APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/326

Collins J.
Whelan J.
Allen J.

Neutral Citation Number [2024] IECA 94

BETWEEN

THE CHILD AND FAMILY AGENCY

APPLICANT

AND

A.P. AND B.P.

RESPONDENTS

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

NON-PARTY

AND

M.F., GUARDIAN AD LITEM

NOTICE PARTY

JUDGMENT of Mr. Justice Allen delivered on the 26th day of April, 2024

Introduction

1. This is an appeal by the Commissioner of An Garda Síochána *("the Garda Commissioner")* against the judgment and order of the High Court (O'Regan J.) declining to answer a consultative case stated from the District Court on the grounds that the issue which had given rise to the case stated was moot; and declining to make an exception to the general rule that the court will not hear and determine a case which is moot.

2. As I will explain, there were four parties to the District Court proceedings and when the case stated came on for hearing before the High Court, they were agreed that it had become moot. The Garda Commissioner – who was not a party to the District Court proceedings but a non-party against whom an order for discovery had been made – variously declared that he had no view on the question whether the District Court proceedings could be heard and determined without the case stated being decided and submitted that the case stated was not moot.

3. In the High Court, and on the appeal to this court, there was agreement on all sides that the general rule is that the High Court will not hear an appeal – or a consultative case stated – where the issues have become moot but may do so in exceptional circumstances. The High Court judge decided that the case stated was moot and declined to hear it.

4. The issues on the appeal are, first, whether the High Court judge was correct in her conclusion that the case stated was moot; and secondly, if it was moot, whether she erred in refusing to hear it.

The facts

5. The respondents are the parents of two small children who since 2016 have been in the care of the Child and Family Agency *("CFA")* on foot of successive interim care orders granted by the District Court pursuant to s. 17 of the Child Care Act, 1991. Shortly after the

making of the first interim care order, the CFA applied for care orders pursuant to s. 18 of the Act of 1991 to bring the children into care until their eighteenth birthdays.

6. The children were initially taken into care on foot of allegations of emotional and physical neglect.

7. In 2018 the CFA applied to suspend the parents' access, on foot of a recommendation made at review by reference to the children's emotional and behavioural presentation. Before the hearing of that application disclosures were made of unspecified allegations of sexual abuse, possibly implicating the parents, and access was suspended by consent. A Garda notification was sent to the CFA and a criminal investigation was commenced into the allegations of sexual abuse.

8. Later in 2018 and again in 2020 the parents brought access applications to the District Court but by reason of the ongoing criminal investigation those applications – and the CFA's application for care orders pursuant to s. 18 of the Act of 1991 – did not proceed.

9. In November, 2018 the mother applied to the District Court for an order for non-party discovery by An Garda Síochána of the criminal investigation file on the ground that the care order and access applications could not proceed if the parents were not permitted access to the evidence that would be relied on at those hearings which, it was said, would include documents in the criminal investigation file.

10. The Garda Commissioner opposed the discovery application on the ground that the disclosure of the criminal investigation file, while the criminal investigation was still active, would prejudice the investigation and any subsequent prosecution. At that stage, the criminal investigation was at an early stage; the specialist interviews of the children pursuant to s. 16(1)(b) of the Criminal Evidence Act, 1992 not having taken place.

11. The discovery application was adjourned from time to time to allow the District Court to monitor the progress of the criminal investigation.

12. By 10th July, 2020 the criminal investigation was not yet complete. The investigation was complex and further sexual abuse disclosures had been made against the mother. Each time a disclosure was made, the Gardaí were required to investigate it.

13. The respondents then pressed their discovery applications, arguing that the criminal investigation which had been ongoing for upwards of two years was still not complete and that they had not had access to their children since late 2018. They argued that their constitutional and family rights were being breached as a result of what they characterised as the delays in the criminal investigation.

14. The Commissioner asserted public interest privilege over the criminal investigation file, contending that the disclosure of the file prior to the completion of the specialist interviews and prior to the suspects being interviewed would prejudice the investigation and undermine any subsequent prosecution.

15. On 10th July, 2020 the District Court made an order for discovery in favour of the parents of three categories of documents from the criminal investigation file on the ground that they were relevant and necessary for the fair disposal of the child care proceedings, namely:-

1. Statement of witness interviews;
2. Section 16(1)(b) [of the Criminal Evidence Act, 1992] interviews including DVD recordings of same; and
3. Referrals to An Garda Síochána by the Child and Family Agency and the guardian ad litem.

16. On 18th September, 2020 the Commissioner complied with the discovery order and claimed public interest privilege over the three categories of documents. On 21st September, 2020 the parents brought applications for production and inspection.

17. The District Court heard extensive argument on the question of public interest privilege.

18. The parents contended that the documents were relevant and necessary for the determination of the child care proceedings and that their constitutional family rights superseded the public interest in the investigation and prosecution of a criminal offence. They argued that without the documents they would be unable to fully contest the application for permanent care orders.

19. The CFA contended that the existing superior court authorities permitted and obliged the District Court to determine whether or not a public interest privilege could be maintained and, having heard the parties and balanced the competing interests, to either order production or uphold the claim of privilege. The CFA's preference was that all parties should be furnished with the documents in advance of the hearing of the child care proceedings, but its position was that whether or not the documents were provided, the child care proceedings should proceed as soon as possible.

20. The Garda Commissioner, acknowledging the previous decisions of the superior courts, contended that documents which were part of a criminal investigation were protected from disclosure until such time as the Director of Public Prosecutions either directed that there should be no prosecution or directed the service of a book of evidence. The Commissioner argued that there was no authority for the discretion contended for by the parents until that point had been reached in the investigative/prosecutorial process.

21. The guardian ad litem argued that it was in the best interests of the children that the child care proceedings should be heard and determined as soon as possible in circumstances in which – at that time – the children had been in care for over four years on foot of interim care orders, reviewed monthly, and had been in successive foster care placements. The view

of the guardian ad litem was that stability and permanency of placements were necessary for the long-term planning for the children's futures.

22. The District Court judge inspected a full un-redacted copy of the documents and concluded that the documentation was relevant and that if production was ordered the court could protect third parties by redaction.

23. On 22nd December, 2020 the District Court judge stated and signed a case submitting five questions of law for *"clarification"* by the High Court. The case stated shows that while there was agreement between the parents and the Commissioner that the proceedings gave rise to a point of law which would benefit from consideration by the superior courts, the questions of law were referred – pursuant to O. 102, r. 14 of the District Court Rules – without a request by a party. The questions were:-

> *"In circumstances where it is accepted that documents (which are the subject of a discovery order made on 10 July 2020 and which the court has deemed to be relevant and necessary for the purpose of the determination of child care proceedings) are capable of attracting public interest privilege;*
>
> *(1) Having regard to the provisions of Article 42A(1) of Bunreacht na h-Éireann is the court bound to hold that An Garda Síochána is entitled to maintain a claim of public interest privilege over the documents until such time as a decision is taken by the DPP not to prosecute or, where a decision is taken to prosecute, until such time as a book of evidence is served on the respondents?*
>
> *(2) If the answer to Question 1 is yes, can the court proceed with the substantive (s. 18 of the Child Care Act, 1991) application in the absence of discovery, and if so, on what basis can the allegations of child sexual abuse be led in evidence?*

(3) *If the answer to Question 1 is no, having regard to the provisions of Article 42A(1) of Bunreacht na h-Éireann, does the court have a discretion to reject an assertion by An Garda Síochána of public interest privilege and make an order for production (prior to the DPP decision not to prosecute, or where a decision is taken to prosecute, when a book of evidence is served on the respondents) consequent on a hearing to determine which of the competing public interests outlined in paragraph 19 has priority?*

(4) *If the answer to Question 3 is yes, (a) at what point in the criminal investigation or prosecution process, and (b) in what circumstances may the best interests of the children, and the interests of their parents to have their child care proceedings determined, outweigh the claim of An Garda Síochána to public interest privilege in respect of the documents, and (c) what are the relevant principles applicable to the assessment and determination of such balancing exercise?*

(5) *If the court directs [the] production of documents, is the court entitled to impose conditions upon the disclosure, restrict the dissemination of the material produced, and/or redact the material? And, if so, what are the criteria which the court must take into account in so deciding?"*

24. I pause here to say that the first question in the case stated does not quite reflect the argument which the Garda Commissioner would have made to the High Court or, indeed, the argument which the case stated shows was made in the District Court. I do not understand that it was ever contested that the Commissioner was entitled to make a claim of public interest privilege over the documents. Rather – as it was put in the Garda Commissioner's submission to the High Court – the suggestion was that the Garda investigation file was *"a time limited, red-circled exception"* to the power of the courts to make orders for the

production of documents. In other words, the argument was that until the DPP decided not to prosecute or, in the event of a decision to prosecute, the service of the book of evidence, the Garda investigation file was immune from disclosure; or, perhaps, that the District Court was bound to uphold – or precluded from examining – a claim by the Garda Commissioner of public interest privilege.

25. According to the notice of appeal – to which I will come – the central issue requiring clarification was:-

> *"[I]n circumstances where a criminal investigation by the Commissioner of An Garda Síochána … is live, where a suspect/parent applies for non-party discovery by the Commissioner of documents within the criminal investigation file while the investigation is active, does the Commissioner have an entitlement/duty to maintain public interest privilege over the contents of the file, until such time as the DPP decides not to prosecute the suspect/parent or, where the DPP decides to prosecute, until such time as the book of evidence is served on the suspect/parent? Or rather does the District Court have the discretion to order discovery/production during the investigation, notwithstanding the Commissioner's entitlement/duty to assert public interest privilege at this time?"*

26. The second question thus posed as an alternative to the first is premised on an affirmative answer to the first. More fundamentally, the proposition appears to be that the discretion of the District Court to make an order for the discovery or production of documents is an alternative to – and therefore might be displaced by – the entitlement or duty of the Garda Commissioner to make a claim for public interest privilege. But there was never any contest that the Garda Commissioner is entitled to make a claim of public interest privilege over a criminal investigation file. Moreover, the issue so formulated confused or conflated the power to order discovery and the power to make an order for inspection. In

circumstances in which the order for discovery which was made by the District Court had not been appealed and had been complied with, there was no issue before the District Court as to the entitlement of the judge to make an order for discovery.

The hearing and decision in the High Court

27. By the time the case stated was listed for hearing before the High Court, the DPP had decided to prosecute; the parents had been charged with offences; and a book of evidence had been served. The issues of discovery/disclosure thus had fallen away.

28. At the start of the hearing before the High Court, counsel suggested that the most efficient way of dealing with the case might be that the court would rise to read the case stated, the written submissions which had been filed, and the extensive books of authority which had been put together. Counsel flagged to the court the question of mootness and stated their clients' positions in summary.

29. It was accepted on all sides that the court would ordinarily not, but exceptionally might, entertain a moot. Counsel for the CFA, the mother, the father, and the guardian ad litem were agreed that the case stated was moot. The parents either already had or soon would have access to the documents the subject of the discovery order.

30. Counsel for the father suggested that the case stated raised a question of systemic importance which he characterised as a policy on the part of An Garda Síochána of refusing to disclose material gathered in the course of a criminal investigation until a decision was made not to prosecute or a book of evidence served.

31. Counsel for the CFA agreed that there was, as he put it, at the kernel of the case stated, a question as to whether there were any circumstances in which a District Court judge could order that documents which had been prepared for the purposes of a Garda investigation should be made available to other parties before a decision by the DPP to prosecute but suggested that a case stated – and in particular the case stated in this case – was

not the appropriate vehicle to bring that issue before the High Court. In particular, counsel made the point that on the authorities – or, as was said, on the authorities to date – questions of public interest privilege had been decided on a case by case, facts specific, basis and in this case the relevant documents were not before the High Court.

32. Counsel for the mother and the guardian ad litem indicated that if the High Court in the exercise of its discretion was disposed to hear the case, they would offer such assistance as they could. Counsel for the guardian ad litem drew attention to the judgment of Barrett J. in *A. v. B.* [2021] IEHC 96 in which, it was said, the same issues had been addressed in the context of what was described as the private family law dimension, and which was the subject of a pending appeal to this court.

33. The position of the Garda Commissioner on the question of mootness was less than clear. Without going so far as to contend that the case stated was not moot, counsel suggested that *"there must be a question with respect to whether it is in fact moot given that District Judge Kelly raised this as a consultative case stated. He wants it dealt with, Judge. One of the reasons he wanted it dealt with was because it was a systemic issue."*

34. Before rising to read the papers, the High Court judge indicated that she was inclined to hear the case on the basis that the parties were gathered, that substantial submissions had been filed, and that it would be a waste of resources not to proceed to hear it. The judge added that the question as to whether the court should proceed to hear a moot might better have been dealt with as a discrete point.

35. When the court sat again in the afternoon, the judge had read the papers. In answer to a question posed by the court in those terms, the parties other than the Commissioner – that is to say, the CFA, both parents, and the guardian ad litem – were agreed that the questions raised by the case stated did not require to be answered in order that the child care proceedings could be heard. Counsel for the Garda Commissioner declared that he was not in

a position to have any view on the question as to whether the child care proceedings could or could not proceed.

36. In an *ex tempore* judgment delivered on 14th October, 2021 the High Court judge held that the case stated was moot. It was, she said, acknowledged by the parents who had sought the discovery in the District Court that it was no longer required, and the CFA and the guardian ad litem agreed that the issue was moot.

37. The judge summarised the Commissioner's position as being that because the legal issues were not confined to this case but were systemically raised, it would be appropriate that the High Court should give guidance. The judge found that the issues raised were not of exceptional public importance requiring clarification. She noted that the then recent judgment of Barrett J. in *A. v. B.* was under appeal to this court. Having – she said – read and re-read the Commissioner's submissions, the judge said that she did not see in *McLaughlin v. Aviva Insurance (Europe) plc* [2012] 1 I.L.R.M. 487 or in *McGuinness v. Commissioner of An Garda Síochána* [2017] IECA 330 – on which the Commissioner had particularly relied – support for the proposition that the Garda file was immune from production while a live investigation was underway. The judge said that she found it difficult to understand how it could be argued that the District Court was bound to accept a claim of privilege without more. She said that she was not satisfied that the necessary guidance was not already to be found in the case law and further guidance was to be expected from the judgment of the Court of Appeal in *A. v. B.*, which potentially would be more generally applicable than any answers she might give to the case stated before her.

38. O'Regan J. said that she was satisfied that the discovery question was moot and that the child care proceedings could continue. She said that there were in this case particular circumstances which would not necessarily mirror a large number of other cases so that it

was not necessarily the case that a decision would be of any great assistance to the other cases in which the systemic argument as to the meaning of the jurisprudence might be raised.

39. For those reasons, the judge declined to hear the case stated.

The appeal

40. The Garda Commissioner has appealed against the judgment and order of the High Court on fourteen numbered grounds, broadly grouped as mootness and exceptional circumstances, but in which there was significant overlap; and topped and tailed with narrative commentary.

41. It is said that the High Court judge erred in determining that the questions raised in the consultative case stated were *"legally moot"*; erred in holding that because the *"inter-partes dispute (non-party discovery)"* was moot, all five questions posed in the case stated were moot; and that the judge *"failed to distinguish between factual mootness and issue or legal mootness"*.

42. Separately it is said that in making her decision – it is unclear whether the impugned decision was the decision that the case stated was moot or the decision not to hear the case stated – the judge failed to have any or any adequate regard to the fact that the referral was a consultative case stated and that the request by the District Court was for clarification of an issue which regularly comes before the District Court in s. 18 child care proceedings on which there are divergent legal views and no superior court authority, and that the judge – *"in holding that mootness determined the matter"* – failed to take account of the time limited nature of the privilege asserted and the practical reality that by the passage of time the *inter partes* discovery dispute will always be moot by the time the issue reaches the High Court, whether by way of case stated or otherwise.

43. Under the heading *"Exceptional circumstances"* it is said that the High Court judge erred *"by failing to consider mootness/exceptional circumstances as a discrete preliminary*

matter … [and] … by conflating reasons on which mootness/exceptional circumstances could be determined with findings made by her in relation to the substantive case stated (in the absence of being addressed in relation to same) which the court held it was precluded to hear [sic.], but nonetheless made findings in relation to."

44. I am bound to say that I find the grounds of appeal to be confused and confusing. The fundamental proposition appears to be that the judge erred in finding that the case stated was moot. If it was not moot, the question of exceptional circumstances could not arise. But repeatedly the notice identifies *"mootness/exceptional circumstances"* as the same issue. Puzzlingly, it is suggested that the judge erred in finding to be moot a dispute which falls into a category of disputes which will always be moot by the time the issue reaches the High Court.

Whether the case stated was moot

45. The first question to be decided is whether the High Court judge erred in her finding that the case stated was moot.

46. I have never, until I came to this case, heard it suggested that there was a difference between factual mootness and legal mootness. At the hearing of the appeal, I was unable to understand what the difference was said to be and having carefully read the transcript I am not much the wiser. Counsel for the Garda Commissioner acknowledged that there is no authority for such a distinction. Doing the best I can, the argument appears to be that a case is factually moot if the legal issue does not arise on the facts. And a case which is legally moot appears to be a case in which the legal question – which no longer needs to be resolved in order to decide the case – has already been decided. Not only is there no authority for the distinction for which the Garda Commissioner contends but it is in my view wholly irreconcilable with the basic concept of mootness.

47. The leading modern authority on mootness is *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 in which Denham C.J. (in a judgment with which Murray, Fennelly and MacMenamin JJ. agreed) said, at para. 16:-

> *"[16] As has been cited by this court previously, including by Hardiman J in* Goold v Collins *[2004] IESC 38 (Unreported, Supreme Court, 12th July, 2004), the* dictum *of the Supreme Court in* Borowski v Canada (Attorney General) *[1989] 1 SCR 342 reflects the law of this jurisdiction where it is stated:-*
>
> > *'An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.'"*

48. In a separate judgment in *Lofinmakin,* McKechnie J., having conducted an extensive review of the authorities, distilled a number of principles, the first two of which are instructive at this stage, which are that (at para. 82):-

> *"(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;*
>
> *(ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined;"*

49. In this case, the issue which gave rise to the case stated to the High Court was the insistence by the Garda Commissioner that the District Court was bound to uphold a claim of public interest privilege over the investigation file – or, perhaps, that the District Court was not entitled even to examine such a claim – until such time as a decision was taken by the DPP not to prosecute or, in the event of a decision to prosecute, until such time as a book of evidence was served on the parents. At the time the case was stated, the practical impact or effect of the decision was that the parents would or would not – or at least that the District Court could or could not decide whether the parents would or would not – have an order for the production and inspection of the documents which had been discovered and which it had already been decided were relevant and necessary for the determination of their child care proceedings. By the time the case stated was listed for hearing before the High Court the DPP had made his decision and the parents had been served with the book of evidence and had the documents the subject of the motion for inspection. In the words of McKechnie J., the essential foundation of the application for production and inspection had disappeared. There was no live controversy as to the parents' entitlement to the documents: they already had them.

50. The premise of the order for discovery was that the documents were relevant and necessary for the determination of the child care proceedings. The issue on the motion for inspection was whether the parents should have sight of the documents. By the time the case stated came before the High Court, the parents had sight of the documents. The issue as to the entitlement of the Garda Commissioner to withhold the documents – or the jurisdiction of the District Court to make an order for their production – had been overtaken. If there was a systemic question as to the power of the District Court to make an order for the inspection of a Garda investigation file – or documents on a Garda investigation file – it was no longer a matter of any practical consequence to the parties to the child care proceedings.

51. The High Court judge was unquestionably correct in her determination that the case stated was moot.

Whether the High Court ought nevertheless to have decided the case stated

52. As in the High Court, so on the appeal, the CFA, the mother, the father and the guardian ad litem were agreed that the case stated was moot but divided as to whether the High Court should nevertheless have heard it; the father contending that the High Court should have heard it and the CFA and the guardian ad litem arguing that the High Court was correct not to have heard it. The mother was neutral.

53. As in any appeal from a discretionary decision of the High Court, this court is reviewing the exercise of the discretion by the High Court rather exercising the discretion *de novo*. In that context, the court gives significant weight to the views of the High Court judge.

54. The Garda Commissioner's first complaint was that the hearing before the High Court was fundamentally flawed. It was said that the judge had initially indicated that she would hear the case, even though it might be moot, but later decided that she would not.

55. I am satisfied that there is no substance to this complaint. The transcript clearly shows that having heard briefly from counsel and before reading the papers, the judge indicated that she was *"inclined"* to hear the case but having read the papers and the written submissions – and having heard further from counsel – decided that she would not. I see no inconsistency in what the judge said. If she was initially inclined one way, her decision was the other way.

56. The Garda Commissioner's second complaint – in logical order, if not in the order in which it appeared in the notice of appeal – is that the judge *"failed to consider mootness/exceptional circumstances as a discrete preliminary matter."* This ground fails to recognise the fundamental basis of the mootness jurisprudence that the general rule is that the court will not entertain a moot but has a discretion to depart from it. The High Court judge

first considered whether the case stated was moot and having decided that it was, considered whether she should nevertheless hear it. That was the correct approach.

57. As to the substance of the decision of the High Court judge not to hear the case stated, there is considerable overlap in the grounds of appeal. Moreover, many of the grounds are fairly obviously at variance with the established jurisprudence.

58. The first of the grounds of appeal directed to the refusal of the High Court judge to entertain the case stated is ground No. 4 which is that:-

> *"In making her decision, the learned High Court judge erred by failing to have any or any adequate regard to the fact that the referral was a consultative case stated, and that the District Judge request for clarification was on a matter that regularly comes before the District Court in section 18 child care proceedings on which there are divergent legal views and no Superior Court authority."*

59. In this ground there are four propositions. First, that the court should take a different approach to moot consultative cases stated than to other moot cases. Secondly, that the clarification sought was *"on a matter"* that regularly come before the District Court – specifically in applications under s. 18 of the Child Care Act, 1991. Thirdly, that there are divergent legal views on the questions. And fourthly, that there is no superior court authority on the questions.

60. I have previously contrasted the formulation of the questions posed by the case stated and the *"time limited, red-circled exception"* for which the Garda Commissioner would contend. The question of systemic importance which regularly comes before the District Court appears to be – as formulated by counsel for the CFA – whether there are any circumstances in which a District Court judge can order that documents which have been prepared or gathered for the purposes of a Garda investigation should be made available to

the parties to litigation before a decision has been made by the DPP to prosecute; but that is not the question posed.

61. I find it quite impossible to reconcile the proposition in the notice of appeal that there is no superior court authority on the questions with the Garda Commissioner's argument in the High Court that there is, and that the proposition for which he contends is supported by authority.

62. Repeatedly, reference is made in the grounds of appeal to exceptional circumstances. Variously it is suggested that the judge erred in finding that there were no exceptional circumstances, in failing to find that there were exceptional circumstances, and in failing to consider exceptional circumstances as a discrete preliminary matter.

63. Before going further, it is useful to return to *Lofinmakin*. Denham C.J., having set out the general rule, turned, starting at para. 17, to the question of discretion.

> *"Discretion*
>
> *[17] There are exceptions to this general rule, when the court will hear and determine issues in a moot appeal. Such exceptions have been described in O'Brien v. Personal Injuries Assessment Board (No. 2) [2006] IESC 62, [2007] 1 I.R. 328, in Okunade v. Minister for Justice [2012] IESC 49, [2012] 3 I.R. 152 and in Irwin v. Deasy [2010] IESC 35, (Unreported, Supreme Court, 14th May, 2010).*
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> *[18] In Irwin v. Deasy [2010] IESC 35, Murray C.J. said:-*
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> > *'In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the court may in the interests of the due and proper administration of justice determine such a question.'*

[19] In some cases an exception may arise if the issue determined in the High Court affects many other cases. Thus, in O'Brien v. Personal Injuries Assessment Board (No. 2) [2006] IESC 62, [2007] 1 I.R. 328, Murray C.J. pointed out at p. 334:-

> *'[20] … Where, as in this case, a party has a bona fide interest in appealing against a declaratory order of the High Court which is not confined to past events peculiar to the particular case which has been resolved in one way or another, the court should be reluctant to deprive it of its constitutional right to appeal. In this case the respondent continues to be constrained in the exercise of public powers under statute by virtue of the declaration granted in the High Court at the instance of the applicant.'*

[20] An exception to the general rule may also arise if it is a test case, and if many other cases have been adjourned pending the decision of the case before the court. [21] The issue of mootness was analysed by Clarke J. in Okunade v. Minister for Justice [2012] IESC 49, [2012] 3 I.R. 152. In that case the issue was, as he stated, at p. 168, "strictly speaking moot". However, it was a test case. Clarke J. stated at p. 169:-

> *'[37] This case had, therefore, been, in a sense, designated as an appropriate test case by reference to which the broad issues which are addressed in this judgment were to be determined. That designation occurred at a time prior to the issue becoming moot by virtue of the decision of Cross J. In those unusual circumstances the Minister was anxious, and the court agreed, that this appeal should be heard notwithstanding the fact that the issue had, by the time the appeal actually came on for hearing, become moot. The unusual set of circumstances outlined above formed the basis for that decision. In addition it seemed to the court that any case in which this issue might arise was likely to*

become moot in a relatively short period of time for the issue concerns the proper approach that should pertain pending the hearing of a leave application. Every case of this type will, therefore, become moot when the leave application is heard. The problem which emerged in this case, being that arrangements for an expedited appeal had been set up with a date set but that the issue became moot by virtue of the hearing and determination of the leave application before that date was reached, has a significant risk of occurring in any other case. In those special and unusual circumstances this court felt that it was appropriate to hear the appeal notwithstanding its mootness.'

[22] The fact that a case raises an important point of law is not of itself a reason to bring it within the exceptional category. The foundations of a case that is moot have fallen away and so they are usually not appropriate cases upon which to decide important points of law, unless there are other factors such as arose in O'Brien v. Personal Injuries Assessment Board (No. 2) [2006] IESC 62, [2007] 1 I.R. 328 and Okunade v. Minister for Justice [2012] IESC 49, [2012] 3 I.R. 152."

64. At the time the case stated came before the High Court it was not a case – such as *Irwin v. Deasy* – in which any of the parties has a material interest in a decision. The outer limit of the time during which the Garda Commissioner would contend that the investigation file is immune from production was past.

65. Nor, unlike *O'Brien v. Personal Injuries Assessment Board (No. 2)* and *Okunade*, or the further decision of the Supreme Court in *Odum v Minister for Justice and Equality* [2023] IESC 3, was it an appeal from a decision on the merits. If, in the past, in other cases, the Garda Commissioner has made the argument which he made to the District Court in this case, it had not been decided against him. Whether the Garda Commissioner has or does not have the power for which he would contend, he was not, by the refusal of the High Court to

entertain the case stated, constrained in continuing to take the position he has previously taken. While counsel for the Garda Commissioner submitted that the District Court judge wanted the case dealt with and that one of the reasons he wanted it dealt with was because it was a systemic issue, there was no evidence of that. Objectively, the case stated was a case stated by the District Court under s. 52 of the Courts (Supplemental Provisions) Act, 1961 by which the District Court judge sought the determination of the High Court on a question of law arising in the proceedings before him, which question of law had become moot.

66. Perhaps with an eye to *Okunade*, one of Garda Commissioner's grounds of appeal was that the High Court judge failed to take account of the time limited nature of the privilege asserted and what was said to be the practical reality that, through the passage of time, the inter-partes discovery dispute will always be moot by the time the issue reaches the High Court. There are a number of problems with this. First of all, while it is said that the privilege or immunity for which the Garda Commissioner would contend is *"a time limited, red-circled exception"* it is not time limited, but process limited. On the facts of this case the Garda investigation began in April, 2018 and concluded at some time between 22nd December, 2020 when the case stated was signed and 13th October, 2021 when it was listed before the High Court for hearing. The written submissions filed in the High Court on behalf of the guardian ad litem show that the father and mother had been charged at some time prior to 13th August, 2021. Counsel for the Garda Commissioner – not unreasonably – took exception to the suggestion that there had been delay in the conduct of the criminal investigation. Without any evidence of what was required for the purpose of the investigation or what steps were or were not taken in the course of the investigation, I can see no warrant for the suggestion that there was delay. The point, for present purposes, however, is that the investigation was ongoing for something like three years. Unlike *Okunade* it

cannot be said that any systemic question of access to Garda investigation files will always be moot by the time it comes to the High Court.

67. Part of the judge's reasoning for not hearing the case stated was that the issues were not of exceptional public importance requiring clarification. She said that she was not satisfied that the necessary guidance was not to be found in the case law and that further guidance could be expected from the judgment of the Court of Appeal in *A. v. B.*

68. The grounds of appeal, at ground No. 10, complain that the High Court judge *"erred in holding that the central issue was settled, despite there being no Superior Court authority on the point in the context of proceedings taken under section 18 of the Child Care Act, 1991 and where a criminal investigation is active and ongoing"* and, broadly, that the judge had excessive regard to the judgment of the High Court in *A. v. B.* and the fact that it was under appeal. Separately, ground No. 13 suggests that if the High Court judge thought that the judgment of the Court of Appeal in *A. v. B.* might have assisted her in determining the present case stated *"an adjournment of the present case stated, pending an outcome of the A. v. B. appeal might have been an appropriate order to make, as opposed to being a proper basis upon which she could find the proceedings to be moot and/or that no exceptional circumstances prevailed to allow the hearing to proceed."*

69. In the course of argument before this court, one of the criticisms made of the judgment of the High Court was that the judge referred only to *McLaughlin v. Aviva Insurance* [2012] 1 I.L.R.M. 487, *McGuinness v. Commissioner of An Garda Síochána* [2017] IECA 330 and *A. v. B.* and not to *"the raft of authorities that were opened to her."* I understand the argument to be that because there was disagreement at the Bar as to whether the law was clear and settled, the judge erred in not hearing the consultative case stated: if not, perhaps, with a view to deciding the case stated, then with a view to deciding whether the law was clear and settled.

70. Before looking at the cases to which the judge referred, I pause to say that in principle in is not necessary and almost invariably not useful that a judgment should refer to all of the cases to which reference may have been made in the course of argument, still less those which have been included in the books of authorities submitted to the court without explanation of their relevance.

71. The cases on which the Garda Commissioner had paced particular reliance in arguing that the High Court judge should hear the moot case stated were *McLaughlin v. Aviva Insurance* and *McGuinness v. Commissioner of An Garda Síochána*. These, of course, brought in tow the raft of authorities to which they referred and relied upon.

72. *McLaughlin* was an action for indemnity on foot of a fire insurance policy. The plaintiff's claim on foot of the policy had been declined on the ground that the plaintiff had been responsible for the fire. Soon after the fire the plaintiff had allowed the defendant's inspectors to take away the CCTV surveillance system which the inspectors, in turn, had handed over to the Gardaí. On the application of the plaintiff the High Court made an order for non-party discovery by the Garda Commissioner and refused a claim of public interest privilege. As the headnote shows, the Garda Commissioner's claim of public interest privilege based on the detection, investigation and prosecution of suspected offences until such time as the DPP should decide whether or not to prosecute was contested on the basis that the insurance company had previously been in possession of the material during the criminal investigation and had already used it in the defence of the civil proceedings.

73. Denham C.J. (with whom O'Donnell J. agreed) found that there is a public interest privilege in documents which are a material part of a criminal investigation and that the Garda Commissioner had discharged the onus of establishing that the items sought were privileged. What appears to have been the core issue on the appeal – whether the fact that the documents and items had not been created by An Garda Síochána made any difference – was

resolved against the plaintiff. In the context of the present appeal, it is useful to recall that Denham C.J. said, at para. 11 :-

> *"11. There is a public interest privilege which arises in some cases whereby certain matters may be privileged and may not be produced in evidence. The decision as to whether evidence is privileged or not is a matter for the courts: Murphy v. Dublin Corporation [1971] I.R. 215. There may be different aspects of the public interest. Walsh J. noted in Murphy v Dublin Corporation at p. 233:*
>
> > *'There may be occasions when the different aspects of the public interest 'pull in contrary directions' – to use the words of Lord Morris of Borth-y-Gest in Conway v Rimmer [1968] A.C. 910, 955. If the conflict arises during the exercise of the judicial power then, in my view, it is the judicial power which will decide which public interest shall prevail. This does not mean that the court will always decide that the interest of the litigant shall prevail.'"*

74. It is also useful to recall that in his concurring judgment in *McLaughlin* O'Donnell J. said that:-

> *"The court is free to inspect the items if it considers it either appropriate or necessary to do so, and is not bound to accept the Commissioner's claim." [Emphasis added.]*

75. *McGuinness* – to which the High Court judge referred but which for some reason was not part of the raft of authorities floated into this court – was a decision of this court (Edwards J., Birmingham and Mahon JJ. concurring) upholding two judgments of the High Court (Keane J.) on an application for discovery of the sworn information relied on by the Gardaí in applying for a search warrant of the plaintiff's premises.

76. In the first of his two judgments ([2016] IEHC 549) Keane J. reviewed the authorities, including *McLaughlin, Ambiorix v. Minister for Environment (No. 1)* [1992] 1

I.R. 277 and *Keating v. RTÉ* [2013] IESC 22. Keane J. set out the summary of the relevant principles in *Ambiorix* – which was restated by McKechnie J. in *Keating* – which was that:-

> *"1. Under the Constitution the administration of justice is committed solely to the judiciary by the exercise of their powers in the courts set up under the Constitution.*
>
> *2. Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the State.*
>
> *3. Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.*
>
> *4. The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the Sate or the efficient discharge of the functions of the executive organ of the Government.*
>
> *5. It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision."*

77. The conclusion of the Court of Appeal in *McGuinness* was that the plaintiff had not established the relevance of the sworn information relied on by the Gardaí in support of the application for the warrant but Edwards J. went on to say that:-

> *"Moreover, even if the plaintiff had been entitled in principle to discovery of the document at issue, and I am satisfied that he was not, there were asserted claims of public interest privilege and informer privilege, which the High Court judge had been disposed to uphold, following a viewing of the document in accordance with*

established and proper procedure. I have heard nothing from, or on behalf of, the plaintiff to persuade me that the High Court judge erred in any way."

78. In the present case the High Court judge could see nothing in those authorities which might support the argument which the Garda Commissioner would make that the investigation file was subject to a *"a time limited, red-circled exception"* from the established principles applicable to claims for executive privilege. Neither can I.

79. The third of the cases to which the High Court judge referred in her judgment was *A. v. B.* [2021] IEHC 96. That was a battle between parents for custody of their children in which the High Court had made an order for the provision by the wife to the husband of a copy of recordings which had been made on electronic devices and which were said to be relevant to the question as to whether the father should have access, or unsupervised access, to the children. The wife had not complied with the High Court order but had handed over the devices to the Gardaí. The husband then applied to the High Court for an order for non-party discovery by the Garda Commissioner.

80. In response to the discovery motion an affidavit of discovery was sworn which confirmed that the Gardaí had the recordings and made a claim of public interest privilege on the ground that the husband was the subject of an ongoing criminal investigation in respect of alleged assault on the children and coercive control of the wife. It was deposed that the recordings formed a material part of the criminal investigation and the investigating officer expressed his opinion that they should not be disclosed to the husband as to so would impede the criminal investigation.

81. Barrett J. undertook an exhaustive review of the authorities before, at para. 25, setting out a summary of the principles distilled from *McLaughlin* and, at para. 42, concluding that the court would order the provision to the court of a copy of the recordings in order that it might undertake a weighing exercise of the competing public interests in the

proper administration of justice in a case concerning the safety and welfare of children and in maintaining investigative privilege associated with a garda investigation into an alleged criminal offence.

82. The principal judgment in *A. v. B.* was delivered on 12th February, 2021 and a supplementary judgment was delivered on 23rd February, 2021. The consultative case stated in this case – which was signed on 22nd December, 2020 – predated the judgment in *A. v. B.* When the case at hand came before the High Court an appeal by the Garda Commissioner against the judgment of Barrett J. was pending before this court.

83. As to whether in this case the High Court should entertain the moot consultative case stated, the judge said that, on the authorities, she found it difficult to understand how it could be argued that the District Court was bound to accept a claim of privilege without more. I have to say that I agree. The authorities, starting with *Murphy v. Dublin Corporation*, clearly and consistently set out the law to be applied to claims for executive privilege. *McLaughlin*, *Ambiorix* and *Keating* clearly set out the principles to be applied – which principles are to be applied by the courts – in balancing competing interests.

84. In this case the Garda Commissioner emphasised that the substantive proceedings in which the order for discovery was made and in which the order for inspection was sought were proceedings under the Child Care Act, 1991. The notice of appeal refers repeatedly to *"section 18 child care proceedings"* but – leaving aside the fact that the disclosure was sought for the purpose of the parents' access applications under s. 37 as well as the CFA's application for a care order under s. 18 – it is difficult to see how the rules applicable to civil proceedings under the Child Care Act, might be different to those applicable to any other civil proceedings, *a fortiori* to access and custody proceedings in which the CFA was not involved.

85. In this case, as I have said, the High Court judge in declining to hear the moot case stated took into account the judgment of the High Court in *A. v. B.* and the fact that there was a pending appeal of that decision before this court. In my view, she was perfectly entitled to do so.

86. Variously the grounds of appeal suggest that the judge's finding that she was bound by *A. v. B.* was incorrect in law and that it was in any event distinguishable. It seems to me that *A. v. B.* was binding unless it was distinguishable. *A. v. B.* and the instant case were both concerned with the judicial power to compel the disclosure of material on garda investigation files in what might broadly be described as civil proceedings concerning the custody of and access to children. I cannot see how *A. v. B.* was distinguishable unless by reference to the statutory schemes governing the substantive proceedings. If the Garda Commissioner did not argue that the principles applicable to non-party discovery applications in proceedings under the Child Care Act, 1991 are different to those applicable to proceedings under the Guardianship of Infants Act, 1964 and the Children and Family Relationships Act, 2015 – or that the principles applicable to an application under s. 18 of the Act of 1991 are different to an application under s. 37 – the judge is not, in my view, to be criticised for failing to invite him to do so.

87. In the written submissions filed on the appeal, the Garda Commissioner contends that *A. v. B.* is distinguishable on four grounds. The first is that in *A. v. B.* the order was made in private law proceedings whereas in this case the substantive proceedings are said to be public law proceedings. I am not at all sure that child care proceedings can properly be regarded as public law proceedings but I would find it startling that the availability of relevant and necessary documents should depend on whether the CFA was or was not involved. The fourth ground of alleged distinction is more or less a refinement of the first, that the *"reference criteria"* in s. 3 of the Guardianship of Infants Act, 1964 – the welfare of the

infant as the first and paramount consideration – are different to those in s. 24 of the Child Care Act, 1991 – the welfare of the child as the first and paramount consideration. Well, I see no difference. And if there is a difference, it would make no difference. As McKechnie J. said in *Keating*, the summary in *Ambiorix* was a restatement without expansion or qualification of the law as stated in *Murphy v. Corporation of Dublin* [1972] I.R. 215 that as a matter of constitutional law, which is mandated by the separation of powers and which permits of no exception, it is for the courts alone to resolve, in a justiciable setting, any conflict or tension which may arise between the public interest in the administration of justice on the one hand, and the public interest, however articulated, which is advanced as a ground for non-disclosure of documents on the other.

88. The second ground of alleged distinction is that in this case the material was generated by the Gardaí while the material in *A. v. B.* was generated by the wife. That is the converse of the argument rejected by the Supreme Court in *McLaughlin.* The third ground of alleged distinction is that in *A. v. B.* the targeted material was within the possession or power of one of the litigants. That is simply wrong. The order against the Garda Commissioner in *A. v. B.* was required because the recordings – which had been – were no longer in the possession or power of the wife.

89. Then it is said that even if it is accepted that the High Court decision in *A. v. B.* was correct, *"it is arguable that the first legal principle elucidated in A. v. B. is coterminous with the first question only in the [consultative case stated]."* This first of all misses the point – correctly identified by the High Court judge – that unless it was distinguishable, *A. v. B.* was binding on her. It then rehearses the argument – which I have already dealt with – that the judge ought to have answered the other questions without answering the first.

90. As to the pending appeal in *A. v. B.*, if the same or substantially the same systemic question was before this court in *A. v. B.*, a decision on the moot case stated before the High Court was not going to resolve it.

91. As to the argument advanced in this court that the High Court judge ought to have adjourned the case stated pending the outcome of the appeal in *A. v. B.* – or perhaps it is that she ought to have adjourned her decision whether or not to hear the case stated pending the outcome of the appeal in *A. v. B.* – this is firstly not something which she was invited to do and secondly goes to show that there was justification for her view that the Court of Appeal in *A. v. B.* would – as it has in the judgments delivered today [2024] IECA 95 – provide whatever, if any, further guidance as was necessary for the resolution of the systemic question**.**

92. The written submissions filed on behalf of the Garda Commissioner identify two questions which arise on the appeal, the first of which is whether the High Court was correct to find that the five questions referred by way of case stated were moot. This reflects the ground that the High Court judge erred in finding that all five questions were moot. As to this, I observe first, that the judge was not invited to consider the mootness of the five questions *seriatim*; secondly, that on the face of the case stated whether the second to fifth questions arose depended on the answer to the first; and thirdly – as was submitted on behalf of the CFA – that the statement of facts did not clearly lay the ground for the further questions.

93. It was submitted on behalf of the Commissioner that the High Court judge misunderstood the nature of a consultative case stated. The guidance sought by the District Court judge, it was said, could not be described as hypothetical or abstract because it related to a systemic issue. It was, it was said, to be inferred from the fact that the District Court judge stated a case that he considered that the law was unclear.

94. By reference to the written submissions filed on behalf of the Garda Commissioner, the argument appears to be that a consultative case stated is a special jurisdiction of the kind contemplated by McKechnie J. in *Lofinmakin* where he said that *"... the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions."* That is incorrect. It is absolutely clear from the authorities, most recently the decision of the Supreme Court in *ELG v. Health Service Executive* [2022] 1 I.L.R.M. 213 that the purpose of a consultative case stated is to resolve an issue of law so as to allow the judge hearing a case to decide it. As Baker J. put it:-

> *"There may be cases where the legal issue is of such importance and of potentially far-reaching effect that the interests of justice, the public interest in clarifying the law and the efficient use of court time and resources might result in the court answering the case stated, especially as in most, or probably in all cases where the lower court judge retires, dies or is promoted the issue in dispute between the parties remains a live one that could be resolved by the answer."*

95. The discretion of the court to hear and determine a case stated which raises an important issue of law notwithstanding the fact that it has become moot is not to be confused with a special jurisdiction – whether in the lower courts to ask for, or in the superior courts to give – purely advisory opinions. Sometimes, perhaps often, a case stated will be prompted by an issue which frequently arises but whether – if the case has become moot in the meantime – the requested court will nevertheless answer it will depend upon the question and not on the vehicle by which the question comes before the court.

96. Moreover, it is not necessarily to be inferred from the fact that a District Court judge has stated a case that he or she considered the law to be unclear, or from the frequency or persistence with which an argument is made that there is substance to it.

97. It was submitted by counsel on behalf of the guardian ad litem that the High Court judge erred in failing to take account of the fact that the Garda Commissioner did not accept that the reasoning of Barrett J. in *A. v. B.* applied to child care cases: not because it did not – which the guardian ad litem argued it did – but because the Commissioner would not accept that it did. On that analysis, the question of law would be whether applications for discovery by the Garda Commissioner in proceedings under the Child Care Act, 1991 should be approached differently to applications for discovery in other proceedings involving children. But while the context in which the consultative case stated had been referred was child care proceedings, the Garda Commissioner's argument was in truth founded on the nature of the garda investigation file and not the nature of the civil proceedings for which disclosure was sought.

98. The Garda Commissioner argues that the judge erred in the exercise of her discretion by failing to apply the criteria laid down by the authorities and applied other criteria that are not supported by the authorities. In support of this, the written submission sets out the list of criteria set out in the judgment of McKechnie J. in *Lofinmakin* and argues that the High Court judgment did not address those criteria *seriatim*. I do not believe that this argument is well founded. A central consideration in the exercise by the court of its discretion whether to make an exception to the general rule is whether notwithstanding the mootness there remains a point of law of exceptional public importance which the court should determine in the interests of the due and proper administration of justice. As The Supreme Court emphasised in *Lofinmakin*, the fact that a case raises an important point of law is not of itself a reason to bring it with the exceptional category, but it is the starting point. Moreover, the list of criteria identified by McKechnie J. is not a template in which the boxes are to be ticked.

Conclusion

99. The Garda Commissioner did not go so far as to argue that the High Court judge needed to decide the case stated in order to decide whether she should decide it.

100. If, as the judge correctly found, the case stated was moot, the application of the general rule required that the court should not entertain it.

101. In the exercise of her discretion as to whether she would nevertheless entertain the case stated the High Court judge was entitled to make an assessment of the law generally and to come to her own conclusion that judgment of the Court of Appeal in *A. v. B.* would likely provide whatever further guidance – if any –as was necessary on the systemic question of the disclosure of documents on garda investigation files. Counsel's peroration was that if the case stated was sent back to the High Court with a direction to hear it, what would probably happen is that the High Court would look at it and the judgment of this court in *A. v. B.* and ask itself whether there is any reason why those principles cannot be applied in both the public law and the private law sphere. That is not very far off the conclusion of the judge that whatever, if any, further guidance may be necessary in child care cases will be available from the decision on the appeal in *A. v. B.*

102. In my opinion the judge was entitled to and did take into account the core issue said to arise. The core issue was the existence or not of a red circled exception of garda investigation files from the general rule. If counsel for the Garda Commissioner was – as he was – adamant that child care proceedings, specifically s. 18 applications, fell into a special category, the judge was entitled to form a view as to whether they probably did or not.

103. I am not persuaded that there was any error in the approach taken by the High Court judge or her conclusion, in the exercise of her discretion, not to entertain the moot case stated and in my view the appeal should be dismissed.

104. The parties are invited to engage as to the appropriate costs order. If agreement cannot be reached, the panel will reconvene for a short costs hearing.

105. As this judgment is being delivered electronically, Colins and Whelan JJ. have authorised me to say that they agree with it.