 'ticked'. At para. 5 of his affidavit, Inspector Hipwell makes the following averment with regard to this form:

*"5. I say and am advised that on the 12th of April 2021, the applicant and his mother arrived at [a named] Garda Station where the applicant and his mother signed their names on a document acknowledging that the child was not accepting responsibility for the incident and the offences referred."*

43. In a supplemental affidavit sworn by Ms. Dunne on 17 December 2021 she points out that Inspector Hipwell was not present when L.B. was interviewed under caution, whereas she was. She avers *inter alia* that no extracts from the complainant's statement were read out or put to the applicant and his specific comments in respect thereof were not sought. However, she does acknowledge the existence of the complainant's statement and acknowledges that it was referred to during the interview. As I have previously observed, the nature and essential details of the complaint were certainly put to the applicant in the presence of his solicitor as the memo of the interview indicates.

#### **Admissibility**

44. Ms. Dunne goes on to aver *inter alia* that "... given the lack of context in respect of the extracts that were put to the Applicant, I could not comment on the admissibility or otherwise of the evidence to enable me to provide full and proper legal advice to the applicant". Echoing comments which I made earlier in this judgment when looking at the facts in respect of the application by J.M., the question of the *admissibility* of evidence is plainly a crucial one in the context of an accused against whom charges have been proffered. The position in respect of all four applicants, including L.B., is that no charges have been made and it remains to be seen whether or not charges will ever be put to any or all of them. The question of admission to the Diversion Programme and the decision which a child has to make pursuant to s. 23(1)(a) arises *ante* the proffering of formal criminal charges. An acceptance of responsibility for criminal behaviour and a decision to admit a child to the programme will mean that criminal charges are not brought and, thus, the question of admissibility of evidence will simply not arise.
45. In her affidavit, Ms. Dunne goes on to aver that she was never shown any material from the Garda investigation file, nor was the applicant. Ms. Dunne also avers that a statement from the complainant's SNA teacher and a statement from his school principal

were read out too quickly to allow for the taking of meaningful notes and she avers that in the absence of being shown these statements, she cannot say whether the entirety of each statement was put to the applicant.

**Text of letter from Tarrant & Tarrant dated 22 February, 2021 (LB)**

46. The letter from Tarrant & Tarrant to the relevant garda superintendent dated 22 February, 2021 in the LB case was written in similar terms to that firm's letter to Garda Paul Buckley (JLO) in the JM case. For the sake of completeness, the request made on behalf of LB in the 22 February, 2021 letter was as follows: -

*"Dear Superintendent,*

*We act for LB who presented at [named] garda station by arrangement and was interviewed by gardaí on the 21st September, 2020. This interview was in relation to an allegation of sexual assault by our client on [complainant identified].*

*We understand that Mr. Paul Buckley JLO has been in direct contact with Ms. G, our client's mother, with a view to considering him for the Diversion Programme under the Child Care Act 2001.*

*As you are aware, pursuant to s.23(1) of the Act, entitled "Admission to Programme", it specifically states at s.23(1)(a) that the criteria for admission to the programme is that the child: '(a) accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her'.*

*We are now formally writing to you and would be obliged if you would please confirm the following, that: -*

- (1) The Director of Public Prosecutions has consented to our client's potential engagement in the Diversion Programme;*
- (2) the complainant's parents have also consented; and*
- (3) you will furnish us with the following documentation so that we may be able to adequately advise our client in respect of the allegations made against him:*
  - (i) DVD and copy of the interview transcripts and copies of the statements taken from the child complainant [name given];*
  - (ii) copies of all statements made by the child complaint's family and any other witness and/or person questioned in respect of the investigation, whether the statements are to be relied upon or not in their original unedited form;*
  - (iii) copies of all garda notebook entries in printed and handwritten form, whether they are to be relied upon or not;*

- (iv) copies of all garda statements, both in their typed and handwritten form, whether they are being relied upon or not;
- (v) copies of any medical evidence and/or medical records in respect of the complainant.

*We await hearing from you as a matter of urgency before we are in a position to advise our client in respect of this matter”.*

Again, it is fair to say that the request was very broadly drawn and for a wide-range of materials, including copy statements “*whether the statements are to be relied upon or not*”. I now turn to look at the factual background in respect of the third applicant, DH.

#### **Factual background (DH)**

47. The applicant was born in 2005 and is a minor. On 22 February 2021, the applicant was arrested and interviewed on suspicion of rape in respect of a certain alleged incident involving a female child who was 14 years old or thereabouts at the alleged time. On or about 4 November, 2020, two members of An Garda Síochána called to the applicant’s home and spoke to his mother. They asked for DH’s mobile phone and the clothing that he was wearing on the night the incident was alleged to have taken place. These were provided and DH’s parents contacted a Mr. Tim Cummings Solicitor of Messrs Kirwan & Kirwan in relation to the matter.

48. On 16 February, 2021 Mr. Cummings wrote to An Garda Síochána prior to the arrest and interview of DH which letter stated *inter alia*: -

*“In order to assist us in advising our client who is a minor would you please provide the following details: -*

- (1) *The exact nature of the allegation(s) being made.*
- (2) *Time, date and location of the alleged incident.*
- (3) *Any other information including Statements taken to be put to our client at interview which will assist us in advising him.*

*As you aware our client is 15 years old and will be attending the interview with one of his parents who we are also advising in relation to the matter.”*

49. In a reply by email dated 19 February, 2021, a Garda Ryan on behalf of the relevant superintendent stated *inter alia*: -

*“DH is to be arrested for the offence section 2 Criminal Law (Rape) Act 1981 on the 1st of November 2020 at [name of location given].”*

50. On 22nd February 2021 DH was arrested by appointment on suspicion of rape and was interviewed over the course of two interviews. He chose to exercise his constitutional right to remain silent. A range of questions were put to him including extracts from the complainant’s statement/child specialist interview.



51. On or about 11th March, 2021, Detective Garda Alan Byrne, in his capacity as JLO, contacted the applicant's father and advised him that the applicant was being considered for inclusion in the Juvenile Diversion Programme, in respect of the alleged incident, but that he would have to accept responsibility for his criminal behaviour with an admission of guilt to the offence of rape. The applicant sought legal advice.
52. By letter dated 31st March, 2021 Kirwan & Kirwan Solicitors wrote to Detective Garda Byrne in his capacity as JLO in the following terms:

*"We act for DH, date of birth [given] who was arrested and detained and interviewed at [named] garda station on 22nd February, 2021 and interviewed by Sergeant John Maher and Detective Garda Jamie Jordan.*

*This was in relation to allegations of rape perpetrated by our client on [complainant named] on 1st November, 2020.*

*We understand from our client that you have been in direct contact with our client with a view to considering him for the Diversion Programme under the Child Care Act of 2001. We understand our client attended at Wexford Garda Station with one or both parents at 7.30 on 11th March, 2021. We understand that there has been follow-up contact with our client's father.*

*As you are aware under s.23(1) entitled Admission to the Programme it specifically states at s.21(1)(a) the criteria for admission to the Programme which states as follows 'the child may be admitted to the Programme if he or she: -*

- (a) accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her.*

*As you are aware our Mr. Cummings, Solicitor has been in telephone contact with you regarding the matter and we are now formally writing to you.*

*We will be obliged if you would please confirm the following: -*

- (1) That the Director of Public Prosecutions has consented to our client's potential engagement in the Diversion Programme.*
- (2) The complainant's parents have also consented.*
- (3) That you will furnish us with the following documentation so that we may adequately advise our client in respect of the allegations made against him:*
- (i) Copy of the interview conducted with the child complainant.*
- (ii) A copy of all statements made by all members of the complainant's family whether they are to be relied upon or not both in typed and handwritten form.*

- (iii) *A copy of all Garda Notebook entries both in printed and handwritten form whether to be relied upon or not.*
- (iv) *Copy of all garda statements both in typed and handwritten form.*
- (v) *Any medical evidence and/or records of the complainant.*

*We await hearing from you as a matter of urgency in this regard before we are in a position to advise or client in respect of the matter."*

53. Once more, it is fair to say that the request was made in very broad terms indeed. It is also fair to say that, prior to making this request, the applicant, his parents and his solicitor were already well aware of (a) the alleged crime; (b) when and where the alleged criminal behaviour was said to have occurred; and (c) the identity of the complainant making the allegations against DH.
54. It is also clear that DH and his parents have had access to legal advice, should they wish to obtain same, with regard to the contents of the 2001 Act and the specific provisions of the Diversion Programme.
55. Certain correspondence took place in April and early May and on 20 May, 2021, the relevant superintendent wrote to Kirwan & Kirwan Solicitors in the following terms: -

*"In response to the question raised in the letter of 31st March, we note the following.*

- *The Director of Public Prosecutions ('DPP') has no statutory or non-statutory function in the consideration of the admission of an eligible person to the Juvenile Diversion Programme which is governed by the Children Act 2001 (as amended).*
- *The role of the victim is also specified in the Children Act 2001 (as amended).*
- *Much of the material sought has been brought to your client's attention in the interview on the 22nd February, 2021 which he attended alongside his father FH and solicitor Mr. Tim Cummings. At this stage of the process where your client is being considered for admission to the Juvenile Diversion Programme, the information sought will not be provided because they are part of an active criminal investigation, and the file will be submitted to the DPP if your client is not admitted to the programme.*

*I trust this clarifies your queries."*

56. Exhibit "GR1" to the affidavit sworn by Inspector Graham Rowley on 1 November, 2021 comprises a typed memo of the interview with DH which was taken at the relevant garda station on 22 February, 2021 by Detective Garda Jordan and Sergeant Maher in the presence of DH's father and solicitor. The memo notes the caution administered to DH and that he acknowledged same. According to the memo, DH understood his rights to legal advice and to consult with his solicitor and understood the reason for the interview.

Numerous questions were put during the interview, including with regard to DH's knowledge and contact with the complainant who was named. Specific questions are put from which, it is entirely fair to say, the nature of what is alleged to have occurred and where and when it is said to have occurred, were put to DH in the presence of his solicitor and father.

57. Similar comments apply in respect of the memo of a second interview which took place later on 22 February 2021, again, in the presence of DH's father and solicitor. The memo of the second interview refers to certain extracts from the complainant's statement having been read out. References are also made to others said to have been present and to *inter alia*, a video said to have been taken. The documents exhibited by Inspector Rowley refer *inter alia*, to the showing of a certain video during the interview.
58. In an affidavit sworn by Mr. Cummings, Solicitor on 17 December, 2021 he avers that Inspector Rowley was not present at the relevant interview. Mr. Cummings *avers inter alia*, that the complainant's statement was said to be 40 pages long and that "*of the 40 pages of statement, extracts were read from only 25 pages thereof*". He avers that he was not shown the complainant's statement and he goes on to aver that "*I say and believe that the applicant and I are strangers to the contents of the entirety of the statement and are unaware of whether same contain any potentially exculpatory evidence*". As well as averring that his note, while somewhat complete, could not be a complete note of exactly what was said he also avers that "*given the lack of context, I cannot comment on the admissibility of the evidence to an extent that I could give a legal opinion on same*".

#### **The 2001 Act and the issue of 'admissibility' of evidence**

59. Before proceeding further with a setting out of the facts in respect of the application made by DH, I note – as I did in respect of other applications – that it is clear from the foregoing averments by Mr. Cummings that a central topic, upon which he wishes to provide legal advice to the applicant and seeks the documents to facilitate same, is "*the admissibility of the evidence*". It is uncontroversial to say that nowhere in the Diversion Programme did the Oireachtas address the issue of the admissibility of evidence, be that in the context of the reference to legal advice which appears in s.23, or otherwise. Why this is so is clear from the aim of the Diversion Programme, namely to divert young people who qualify for entry away from a formal criminal trial process where questions of the admissibility of evidence would, of course, be fundamentally important.

#### **Materially different concepts**

60. To my mind, the concept of *admissibility of evidence* in the context of a criminal prosecution is materially different to the concept of the *admission of responsibility* for criminal behaviour. The former speaks to *proof* of criminality whereas the latter concept speaks to *acknowledgement* of responsibility. It is this latter concept which Part 4 of the 2001 Act is concerned with.

#### **Earlier stage**

61. Why this is so is because the process envisaged by Part 4 of the 2001 Act does not take place *after* criminal charges have been proffered, but at a significantly *earlier* stage where

suspected criminality is being investigated and a young person has an opportunity to make a choice which, if made, could result in no criminal charges ever being brought and, in that scenario, the question of admissibility of evidence never arising. Having made those observations, I will continue to look at what the solicitor for D.H. has averred in relation to his client's interview under caution.

62. At para. 6 of his affidavit Mr. Cummings avers *inter alia*, that statements by other witnesses were not shown to him or to the applicant and, while he took a relatively good note of the extracts, this is limited in parts given the lack of context. He also avers that it is not clear whether statements made by three named individuals amount to a recent complaint and he avers *inter alia*, "I am unable to advise my client on the admissibility or otherwise of same". He also avers that, having not had sight of the entire statements, he is unable to advise whether the statements are consistent or not with the allegations made by the complainant. Finally, Mr. Cummings avers at para. 7 of his affidavit that "it is correct that certain clips of CCTV were played to the applicant" but he goes on to aver that "it was impossible to tell who all of these people were and therefore I could not appropriately advise on the nature of this evidence".
63. Once more, the foregoing averments seem to relate to the strength or otherwise of a potential prosecution case and the question of how likely or not it might be that a criminal conviction might be secured, were charges to be proffered – issues such as admissibility of evidence being highly relevant in that regard. To make this observation is not for a moment to criticise. It is plain that the applicant's solicitor was acting at all times to protect his client's position and doing so thoroughly and appropriately. Similar comments apply in respect of the legal advisors to all four applicants.
64. It is uncontroversial to say, however, that nothing in Part 4 of the 2001 Act states or suggests that the 'legal advice' envisaged by the reference in s.23(1)(a) is legal advice concerning the strength of a potential future case which a child might have to face were charges in the future proffered. By contrast, legal advice as to what the Diversion Programme entails and what its provisions might mean for a child who is admitted to same is plainly something envisaged by s.23(1)(a). However, the admissibility of evidence and issues relating to proof to the criminal standard speak to different concepts than a young person's acceptance of responsibility for criminal or anti-social behaviour in the context of the provisions of the Diversion Programme. I now turn to look at certain facts in respect of the backdrop to the fourth application.

#### **Factual background RG**

65. The applicant was born in 2005 and is a minor. On 4 November 2020 members of An Garda Síochána called to RG's home in respect of an alleged incident of rape, alleged to have occurred in late 2020. Gardaí asked for the applicant's mobile phone and the clothes he was wearing on the night in question, which were provided to them by the applicant's parents. The applicant was questioned by the Gardaí for approximately ten minutes at his home. The applicant's mother sought legal advice.

66. On 6 November 2020 a member of An Garda Síochána contacted the applicant's mother by telephone requesting the password and "PIN" in relation to the applicant's mobile phone, which was provided. On 29 December 2020, the Family Liaison Officer appointed to the case, Garda Jamie Jordan, telephoned the applicant's mother to inform her that the applicant would be formally arrested and interviewed.
67. On 4 January 2021, the applicant was arrested by arrangement on suspicion of rape alleged to have been perpetrated against a child who was fourteen or thereabouts at the alleged time. The applicant was formally questioned over the course of two interviews conducted that day. The applicant's mother and his solicitor were present during both of those interviews.
68. During the said interview under caution, certain material from the garda investigation file was put to RG. This included *inter alia*, the following: -
- (a) The reading of a number of passages from the complainant's statement;
  - (b) the showing of certain excerpts from CCTV footage gathered in the course of the investigation;
  - (c) a video clip from a mobile phone;
  - (d) selected extracts from other witness statements;
  - (e) reference to a statement from Garda Brian Frost responsible for analysing the scene of the alleged crime and in particular certain fingerprints taken from the scene and damage to certain items;
  - (f) reference at the end of the interview to the complainant's referral to a sexual treatment unit ('SATU') and to the complainant having been medically examined.
69. All the foregoing is averred to in an affidavit sworn by KG's mother on 16 July 2021. She also avers that her son made no admissions in respect of the allegations put to him. On 24 January 2021, Detective Garda Alan Byrne, in his capacity as JLO, contacted RG's mother to inform her that the applicant would benefit from inclusion on the Juvenile Diversion Programme and he made an appointment for RG and his mother to meet with him to discuss the programme in more detail.
70. On 28 January Detective Garda Byrne contacted the applicant's solicitor, Ms. O'Hanlon, and spoke to her about the process involved in the Juvenile Diversion Programme. On 29 January 2021, RG and his mother attended the relevant Garda Station and were advised by Detective Garda Byrne that RG was being considered for inclusion in the Juvenile Diversion Programme in respect of the alleged incident, but that he would have to accept responsibility for his criminal behaviour in that regard, with an admission of guilt to the offence of rape, for inclusion in the programme. RG's mother informed Detective Garda Byrne that they would need time to consider things and seek further advice.

71. On 16 and 24 February 2021, Detective Garda Byrne contacted the applicant's mother to inquire as to whether the applicant had made a decision in respect of his proposed inclusion on the Juvenile Diversion Programme and RG's mother informed him that they required more time.
72. On 10 March 2021 Detective Garda Byrne again contacted the applicant's mother, informing her that he had received an email from Garda Jordan, Family Liaison Officer, wherein it was claimed that the applicant had agreed through her to participate in the Diversion Programme and that he was ready to sign the paperwork. RG's mother informed Detective Garda Byrne that this was untrue and requested that he contact their solicitor from then on. RG's mother avers that they subsequently sought legal advice from Ms. O'Hanlon, solicitor, as to whether RG should accept responsibility for his alleged criminal behaviour.
73. On 22 March 2021 Ms. O'Hanlon of Messrs Doyle Solicitors LLP, wrote to Garda Byrne, Juvenile Liaison Officer, at the relevant garda station in the following terms: -

*"Dear Sirs,*

*We act for RG, date of birth [given] 2005 who was presented at [a named] garda station by arrangement and was interviewed by gardaí on 4 day of January 2021. This interview was in relation to an allegation of rape allegedly perpetrated by our client on [a named complainant] on the day of 1 November 2020.*

*We understand from our client's parents that you have been in direct contact with our client and/or his parents with a view to considering him for the diversion programme under the Child Care Act 2001. As you are aware, pursuant to s.23(1) of the Act entitled "Admission to Programme", it specifically states at s.23(1)(a) that the criteria for admission to the programme is that the child: -*

*"(a) accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her,"*

*We are now formally writing to you and would be obliged if you would please confirm the following that: -*

- (1) The Director of Public Prosecutions has consented to our client's potential engagement in the Diversion Programme;*
- (2) the complainant's parents have also consented; and*
- (3) you will furnish us with the following documentation so that we may be able to adequately advise our client in respect of the allegations made against him: -*

- (i) *copy of the interview conducted with and/or copies of the statement taken from the child complainant [named];*
- (ii) *copies of all statements made by the child complainant's family and any other witness and/or person questioned in respect of the investigation, whether these statements are to be relied upon or not, in their original unedited form;*
- (iii) *copies of all garda notebook entries in printed and handwritten form, whether they are to be relied upon or not;*
- (iv) *copies of all garda statements, both in their typed and handwritten form, whether they are being relied upon or not;*
- (v) *copies of any medical evidence and/or medical records in respect of the complainant."*

*We await hearing from you as a matter of urgency before we are in a position to advise our client in respect of this matter."*

74. Comments made earlier with regard to similar requests apply equally here. Plainly, the request is a very broad one. It is uncontroversial to say that this very wide-ranging request is made as of right, insofar as the applicant and his solicitor is concerned. This was true in respect of each request for the material from the Garda Investigation file made on behalf of each applicant. It is also fair to say that the foregoing request was made at a time when the applicant, his parents and his solicitor had already been made aware of (a) the nature of the alleged criminal behaviour; (b) the identity of the complainant who makes the allegation; and (c) when and where the alleged incident is said to have occurred. Two other comments seem to me to be appropriate.
75. The first is to repeat an earlier observation with regard to the sheer breadth of the documentation being sought, in that it includes all statements and all garda notebook entries, in printed and handwritten form "*whether they are to be relied upon or not*". Secondly, it seems clear that the reference to reliance is a reference to reliance in the context of criminal charges if same are proffered in the future. Similar comments apply in respect of all requests concerning all applicants in that, as matters stand, no charges whatsoever have been brought against RG or any of the applicants. Thus, there is no question of any evidence being relied on, or not, in the context of prosecuting criminal charges. Nor, as I say, do questions of the admissibility of evidence arise at this stage.
76. The applicant's solicitor subsequently contacted Detective Garda Byrne with regard to the status of the 22 March 2021 request and was informed that the respondent's had sought legal advice from the Chief State Solicitor's office who confirmed their involvement, by correspondence dated 22 April, 2021. A response to the request was given by Superintendent James Doyle in a letter dated 20 May, 2021 to Messrs Doyle Solicitors which stated the following: -

*"Dear Ms. O'Hanlon,*

*I refer to the above and your request dated 22 March, 2021. In response to the questions raised in the letter of 22 March, we note the following: -*

- *The Director of Public Prosecutions ('DPP') has no statutory or non-statutory function in the consideration of the admission of an eligible person to the Juvenile Diversion Programme which is governed by the Children Act 2021 (as amended) [sic].*
- *The role of the victim is also specified in the Children Act 2021 (as amended).*
- *Much of the material sought has been brought to your client's attention in the interview on 4th January, 2021 which he attended alongside his mother KG and solicitor June O'Hanlon.*

*At this stage of the process where your client is being considered for admission to the Juvenile Diversion Programme, the information sought will not be provided because they are part of an active criminal investigation, and the file will be submitted to the DPP if your client is not admitted to the programme. I trust this clarifies your queries".*

77. Inspector Graham Rowley swore an affidavit on 1 November 2021 exhibiting a typed memo of interview with RG taken at the relevant garda station at 11:23 am on 4 November, 2021 by Detective Garda Jordan and Sergeant Maher which records the caution administered and that RG confirmed that he understood the caution. The said memo also records that Ms. June O'Hanlon solicitor and RG's mother were present and witnessed RG's signature. A memo of a second interview carried out on the same date is also exhibited and, again, the applicant's solicitors were present throughout that second interview.
78. In an affidavit sworn by Ms. O'Hanlon solicitor on 17 December, 2021 she avers that Inspector Rowley was not present during the interview under caution. She avers that it is not the case that the entire of the statement by the complainant was put to the applicant during the interview and she avers that extracts only from the complainant's statement were put. She avers that Sergeant Maher stated that the statement was "40 pages long" and she goes on to aver that only extracts from approximately 21 or so pages were put to the applicant. With regard to other statements, Ms. O'Hanlon avers *inter alia*, that copies were not shown to her or to the applicant and, while she took as detailed a note as possible in respect of the extracts which were put to the applicant, her note is limited in parts. With regard to statements of other relevant witnesses, Ms. O'Hanlon avers that she has been unable to give any advice as to whether any of the statements amount to recent complaints. She avers that, whilst the applicant was informed of the existence of these statements and that they were "consistent" with the allegations made by the complainant, Ms. O'Hanlon has "*not been able to advise as to their admissibility or otherwise or indeed whether same are consistent with the complainant's statement*".



79. The observations which I made earlier in this judgment as regards admissibility apply equally here. In short, it seems to me that there is a material difference between (a) the *admissibility of evidence* in the context of a criminal prosecution in respect of charges proffered and (b) *the acceptance of responsibility* for criminal behaviour at a time when no criminal charges have been proffered and whether a trial will ever take place in the future is wholly unknown. It seems to me that it is the latter with which part 4 of the 2001 Act is concerned.
80. Elsewhere in her 17 December, 2021 affidavit, Ms. O’Hanlon confirms that 3 “stills” from a video taken from another party’s phone, of the alleged incident, were shown to the applicant. Ms. O’Hanlon avers that when these “stills” were put to the applicant, his response, as noted by her and as appears from the memo of the interview under caution, was “*I don’t think I’m having sex with her in it. I think I was about to*” and Ms. O’Hanlon goes on to aver that, because the video itself was not shown and the total duration or provenance of the video was unknown, she “*could not appropriately advise on the nature of this evidence*”. Ms. O’Hanlon’s affidavit concludes by asserting that significant difficulties have been created in relation to appropriately advising the applicant, having regard to what was not shown to him and it is asserted that this has deprived the applicant of his statutory rights pursuant to the 2001 Act to receive adequate legal advice concerning his possible inclusion in the diversion programme.

#### **The Juvenile Diversion Programme**

81. Part 4 of the 2001 Act, as amended by Part 12 of the Criminal Justice Act 2006 provides for the Juvenile Diversion Programme. At the risk of repeating the wording of certain sections in Part 4 of the 2001 Act to which I made reference earlier in this judgment, it seems to me to be useful at this point to look in some detail at several sections, as follows.

#### **Section 18 of the 2001 Act**

82. It seems uncontroversial to say that a fundamental principle underpinning the operation of the diversion programme is the acceptance of responsibility on the part of a child for his or her criminal behaviour. This is clear from s.18 which states the following with regard to the consideration for admission to the programme: -

*"Principle 18. – Unless the interests of society otherwise require and subject to this Part any child who –*

*(a) has committed an offence, or*

*(b) has behaviour anti-socially,*

*and who accepts responsibility for his or her criminal or anti-social behaviour shall be considered for admission to a diversion programme (in this Part referred to as the Programme) having the objectives set out in section 19."*

#### **Section 19**

83. The objective of the programme is stated clearly in s.19 of the 2001 Act in the following terms: -

*"Objective of Programme 19. – (1) The objective of the Programme is to divert any child who accepts responsibility for his or her criminal or anti-social behaviour from committing further offences or engaging in further anti-social behaviour.*

*(2) The objective shall be achieved primarily by administering a caution to such a child and, where appropriate, by placing him or her under the supervision of a Juvenile Liaison Officer and by convening a conference to be attended by the child, family members and other concerned persons."*

84. Section 20 of the 2001 Act makes clear that the programme shall be carried on and managed, under the superintendence and control of the Garda Commissioner, by a member of An Garda Síochána not below the rank of superintendent and who is referred to in Part 4 of the 2001 Act as the "Director". Section 21 deals with the temporary incapacity of the Director.

#### **Section 22**

85. Section 22 of the 2001 Act, as amended, states as follows: -

*"Report on child to Director. 22. – Where criminal or anti-social behaviour by a child comes to the notice of the Garda Síochána, the member of the Garda Síochána dealing with the child for that behaviour may prepare a report in the prescribed form as soon as practicable and submit it to the Director with a statement of any action that has been taken in relation to the child and a recommendation as to any further action, including admission to the Programme, that should, in the member's opinion be taken in the matter."*

#### **Section 23**

86. Of fundamental importance to all four of the applications before this Court is the wording of s.23 of the 2001 Act. Whereas s.18 set out principles relating to the consideration for admission to the programme, s.23 concerns admission to the programme and details certain statutory criteria which must be met for admission. It is appropriate to quote s.23, as amended, in full, as follows: -

*"Admission to Programme. 23.- (1) Subject to subsection (6) a child may be admitted to the Programme if he or she –*

*(a) accepts responsibility for his or her criminal or anti-social behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her,*

*(b) consents to be cautioned and, where appropriate to be supervised by a juvenile liaison officer, and*

*(c) is 10 years of age or over that age and under 18 years of age,*

*but paragraph (b) shall not apply where the Director is satisfied that the failure to agree to be cautioned or supervised is attributable to undue pressure being brought to bear on the child by any person and, in that event, the child shall be deemed to have consented for the purposes of that paragraph.*

- (2) *The Director shall be satisfied that the admission of the child to the Programme would be appropriate, in the best interests of the child and not inconsistent with the interests of society and any victim.*
- (3) *The criminal behaviour for which the child has accepted responsibility shall not be behaviour in respect of which admission to the Programme is excluded under any regulations pursuant to section 47, unless the Director of Public Prosecutions directs otherwise in a notification to the Director.*
- (4) *When the admission of a child to the Programme is being considered any views expressed by any victim in relation to the child's criminal or anti-social behaviour shall be given due consideration but the consent of the victim shall not be obligatory for such admission.*
- (5) *For the purposes of subsection (1)(c), the age for admission to the Programme shall be the age of the child on the date on which the criminal or anti-social behaviour took place.*
- (6) *Notwithstanding subsection (1), a child aged 10 or 11 years shall be admitted to the Programme if –*
  - (a) *he or she accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her and*
  - (b) *subsections (2) to (5), apply in relation to the child."*

87. The reference in s.23(3) to 'section 47' refers to the power of the Minister for Justice and Equality to make regulations prescribing (pursuant to s.47(c)) "any criminal behaviour of a serious nature in respect of which admission to the Programme shall be excluded". This Court understands that, to date, the Minister has made no such regulations. As Simons J stated at para. 19 of his judgment in *S (identity protected) v. The Director of the Garda Juvenile Diversion Programme* [2019] IEHC 796:

*"In principle, therefore, the Programme is available - and has been applied in practice - even in the case of serious offences such as murder. (See page 17 of the Section 44 Monitoring Committee Report)."*

#### **Section 24**

88. The Director's role, in particular as regards a decision to admit a child to the programme, is clearly set out in s.24, in the following terms: -

*"Decision to admit to Programme. 24. – (1) It shall be a function of the Director to decide whether to admit a child to the Programme and the category of caution to be administered to any child so admitted.*

- (2) *Where the Director decides that a child should be admitted to the Programme, he or she shall direct a Juvenile Liaison Officer to give notice in writing to the parents or guardian of the child specifying the criminal or anti-social behaviour in respect of which a caution is to be administered, whether the caution is to be formal or informal and the time and place where it is to be administered and stating that the parents or guardian are obliged to attend its administration.*
- (3) *Every notice shall be expressed in language designed to be understood by the parents or guardian of the child and shall be available in the Irish language to a child who is from a Gaeltacht area or whose first language is Irish."*

89. In conducting an analysis of Part 4 of the 2001 Act, Mr. Justice Simons observed at para. 17 of his decision in *S (identity protected)* that: *"Part 4 of the Children Act 2001 has put in place a detailed legislative framework which is intended to regulate the diversion of juvenile offenders from the criminal justice system."* He went on to refer to the purpose and objective of the Diversion Programme as set out in ss. 18 and 19. At para. 18 of his decision, Simons J observed that the legislation prescribes certain *"qualifying criteria"* which must be fulfilled before a *"child"* (as defined) is eligible to be considered for admission to the programme, being a reference to the provisions of s.23. Commenting on the role of the Programme Director as provided for in s.24, Simons J observed that *"once these qualifying criteria have been fulfilled, it is then the 'function' of the Programme Director to decide whether to admit a child to the programme."* As Mr. Justice Simons observed, the principle statutory criteria governing such a decision by the Director are to be found in ss. 23(2) and (4).

#### **Admission to the Programme is a bar to criminal prosecution**

90. As Simons J observed at para. 21 of his judgment in *S. (identity protected)*, the *"legal effect of admission to the Programme is to be bar a prosecution for that offence"*. This is clearly provided for in s.49(1) of the 2001 Act which states as follows:

*"Bar to proceedings. 49. – (1) A child shall not be prosecuted for the criminal behaviour, or any related behaviour, in respect of which he or she has been admitted to the programme."*

#### **Any subsequent criminal trial**

91. Before proceeding further, it is appropriate to note that it is common case between all parties that an acceptance of responsibility for criminal behaviour on the part of any applicant could not be used as evidence in any subsequent criminal prosecution that might arise if it was decided by the Director not to admit the applicant to the Programme.

#### **The Director of the Programme / The Director of Public Prosecutions**

92. As Simons J also highlighted, the role of the Director of the Programme is separate and distinct from the position of the Director of Public Prosecutions. Simons J. put matters as follows at para. 84 of his judgment in *S (identity protected)*:

*"84... The Oireachtas has made a policy choice to divert certain juvenile offenders from the criminal justice system. The Programme Director is the person designated to give effect to this legislative intent. The decision as to whether or not to admit any individual offender to the Programme must be made by reference to the statutory criteria prescribed. Whereas Part 4 of the Children Act 2001 does undoubtedly confer a margin of discretion on the Programme Director, this discretion is constrained and he must observe the statutory criteria. The Programme Director is in a very different position than the Director of Public Prosecutions. The latter is entirely independent in the exercise of her functions, and the Prosecution of Offences Act 1974 is not prescriptive as to the criteria to which the Director must have regard in reaching prosecutorial decisions."*

93. Mr. Justice Simons went on to say the following at para. 86 *"Thirdly, there are certain conditions precedent to the making of a decision to admit a juvenile offender to the Programme. It is only where these have been fulfilled that the statutory discretion comes into play."* It is plain that the conditions precedent include the acceptance by a child of responsibility for his or criminal or anti-social behaviour in accordance with the provisions of s.23(1)(a). The reference by Simons J. to *"statutory discretion"* was plainly a reference to ss. 23(2) and (4). It will be recalled that these subsections require the Director to be *"satisfied"* that the admission of the child to the Programme would be appropriate, in the best interests of the child and not inconsistent with the interests of society and any victim and when the admission of a child to the programme is being considered, any views by any victim in relation to the child's criminal or anti-social behaviour must be given due consideration, although the consent of the victim is not obligatory for the admission of a child to the programme.

#### **Section 25 – Administration of cautions**

94. It will be recalled that s.19(2) makes clear that the objective of the Programme shall be achieved primarily by administering a caution and, where appropriate, by placing a child under supervision of a Juvenile Liaison Office and by convening a conference to be attended by the child, family members and other concerned persons. Section 25 of the 2001 Act deals with cautions and provides that a caution to be administered can be *formal* (per s.25(2) and (4)) or *informal* (per s.25(3) and (4)). A formal caution shall be administered in a garda station, save in exceptional circumstances.

#### **Section 26 – Presence of victim at formal caution**

95. Section 26 makes clear that if the victim's views in relation to the child's criminal behaviour was considered when admitting the child to the Programme, the victim may be invited to be present at the administration of the formal caution where there *"...shall be a discussion among those present about the child's criminal or anti-social behaviour"* (per s.26(2)). The garda administering the caution may invited the child to apologise, orally or in writing (or both) and make financial or other reparation to the victim (per s.26(3)).

### **Section 27 - Supervision**

96. Section 27(1) provides that, where the child has received a formal caution they shall be placed under the supervision of a Juvenile Liaison Officer ('JLO') for a period of 12 months from the date of the administration of the caution. Typically, a child who has received an informal caution shall not be placed under the supervision of a JLO (per s.27(b)). In exceptional circumstances, a child who has received an informal caution may be placed under supervision for a period of six months (per s.27(1)(c)). If a child who is under supervision is subsequently found guilty of an offence, the period of supervision "*shall terminate forthwith, if it has not terminated at the time of the finding of guilt*" (per s.27(1)(ii)).

### **Section 27 – Level of supervision**

97. Section 28 makes clear that the level of supervision shall be determined having regard, *inter alia*, to the seriousness of the criminal or anti-social behaviour; the level of support given to and level of control of the child by their parents or guardian; and the likelihood of the child committing further offences (per s.28(2)).

### **Sections 29 and 30 - Conference**

98. Where a child is placed under supervision, the JLO may recommend that a "*conference*" be held in respect of the child (per s.30(1)). Without prejudice to any decision of the Director, the agreement of a child's parent or guardian shall be required for, and the views of the child shall be ascertained on, the holding of a conference (per s.30(2)). The JLO is also obliged to ascertain the views of any victim with regard to the possibility of a conference being held and as to whether the victim would be agreeable to attend same (per s.30(3)(a)). Where the victim is a child, the JLO is required to have regard to his or her best interests and, where practicable, must also ascertain whether his or her parent or guardian would be agreeable that a conference be held and would attend it (per s.30(3)(b)).

99. The JLO is also under an obligation, when he or she decides to make a recommendation that a conference be held, to explain the procedures and functions of a conference to the child concerned and to his or her parent or guardian (per s.30(4)). The functions of a conference are to bring to together relevant parties and the facilitator of the conference with a view to establishing why the child became involved in the criminal behaviour; helping to prevent the child from becoming involved in further such behaviour; where appropriate, reviewing the child's behaviour since their admission to the Programme (per s.29(a) (i) to (iii)); as appropriate, to mediate between the child and the victim (per s.29(b)); to formulate an action plan for the child (per s.29(c)); and to uphold the concerns of the victim and have due regard to his or her interests (per s.29(d)).

### **Section 31 – Decision on holding conference**

100. As s.31 makes clear, it is the Director who decides whether or not a conference should be held. This is a decision made on receipt of a report from a JLO (per s.31(1)). Section 31(2) sets out a range of criteria which the Director is required to have regard to in deciding whether a conference should be held, namely, the recommendations of the JLO; whether in the Director's opinion a conference would assist in preventing the commission of further offences; the role and responsibilities of the child's parents or guardian and

relatives; the views if any of the victim; whether the victim would attend the conference and, where the victim is a child, whether such attendance would be in their best interests; the interests of the community in which the child resides; and any other matter which the Director considers to be relevant. Section 31(3) makes explicit that a conference "*shall not be held unless the child and the child's parents or guardian indicate that they will attend it*". Where the Director decides that a conference should be held, they are required to appoint a "*facilitator*" to convene and chair same (per s.31(4)(a)). The facilitator shall be either the JLO supervising the child or another member of An Garda Síochána.

### **Section 32 – Persons entitled to attend conference**

101. Those entitled to attend a conference include the child in question (per s.32(1)(a)) and the parents or guardian of the child and members of the child's family or relatives of the child if the facilitator believes they or any one of them would make a "*positive contribution*" to the conference (per s.32(1)(b)). A conference shall not be held unless at least one person from the latter category is in attendance. The facilitator is also required to invite any other person who in their opinion would make a "*positive contribution*" to the conference including one or more representatives from: the Child and Family Agency; the Probation and Welfare Service; the school attended by the child; the School Attendance Service and An Garda Síochána (per s.32(3) (a) to (e)). The victim shall also be invited as well as any relatives or friends whom the victim requests to have present unless the facilitator takes the view that their attendance would not be in the best interests of the conference (per s.32(4)). The facilitator may also invite any other person requested by the child or their family whom the facilitator believes would be of benefit to the conference (per s.32(5)).

### **Section 36 – Views of those unable or unwilling to attend**

102. Sections 33 to 35 deal with the location of a conference, the holding of same during a period when the child is under supervision by a JLO, and notification to participants, whereas s.36 obliges the facilitator to take all reasonable steps to ascertain the views, if any, of any person invited to a conference but unable or unwilling to attend and to make those views known at the conference.

### **Section 38 – Period or level of supervision**

103. Section 37 deals with procedure at a conference and s.38 goes on to provide that a conference shall consider whether the period or level of supervision of the child in question should be varied in light of the child's: education training or employment; leisure time activities; relationship with family and local community; attitude to being supervised; progress under supervision; attitude to his or her criminal or anti-social behaviour and to the victim of that behaviour; and any other matter that may be relevant in the particular case (per s.38 (a) to (e)).

### **Section 39 – Action plan**

104. Section 39 provides for the parents or guardian or family member and the child formulating an action plan for the child at a conference with the assistance of the others present. Any action plan shall be agreed unanimously by those present at the conference unless the facilitator regards the disagreement of any person present as unreasonable (per s.39 (1) and (2)). An action plan may include any one or more of the following: An

apology by the child to any victim; financial or other reparation to any victim; participation by the child in sporting or recreational facility; attendance of the child at school or work; participation by the child in appropriate training or education; the child being home at specified times; the child staying away from specified places or persons; taking initiatives with the child's family and community that might help to prevent the commission by the child of further offences or further criminal or anti-social behaviour by the child; and any other matter that in the opinion of those present at the conference "would be in the child's best interests or would make the child more aware of the consequences of his or her criminal or anti-social behaviour".

### **The child's best interests**

105. At this point in the analysis of the Diversion Programme which is provided for in Part 4 of the 2001 Act, I feel certain comments are appropriate. In submissions made on behalf of the first three applicants, it is asserted that "*while the objective of the programme is to divert children from the criminal justice system, its efforts in so doing are somewhat punitive in nature*" (emphasis added). I do not regard the foregoing as a fair characterisation of the Diversion Programme when considered in the round.
106. It seems to me that the Oireachtas put in place a carefully constructed process which, with the aim of diverting children away from the criminal justice system, has a clear focus on the *best interests* of the child in question. A reading of its terms seems to me to demonstrate that, far from being punitive in nature, the sophisticated architecture of the Diversion Programme is child-focused and designed to support and assist, rather than punish.
107. That the Diversion Programme cannot, in my view, be fairly described as punitive in nature is also evident from the fact that entry is voluntary. In other words, whilst acceptance of responsibility for criminal or anti-social behaviour does not guarantee admission to the programme, no child is required to accept such responsibility. Entry into the programme is not obligatory.
108. Furthermore, an acceptance of responsibility for criminal or anti-social behaviour in the context of the programme is not admissible in any subsequent criminal proceedings and if a child is admitted to the programme, that acts as a bar to prosecution in respect of the criminal or anti-social behaviour for which the child has accepted responsibility.
109. It also seems to me that, viewed in the round, the Diversion Programme offers very significant advantages to a participating child, even taking on board the extent to which constraints on a child's autonomy might be involved. Taking, as an example, an '*action plan*', it is true to say that it might require a child being home at specified times. Leaving aside the fact that few parents will not have insisted that their child be home at a specified time, insofar as the foregoing represents a constraint on liberty, it must be seen in context. The context is plainly the focus on the best interests of the child in question and, as seen earlier, the action plan may include provisions in respect of, for example, attendance of the child at *school* or participation in an appropriate *training or educational* course or participation in appropriate *sporting or recreational* activity. Similarly, whilst the



Diversion Programme provides for supervision, the level of supervision is with a view to supporting and assisting the child, consistent with the aims of the programme.

Furthermore, the level of supervision to be applied in any given case is also a 'bespoke' matter to be determined by the JLO having considered a range of factors including (per s.28(1)(b)) the level of *support* given to and the level of control of the child by their parents or guardians.

110. Moreover, where, for example, a 'conference' is held, supervision can be varied in light of a range of matters (including education, leisure activities, relationship with family and community, attitude to and progress under supervision, attitude to criminal or anti-social behaviour and any other matter deemed relevant in the particular case). It seems to me fair to say that the elements of the Diversion Programme reflect a desire on the part of the Oireachtas to provide a process which has, as a genuine aim, supporting a child in a holistic manner in furtherance of the underlying objective of diverting them away from the criminal justice system. For these reasons, I cannot regard the programme as truly being 'punitive' in nature and, whilst certain restrictions may be a feature, their aim is not to punish, but to support. On behalf of the first three applicants it is also contended that the diversion programme "*is not without conditions which may have negative consequences for the child*"(emphasis added). For the reasons expressed, I take the view that a careful analysis of the terms of the Diversion Programme undermine that submission. Viewed in its entirety, the Programme is squarely aimed at supporting and assisting children who are admitted to it. To the extent that, in any given case, terms apply which could be viewed as impacting on autonomy, these seem to me to constitute elements of a sophisticated process providing 'scaffolding' around the relevant child for their benefit, also taking on board the role of other stakeholders and interested parties including the position of a victim of criminal or antisocial behaviour.

111. The foregoing seem to me to be relevant observations to make, because it is in the context of the overall Diversion Programme and its objective that s.23(1)(a) falls to be interpreted. I now return to the analysis of the specific provisions in the Programme.

#### **Section 42 – decision by Director on period or level of supervision**

112. Section 40 makes clear that failure to agree on the terms of an action plan shall not invalidate the proceedings at a conference, whereas s. 41 provides that, as soon as practical after a conference, the facilitator is obliged to report to the Director on the terms of any action plan; the matters discussed at the conference; the views of those present; and any views ascertained pursuant to s. 36 (namely the views of any person invited to attend the conference but unable or unwilling to do so). The facilitator is required to recommend, having had regard to the views of those present at or invited to the conference, whether in the facilitator's opinion "*the period and level of supervision of the child concerned should be varied, and, if so, to what extent*". Section 42 requires the director, on receipt of a s. 41 report, to decide on whether the child's period or level of supervision should be varied and, if so, to what extent.

113. Section 44 requires the Minister to appoint a committee to monitor the effectiveness of the programme. Section 45 deals with vacancies in the committee, whereas s. 46 relates

to supplemental provisions including the obligation on the Garda Commissioner to ensure that all members of the Force who act as facilitators receive whatever training the Commissioner considers sufficient. Section 47 was referred to previously and the Minister has yet to make any regulations prescribing any criminal behaviour of a serious nature in respect of which admission to the programme shall be excluded.

#### **Section 48 – inadmissibility of certain evidence**

114. Earlier in this judgment, I noted that s. 49 makes clear that a child shall not be prosecuted for the criminal behaviour, or any related behaviour, in respect of which he or she has been admitted to the programme. Section 48 provides as follows:

“Inadmissibility of certain evidence      48.-(1) subject to subs. (2), no evidence shall be admissible in any court in respect of –

(a) *any acceptance by a child of responsibility for criminal or anti-social behaviour in respect of which the child has been admitted to the Programme,*

(b) *that behaviour, or*

(c) *the child’s involvement in the Programme.*

(2) *Where a court is considering the sentence (if any) to be imposed in respect of an offence committed by a child after the child’s admission to the Programme, the prosecution may inform it of any of the matters referred to in subsection (1).*

(3) *Subsection (2) applies, with the necessary modifications, in relation to a child who has attained the age of 18 years”.*

115. On behalf of the applicants the submission is made that “*a child can no longer be assured that their participation in the Programme will not be taken into account in any subsequent criminal proceedings*”. It seems important to emphasise that the foregoing is true *only* in respect of a child who goes on to commit an offence *after* their admission to the programme. Thus, it cannot fairly be considered to be a negative consequence of admission to the Programme. Rather, it is a negative consequence of a child committing an offence, *after* admission to the Programme, for which they are convicted.

#### **The applicant’s submissions**

116. On behalf of the first three applicants (J.M., D.H. and L.B.) it is emphasised that statutory interpretation requires this court to give pre-eminence to the text of the legislation. The following principle from *County Council of the County of Cork v. Whillock* [1993] 1 I.R. 231 is relied on:

*“There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain.”*

117. Reliance is also placed on the statement by the Supreme Court in *Goulding Chemicals Ltd v. Bolger* [1977] I.R. 211 that: "*it is to be presumed that words are not used in a statute without a meaning and accordingly effect must be given, if possible, to all the words used ...*". On behalf of the first three applicants it is submitted that, when considering the text of s. 23 (1) (a) this court must have regard to all the words contained therein and, thus, the literal and ordinary meaning of s. 23 (1) (a) is that the child is to be afforded the opportunity to seek legal advice on whether to accept responsibility for the alleged criminal behaviour. The meaning of "*legal advice*" in the absence of any specific definition and in the context of the text of the relevant provision cannot, submit the first three applicants, be divorced from the condition precedent in respect of the child's admission to the Programme, which is to accept responsibility. It is submitted, therefore, that the meaning of "*legal advice*" must be given a *purposive* interpretation. Thus, contend the first three applicants, their right to legal advice, given the significance of the decision to be made, must extend to the right of each applicant's solicitor to be given all such material contained in the Garda Investigation file.
118. On behalf of the first three applicants it is also submitted that the United Nations Committee on the Rights of the Child, in General Comment No. 12, recommended that in the case of diversion, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed.
119. Before proceeding further, it seems appropriate at this juncture to observe that in the submissions on behalf of the first three applicants, it is contended that a *literal* meaning of the words in s. 23 (1) (a) is that the child is to be afforded the opportunity to seek legal advice on whether to accept responsibility for the alleged criminal behaviour. That submission appears to me to be entirely uncontroversial. However, there is plainly a very material difference between (a) the consequences for a child of accepting responsibility for criminal or anti-social behaviour in the context of admission to the diversion programme and (b) acknowledging guilt in respect of a criminal charge proffered in the context of formal criminal proceedings. Despite this material difference, it is clear from the contents and breadth of the requests for documentation made by the solicitors representing the applicants that the legal advice they envisage providing is not at all limited to the consequences for the child in question of an acceptance of responsibility, insofar as the Diversion Programme is concerned. Rather, it is very clear from the requests for documents made and from the submissions to this Court, that "*legal advice*" for the purposes of s. 23 means, according to the applicants, legal advice including with regard to issues such as the admissibility of evidence and the extent to which there are possible inconsistencies as between witness accounts etc. In other words, it is plain that the solicitors for the applicants wish to provide comprehensive advice through the lens of an assessment of the strength or otherwise of a prosecution case as if criminal charges had been proffered when, as a matter of fact, none have been.
120. In contending that "*legal advice*" in s. 23 requires a *purposive* interpretation, counsel for the first three applicants submitted that admission to the Diversion Programme brings

with it "very serious consequences". Although acknowledging that a child shall not be prosecuted for the criminal or any related behaviour in respect of which they have been admitted to the Programme, it is submitted that admission may constitute "specified information" for the purposes of Garda vetting as defined by s. 2 of the National Vetting Bureau (Children and Vulnerable Persons) Act, 2012 ("the 2012 Act") as amended by the Criminal Justice (Spent Convictions and Certain Disclosures) Act, 2016. Counsel point out that "Specified information" means information concerning a "finding or allegation of harm to another person" received by the Gardaí "...pursuant to an investigation of an offence or pursuant to any other function conferred on the Garda Síochána by or under any enactment or the common law" (see s. 2 of the aforesaid 2012 Act) where the information is such "as to reasonably give rise to a bona fide concern that [the person may represent a risk to a child or vulnerable person]" (see s.2 of the 2012 Act). The 2012 Act contains detailed provisions regulating the disclosure of specified information. On behalf of the applicants it is submitted that, ultimately, the Chief Bureau Officer may decide to disclose specified information if satisfied that same is "necessary, proportionate or reasonable" (see s.15). The submission is also made that there is nothing in either the 2001 or the 2012 Act which prohibits disclosure, for vetting purposes, of anything arising in connection with admission to the Programme.

121. It does not seem to me that it is necessary to resolve the question as to whether an acceptance of responsibility in the context of s. 23 or admission to the Diversion Programme falls within the definition of *specified information* in the 2012 Act in order for this Court to decide the issue arising in the present applications. I say this in circumstances where, if the legal advisors to any applicant take the view that an acceptance of responsibility or admission to the Programme comes within the definition of *specified information* and raises the possibility of disclosure under the 2012 Act, this is something they are *currently* in a position to provide legal advice upon to any applicant who seeks it. In other words, if the foregoing is truly a consequence of admission to the Diversion Programme, (a) legal advice on such a consequence is available to the applicants and (b) for that advice to be given does not require any further documentation (or, for that matter, an analysis of the potential strength of a prosecution case encompassing issues such as the admissibility of evidence; what was or was not found as a result of the examination of clothing; the examination of medical evidence, and or any potential for inconsistencies in a complainant's account etc). In short, the applicants and their legal advisors do not need material from the Garda Investigation file in order for the latter to provide legal advice to the former on the potential significance, insofar as the 2012 Act is concerned, of a decision to accept responsibility in accordance with s. 23 of the 2001 Act.
122. Submissions were also made with reference to the enhanced position of the child pursuant to Article 42(A) of Bunreacht na hÉireann, whereby the State recognises and affirms the natural and imprescriptible rights of all children and guarantees, as far as practicable, by its laws to protect and vindicate those rights. It is submitted that an interpretation of Part 4 of the 2001 Act in light of Article 42(A) supports what is contended to be the proper outcome of a purposive interpretation of the words used in s.

23, namely, the right to all documents contained in the Garda investigation file contended for. Counsel for the first three applicants also made a submission to the effect that the applicants are vulnerable children and the enhanced position of the child, per Article 42(A), must bear on the interpretation of the 2001 Act insofar as what the right to any "legal advice" means.

123. Reliance was also placed on the Council of Europe's "*Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*" (2011, Part IV, Rule 82) which state the following with regard to "*Child-friendly justice before judicial proceedings*":-

"24. *Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests. The preliminary use of such alternatives should not be used as an obstacle to the child's access to justice.*

25. *Children should be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Based on adequate information, both legal and otherwise, a choice should be available to use either court procedures or alternatives for these proceedings whenever they exist. Children should be given the opportunity to obtain legal advice and other assistance in determining the appropriateness and desirability of the proposed alternatives. In making this decision, the views of the child should be taken into account.*

26. *Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings."*

124. With regard to the foregoing Guidelines, I am entirely satisfied that there is no evidence before the court to the effect that the use of the Diversion Programme constitutes an obstacle to any of the applicants accessing justice. The Guidelines emphasise that information should be made available to a child regarding the possible consequences of each option. The evidence before this court is that each of the applicants has access to professional legal advice with regard (a) to the consequences for them of accepting responsibility in order for them to qualify for consideration for admission to the Diversion Programme and consequences for them of admission to the Programme as opposed to (b) participation in the formal criminal justice process. In my view, no objective reading of the Council of Europe's guidelines suggests that a child's entitlement to obtain legal advice and assistance in determining the appropriateness of those two alternatives, (a) and (b), requires or entitles that child to be furnished with legal advice on the strengths or otherwise of a possible conviction for offences which have not been proffered, based on a consideration of, *inter alia*, the question of the admissibility, or not, of what might potentially become evidence upon which a prosecution might seek to rely or, as in the

case of the specific requests for documents made on behalf of the applicants "*whether they are being relied upon or not*".

125. It seems to me that, as regards an alternative to participation in the criminal justice process, the core message in the Guidelines is that a child should be informed about the possible consequences for them. The evidence before this Court demonstrates that the applicants, their parents and their solicitors, have sufficient information to facilitate the provision of all advice as might be sought as to the contents and effect of the various legal provisions which make up the Diversion Programme and the potential consequences for any child admitted to same. Moreover, the applicants' legal advisors are already in a position to provide advice on the possible consequences of participation in the formal criminal process, at least in broad terms. To be in a position to provide such advice on possible consequences does not require a granular analysis of evidence which might be available to a prosecution in the event formal charges are proffered – an eventuality which, at this stage, is entirely unknown, no file having even been sent to the DPP.
126. A somewhat different approach to the question of interpretation is taken on behalf of the fourth named applicant (RG). The submission is made on their behalf that "*It is self-evident that s.23 does not expressly provide that the child or his parent/guardian or their legal adviser has a right to be provided with the primary material of the garda investigation file*". The submissions on behalf of RG also make clear that "*It is not contended by either side that s.23 of the Children Act, 2001 is either obscure or ambiguous or that a literal interpretation of the provision would give rise to any form of absurdity such as to engage the plain intention approach mandated by s.5 of the 2005 Act*". The foregoing approach differs from that taken on behalf of the first three applicants who contend that a purposive interpretation of the section is necessary, given the absence of a definition of "legal advice" in s.23.

#### **'Proper' legal advice**

127. Notwithstanding the foregoing difference in approach, all four applicants contend that, as a matter of fair procedures, the applicants are entitled to all material contained in the Garda Investigation file which the applicants and their solicitors may deem necessary to enable the giving of what they characterise as "*proper*" legal advice, prior to any admission being made in the context with the engagement with the Diversion Programme's statutory process.
128. On behalf of all the applicants it is submitted that a number of constitutional rights are engaged by a decision to accept responsibility for the purposes of s.23 and to become subject to the requirements of the Diversion Programme. In addition to Article 42A, emphasis is laid on Article 38.1 which provides that "*no person shall be tried on any criminal charge save in due course of law*". It also submitted that constitutionally protected rights of a child to protection of their person, good name and right to earn a livelihood are relevant. On behalf of all four applicants, emphasis was laid on the decision of the Supreme Court in DPP v. Gormley & Anor.

129. In *DPP v. Gormley*, the appellant in the first appeal was arrested and conveyed to a Garda Station. He requested a solicitor. He was interviewed by the Gardaí before the solicitor had arrived and he made a number of inculpatory admissions during the course of that interview. He was charged with a serious criminal offence and subsequently convicted. He sought leave to appeal the conviction on the ground *inter alia*, that the trial judge erred in admitting the evidence of his statements allegedly made during interviews on the basis that they were conducted in breach of his constitutional right of access to a lawyer. The application for leave to appeal was dismissed. Leave to appeal to the Supreme Court was sought wherein the court of criminal appeal certified two questions of law of exceptional importance, namely: -

*"1. Does the constitutional right of access (to legal advice) require that commencement of questioning of a detained suspect (who has requested a solicitor) be postponed for a reasonable period of time to enable the solicitor who was contacted an opportunity to attend the garda station?"*

*"2. Is the constitutional right of access to legal advice of a detained suspect vindicated where members of An Garda Síochána make contact with a solicitor requested by the suspect but do not thereafter postpone the commencement of questioning for a reasonable period of time in order to enable the named solicitor to actually attend at the garda station and advise the suspect?"*

130. The appellant in the second appeal was arrested on foot of a warrant and conveyed to a garda station. He requested a solicitor. Before the solicitor arrived, forensic samples were taken from him. He was charged with a serious criminal offence and subsequently convicted. He sought leave to appeal the conviction on the ground, *inter alia*, that the trial judge erred in ruling that the taking of samples from his was not unlawful on the basis that there had been a breach of his right of reasonable access to his solicitor. His application for leave to appeal was dismissed. Leave to appeal to the Supreme Court was sought. The Court of Criminal Appeal certified the following question as one of exceptional importance:

*"In circumstances where a person is in custody and has requested a solicitor, are members of An Garda Síochána, for the purpose of ensuring protection of rights of an accused, obliged not to take, or to cease if they have commenced taking, any forensic samples until such time as a person who has sought access to a solicitor, and that solicitor has indicated he/she will attend, has had actual access to that solicitor?"*

131. In the present applications, all four applicants lay emphasis on statements made by Clarke J (as he then was) at para. [82] of his judgment. It is useful to quote the preceding paragraphs also: -

*"[80] The first real question which must, therefore, be addressed is as to whether it is now necessary to interpret the 'due course of law' provisions of Bunreacht na*

*hÉireann as encompassing the asserted right to access to a lawyer prior to interrogation or the taking of forensic samples.*

*[81] The first issue which perhaps arises is as to whether it is appropriate to regard any part of the investigative stage of a criminal process as forming part of a 'trial in due course of law'. It is clear that the ECtHR takes such a view. It must, of course, be recalled that, in many civil law countries, there are formal parts of the investigative process which are judicial or involve prosecutors who have a quasi-judicial status. The line between investigation and trial is not necessarily the same in each jurisdiction. Furthermore, it is important to emphasise a potential distinction between a formal investigation directly involving an arrested suspect and what might be termed a pure investigative stage where the police or other relevant prosecuting authorities are simply gathering evidence.*

*[82] However, I am persuaded that the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect represents an important juncture in any potential criminal process. Thereafter the suspect is no longer someone who is simply being investigated by the gathering of whatever evidence might be available. Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods and, indeed, in certain circumstances, may be exposed to a requirement, under penal sanction, to provide forensic samples. It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage. It seems to me to follow that the requirement that persons only be tried in due course of law, therefore, requires that basic fairness of process identified as an essential ingredient of that concept by this Court in *State (Healy) v. Donoghue* [1976] I.R. 325 applies from the time of arrest of a suspect. The precise consequences of such a requirement do, of course, require careful and detailed analysis. It does not, necessarily, follow that all of the rights which someone may have at trial (in the sense of the conduct of a full hearing of the criminal charge before a judge with or without a jury) apply at each stage of the process leading up to such a trial. However, it seems to me that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law. In that regard it seems to me that the Irish position is the same as that acknowledged by the ECtHR and by the Supreme Court of the United States." (emphasis added)*

132. The ultimate conclusions reached in *DPP v. Gormley* were to allow the appeal in respect of the certified point in Mr Gormley's case i.e. where a conviction was substantially on the basis of admission evidence made during interrogation in custody, during a period after which the appellant had requested the presence of a solicitor and before that solicitor had arrived to advise him. The appellant's conviction on the foregoing basis was found to be in breach of the constitutional guarantee of fair process and amounted to a trial otherwise in



due course of law. The Supreme Court was not, however, satisfied that the taking of samples amounted to a breach of fair process in circumstances where the appellant was legally obliged to provide the samples and same were taken in an unobtrusive way.

133. The facts which were before the Supreme Court in *DPP v. Gormley* are strikingly different to those in the present case. None of the applicants have been convicted. None of the applicants have been charged. There is no question of any of the applicants having been refused access to legal advice. All of the applicants had their respective solicitors present when interviewed under caution. It seems to me that the thrust of the submission made with reliance on *DPP v. Gormley* is that, given the fact that each of the applicants have been interviewed under caution, they are now part of a "*process...intimately connected with a potential criminal trial*". Thus, argue the applicants, the full panoply of constitutionally protected rights to fair procedures must be afforded to them as are available to someone facing a criminal trial for a very serious offence.
134. On behalf of the first three applicants, it was submitted, with reference to *DPP v. Gormley*, that their fair procedures rights are given concrete expression by an interpretation of s.23 that their right to any "legal advice" is, in its plain meaning, a right to receive *adequate* legal advice and, for such advice to be adequate, the applicants are entitled to all material from the Garda Investigation file necessary to enable their respective solicitors to provide full and adequate legal advice, so as to ensure the applicants' statutory and constitutional rights were not set at naught.
135. The foregoing submissions appear to me to ignore two very important things, the first being a question of fact and the second being one of principle. Wholly unlike the factual position in *DPP v. Gormley*, admission to the Diversion Programme is potentially available to the applicants. If any applicant decides to accept responsibility pursuant to s.23 and the Director decides to admit the child to the Programme, the question of a potential criminal trial utterly disappears. Thus, on the facts of the present case, regardless of how intimately connected with a potential criminal trial process the applicants are said to be, that connection will be utterly severed for any child admitted to the Diversion Programme. Furthermore, it is common case that even if a child accepts responsibility pursuant to s.23(1)(a) but the Director does not admit them to the Programme, this in no way prejudices their position with regard to any subsequent prosecution which may or may not be brought against them.

#### **A criminal justice process**

136. The second point which the submissions do not appear to me to engage with is the principle that the right to fair procedures must respond to the interests of justice and this response will be determined by specific circumstances. That principle emerges from the decision in *DPP v Gormley* and I highlighted, above, the relevant passage from that decision. Thus, even if this Court were to hold that, as matters stand, all four applicants are part of a criminal justice *process*, such a finding shines no light on the specific fair procedures rights to which they are entitled, without an engagement with the particular facts and circumstances.

137. In the present case an acceptance of responsibility for the purposes of s.23 cannot in any way prejudice their fair procedures rights insofar as any potential future prosecution which may, or may not, be taken against them or any of them. In essence, if any of the four applicants accept responsibility for criminal behaviour, per s.23, the consequence is that they are eligible for consideration for admission to the Diversion Programme, should the Director so decide. In the manner explored when I looked at specific provisions in Part 4 of the 2001 Act, and referred to the helpful analysis by Simons J in *S (identity protected)*, the Director is not 'at large' as regards such a decision. However, even if the Director decided against admitting to the Programme any one of the applicants who have accepted responsibility for criminal behaviour pursuant to s.23(1)(a), the foregoing is inadmissible insofar as any subsequent prosecution of them which may or may not take place. Moreover, any applicant who is admitted to the Programme enjoys a statutory prohibition on their prosecution in respect of offences regarding criminal behaviour for which they have accepted responsibility.

### **Making a guilty plea**

138. On behalf of the applicants, it was submitted that their current position is analogous to an accused making a guilty plea. In support of the foregoing proposition. The applicants cited the views of Professor Dermot Walsh in "*Balancing due process values with welfare objectives in juvenile justice procedure: Some strengths and weaknesses in the Irish approach*" (Youth Studies Ireland – 2008). In that article, the learned author stated *inter alia*, the following:

*"A key element in the procedure is the requirement for the child to accept responsibility for his or her criminal or anti-social behaviour in order to be admitted to the Programme. This is the equivalent of a guilty plea and an acceptance of remedial interventions in his or her autonomy and freedom (Griffin 2003:5). These interventions can be far-reaching and prolonged and can be more severe than punishment that may have been inflicted by a Court if it had found the child guilty of the behaviour in question. It would not be unusual, for example, for the Children Court to impose no formal penalty on a child offender for the first offence at the lower end of the scale (Carroll and Meehan 2007:45). If, however, the child is dealt with through the Garda Diversion Programme, it is possible that he or she will be subject to a period of supervision by a Garda Juvenile Liaison Officer for a period of up to twelve months. Moreover, while admission to the Programme technically does not amount to a criminal record, circumstances may arise subsequently where the prosecution may inform a court of the child's acceptance of responsibility for the underlying criminal or anti-social behaviour and/or involvement in the Programme. This can happen where the court is considering the sentence to impose on the child for an offence committed after admission to the Programme. It is vital, therefore, that the child should be afforded due process protections equivalent to those that would attach to the accused in respect of a plea and sentencing in the criminal process (Kilkelly 2006:75 – 77)."*

139. With all due respect to the most learned author and any academic papers cited by him, there are fundamental and material differences between, on the one hand, entering a guilty plea in respect of a charge for the offence of rape or section 4 rape and, on the other, accepting responsibility for such criminal behaviour pursuant to s.23(1)(a) in the context of admission to the Diversion Programme.
140. Earlier in this judgment, I looked closely at the potential consequences for a child of admission to the Diversion Programme. Doubtless the applicant's legal advisors are in a position to provide to each applicant such advice as they may require insofar as the consequences of admission to the Diversion Programme, for them, might be concerned. Equally, their legal advisors are, in light of the evidence before this Court, already in a position to advise each applicant as to the potential consequences if an applicant decides not to accept responsibility for the purposes of admission to the Diversion Programme.
141. It is also appropriate to note that Professor Walsh's article acknowledges not only the potential benefits for child participants on the programme but also certain due process protections. Furthermore, it is fair to say that nowhere in Professor's Walsh's article is it contended that a child against whom a complainant has made an allegation of rape (or any other alleged criminality) is entitled, as a requirement of constitutional fair procedures rights, to have access to the Garda Investigation file as a precondition for making a decision as to whether or not to accept responsibility pursuant to s.23. It is appropriate to quote certain further passages from Professor Walsh's article: -

*"In 2007, which is the last full year for which statistics on the Programme have been published, 27,853 cases, involving 21,941 children, were considered for admission. In the course of the year almost 17,000 child offenders were processed through the Programme by means of a formal or an informal caution rather than by a prosecution through the courts. These figures are part of a steady increase in referrals to the Programme since the implementation of the statutory provisions in 2002. Significantly, the age of children referred are heavily weighted towards the upper age groups. More than half of the 2007 referrals are in the sixteen and seventeen year old bracket, while only three percent are less than 13 years of age. Although this broadly reflects the age profile of young offenders (Walsh 2007:320-350), it also suggests that an effort is being made to reach out to young offenders and to divert them from an offending lifestyle before they cross the threshold into the adult criminal justice system. Further support for this assessment can be found in the range of offences for which children are being referred. While most of the cases concern alcohol offences, road traffic offences, theft, criminal damage and public order offences, there are significant representations from more serious offences such as burglary, drugs and assault.*

...

*A positive feature from a due process perspective is that the programme is now placed on a statutory foundation and operates in accordance with law. For almost the first forty years of its existence the Programme operated exclusively on the*

*basis of administrative guidelines internal to the garda (Walsh:24-26) the principles and procedures governing the eligibility of a child for admission are now set out in the Children Act 2001. Moreover, the Programme is managed by a statutory director who is a senior member of the Garda Síochána appointed by and answerable to the Garda Commissioner. He or she is given certain specific powers and duties by the legislation, including the decision whether to admit a child in any individual case. The administration of cautions is also the subject of statutory regulation.*

...

*Commendably the child retains a veto over admission. He or she can refuse to accept that he or she committed a criminal offence or engaged in anti-social behaviour, thereby placing the onus on the garda and the DPP to consider prosecution. Critically, before making this key decision, the child must be given a reasonable opportunity to seek advice from his or her parents and legal advice.*

*Once the child has admitted responsibility for his or her behaviour, the due process protections diminish. The substance and direction of the subsequent procedure, while broadly regulated by law, are heavily dependent on the discretion of the Director, gardaí and, where relevant Probation Officers (Kilkelly 2006; Griffin 2005(a))."*

142. It is plain from the learned author's comments that he regards the opportunity for a child to take legal advice which is provided for in s.23(1) and the veto which a child retains over admission to the Programme as being key elements of what he refers to as "*the due process protections*". Doubtless this is so, but nowhere does Professor Walsh suggest that from the learned author's perspective the entitlement to seek legal advice pursuant to s.23(1)(a) includes a right of access to the Garda Investigation file in respect of material which might, or might not, at a future date, give rise to the proffering of formal charges (the bringing of charges being, of course, a decision for the DPP).
143. All four applicants contended that as a result of the refusal of the relevant superintendent to provide the requested documentation from the Garda Investigation file, the applicant's rights pursuant to s.23(1)(a) had been rendered 'nugatory' and their fair procedures rights have been breached, but the views expressed by Prof. Walsh do not offer support for those contentions.
144. Reliance was also placed by the applicants on the provisions of Directive 2012/13 EU of the European Parliament and of the Council of 22 May, 2012 on the right to information in criminal proceedings, with the following Articles being said to be particularly relevant to the applicants' asserted rights:

*"Article 1*

*Subject Matter.*

*This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights.*

## *Article 2*

### *Scope 1*

*This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.*

...

## *Article 7*

### *Right of access to the materials of the case*

- 1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents relating to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.*
- 2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.*
- 3. Without prejudice to paragraph 1, access to the materials referred to in para. 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.*
- 4. By way of derogation from paras. 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in*

*national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.*

5. *Access, as referred to in this Article, shall be provided free of charge."*

145. The applicants drew the Court's attention to a brief consideration of the foregoing Directive in *DPP v O'Sullivan* [2018] IESC 15 wherein O'Malley J. made the following obiter comments: -

"59. Article 7(2) of the Directive requires Member States to ensure that access is granted 'at least' to 'all material evidence in the possession of the competent authorities' to suspects or accused persons, whether the evidence is for or against them. Article 7(3) provides that such access is to be granted in due time to allow the effective exercise of the rights of the defence 'and at the latest upon submission of the merits of the accusation to the judgment of a court', although exceptions may be permitted in certain circumstances.

60. The Directive was not considered in either the trial court or the Court of Appeal in this case and was the subject of submission for the first time at the request of this Court. The prosecutor submits that the requirements of the Directive are fulfilled by the rules relating to the book of evidence and the duty of disclosure. The appellant has submitted that it underscores his submissions, while accepting that, in the circumstances of this case and having regard to national law, it probably does not add a great deal to the argument.

61. It seems to me that the case can be appropriately dealt with by reference to national law without in any way infringing the Directive. In view of that position, and given that it was not referred to in the courts below, I do not propose to embark upon a full analysis of its impact. That does not mean that it may not be of significance in another case."

146. The applicants also referred to the decision of the Court of Justice of the European Union in Case C-612/15 *Kolev & Ors.* where, from para. 89, the Court (Grand Chamber) held as follows:

"89. *as stated in recitals 27 and 28 of that directive and in Articles 6 and 7 thereof, it is precisely the objective of those provisions to allow for an effective exercise of the rights of the defence and to ensure the fairness of the proceedings (see, to that effect, with respect to Article 6, judgment of 22 March 2017, Tranca and Others, C-124/16, C-188/16 and C-213/16, EU:C:2017:228, paragraph 38 and the case-law cited).*

90. *That objective dictates that the person accused must receive detailed information on the charges and have the opportunity to acquaint himself with the case materials in due time, at a point in time that enables him to prepare his defence effectively, as is moreover laid down in Article 7(3) of Directive 2012/13 in relation*

*to access to the file, it being specified that the sending of incomplete information and the granting of partial access to the case materials are in that regard insufficient.*

91. *Directive 2012/13 does not require the point in time when detailed information on the charges is disclosed and the point in time when access to the case materials is provided to be identical. Further, that point in time may, depending on the specific circumstances and the type of proceedings in question, be prior to or contemporaneous with the time when the court is seised, or even after that time.*
92. *However, that objective and the proper conduct of proceedings presuppose, as a general rule and without prejudice, in some cases, to special or simplified procedures, that that disclosure should take place, and that the opportunity to have access to the case materials should be afforded, no later than the point in time when the hearing of argument on the merits of the charges in fact commences before the court that has jurisdiction to give a ruling on the merits."*

147. On behalf of the applicants, it is submitted that the Court's comments at para. 92 implied that in 'special' or 'simplified' procedures, the point of time when access to the materials of the case should be granted may be different than in the 'ordinary' course of the criminal proceedings, which results in a trial. The applicants go on to submit that the Juvenile Diversion Programme is an example of a special procedure as envisaged by the CJEU. In furthering this submission, it is argued that the Diversion Programme arises "*during the criminal process*" and, if availed of "*will result in punitive sanction*". This is not a submission I accept. In my view nothing in the Directive creates or reflects the right contended for by the applicants. No charges have been proffered. Indeed, it appears to be common case that no file has even been sent to the DPP. Even if it is fair to describe the applicants as currently being part of the criminal justice *process*, it is plain that Directive 2012/13 and the decision in *K.C. – 612/15* were concerned with a materially different *stage* in that process. On the evidence before this court there is simply no question of any rights enshrined in the Directive having been breached and, given the stage at which the applicant's find themselves in the criminal justice 'process' (if such be a correct description), it does not seem to me that the invocation of any rights under the Directive entitles them to access, on demand, the contents of the Garda Investigation file at this point in such process.

148. Although it was argued on behalf of RG that the contended-for right arises on foot of the proper interpretation of s. 23(1)(a), the submission was made that it is not essential for this court to conclude that the statute confers a right to the Garda Investigation file. It was submitted that such a right exists independently, in view of the constitutionally protected right to fair procedures. Submissions were also made in relation to the particular material put to RG during the course of the two interviews which were conducted under caution on 4 January 2021. These submissions were, in essence, as follows:

- It was acknowledged that numerous extracts from the complainant's 40-page statement were put to the applicant. However, it was submitted that this is not equivalent to providing the applicant's solicitor with the opportunity of reading and considering the whole of the relevant statement and it was contended that the applicant enjoys this right pursuant to s. 23, or as a matter of fair procedures, in the context of the entitlement to receive comprehensive legal advice prior to the applicant deciding to accept responsibility or not, for the purposes of admission to the Diversion Programme;
- RG is unaware of what is contained in the statement of the Scene of Crimes Examiner, Garda Brian Frost, and, more importantly, does not know what the results of any forensic testing of items taken from the scene or fingerprint analysis shows. Again, the submission was to the effect that the fourth named applicant is entitled to the foregoing prior to deciding whether to accept responsibility pursuant to s. 23(1)(a);
- The applicant's solicitor is not in a position to make any assessment as to whether the evidence of witnesses, other than the complainant, might be admissible in any trial under the doctrine of recent complaint. The foregoing submission is made in circumstances where reference was made during the RG's interview to statements provided by persons to whom disclosures had been made by the complainant which were characterised as being consistent with her allegations. It was plain that RG contended that he was entitled to advice, including as to the admissibility of evidence at a potential future criminal prosecution, even though no charges have been proffered at this stage; and that his asserted right is exercisable now in the context of deciding whether or not to accept responsibility for the purposes of admission to the Diversion Programme;
- It was contended on behalf of the fourth named applicant that, in circumstances where the complainant has been examined at a Sexual Assault Treatment Unit, he is entitled to know the contents of the medical report arising out of that examination and to have this information before deciding whether or not to accept responsibility for the purposes of entry to the Diversion Programme.

149. It is fair to summarise the applicants' position as being that, as a consequence of the refusal to provide the documents sought, the applicants' rights to be legally advised under s. 23(1)(a) of the 2001 Act have been '*rendered nugatory*'. All applicants assert that the proper interpretation of s. 23(1)(a) is that each applicant has a right, under Statute, to be provided with the material requested from the Garda Investigation File. All applicants assert that the legal advice envisaged by s. 23(1)(a) cannot properly be provided unless the applicant's solicitor, or the solicitor of his parent or guardian, has access to what was describe in submissions as "*the primary material contained on the garda investigation file in support of the allegation of criminal behaviour*". As to what the foregoing phrase means to each applicant, I set out, *verbatim*, earlier in this judgment, each of the four requests made on behalf of the applicants, respectively. It was also argued that a failure



to be heard, prior to a finding by a Tribunal of Inquiry, is an analogous fair procedural breach to the failure to provide the primary material on the Garda Investigation file prior to an admission of responsibility in the context of the Juvenile Diversion Programme. Reliance was placed on *obiter* comments by Mr. Justice Fennelly in *Murphy v Flood* [2010] IESC 21 that a failure to allow the plaintiffs to be heard in advance of a finding that the plaintiffs had obstructed and hindered the Tribunal (a crime under the Tribunals of Inquiry (Evidence) Act, 1921) would have violated fair procedures, as anyone who may have adverse findings related to alleged criminal conduct would need notice and other procedural requirements.

150. It was also submitted that the principles underpinning when an accused is to be provided with witness statements by the DPP, when charged with an indictable offence but where they have elected to be tried summarily, apply to the issues in the present application. Reliance was placed on the decision in *DPP v Doyle* [1994] 2 IR 286 where the Supreme Court found that, when dealing with the question as to whether constitutional justice required the accused person to be furnished with advance notice of the case against him, the following factors should be taken into account (at 303):

- “(a) The seriousness of the charge;
- (b) the importance of the statements or documents;
- (c) the fact that the accused had already been adequately informed of the nature and substance of the accusation;
- (d) the likelihood that there was no *risk of injustice* in failing to furnish the statements or documents in issue to the accused.” (emphasis added)

**Risk of injustice**

151. Having taken full account of all the submissions made on behalf of the applicants, I am satisfied that, in light of the evidence before the court as to what is *already* known to each of the applicants, their parents and solicitors, there is no possibility of any risk of injustice arising out of the relevant decisions to decline to furnish the documents from the Garda investigation file. I take this view in circumstances where, as Prof. Walsh makes clear, each child retains a ‘veto’ over admission to the Programme, and having regard to the nature of the decision which the applicants are faced with making, namely, a decision for the purposes of s. 23 which, if responsibility is accepted, simply entitles them to be considered for admission to the Diversion Programme, but is a decision which can in no way prejudice any potential future criminal prosecution. For the reasons detailed in this judgment, I agree with the submissions made on behalf of the respondents that the principles relied upon and authorities cited by the applicants do not establish any fair procedures right which would extend to an entitlement to obtain, in effect, all documents and material contained in the Garda Investigation file as the applicants’ solicitors might deem necessary.

152. On behalf of the respondents, the attention of this court was drawn to certain authorities dealing with the amenability of review of garda investigations. I accept the submissions on behalf of the respondents that these authorities are more relevant to the factual circumstances arising in each of the four applications before this court where the applicants are seeking, in advance, copies of materials that would only be made available in accordance with the rules of disclosure at the point of a subsequent criminal prosecution (which is no more than a possibility in this case).
153. Constitutional justice does not require a departure from the normal rules of disclosure applicable (were charges to be proffered in the future) by way of what is in effect an asserted right to a 'preview' or 'advance viewing' of what might or might not potentially be evidence which a prosecution might wish to rely upon. In *Maloney v Member in Charge of Finglas Garda Station* [2017] IEHC 279, Mr. Justice Noonan dealt with an argument that arrested persons are entitled, in advance of a garda interview, to sight of any evidence which it is proposed to put to them in the course of such interview and held (at para. 32) that:

*"... judicial review is not, save in the most exceptional circumstances ... , available to accused persons ... to seek directions or declarations as to the interpretation of legal provisions in advance of their trials based on hypothetical issues that might never arise. That would be a usurpation of the trial court ... which is the forum for ruling on the law applicable in criminal cases."*

154. The respondents also drew this court's attention to *obiter* comments by Denham J. (as she then was) in the Supreme Court's decision of *Brady v Haughton* [2005] 7 JIC 2909 where, (at 347) the learned judge stated as follows:

*"The appropriate fair procedures depend on the type of hearing and the circumstances of the case. In general, fair procedures do not require a person to be informed of steps being taken by a member of the Garda Síochána who is investigating a crime. Thus, if the property in issue was being considered by a forensic authority in Ireland for the purpose of an investigation here, the applicant would not be given, or be entitled to be given, notice of the steps being taken during such an investigation. Of course, later he could query any such steps in a trial if such evidence is presented to the court."*

155. With regard to the submission made on behalf of RG that, insofar as the proper interpretation of s. 23 is concerned, the real question is whether it is appropriate to read into the section words having the effect of recognising the right of a child or their parent/guardian or their legal advisor the right to be provided with the primary material from the Garda Investigation file, the respondents submit that none of the authorities relied upon resulted in substantial or even significant changes to the meaning of the relevant sections. As regards the applicant's reliance on *Kincaid v Aer Lingus Teoranta* [2003] 2 IR 314, the respondents submit that this involved filling a gap in Rules made by the Rules Committee of the Superior Courts which did not cover every eventuality but which arose through the interpretation of the principal Act underpinning those Rules.

156. As regards the applicant's reliance on *O'Ceallaigh v Fitness to Practice Committee* [1999] 2 IR 552, the respondents submit that the court gave expression to the intention of the legislature in respect of the procedural format of the Fitness to Practice Committee for Nurses which was "*read so as to give it its presumed constitutional meaning*" that in a scheme designed to operate like High Court proceedings, there must be an entitlement to have persons present at an inquiry which might assist their defence.
157. Insofar as the applicant relied on *DPP (Sheehan) v Galligan* (High Court, (unreported) Laffoy J. 2nd November 1995; [1999] WJSC HC 1721) the respondents submit that, in answering a case stated to the question in respect of the evidentiary requirements of s. 8 of the Criminal Justice (Public Order) Act, 1994, it was determined that in a prosecution of such an offence, there should be evidence before the court of trial that the accused was informed or was aware of the fact that if he did not comply with a direction made under the Act, he would be guilty of an offence.

### **The literal rule**

158. At this juncture it is appropriate to emphasise that the principal rule of statutory interpretation is the "literal rule". In other words, the guiding principle is that words used in legislation should be given their ordinary and plain meaning. On behalf of the respondents, reference is made to "*Administrative Law in Ireland*" (5th ed., 2019 – Hogan, Morgan and Daly) wherein the learned authors (at [12.02] to [12.04]) state, with regard to the principles of statutory interpretation in administrative law, that "*First, words must be construed according to their ordinary and neutral sense*" and that the "*cardinal rule*" is that the words in a statute "*should be construed according to the intention expressed in the Acts themselves*". The learned authors note that this "literal approach" is the default approach in this jurisdiction as "anything else would lead to chaos". The respondents also drew the court's attention to *D.B. v Minister for Health and Children* [2003] 3 IR 12 wherein Denham J. (as she then was) held the following (at 21) as regards the proper approach to statutory interpretation:

"If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words are clear and unambiguous they declare best the intention of the legislature. If the meaning of the statute is not plain, then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. ... [S]tatutes should be construed according to the intention expressed in the legislation and ... the words used in the statute declare best the intent of the Act."

### **S. 5 of the Interpretation Act, 2005**

159. *The primacy of the 'literal' rule is reflected in s. 5 of the Interpretation Act, 2005 (hereinafter "the 2005 Act") which is entitled "Construing ambiguous or obscure provisions, etc" and begins in the following terms:*

"[5]—(1) *In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

*the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

160. Having regard to the foregoing, it is entirely fair to say that the literal rule constitutes the proper approach, in respect of which s. 5 of the 2005 Act allows an exception where a literal interpretation would defeat the intention of the legislature.

**The result of a 'literal' interpretation**

161. A literal interpretation of s. 23 reveals no right of the type contended for by the applicants. Plainly, the Oireachtas could have decided to provide for such a right, had it so wished. It did not do so in the words actually used. A literal interpretation of the words used most certainly does not fail to reflect what is the plain intention of the Oireachtas, nor does it produce any absurdity. The intention of the Oireachtas is very clear from the objective specified in s. 19 of the 2001 Act. I quoted that section earlier in this judgment - the objective of the Programme being to *divert any child who accepts responsibility for his or her criminal or anti-social behaviour* from committing further offences or engaging in further anti-social behaviour.

162. Section 19 does not read that the objective of the Programme is to divert *any child who, after receiving legal advice including as to the possible strength of a future prosecution against them, including, but not limited to, legal advice on the potential inadmissibility of evidence which might be used in such a future criminal prosecution, were charges to be proffered, accepts responsibility for his or her criminal or anti-social behaviour* from committing further offences or engaging further in anti-social behaviour.

163. A literal interpretation of s. 23, in the context of the subject matter of Part 4 of the 2001 Act and the objective of the Diversion Programme put in place by the Oireachtas means that an undoubted breach of a statutory right would have arisen if any of the applicants had been denied a reasonable opportunity to obtain, for example, legal advice on the various sections in Part 4 and the possible consequences for them of participation in the Diversion Programme (e.g. such as the potential for a *formal* as opposed to *informal* caution; and issues arising such as *supervision*; and the nature and duration of same; as well as the possibility of a case *conference*; or action plan; and what that might mean for a relevant child).

164. The foregoing is not to say that legal advice is confined to the foregoing, but it is to say that to interpret s. 23 as reflecting a right on the part of the applicant, their parent/guardian or solicitor, to such documents from the Garda Investigation file as the applicant or their solicitor deems necessary to provide legal advice would be to do violence to the words actually used; to engage in impermissible judicial law making; and to import a meaning which undermines the plain intention of the Oireachtas, having regard to the plain meaning of the words used.
165. The Diversion Programme is not at all concerned with the admissibility of evidence, yet that is a theme which runs through all four requests made on behalf of the four applicants in the present case. The Diversion Programme has, as its objective, to divert children who are admitted to the Programme away from the formal criminal justice process and, in the manner examined, admission to the Programme operates as an absolute 'bar' to future prosecution, whereas an acceptance of responsibility for criminal behaviour pursuant to s. 23(1)(a) cannot prejudice an applicant who is *not* admitted to the Programme even in the event of future prosecution.
166. In submissions on behalf of RG it is claimed that no obscurity or ambiguity exists insofar as s. 23 is concerned. It is also submitted on behalf of RG. that a literal interpretation of the provision does not give rise to any form of absurdity. Notwithstanding the foregoing, it is submitted on behalf of RG. that an interpretation which does not read into the statute a requirement that the documents on the Garda Investigation file must be provided, renders the right to legal advice nugatory. For the reasons detailed in this judgment, I cannot agree with that submission.
167. A wealth of authority underlines that the principal or general rule of statutory interpretation is the literal rule and a purposive approach is only to be taken where ambiguity or doubt arises. Applying the literal rule in the present case produces no ambiguity or doubt. The applicants do not have the right of access to the Garda investigation file contended for, under a literal interpretation of s. 23(1)(a) of the 2001 Act. Nor does such a right of access flow from any fair procedures rights, whether pursuant to Bunreacht na hÉireann or a European Directive or otherwise.
168. For the foregoing reasons, none of the applicants are entitled to any of the relief claimed and all four applications must be dismissed. I do, however, feel it appropriate to make very clear that even if a purposive approach was taken to the interpretation of s. 23, the outcome would be the same.

**Purposive approach is inappropriate in this case**

169. A purposive approach is inappropriate in the present case where a literal interpretation produces no absurdity, ambiguity or any failure to reflect the plain intention of the Oireachtas. My view that a purposive approach is not appropriate in the present case is fortified by the statements of principle to which the respondents referred in several authorities as follows.
170. In *McGrath v. McDermott* [1988] I.R. 258, Finlay C.J. held (at p. 276) that:-

*"[t]he function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to consideration of the purpose and intention of the Legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it."* (emphasis added)

171. In *Texaco (Ireland) Ltd v. Murphy* [1991] 2 I.R. 449, McCarthy J. held (at 456) that "[w]ilst the Court, must, if necessary, seek to identify the intent of the legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning".

172. O'Donnell J. (as he then was) in *Bookfinders Ltd v. The Revenue Commissioners* [2020] IESC 60, having cited *Texaco (Ireland) Ltd* with approval, went on to say the following:-

"52. *The task of statutory interpretation in any context is the ascertainment of meaning communicated in the highly formal context of legislation. But some degree of uncertainty or lack of clarity is almost inevitable, and the principles of statutory interpretation are designed to assist in achieving clarity of communication. As long ago as 1964, in C.K. Allen, Law in the Making, (Oxford: Oxford University Press, 7th ed., 1964), the 7th edition of a textbook which had spanned the golden age of strict literal interpretation, Professor C.K. Allen observed at p. 349 that:-*

*"Common experience tells us that it is impossible to devise any combination of words, especially in the form (which all laws must take) of a wide generalisation, which is absolutely proof against doubt and ambiguity. So long as men can express their thoughts only by the highly imperfect instrument of words, an automatic, irrefragable certainty in the prescribed rules of social conduct is not to be admitted".*

*It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation."*

173. On a literal interpretation of s. 23, the applicants have a right to obtain any legal advice sought by or on their behalf. The evidence demonstrates conclusively that this right has not been breached. Legal advice was availed of prior to and during the relevant interviews, in the manner examined earlier in this judgment. The ordinary and plain meaning used in s. 23 produces what, in my view, is an obvious interpretation which runs contrary to and undermines the claims made, in particular, by the first three applicants.

Indeed, I regard the approach to construction advocated by these applicants as being a situation where the applicants are putting the plain meaning to one side and ignoring the ordinary sense and meaning of the words used by the Oireachtas in the context in which they appear, in favour of an implausible, strained and impermissible construction.

**The same result regardless of the approach taken to construction**

174. For the following reasons, it also seems to me that, regardless of what approach were to be taken to construction, the result is the same. Certain observations in relation to s. 23, as well as the aims of the Diversion Programme in which that section appears, and the consequences of the interpretation contended for by the applicants seem appropriate to make.
175. Leaving aside the fact that each of the applicants enjoy a 'veto' in the manner previously discussed (and are not obliged to make any decision which, if made, would qualify them for consideration for admission to the Programme), a young person at the s. 23 stage may decide to accept responsibility for criminal (or anti-social) behaviour, or not.
176. At the level of principle, there is a material difference between not accepting responsibility for criminal or antisocial behaviour because (a) that behaviour was not engaged in, as opposed to (b) because a view is formed on legal advice after the interrogation of a Garda investigation file that a potential prosecution case is unlikely to secure a guilty verdict due, for example, to the inadmissibility of evidence in respect of that behaviour. It also seems to me that the Diversion Programme was put in place by the Oireachtas with the primary aim of diverting away from the formal criminal justice process not (i) those who took the view, based on legal advice as to the possible strength of a potential future criminal case (consideration having been given to issues such as admissibility of witness evidence; the results of fingerprint analysis; the result of analysis of clothing; the views of expert crime scene investigators; or the results of specialist medical examination of a complainant) that admission to the Programme was in their interests, but (ii) those who *accepted responsibly* for criminal behaviour. In the manner touched on earlier, these seem to me to be two different categories and Part 4 of the 2001 Act focuses squarely on the latter. Indeed, the sophisticated architecture of the Programme seems to me to require, for it to succeed in its core objective, a genuine acceptance of responsibility, not a tactical decision by someone focussing on the prospects for a conviction of a potential criminal case. That is not for a moment to suggest that any of the applicants fall into that category but it is to say that the fundamental aim of the Programme is utterly at variance with the contended for right of access to the Garda Investigation file materials, given that such contended-for access focuses squarely on something the Programme is not at all concerned (with i.e. admissibility and probative value etc of evidence in the event of a theoretical future prosecution within the formal criminal process context).
177. To look at matters from a slightly different perspective, the ultimate outcome of a formal criminal trial process is typically a 'binary' one, i.e. either (a) an accused is *found not guilty* or (b) they are found guilty. The criminal justice process is not capable of delivering (c) an accused is *found to have accepted responsibility for criminal behaviour*. None of the applicants have had formal charges proffered against them but, it seems to me, that it is

this latter concept (c) of the *acceptance of responsibility* which constitutes the foundation upon which the architecture of the Diversion Programme was constructed with care by the Oireachtas. That this is so has obvious benefits for a young person as well as other stakeholders including the young person's family, the victim and their family, the community and wider society.

178. It was plain from certain of the submissions made on behalf of the applicants and wholly apparent from the correspondence sent by the applicants' solicitors requesting documents from the Garda investigation file, that the focus, insofar as the 'legal advice' which was said to be necessary, concerned the potential strength of a prosecution case. Indeed, one of the submissions made on behalf of the applicants, in support of a right to the contents of the Garda investigation file, related to the "*risk*" of a young person opting for potential admission to the Diversion Programme in circumstances where, had their legal advisor the opportunity to interrogate the contents of the Garda investigation file, it might have transpired that the prosecution case was weaker and it might have transpired that, in the event of a criminal prosecution, securing a guilty verdict would not have been possible for the prosecution.
179. The foregoing seems to me to focus on what the 2001 Act was plainly *not* put in place to address, its focus being on the *acceptance of responsibility* for criminal or antisocial behaviour and clearly providing, per s. 23, the opportunity for legal advice to be given (which, it seems wholly uncontroversial to say, might well address the consequences for admission to the Diversion Programme, were a child to decide to admit such responsibility). As has been emphasised more than once in this judgment, entry into the Diversion Programme is entirely voluntary and no acceptance of responsibility can prejudice a child's rights in any future criminal prosecution even if the Director decides not to admit them to the programme, whereas admission operates as a bar to prosecution.
180. A principal submission made on behalf of all applicants is that the consequences, for a child, of admission to the diversion programme, are so '*serious*' that they give rise to the contended-for right of access to documents from the Garda investigation file. That submission ignores several things. Firstly, it ignores the fact that all applicants have already available to them such legal advice as they might wish to request insofar as the consequences for them of admission to the Programme. Those consequences are set out in detail in Part IV of the 2001 Act and I have looked at many of the provisions earlier in this judgment.
181. As a matter of simple logic, a legal advisor does not require evidence touching on, for example, the admissibility or otherwise of evidence potentially available to a prosecution in the event that criminal charges are proffered in order to be in a position to advise their minor client and his or her parents as to the legal consequences of admission to the Diversion Programme. Those consequences are spelled out in Part 4 of the 2001 Act. Insofar as it is contended on behalf of the applicants that there are other potentially adverse consequences, having regard to other legislative provisions (be that a potential



for disclosure under the 2012 Act, or otherwise), the applicants' legal advisors are already in a position to provide such advice and, as a matter of fact and first principles, do not require sight of the contents of the Garda investigation file to provide such advice.

182. Thus, even if the consequences for a child of admission to the Diversion Programme can fairly be regarded as '*punitive*' and/or '*very serious*' and/or '*negative*' (as per the applicants' submissions), their legal advisors need no documents from the Garda Investigation file to advise on those consequences of admission to the Programme (be they as set out in the various provisions of Part 4 of the 2004 Act, or with reference to any provisions in any other legislation).

**Words used and not used**

183. That the legal advice envisaged by the Oireachtas when enacting s. 23(1)(a) concerns legal advice with regard to the consequences, for a child applicant, of admission to the Diversion Programme, seems to me to be apparent from both the wording used in that section and the words which were not used. As to the words which the Oireachtas chose to use, it is plain from s. 23(1)(a) that a child may or may not decide to accept responsibility for criminal or antisocial behaviour. There is nothing in the legislation which requires a child to enter the Diversion Programme, a first step being the acceptance of responsibility. The fact that the Diversion Programme is not mandatory is doubtless something any legal advisor who is called upon to provide legal advice in the context of s. 23 would be in a position to confirm.
184. There is no evidence whatsoever before this Court that any applicant has been pressurised into entering the Diversion Programme, or qualifying for potential entry, by accepting responsibility for something they maintain they did not do. Submission which identifies this as a 'risk' are wholly unsupported by any evidence. On the other hand, there is ample evidence of the opportunity which every applicant had, and took, to consult with solicitors and with parents.
185. As to words which are not in s.23, it is important to note that a plain reading of the wording enacted by the Oireachtas was to impose no *requirement* that legal advice be sought. It is obviously a positive feature of the legislation that it provides an entitlement for legal advice to be obtained. However, what the section provides is that a child may be admitted to the programme if they accept responsibility for their criminal or antisocial behaviour "*having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her*". Thus, if a child, having consulted with their parents, decides that they do not require any legal advice and accepts responsibility in the context of s. 23, their decision *not* to seek legal advice does not disqualify them from admission to the Diversion Programme.
186. Given the fact that the consequences of entry into the programme are set out in such detail in Part IV of the 2001 Act, one can certainly imagine circumstances in which a decision was taken that legal advice was not necessary. The fact that the taking of legal advice is not a necessary precondition for admission to the programme seems to me to reflect that fair procedures rights are adequately protected by having the option, under s.

23, of taking legal advice, in particular, as to the consequences of entry for the programme, if such advice is sought.

187. It also fortifies me in the view that there is no fair procedures right of access to the Garda Investigation file as a precondition for a young person deciding whether or not to accept responsibility for the purposes of s. 23(1)(a). In other words, the proposition that the correct interpretation of s.23 is to confer a right of access to the Garda Investigation file in order that what the applicants' call '*proper*' or '*adequate*' legal advice can be given, is impossible to square with the fact that the taking of legal advice is not required under s. 23 and the taking of legal advice is not a necessary precondition for entry into the Programme.
188. That obtaining legal advice is not a necessary precondition for admission to the diversion programme seems to me to reflect both the aim and contents of the Programme. The aim has been referred to previously and it is to take young people who qualify for entry away from the formal criminal justice process, something of potentially great benefit to them and to the wider society. The contents of the Diversion Programme represent a sophisticated process designed to provide 'wrap-around' supports for a young person, to better ensure that this early intervention by the State enures to their benefit (by diverting them away from criminal or antisocial behaviour, the obvious hope and aim being that this diversion will be permanent and they will never have to interact with the criminal justice process as an accused, post admission to the Programme).
189. At the risk of repeating myself, insofar as it is submitted on behalf of the applicants that a child might feel '*pressurised*' into deciding to admit responsibility in accordance with s. 23, rather than deciding to defend themselves at a criminal trial, there is simply no evidence whatsoever before this Court to support any such proposition.

**The consequences of the interpretation contended for by the applicants**

190. It also seems to me to be appropriate to make certain observations in relation to the consequences, for the operation of the Diversion Programme, of the right of access contended for by the applicants. Irrespective of whether the right to documents from the Garda investigation file is said by the applicants to arise by virtue of a *literal* or a *purposive* interpretation of s. 23 or, for that matter, to be derived from constitutional rights or otherwise, the following appear to me to be consequences, for the operation of the Programme, which flow from the asserted right.

**A subjective view as to what documents are necessary**

191. If the applicants are correct, it is open to any solicitor in any given case to make a demand for as much documentation or information from the Garda investigation file as they, *subjectively*, deem necessary for the purposes of providing to an applicant of what they deem to be '*proper*' or '*adequate*' advice. As already discussed, I am entirely satisfied that no such documents are at all necessary in order for an applicant to be advised as to the consequences of entry on to the Diversion Programme. However, given that a *subjective* view by a legal advisor in a given case is what would determine the

breadth of a request for documents or information from the Garda investigation file, at least the following consequences arise.

192. Firstly, there is the clear scope for there to be material *differences* as between what one legal advisor regards as necessary, and what another legal advisor regards as necessary, with regard to the production of documentation from the Garda investigation file in respect of two young people interviewed under caution in the context of an investigation into *identical* allegations.
193. One legal advisor may take the view that nothing at all is required by way of documentation from the Garda investigation file for the purposes of providing s.23 legal advice, having regard to what their client and/or his or her parents were told prior to or during the child's interview under caution (as to the nature of the alleged criminal behaviour; when it was said to have occurred; and who made the complaint, etc). Another solicitor might subjectively take the view that the *entire* of the Garda investigation file is required.
194. The Act provides no guidance whatsoever in relation to the foregoing. The 2001 Act has nothing to say about how much or how little documentation from the Garda Investigation file a child or their solicitor is entitled to or how a difference as between legal advisors as to how much documentation is necessary should be dealt with. If the applicants were correct in the right they argue for, this difference would undoubtedly arise (ie two children interviewed under caution in respect of identical matters could end up with very different amounts of material on foot of which legal advice was provided to them). The potential for this difference does not reflect a failure in the draftspersons office to specify a statutory right with clarity. Nor is it a consequence the legislation's failure to recognise a fair procedures right. Rather, it fortifies me in the view that no interpretation of Part 4 of the 2001 Act discloses any such right and there is no 'free-standing' fair procedures right which confers on the applicants any right of access to the Garda investigation file for the purposes of qualification for entry into the Diversion Programme, per s. 23.
195. Another problem which arises from the contended-for right of access to the Garda investigation file concerns the adjudication of a dispute as between (i) the legal advisor seeking the documents or information and (ii) the first named respondent Commissioner. It will be recalled that the legal advisors for the four applicants in the present case have delivered letters making very extensive requests, purportedly as of right, for what would appear to amount to the entire of the Garda investigation file with regard to their respective clients. An obvious question which arises, were the applicants correct in their claims, is: 'Who determines how much material from the Garda investigation file is, in objective terms, *necessary* to enable an applicant to obtain what each of the present applications describe as '*proper*' legal advice and how is that determination to be made?'
196. It will be recalled that the requests as delivered by the legal advisors for the four applicants in the present case do not admit the possibility that anything less than the entire of what has been sought constitutes what is necessary. Leaving the foregoing aside, the complete absence from s. 23 and any other term in Part 4 of the 2001 Act of a

methodology for resolving disputes over what is *objectively* necessary to be furnished by way of documentation, having regard to a request for same which is *subjectively* made, also fortifies me in the view that the applicants do not have the contended – for right.

197. It is also appropriate to repeat, at this juncture, the point I made earlier in this judgment, when looking at the specific evidence in the present case. On any analysis, each of the applicants, their solicitors and their parents, have already been made aware of the allegedly criminal behaviour under investigation and what is said to be the relevant child's part in same, in that they have been informed of the identity of the complainant; what the complainant alleges; when the alleged criminal behaviour took place; and where it is said to have taken place. The foregoing is the factual backdrop against which the applicants assert that s. 23, properly interpreted, and/or freestanding natural justice rights, entitle them to far more, namely, the contents of the Garda Investigation file.
198. Given the purpose of the Diversion Programme and nature of the decision which a potential entrant to the Programme is faced with (namely whether or not to accept responsibility for the purposes of entry on a Programme, which decision cannot in any way prejudice their rights insofar as any potential future criminal prosecution is concerned), I am entirely satisfied that no applicant in these proceedings is entitled to more information, for the purposes of s. 23, than they have received.

#### **Delay and administrative burdens**

199. It also seems to me that if the applicants were correct in what they contend for (and I am entirely satisfied that they are not) another adverse consequence would be the potential to introduce very considerable delay as well as administrative burdens into the Juvenile Diversion Programme. I say this in circumstances where the decision to be made by a child, pursuant to s. 23, is plainly one which arises at the very earliest stage in the Diversion Programme itself. Furthermore, insofar as the Programme sits within the timeframe of what could later become the 'process' of a formal criminal prosecution (e.g. if a child accepted responsibility pursuant to s. 23(1)(a) but the Director, pursuant to s. 24(1), decided *not* to admit them to the Programme and, upon a file having been sent to and considered by the DPP, a decision was made to proffer criminal charges) the Programme is one which sits very early in the chronology of such potential events.
200. Were the applicants correct in the right contended for, it seems to me that major delays could be created which the 2001 Act did not at all envisage. That this is a possibility seems self-evident if legal advisors throughout the State can request so much of the Garda investigation file, in any given case, as they consider necessary. An adjudication of disputes, although it is entirely unclear how such an adjudication would take place in practice, would also have the potential to introduce delay. Added to the foregoing, is the obvious administrative burden of addressing requests for documentation and material. None of these consequences are addressed in the Act and I am satisfied that this because none are envisaged, in circumstances where the right contended for does not arise.

#### **Parallel process of disclosure**

201. A further consequence of the contended-for right is that it would introduce into the architecture of the Diversion Programme a parallel process concerning the disclosure of material 'mirroring' a disclosure process in the context of formal criminal proceedings. That this is contended for was very clear from the submissions made on behalf of the applicants who asserted that each of the applicants, at *this stage* are entitled to all of the rights, in particular as regards disclosure, which an accused person enjoys in the context of their prosecution in criminal proceedings. For the reasons in this judgment, I am satisfied that the applicants are entirely incorrect in that view. The right to be tried in due course of law which, of course, requires basic fairness of procedures, does not entitle a young person at the s. 23 stage to access the Garda Investigation file. Moreover, the importation into the Diversion Programme of this parallel disclosure process seems to me to be diametrically opposed to the fundamental aims of the Diversion Programme legislation which aims to divert young persons who qualify for entry *away* from the formal criminal justice process.
202. Thus, the consequences of the contended-for right seem to me to underline the correctness of the interpretation of s. 23 which I have set out earlier in this judgment, namely, that the literal approach is the appropriate one and that such an approach rules out the contended-for right of access to the Garda investigation file.
203. In short, s. 23(1)(a) of the 2001 Act ensures that a person can receive independent legal advice, if they so wish. The evidence in this case is that the applicants have, in fact, obtained legal advice.
204. For obvious reasons, this Court is not privy to the legal advice provided. Doubtless, it was provided very professionally and appropriately. It does not seem controversial to suggest that such advice may well have alerted the relevant applicants to the fact that entry to the Diversion Programme is not mandatory and an applicant is entirely free to decide, or not, to accept responsibility for criminal behaviour pursuant to s. 23.
205. It also seems safe to assume that legal advice availed of by the applicants addressed the fact that an acceptance of responsibility pursuant to s. 23 cannot prejudice an applicant in the event of criminal charges being proffered in the future, whereas admission to the programme operates as a complete 'bar' to prosecution.
206. Similarly, it seems entirely safe to say that the applicants had available to them advice as to the potential consequences for them of admission to the Programme, including on the topics of cautions, supervision, conferences, action plans, or otherwise.
207. The applicants also had available to them legal advice in relation to any other consequence of entry to the Diversion Programme which their respective legal advisors characterise as "*negative*" or "*serious*", be that the potential for any future disclosure of participation in the Programme pursuant to the 2012 Act or the significance of s. 48(2) (arising only in the event of conviction for an offence committed after entry to the programme).

208. The contended-for right is not contained in s. 23. There is no ambiguity or absurdity which requires a jettisoning of the *literal* approach in favour of a *purposive* analysis.
209. Regardless, however, of what approach to interpretation is taken, the outcome is the same, i.e. the contended-for right to disclosure does not arise in the 2001 Act. The 'downstream' consequences of the contended-for right also fortify me in that view.
210. It was the applicants who referred this Court to the article by Prof. Walsh which, it will be recalled, referred to 27,853 cases, involving 21,941 children, being considered for admission to the programme in 2007. The foregoing highlights the scale of the potential problems (be they under the headings of delay, the resolution of disputes or administrative burdens) which are likely to arise were the applicants correct. The solution to these problems is nowhere addressed in Part 4 of the 2001 Act and I am satisfied that this is for the simple reason that the contended-for right runs wholly contrary to the will of the Oireachtas as clearly expressed in the plain meaning of the words used in the legislation.
211. Nor does the contended-for right arise by virtue of European Directive or constitutional provision. Thus, there is simply no question of the right of each application to be legally advised under s. 23(1)(a) of the 2001 Act having been '*rendered nugatory*'.
212. This is not for a moment to criticise the applicants or their legal advisors. The latter have no doubt been acting in accordance with the highest standards of their profession, motivated exclusively by the aim of asserting their respective clients' rights vigorously and professionally.
213. Constitutional justice could not countenance a situation whereby a child was faced with making a decision as to whether or not to accept responsibility for criminal behaviour pursuant to s. 23 in a 'Kafkaesque' position of not having been given any information as to what alleged criminal behaviour was under investigation and what was said to be the relevant child's role in same. This is not at all the position in the present case.
214. For the reasons set out in this judgment, I am satisfied that all four applications must be dismissed.
215. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "*The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.*" Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the

appropriate form of order, including as to costs which should be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days. Finally, an effort was made to include appropriate redactions in this judgment but if the parties agree that further or other redactions are appropriate, they are invited to make such proposals as are agreed between all parties in that regard, again, within 14 days.