SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2020] ABE 42

ABE-B657-19

JUDGMENT OF SHERIFF ANDREW MILLER

in causa

SUMMARY APPLICATION IN TERMS OF SECTION 2 OF THE PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) ACT 1995

by

IAIN LIVINGSTONE QPM, Chief Constable, The Police Service of Scotland

Applicant

against

XY

Respondent

Act: Mr McLaren
Alt: Mr McLoone

Aberdeen: 1 September 2020

INTERLOCUTOR

The sheriff, having resumed consideration of the cause, repels the second plea-in-law for the respondent; assigns a hearing for 16 September 2020 at 10.00am within Aberdeen Sheriff Court, Civil Annexe, Queen Street, Aberdeen, to proceed by conference call unless otherwise advised, to consider further procedure; ordains parties to email brief notes of their proposals for further procedure along with contact details for said hearing to aberdeencivilteam@scotcourts.gov.uk no later than 4.00pm on 11 September 2020; and continues consideration of the question of liability for the expenses of the debate which proceeded on 24 August 2020 to said hearing.

NOTE

The 2019 summary application

[1] A warrant to cite was granted in this summary application ('the 2019 summary application') on 4 September 2019. The respondent was aged 57 when the 2019 summary application was warranted. The applicant craves a Risk of Sexual Harm Order ("ROSHO") under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 ("the 2005 Act"), to last for a period of 5 years, prohibiting the respondent from

> "having or attempting to have any contact or communication of any kind whatsoever with any female person under the age of 16 years save for incidental or unavoidable contact and from having contact with the respondent's grandchildren [AB] and [CD] unless supervised by an adult of 21 years or over who has been approved by an officer of the offender management (sic) responsible for managing him to carry out the supervision."

The applicant also craved an interim ROSHO under section 5 of the 2005 Act in corresponding terms.

[2] An interim ROSHO was granted on 2 October 2019, after a number of procedural callings. Thereafter, the summary application was continued on a number of occasions to allow parties to adjust their pleadings. A debate was assigned for 17 March 2020 on the respondent's second plea-in-law (*res judicata*). That hearing was discharged in order to enable the respondent to recover papers relating to earlier proceedings involving him. A new diet of debate was assigned for 31 March 2020, which could not proceed due to the coronavirus lockdown. Ultimately, the debate on the respondent's plea of *res judicata* was assigned for 24 August 2020, when the matter proceeded before me. The interim ROSHO was continued on a number of occasions during the intervening period. Having heard

parties' submissions at the debate, I further continued the interim ROSHO until midnight on 24 October 2020 and thereafter made avizandum.

[3] Article 3 of condescendence avers that, on 2 October 2009, the respondent exposed his penis to a 4 year old girl, EF, whilst he was within her parents' home in the course of his work. Article 4 of condescendence avers that on 13 October 2009 a 3 year old girl, GH, made an allegation to her mother that the respondent, who was within the child's home that day in the course of his work, had exposed his penis to her and had asked her to "show him mine". Article 4 avers that, when subsequently interviewed, the child repeated her account of these events and further disclosed that the respondent had asked her to remove her leggings. Article 5 of condescendence avers that, on or around 12 October 2009, a 5 year old girl, JK, who was within the respondent's place of work with her mother and grandmother, made a comment to her mother and grandmother alleging that the respondent had exposed his penis to her on that occasion.

[4] According to the Record in the 2019 summary application, all three of these allegations were contemporaneously reported to the police, as a result of which the respondent was charged with three offences of lewd, indecent and libidinous practices and behaviour. The charge relating to the child EF did not proceed to trial. The charges relating to GH and JK did proceed to trial separately, apparently in late 2009. In each case the respondent was found not guilty.

[5] Article 6 of condescendence in the 2019 summary application avers that, on an unknown date between December 2018 and May 2019, a 7 year old girl, LM, encountered the respondent near to her home, at which time the respondent pulled down his lower clothing and exposed his penis to her. It is also averred that on a separate occasion in March 2019 the same child encountered the respondent again near to the respondent's home, when the

respondent pulled down his trousers and again exposed his penis to her. The child told her parents about both incidents, and added further details to the effect that the respondent had tried to entice her to a secluded area and had suggested that she was now in a relationship with him. The child's parents reported the matter to the police, who arranged for a joint investigative interview of the child. The respondent was arrested and interviewed and then liberated. No further criminal proceedings have followed so far.

[6] The respondent denies each of the allegations made against him in relation to these four children.

The earlier proceedings

[7] It is a matter of agreement that there have been a number of legal proceedings arising from and relating to the allegations founded upon by the applicant in the present summary application, with the exception of the most recent allegations involving the child LM.

The summary criminal proceedings

[8] Firstly, summary criminal proceedings on charges of lewd, libidinous and indecent practices and behaviour went to trial against the respondent in late 2009 in relation to the allegations concerning the children GH and JK. In both cases the respondent was found not guilty after trial.

The 2009 summary application

[9] In addition, a summary application under section 2 of the 2005 Act was brought by the chief constable of Grampian Police against the respondent in 2009. In that process the chief constable craved a ROSHO imposing the following prohibitions on the respondent:

a) To prohibit the respondent "from having any communication or contact with any female under the age of 16 years save for (i) communication or contact with his granddaughter, [AB], under direct supervision by [the local authority] social work department or (ii) communication or contact that is inadvertent or unavoidable".

b) To prohibit the respondent "from residing in any accommodation where there is a female under the age of 16 years present".

c) To prohibit the respondent "from entering or loitering in or around any nursery, primary or secondary school or other educational establishment for children under the age of 16 years".

d) To prohibit the respondent "from undertaking any work in any capacity ... in circumstances where there is a female under the age of 16 years present in the same vehicle or in the same premises" as the respondent.

[10] An interim ROSHO in corresponding terms was also craved.

[11] The 2009 summary application is produced as no 6/3/1 of process. Article 3 of condescendence narrates the allegations concerning the children EF and GH which are averred in greater detail in articles 3 and 4 of condescendence respectively in the 2019 summary application. Article 4 of condescendence in the 2009 summary application narrates the allegation concerning the child JK which is narrated in article 5 of condescendence in the current summary application. No other incidents or allegations were averred in the 2009 summary application.

[12] An interlocutor pronounced on 24 December 2009 (no 6/2/6 of process) indicates that, on that date, the sheriff allowed amendment of the summary application and thereafter made an interim ROSHO. It appears that the 2009 summary application was then continued

on a number of occasions to await the outcome of the summary criminal proceedings to which reference has been made, until 3 November 2010 when, according to the interlocutor of that date (no 6/2/7 of process):

> "The sheriff, on pursuer's motion, of consent, Recalls the interim order previously made on 24 December 2009; Dismisses the Application and Finds no expenses due to or by either party".

The 2010 referral proceedings

[13] Finally, in April 2010 an application was made to the sheriff at Aberdeen by the Scottish Children's Reporter Administration under section 68 of the Children (Scotland) Act 1995 ('the 1995 Act' - the legislation which preceded the Children's Hearings (Scotland) Act 2011) in respect of a ground of referral concerning the respondent's granddaughter AB. The ground of referral to which the application related was under section 52(2)(f) of the 1995 Act, namely that the respondent's granddaughter was, or was likely to become, a member of the same household as a person (namely the respondent) who had committed any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1995. The ground of referral and supporting facts (production 6/2/1) narrated that the respondent's granddaughter AB lived with the respondent and his wife in terms of an interim residence order and that the respondent had committed the offences of lewd, indecent and libidinous practices or behaviour against the children EF, GH and JK which are averred in articles 3, 4 and 5 of condescendence in the 2019 summary application and which were also averred in articles 3 and 4 of the 2009 summary application. The grounds of referral were disputed by the respondent, his wife and their daughter (AB's mother). The matter proceeded to proof at Aberdeen Sheriff Court on 23 and 24 November 2010. The

interlocutor from 23 November 2010 states that evidence was led but not concluded that day and that the matter was continued until the following day for further evidence to be led.

[14] The interlocutor from 24 November 2010 reads as follows:

> "The Sheriff, further evidence having been led and concluded, Deems that the grounds of referral have not been established therefore Dismisses the Application and Discharges the Referral in respect of the grounds in which the Application has been made" (sic).

The sheriff's order for dismissal was presumably made in terms of section 68(9) of the 1995 Act.

The respondent's plea of res judicata

[15] Against this background, a debate was assigned in the 2019 summary application on the respondent's second plea-in-law, being a plea of *res judicata*.

[16] At the debate the applicant was represented by Mr McLaren and the respondent by Mr McLoone, each of whom adopted his written submissions and made further submissions during the debate.

Submissions on behalf of the respondent

[17] Mr McLoone took as his starting point the analysis of the elements of the plea of *res judicata* which appear in Macphail, *Sheriff Court Practice*, 3rd Edition at paragraphs 2.104 to 2.109. Mr McLoone made it clear that he placed no reliance upon the summary criminal proceedings to which reference has been made. The proceedings relating to the 2009 summary application and the 2010 referral proceedings formed the basis for the respondent's plea of *res judicata*.

[18] Under reference to the relevant passages in Macphail, Mr McLoone founded upon the following circumstances in support of the respondent's plea of *res judicata*:

i. Both the 2009 summary application and the 2010 referral proceedings were decided by competent tribunals.

ii. The determinations in both the 2009 summary application proceedings and the 2010 referral proceedings were pronounced '*in foro contentioso*.' The summary application was opposed. Although it was clear that no evidence had been led and that the sheriff had dismissed the summary application, rather than granting absolvitor, section 2(4)(a) of the 2005 Act, which required an application for a ROSHO to be brought within 3 months of the applicant becoming aware of the underlying circumstances, would have prevented the matter from being re-raised outwith that period. Therefore, the sheriff's order dismissing the 2009 summary application had the same practical effect as if the sheriff had granted absolvitor. Mr McLoone made it clear, however, that he did not press this latter point with any great force. Evidence was led in the 2010 referral proceedings. The sheriff's order dismissing the application in the referral proceedings had been made because that was the only order available to the court, having decided that the grounds of referral had not been established (1995 Act, section 68(9)). A decree of absolvitor was not open to the sheriff in referral proceedings.

At no point did Mr McLoone submit that section 2(4) of the 2005 Act in itself operated as any bar to the inclusion in the 2019 summary application of averments relating to incidents which were within the knowledge of the police at the time of the 2009 summary application.

iii. The subject matter of the 2019 summary application was, in substance, the same as that of the 2009 summary application and the 2010 referral proceedings. Although expressed in slightly different terms, it was clear that each was based upon the same allegations against the respondent concerning the children EF, GH and JK, although the 2019 summary application was also based on the further allegations made by the child LM, relating to the period between December 2018 and May 2019, which had not featured in either of the earlier proceedings.

iv. In relation to the 2009 and 2019 summary applications and the 2010 referral proceedings, the *media concludendi*, or points in controversy, were the same, insofar as they concerned the question of whether the respondent had committed the acts alleged by the children EF, GH and JK.

v. The parties to the 2009 and 2019 summary applications were identical, taking account of the absorption of Grampian Police into Police Scotland during the intervening period. Although the same could not be said in relation to the 2010 referral proceedings, those proceedings were nevertheless brought by the reporter, who was, like the chief constable, a "manifestation of the state" with the result that the necessary identity of the parties was also established as between the 2010 referral proceedings and the 2019 summary application (*RG* v *Glasgow City Council and Another* [2019] CSIH 45; 2020 SC 1 per Lord President (Carloway) at paras [27] and [28]). In addition, both the 2010 referral proceedings and the 2019 summary application, having implications for the respondent's liberty to go about his daily activities, related to the respondent's status, and the plea of *res judicata* was available in relation to matters of status

> even where the parties to the current proceedings are not identical to those involved in the prior proceedings on which the plea is based (*Administrator of Austrian Property* v *Von Lorang* 1926 SC 596).

[19] I invited Mr McLoone to comment on paras [29] and [30] of the opinion of the court in *RG* v *Glasgow City Council and Another*, in which the Inner House concluded that *res judicata* could not apply as between, on one hand, an application for a permanence order based upon certain alleged facts and, on the other, previous children's referral proceedings concerning the same child and the same allegations, in which the sheriff had made findings in fact in relation to the infliction of non-accidental injuries, which were also of significance in the context of the permanence order proceedings. The critical factor in the reasoning of the Inner House appears to have been that different questions required to be considered by the courts in reaching their decisions in those two sets of proceedings. Against that background, the Lord President concluded that the *media concludendi* in the two processes were different and that *res judicata* could not therefore apply "with full force and effect."

[20] Mr McLoone accepted that, in the case of *RG* v *Glasgow City Council and Another*, the issues which the court required to consider in relation to the permanence order were different from those which required to be considered in the context of the preceding referral proof. However, he insisted that the situation in the instant case was different because in both the 2010 referral proceedings and the 2019 summary application, the focus of the proceedings was to "restrict the conduct of the respondent".

Submissions on behalf of the applicant

[21] On behalf of the applicant Mr McLaren emphasised that the 2009 summary application was ultimately dismissed without evidence being led and submitted that a

decree of dismissal could not found a plea of *res judicata* (Macphail, para 2.106). Although Mr McLaren accepted that dismissal was the only order available to the sheriff in the 2010 referral proceedings, having found that the grounds of referral were not established, he nevertheless founded on the fact that the sheriff had dismissed the application in those proceedings as a circumstance which indicated that the referral proceedings were also not capable of forming the basis for a plea of *res judicata*.

[22] Although the parties to the 2019 summary application were, for practical purposes, identical to those in the 2009 summary application, the same could not be said of the 2010 referral proceedings. Although the respondent was a party to the 2010 referral proceedings, the chief constable was not. The chief constable and the reporter might both be described, in a sense, as being "manifestations of the state" (*RG* v *Glasgow District Council and Another* per Lord President at para [28]). However it did not follow that they should be regarded as being the same for the purposes of the respondent's plea of *res judicata*. The chief constable was not represented in the 2010 referral proceedings and the reporter is not represented in the 2019 summary application proceedings. The two offices carry quite separate duties and responsibilities. The critical issue is whether it can be said that the "interest of the parties" in the 2010 referral proceedings and in the 2019 summary application was the same (*RG* v *Glasgow City Council and Another* per Lord President at para [27]). It was clear from consideration of the duties and responsibilities of the reporter, on one hand, and the chief constable on the other, and from consideration of the focus of each of those proceedings, that the interest of the chief constable in the 2019 summary application, being concerned with the question of the risk posed by the respondent to children generally, was much wider than that of the reporter in the 2010 referral proceedings, which was concerned with the welfare of the respondent's granddaughter in particular.

[23] Mr McLaren also submitted that the subject matter and *media concludendi* of the 2010 referral proceedings and the 2019 summary application were quite different. Although there were common factual matters for the court to consider, namely whether the respondent had committed the acts alleged by the children EF, GH and JK, the subject matter of the 2010 referral proceedings was the welfare of the respondent's granddaughter. The subject matter of the 2019 summary application was the prevention of the risk of sexual harm posed by the respondent to children generally. The 2019 summary application included allegations (relating to the child LM) which had not featured in the 2010 referral proceedings. Had the sheriff found the grounds of referral to be established in 2010, he would have been required to remit the matter to the reporter to convene a children's hearing, which could have considered whether to make a compulsory supervision order in respect of the respondent's granddaughter. The ROSHO and interim ROSHO craved in the 2019 summary application, by contrast, contemplate the imposition by the court of restrictions on the respondent.

[24] Although Mr McLaren accepted that the sheriff's interlocutor dated 24 November 2010 made it clear that evidence was led in the 2010 referral proceedings, there was no information available as to the evidence which was led or as to any particular findings made by the sheriff which led him to the conclusion that the grounds of referral were not established. The 2019 summary application is based upon further, more recent allegations in addition to the incidents which appeared to have featured in the evidence led at the 2010 referral proof. The public interest required that the 2019 summary application be allowed to proceed.

Decision and reasons

[25] The elements of the plea of *res judicata* are not in dispute (Macphail, paras 2.104 to 2.109; *Durkin* v *HSBC Bank Plc* 2017 SLT 125 per Lord Malcolm at paras [9] to [11]). Having considered parties' submissions I do not accept that the respondent's plea of *res judicata* is well founded in this case.

[26] The respondent accepts that the outcome of the summary criminal proceedings taken against him in relation to the allegations made by the children GH and JK cannot form the basis for a plea of *res judicata* in the context of the 2019 summary application.

[27] The sheriff's order dismissing the 2009 summary application cannot found a plea of *res judicata* because, generally speaking, dismissal of an action, including a summary application, reserves to the pursuer or applicant the right to re-raise the proceedings (*Paterson* v *Paterson* 1958 SC 141 per Lord President (Clyde) at page 146).

[28] With regard to Mr McLoone's submission that the dismissal of the 2009 summary application had the same practical effect as a decree of absolvitor because of the time limit provisions of section 2(4) of the 2005 Act, I accept that, where a statutory time limit applies to the raising of proceedings, that time limit may act as a bar to the re-raising of proceedings following an order for dismissal. In relation to an application for a ROSHO under section 2 of the 2005 Act, section 2(4) of the Act provides that the application shall be made within:

> "(a) the period of 3 months beginning with the date on which the matter mentioned in subsection 1(a) above appears to the applicant to be the case; or
> (b) such longer period as the sheriff considers equitable having regard to all the circumstances."

[29] It appears to me that, had the applicant in the 2009 summary application sought to re-raise the matter based on precisely the same allegations subsequent to the sheriff's order for dismissal of the original application, section 2(4) of the 2005 Act may have presented an

obstacle (subject to any argument directed towards section 2(4)(b)), but the principle of *res judicata* would not.

[30] It was not suggested by Mr McLoone that section 2(4) of the 2005 Act operated as any bar to the inclusion in the 2019 summary application of averments relating to the allegations which were the subject of averments in the 2009 summary application. It seems to me that the terms of section 1(1)(a) of the 2005 Act, taken together with the averments in the 2019 summary application relating to the most recent incidents (relating to the child LM), would permit the inclusion of the earlier incidents in the 2019 summary application, subject to any argument under section 2(4) of the 2005 Act relating to the time when the applicant became aware of the allegations concerning LM.

[31] It seems to me that the principle that an order for dismissal cannot found a plea of *res judicata* does not operate in relation to the 2010 referral proceedings in the same way as it does in relation to the 2009 summary application. It seems clear that the sheriff made the order dated 24 November 2010 dismissing the reporter's application having concluded, after hearing evidence, that the grounds of referral to which the application related were not established. Having regard to the terms of section 68(9) of the 1995 Act, which are in different terms to but to the same effect as those of section 108(3) of the Children's Hearings (Scotland) Act 2011, in those circumstances dismissal was the only order open to the sheriff. There was no statutory basis for a decree of absolvitor. Mr McLaren did not identify any provision of the 1995 Act which would have entitled the reporter to make a further application to the sheriff in relation to identical grounds and supporting facts subsequent to the sheriff's order for dismissal on 24 November 2009.

[32] I note the observations of the Lord President at para [27] in *RG* v *Glasgow City Council and Another* as follows:

> "The reference to 'same parties' should not be construed too strictly. It is sufficient if the interest of the parties in the first and second action is the same (Gray *v McHardy*, Lord Justice Clerk (Inglis), p 1047; *Glasgow Shipowners' Association and Ors v Clyde Navigation Trs*, Lord Shand, p 699; *Allen v McCombie's Trs*, Lord President (Dunedin), p 715). Equally, in relation to the *media concludendi*, excessive concentration on the precise nature of the remedies sought in each action should be avoided in favour of a simple enquiry into 'what was litigated and what was decided?' (*Grahame* v *Secretary of State for Scotland* 1951 SC 368 at 387)".

[33] It seems clear enough that the evidential focus of the 2010 referral proceedings was the question of whether it was established that the respondent had committed the same indecent acts alleged by the children EF, GH and JK as are averred in articles 3, 4 and 5 of condescendence in the 2019 summary application. After hearing evidence the sheriff was not satisfied that the grounds of referral were established. However it seems to me that this evidential correlation between the 2010 children's referral proceedings and the 2019 summary application is not conclusive as to the merits of the respondent's plea of *res judicata*.

[34] Although each of those processes was initiated by a public official, namely the reporter in the case of the 2010 referral proceedings and the chief constable in the case of the 2019 summary application, each acted with a focus and emphasis which was different from the other. In the 2010 referral proceedings, the reporter's focus was on the question of whether the grounds of referral were established and, if so, whether compulsory measures of supervision were necessary in relation to the respondent's granddaughter. In the context of the 2019 summary application, the focus of the chief constable is on the questions of whether the respondent committed the indecent acts averred and, if so, on the risk posed by the respondent to children generally and the restrictions on the respondent's conduct which are necessary in order to address that risk.

[35] Although both the reporter and the chief constable could be described as 'manifestations of the state' (*RG* v *Glasgow City Council and Another* per Lord President at para [28]), it does not follow that any two public officials fall to be regarded as the same party for the purposes of a plea of *res judicata*. Para [27] of the same judgment indicates that much may turn on whether "the interest of the parties in the first and second action is the same." In *RG* v *Glasgow City Council and Another* it could at least be said that both the reporter, in the referral proceedings, and the local authority, in the subsequent permanence order proceedings, were primarily interested in the welfare of the same child. In my view, by contrast, the reporter in the context of the 2010 referral proceedings and the chief constable in the context of the 2019 summary application should not be regarded as 'the same' for the purposes of the respondent's plea of *res judicata*, having regard to the distinctions between the focus and interests of both officials in the context of the proceedings brought by them.

[36] I do not accept Mr McLoone's submission, based on the case of *Administrator of Austrian Property* v *Von Lorang*, that the plea of *res judicata* should be available to the respondent even if the parties to the 2010 referral proceedings and the 2019 summary application are different, because the subject matter of the two processes is, in some way, the status of the respondent. The 1926 Inner House decision cited by Mr McLoone in fact appears to have decided, by majority, that the foreign decree of nullity, not being a decree *in rem*, was not necessarily binding on the Scottish courts in relation to the status of the Respondent. That decision was overturned by the House of Lords on appeal, which held (1927 SC (HL) 80) that the foreign decree of nullity, being a judgment concerning status, was equivalent to a judgment *in rem* and would, so long as it was pronounced by a competent foreign court and absent fraud, collusion or breach of Scottish notions of substantial justice,

be conclusive in a question arising in the Scottish courts. However I do not accept Mr McLoone's hypothesis that the 2010 referral proceedings and the 2019 summary application are focussed on the 'status' of the respondent. I have analysed the focus of each process above. I do not accept that this case is of any assistance to the respondent.

[37] Even if I am wrong in relation to the question of whether the reporter in the 2010 referral proceedings and the chief constable in the 2019 summary application should be regarded as being 'the same' for the purposes of the respondent's plea of *res judicata*, I do not accept that the subject matter and *media concludendi* of the 2010 referral proceedings on one hand and the 2019 summary application on the other are the same. The questions for the court to consider in each process are quite different. In terms of section 68(9) of the 1995 Act, the sheriff had to decide whether the grounds of referral were established. Having decided that the grounds were not established, he was obliged to dismiss the application and discharge the referral to the children's hearing in respect of those grounds. In terms of section 68(10), had the sheriff found that the grounds of referral were established, he would have been required to remit the case to the principal reporter to make arrangements for a children's hearing to consider and determine the case.

[38] By contrast, in terms of section 2(6) of the 2005 Act, a sheriff who is asked to make a ROSHO must consider whether he is satisfied that:

> "(a) the person against whom the order is sought has on at least two occasions, whether before or after the commencement of the section, done an act within subsection (5) above; and
> (b) it is necessary to make such an order for the purpose of protecting children generally or any child from harm from that person (emphasis added)."

[39] In addition, the 2019 summary application deals with the more recent allegations made by the child LM in addition to the same earlier allegations as were addressed in the 2010 referral proceedings.

[40] Thus it appears to me that, although there is significant evidential overlap between the 2010 referral proceedings and the 2019 summary application, on the other hand the issues for consideration by the court in each process, and the orders available to the court at the conclusion of each process, are sufficiently distinct to lead me to the conclusion that the subject matter and *media concludendi* are not the same. Therefore, as in the case of the children's referral proceedings and subsequent permanence order application which were considered by the Inner House in *RG* v *Glasgow City Council and Another*, my view is that the 2010 children's referral proceedings do not provide a sound basis for the respondent's plea of *res judicata*.

[41] In summary therefore, I repel the respondent's plea of *res judicata* for the following reasons:

i. Although the parties to the 2019 summary application are the same as the parties to the 2009 summary application and the 2009 summary application dealt with three of the four allegations against the respondent which feature in the 2019 summary application, the 2009 summary application was dismissed, thus preserving the applicant's right to re-raise the matter insofar as it was otherwise competent to do so; and

ii. The parties, subject matter and *media concludendi* of the 2010 referral proceedings are different from those in the 2019 summary application.

[42] In the absence of any submission to the contrary, I also proceed on the basis that the applicant in the 2019 summary application became aware of the most recent allegations which are averred there, and which did not feature in either the 2009 summary application or in the 2010 referral proceedings, within a timescale which was compatible with section 2(4) of the 2005 Act.

Further procedure

[43] I therefore repel the respondent's second plea-in-law. I shall assign a hearing to consider further procedure and to deal with the question of liability for the expenses of the debate.