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Judgment: approved by the Court for handing down | *Delivered:* **27/03/2015**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BP's Application [2015] NICA 20

IN THE MATTER OF AN APPLICATION BY BP TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE INQUIRY INTO HISTORICAL INSTITUTIONAL ABUSE 1922 TO 1995

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Before: Girvan LJ, Coghlin LJ and Gillen LJ

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Girvan LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from the judgment of Treacy J granting judicial review of a decision by the Chairman of the Historical Institutional Abuse Inquiry ("the Inquiry") whereby he refused an application for publicly funded legal representation at the Inquiry brought by the applicant, the respondent to the appeal ("the applicant"), who wishes to give evidence to the Inquiry regarding the abuse she allegedly suffered while living in institutions run by a religious Order, the Sisters of Nazareth.

[2] Mr Aiken appeared on behalf of the Inquiry. Mr Stitt QC and Mr McGowan appeared for the applicant. We are grateful to counsel for their full and detailed written and oral submissions.

Background

[3] The Inquiry was established by the First and Deputy First Ministers to examine whether there were "systemic failings by the institutions or the State in their duties towards those children in their care between the years of 1922 to 1995". The background to the Inquiry and its work methodology are helpfully described by Treacy J at paragraphs [4] to [17] of his judgment ([2015] NIQB 3) which should be read in conjunction with this judgment.

[4] There are three main categories of individuals or institutions whose evidence comes before the Inquiry or have a role to play in the course of the Inquiry, namely:

(i) individuals who voluntarily give evidence to the Inquiry about their experiences while they were in institutional care;

(ii) individuals against whom allegations are made; and

(iii) institutions which ran or regulated the children's homes.

An individual may be both the victim of abuse and an alleged perpetrator of abuse against other individuals.

[5] By virtue of Rule 5 of the relevant Rules the chairman may designate an individual or a body as a "core participant." This carries with it certain participatory rights in the Inquiry (see Rules 10 to 12). This designation is reserved for those who may face explicit or significant criticism from the Inquiry. As a matter of fairness, however, in order to give an opportunity to respond, the Inquiry grants a form of participation to individuals who are the subject of allegations of abuse made by witnesses. Such individuals are encouraged by the Inquiry to seek legal representation and, where they are not able to afford it, they may apply to the Inquiry for an award of expenses under section 14 of the Act.

[6] During her childhood the applicant was placed in the care of the Sisters of Nazareth. She wishes to give evidence at the public hearing of the Inquiry detailing the physical, mental and sexual abuse she alleges that she suffered in their care. She further wishes to give evidence of being sexually abused by an outside and independent person (X) during the period when she was in care.

[7] Pursuant to the Inquiry into Historical Institutional Abuse Rules (NI) 2013 ("the Rules"), the applicant applied to the Inquiry to grant her legal representation at public expense to enable her to participate in the Inquiry to the extent necessary to safeguard her interests. Following an oral hearing of the application on 13 November 2014, the learned Inquiry Chairman gave an ex tempore decision refusing the application ("the impugned decision").

[8] On 26 November 2014 the applicant lodged an application for judicial review of the impugned decision. Treacy J gave judgment on 13 January 2015 granting judicial review and remitting the impugned decision back to the Inquiry Chairman for reconsideration. The respondent lodged a notice of appeal on 15 January 2015. The applicant served a respondent's notice dated 5 February 2015.

The relevant legislation

[9] The Inquiry is a creature of statute established by the Inquiry into Historical Institutional Abuse Act (NI) 2013 ("the Act"). In so far as is relevant, section 6 of the Act provides:

> "(1) Subject to any provision of this Act or of rules under section 21, the procedure and conduct of the inquiry are to be such as the chairperson may direct.
> …
> (4) In making any decision as to the procedure or conduct of the inquiry, the chairperson must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

[10] Section 14 empowers the chairman of the Inquiry to award the payment of expenses, stating:

"(1) The chairperson may, with the approval of (OFMDFM), award such amounts as the chairperson thinks reasonable to a person—

(a) by way of compensation for loss of time; or

(b) in respect of expenses properly incurred, or to be incurred,

in attending, or otherwise in relation to, the inquiry.

(2) The power to make an award under this section includes power, where the chairperson with the approval of (OFMDFM) considers it appropriate, to award amounts in respect of legal representation.

(3) A person is eligible for an award under this section only if the person—

(a) is giving evidence to the inquiry or attending the inquiry to produce any document or other thing; or

(b) in the opinion of the chairperson, has such a particular interest in the proceedings or outcome of the inquiry as to justify such an award.

(4) The power to make an award under this section is subject to such conditions or qualifications as may be determined by (OFMDFM) and notified by (OFMDFM) to the chairperson."

[11] The Rules provide (inter alia) for applications for an award of payment of expenses; the determination for whether such an award should

be given; and the additional conditions for determining such an award to pay for the expense of legal representation. Rules 22, 23 and 24 provide:

> "22(1) A person may apply at any time in writing to the chairperson for an award.
>
> (2) Where the application relates to expense to be incurred in respect of legal representation, the application must state—
>
> (a) in respect of each qualified lawyer in relation to whom the application relates—
>
> (i) the nature and estimated duration of the work of that lawyer in respect of which the award is sought;
>
> (ii) whether that lawyer is a recognised legal representative;
>
> (iii) which of sub-paragraphs (a) to (d) of rule 24(2) applies to that lawyer;
>
> (iv) the proposed hourly rate to be applied in his case;
>
> (b) in respect of each paralegal or trainee solicitor—
>
> (i) the nature and estimated duration of the work of that person in respect of which the award is sought;
>
> (ii) which recognised legal representative that person is to assist; and
>
> (iii) the proposed hourly rate to be applied in his case;

(c) any other amounts which the person anticipates claiming in relation to legal representation.

(3) An application for an award and any bill submitted under rule 28 must include or be accompanied by such other information and such evidence in support of it as the chairperson may require.

(4) Where the chairperson does not consider that the information and evidence provided in accordance with paragraph (3) is sufficient to enable a decision to be made in relation to any application or bill, he shall notify the person who submitted the application or the bill, as the case may be, of the fact and that person shall, within such time as the chairperson may require, provide such further information or evidence as may be specified in the notice.

23(1) An award shall only be made in accordance with the pre-authorisation procedures set out in these Rules.

(2) Subject to section 14(4) of the Act (conditions or qualifications determined by OFMDFM), the chairperson must take into account the general criteria set out in paragraph (3) when determining whether an award should be made.

(3) The general criteria are—

(a) the financial resources of the applicant; and

(b) whether making an award is in the public interest.

(4) The chairperson shall not make an award to any residential institution by way of compensation for loss of time.

(5) The chairperson shall not make an award in respect of expenses to any residential institution except—

(a) where that institution does not have the resources needed to meet in full the expenses properly incurred, or to be incurred, in attending, or otherwise in relation to, the inquiry; or

(b) where the cost of meeting those expenses in full would cause hardship to an individual; or

(c) in other exceptional circumstances.

(6) The chairperson shall not make an award in respect of legal representation for any individual in circumstances where a residential institution has agreed to meet those expenses or where it is reasonable, in all the circumstances of the case, to expect a residential institution to do so.

(7) Where the chairperson makes an award in respect of the expenses of a residential institution on the grounds set out in paragraph (5)(a) or (b) but the institution has the resources needed to meet part of the expenses properly incurred, or to be incurred, in attending or otherwise in relation to the inquiry or can meet part of the costs of those expenses without causing hardship to an individual (as the case may be) that award shall only be in respect of the other part of the expenses.

(8) The chairperson shall not make an award in respect of legal representation provided by any person other than the recognised legal representative or a paralegal or trainee solicitor assisting that legal representative.

(9) For the purposes of this Rule, "residential institution" means an institution for the purposes of the terms of reference of the inquiry.

24(1) Where the chairperson has determined an award for amounts to be incurred in respect of legal representation should be made, the determination of the application must set conditions, including but not limited to the following, that is to say—

(a) the nature and scope of the work to be funded;

(b) the hourly rates which will be paid shall not exceed the amounts specified in paragraph (2);

(c) the upper limit or limits on the sums or number of hours which will be paid;

(d) the dates and times for which attendance at the inquiry by recognised legal representatives, paralegals or trainee solicitors will be funded;

(e) the representatives, paralegals or trainee solicitors whose attendance on any day will be funded;

(f) the frequency with which bills must be submitted to the solicitor to the inquiry; and

(g) the form in which bills must be submitted to the solicitor to the inquiry.

(2) It is a condition of any award that the maximum hourly rates for counsel and solicitors shall be:

(a) Senior Counsel £200.00

(b) Junior Counsel or solicitor advocate £100.00

(c) Solicitor (Partner) £146.00

(d) Solicitor (Assistant) £130.00

(e) Paralegal or Trainee Solicitor £65.00"

[12] Rule 5 of the Rules provides that in deciding whether to designate a person, body, organisation or institution as a core participant the chairman must in particular consider whether the person, body, organisation or institution played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates; has a significant interest in an important aspect of the matters to which the inquiry relates; or "may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report (see Rule 5(2)(c)). Where a core participant has appointed a qualified lawyer to act on behalf of that person the chairman must designate that lawyer as that person's recognised legal representative in respect of the inquiry proceedings.

[13] Under Rule 14 the chairman may send a warning letter to any person he considers may be or has been subject to criticism in the inquiry proceedings or about whom criticism may be inferred from evidence given in the inquiry or may be subject to any criticism in any report. The recipient of the letter may disclose it to his recognised legal representative. The inquiry panel must not include any explicit or significant criticism of a person in any report of the inquiry unless a warning letter has been sent and the person has been given a reasonable opportunity to respond to it.

The Costs Protocol

[14] The Inquiry's Costs Protocol provides, inter alia that a person is eligible for an award in respect of compensation for loss of time or expenses only if the person: (a) is giving evidence to the Inquiry or attending the Inquiry to produce any document or thing; or (b) in the opinion of the chairman has such a particular interest in the proceedings or outcome of the Inquiry as to justify such an award. The Protocol contains the matters to be considered when deciding whether to make an award. Thus in making any decision about whether to award compensation for loss of time or expenses at public expense the chairman will take the following into account: the financial resources of the applicant; whether making an award is in the public interest; his duty to act with fairness and with regard to the need to avoid any unnecessary cost; and any conditions or qualification imposed by the sponsor department OFMDFM in respect of the making of awards and notified to the chairman. The factors which the chairman may consider, when deciding whether making an award is in the public interest, include: whether the individual played, or may have played, a direct and significant role in relation to the matters set out in the Inquiry's Terms of Reference; whether the individual has a significant interest in an important aspect of the matters set out in those Terms of Reference; whether the individual may be subject to significant criticism during the Inquiry's proceedings or in any report by it; whether it is necessary that the individual should have legal representation before the Inquiry; if the chairman considers legal representation is necessary, whether the individual would be prejudiced in seeking representation if there were to be any doubt about funds becoming available and there are no other means by which such representation can be funded; and whether it is fair, reasonable, and proportionate for the costs of the legal representation to be borne by the public purse. In the light of those matters the Protocol states that the chairman does not expect to receive applications for compensation for loss of time or expenses, including for legal representation, from Government Departments, or other public bodies, or private individuals or bodies who have access to other sources of funding, including funding from insurance companies or defence associations. If the chairman makes an award it will be paid by OFMDFM.

[15] The Protocol also makes clear that awards for expenses in respect of legal representation will only be for work which is within the Inquiry's terms of reference; which is necessary, fair, reasonable, and proportionate in all the circumstances; and which is conducted in a cost effective and efficient manner, and without duplication. Where the chairman decides to make an award, it will normally be limited to a recognised legal

representative having a role in relation to some or all of the following matters:

(a) considering initial instructions;

(b) advising the client in relation to the making of a witness statement, and/or otherwise providing evidence to the Inquiry, in accordance with any request made by the Inquiry, whether under Rule 9 or Rule 10 of the Inquiry Rules or otherwise;

(c) considering any documentary material provided to the applicant by the Inquiry so far as is necessary to represent the client's interests;

(d) advising the client in relation to any warning letter issued by the chairman under Rule 14 of the Inquiry Rules;

(e) representing the client on those occasions:

(i) when evidence is being given directly in respect of their client;

(ii) when their client is giving evidence; or

(iii) when, in the opinion of the chairman, evidence is being given by other witnesses which may have a bearing on their client;

(f) in respect of the recognised legal representative of a core participant:

(i) making an opening statement, where permitted by the chairman;

(ii) submitting questions to counsel to the Inquiry to be asked of witnesses;

(iii) providing final submissions, where permitted by the chairman;

(iv) making a closing statement, where permitted by the chairman.

The chairman will determine the level of representation to be met by an award for legal representation at public expense depending on the extent of the applicant's involvement before the Inquiry and the gravity of the allegations involved. At any time the chairman may approve funding for legal representation where a witness is unrepresented, and does not have access to representation from any other source, and where the interests of justice require that witness to be legally represented. The chairman and the Solicitor to the Inquiry retain the discretion to vary the application of the terms of this Protocol on a case by case basis where it is considered necessary for the proper conduct of the Inquiry.

The Inquiry Chairman's Decision

[16] The learned Chairman considered a number of questions:

(i) Were there any grounds for believing the applicant might be subject to criticism in the Inquiry Report?

(ii) Was it necessary for her to be legally represented?

(iii) Was legal representation required in the interests of fairness?

(iv) Was it reasonable to grant the application?

(v) Was it proportionate to grant the application?

The Chairman noted the applicant's allegation relating to X as possibly not falling within the Inquiry's Terms of Reference but considered for the purposes of the application that it did. He noted that the allegations were extremely serious and against someone who is considered to be a prominent member of the community. Such a situation was a common occurrence in the Inquiry. He stressed that the Inquiry is an inquisitorial process which is prohibited from determining matters of civil or criminal liability and it is not an evidence gathering process for other civil or criminal proceedings. He opined that the fact the Inquiry may not accept every allegation made by a witness did not transform the Inquiry into an adversarial process. There was no material presently before him to

conclude that the applicant was likely to be the subject of criticism in the Inquiry's Report. There was no evidence that the lack of individual legal representation would deter her, or any other witness, from giving evidence. The Chairman noted the applicant's contention that her legal representatives would be required to have access to all relevant material. This would amount to several thousand pages. The applicant contended that the legal representatives would be required to be at the Inquiry on every hearing day in which there was evidence which had a proximity of relevance to the applicant. This might run to some 40 hearing days. He opined that this would add considerable extra burden on the Inquiry staff and would incur a cost upward of £100,000. The Chairman concluded that he was satisfied that it was not necessary for the applicant to be legally represented; that legal representation for her is not required in the interests of fairness; and that it would be neither reasonable nor proportionate to grant the application.

The Application for Judicial Review

[17] The applicant's Order 53 Statement, dated 26 November 2014, seeks the following relief:

(a) An Order that the proceedings be anonymised to protect the identity of the applicant;

(b) An order of certiorari quashing the decision of the Chairman to refuse her application for legal representation at public expense;

(c) A declaration that the applicant should be provided legal representation at public expense to enable her to participate in the inquiry;

(d) A declaration that the Inquiry is obliged to adopt procedures which are compliant with the procedural obligations under Article 3 ECHR.

Treacy J's Decision

[18] The learned judge took the view that if fairness required the applicant to be legally represented then the cost incurred in providing it could not be regarded as "unnecessary" as it is a public law obligation and,

therefore, also in the public interest. Moreover, as a public obligation no margin of appreciation could be granted to the Inquiry. The learned judge considered that what constitutes fairness in the given circumstances is an objective test. In the present context the victims of abuse had neither legal representation, provision of documents nor the raft of participatory rights afforded to the perpetrators of the abuse, which caused the judge to ask the question, "why should the perpetrator be placed in a materially more advantageous position in terms of legal representation especially in circumstances where he already enjoys significantly more participatory rights to safeguard his interests?" The learned judge considered the learned Chairman had placed too high a hurdle by asking whether the applicant was "likely" to be subject of criticism in the Inquiry Report; the correct test should have been whether she "may" be subject to explicit or significant criticism during the Inquiry proceedings and it is not confined to the Report. He opined that, in the present case, the applicant's account is likely to be challenged by the alleged perpetrator who will be entitled to legal representation and afforded full participatory rights.

The Appeal

[19] In its Notice of Appeal, dated 15 January 2015, the Inquiry seeks to appeal the judgment of Treacy J on the grounds:

(i) The learned judge erred in not applying the proper test as to "real injustice" when considering whether it was appropriate for the Court to interfere with the exercise of the Inquiry Chairman's statutory discretion, pursuant to section 6 of the Act, as to the procedure or conduct of the Inquiry.

(ii) The learned judge erred in not identifying the "real injustice" caused to the applicant arising from the exercise of the Chairman's statutory discretion, pursuant to section 6 of the Act, as to the procedure or conduct of the Inquiry.

(iii) The learned judge erred in not giving sufficient weight or appropriate weight to the nature of the Inquiry's terms of Reference when considering whether it was appropriate for the Court to interfere with the exercise of the Chairman's statutory discretion, pursuant to section 6 of the Act, as to the procedure or conduct of the Inquiry.

(iv) The learned judge erred in finding for the applicant and not dismissing her application for judicial review.

[20] The applicant has lodged a Respondent's Notice, dated 5 February 2015, seeking the learned judge's judgment to be upheld for the following additional reasons:

(i) To the extent that the refusal of the applicant's application for legal representation results in the applicant being denied sight or possession of relevant documents, and denied information as to when relevant witnesses will attend, the decision further amounts to common law unfairness;

(ii) The decision of the Chairman amounts to an infringement of the procedural obligations under Article 3 ECHR, and therefore in breach of s.6 of the Human Rights Act 1998, insofar as the legal representation at public expense sought is necessary to ensure that the applicant can participate in the Inquiry to the extent necessary to safeguard her interests;

(iii) The decision of the Chairman will result in the defendants in her civil claim being provided with an unfair advantage in defending that claim if the applicant gives evidence to the Inquiry, that civil claim forms an aspect of the procedural remedies available for the infringements of her Article 3 rights, and the decision is consequently incompatible with Article 3 ECHR and therefore in breach of s.6 of the 1998 Act and in addition will result in unfairness.

(iv) The decision of the Chairman was based on the conclusion for which there was insufficient evidence to support, namely that no one had been deterred from giving evidence to the Inquiry as a result of the fact that the Orders and Institutions benefitted from permanent representation at the Inquiry.

The parties' submissions

[21] The appellant's underlying contention is that the courts should not interfere in the procedures and conduct of a public inquiry unless the court forms the view that what the public inquiry is doing causes a "real injustice" (Re Chief Constable's Application (Stephen Walker) [2008] NIQB

145; Flood v Lawlor (24 November 2000) (Irish Supreme Court); and LP's Application [2014] NICA 67). Establishing a 'real injustice' is a very high hurdle and the Court's assessment of 'fairness' must be conducted in that context. The question is not whether the Chairman's decision was *the* fair one but rather was it *a* fair one (Terluk v Berezovsky [2010] EWCA Civ 1345). The appellant contends that it is not interested in every aspect of detail of allegations and does not engage in a trial of individual allegations; rather, it is concerned at looking at the question whether there were systemic failures. Thus, a finding by the Inquiry that a systemic failure did or did not occur does not necessarily involve an acceptance or a rejection of a specific allegation of abuse. The possibility of the non-acceptance or rejection of a specific allegation does not mean that a witness is facing the kind of explicit or significant criticism which triggers the need for that person to have legal representation. Given the terms of reference of the Inquiry it anticipates that it is the persons, bodies or organisations which ran or supervised or had an oversight role in respect of institutions under investigation which may be subject to explicit or significant criticism from the inquiry. It is for that reason that they are designated as core participants under Rule 5 of the Rules. That concept comes from the Inquiries Act 2005 and the Inquiries Rules 2006. In this context the question which the Court should ask itself is whether the Chairman's decision that it is not necessary for the applicant to have legal representation at public expense caused any real injustice to the applicant. She has been granted limited public funding to deal with allegations of physical abuse made against her. This demonstrates that the Inquiry has not adopted an inflexible approach to the question of representation or the public funding thereof. Counsel stressed that the Inquiry does not and cannot allow itself to be drawn into or delayed by conducting an endless series of trials in relation to individual allegations. Over 300 or so voluntary witnesses will be called and the Inquiry is likely to hear 500 witnesses in total. The Inquiry's proper focus is on the question of systemic failures arising from a broad range of matters and from a wide body of evidence. The Inquiry is not expected to reach conclusions on every allegation. In relation to the Respondent's Notice regarding the Article 3 ECHR issues, the appellant contends that, while it was pleaded, it was not pursued before the learned judge at first instance and the appellant was not required to address the learned judge on the point.

[22] The applicant submits that she is a vulnerable individual, with limited educational ability, a history of mental illness, difficulties with alcohol abuse, has a criminal record and is currently in prison. She

contends that she will be scrutinised on all these issues and attempts will be made both inside and outside the Inquiry to criticise and cast doubt on her truthfulness and credibility. She contends that the appellant's underlying argument (that even if fairness requires her to have legal representation it should nevertheless be denied in the absence of 'real injustice') has no foundation in law or logic. She argues that in coming to his decision the learned Chairman failed to take into account the fact that she would require legal advice before giving evidence alleging abuse by a high profile person; he took into account irrelevant considerations including, inter alia, the potential overall cost to the Inquiry if hundreds of witnesses were each to be given legal representation; he fettered his discretion by holding an underlying opinion that victims did not require legal representation at the Inquiry unless they were also an alleged perpetrator; and he misdirected himself in law as Rule 7 of the Rules clearly envisages that persons other that 'core participants' may have legal representation at the Inquiry. Furthermore, it is impossible for the Inquiry to determine systemic failings without determining the facts; in order to determine the facts the Inquiry must determine the truth of individual allegations by witnesses. In order to determine the truth a determination must be reached on the veracity and accuracy of the applicant's evidence. Consequently, the potential for her allegations to be dismissed by virtue of the alleged perpetrator having legal representation while she does not, is neither in the public interest nor in the interests of justice. The applicant argues that the failure to provide her with legal representation at the Inquiry, in circumstances where the Order of Sisters of Nazareth has full legal representation and participatory rights, breaches the positive obligations under Article 3 ECHR. The findings of the Inquiry in relation to her allegations could jeopardise the applicant's civil claim against the Order.

Conclusions

[23] Scott LJ speaking extra judicially from his experience as chairman of the Arms to Iraq Inquiry set up in 1992 in the Chancery Bar Association Lecture delivered in May 1995 (to be found in [1995] 111 LQR 596) pointed out that the objects to be served by procedures for inquiries are threefold. Firstly, there is the need to be fair and to be seen to be fair to those whose interests, reputations or fortunes may be adversely affected by the proceedings. Secondly, there is a need for such proceedings to be conducted with efficiency and as expeditiously as possible. Thirdly, the

costs of the proceedings need to be kept within reasonable bounds. Concluding his lecture Scott LJ stated that:

> "The golden rule is that there should be procedural flexibility with procedures to achieve fairness tailored to suit the circumstances of each enquiry."

[24] What is called for by the requirements of procedural fairness will be specific to the individual circumstances arising in individual inquiries. There is no overriding and all inclusive principle requiring that everybody giving evidence before a tribunal of inquiry is entitled to separate legal representation. Procedural fairness may not require separate representation, the cost of which, if applied generally, would be very significant and the effect of which would be likely to increase the duration of the inquiry and would be likely to encourage the proliferation of side issues. In the case of adversarial litigation and the trial of criminal causes virtually no provision is made for the need to protect the interests of witnesses whose reputations, personal or sometimes professional, may depend on his evidence being believed or sympathetically received by the court. In such proceedings a witness has no means of defending his or her reputation, is not allowed to address the court or to cross-examine the witnesses who have given hurtful or damaging evidence. The witness is not a party to the litigation or proceedings and has no case which he is entitled to promote or which the court has to consider. Not every legal system takes this approach. For example under the Code de Procédure Pénale in France the victim of a crime is a party to the criminal proceedings as the *partie civil*, entitled to separate representation to safeguard his or her interests.

[25] Inquiries differ from *inter partes* litigation. They provide an inquisitorial rather than an accusatorial forum to enquire into matters of public interest or concern. Inquiry witnesses before inquiries have no "case" to promote in the adversarial sense and similarly there is no case against any witness. There may be damaging factual evidence given by others which is disputed and there may be opinion evidence which disparages a witness. In these events the witness may need an opportunity to give his own evidence in refutation but he is not answering a case against himself in the adversarial sense. He is simply a witness giving his own evidence in circumstances in which he has a personal interest in being believed.

[26] It is well accepted that in inquiries procedures may need to be put in place to protect the interests of individuals, witnesses or non-witnesses, who become involved in the inquiry's investigation. In Re Pergamon Press Ltd [1971] 1 Chancery 388, dealing with a DTI inspector's investigation of Pergamon Press Ltd, a company controlled by Robert Maxwell who refused to answer questions because he alleged the procedures were unfair, Lord Denning MR noted that the findings of the inspectors might be very damaging and ruin reputations. He concluded that the inspectors must act fairly. He said that the inspectors can obtain information in any way they think best but before they condemn or criticise a man they must give him a fair opportunity for correcting or contradicting what is said against him. He went on:

> "That is what inspectors here propose to do, but the Directors of the company want more. They want to see the transcripts of the witnesses who speak adversely to them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all this the Directors go too far."

[27] Later in his judgment he said:

> "It was suggested before us that whenever the inspectors thought of deciding a conflict of evidence or of making adverse criticisms of someone they should draft a proposed passage of their report and put it before the party for his comments before including it. But I think this is also going too far. They must be masters of their own procedure. They should be subject to no rules save this: they must be fair. This being done, they should make their report with courage and frankness keeping nothing back. The public interest demands it."

[28] Sachs LJ concluded that:

> "There must be an appropriate measure of natural justice or as it is nowadays styled fair play in action."

[29] He said that in the application of the concept of fair play there must be real flexibility so that very different situations may be met without producing procedures unsuitable to the object in hand. He said that it is "impracticable and indeed ill-advised to attempt to lay down a set of rules applicable to all witnesses at all times". Buckley LJ emphasised the DTI inspectors were discharging an inquisitorial function. He too concluded that the procedures to be adopted were matters which rested "in the discretion of the inspectors, a discretion which they must exercise with due regard for fair treatment of anyone likely to be adversely affected by their report."

[30] In the case of this Inquiry the terms of reference make clear that the purpose and intent of the inquiry is to examine whether there were systemic failings by institutions or the state in duties owed to children in their care between 1922 and 1995. Institutions include any body, society or organisation with responsibility for the care, health and welfare of children in Northern Ireland other than a school (but including a training school or borstal) which during the relevant period provided residential accommodation and took decisions about and made provision for the day to day care of children. Those involved in the running, management, supervision and oversight of relevant institutions face the real possibility of adverse findings and conclusions and criticisms and accordingly the dictates of fairness undoubtedly call for procedural safeguards and protections for those individuals and institutions. Furthermore, in the course of the Inquiry particular allegations and evidence may be made and presented against identified individuals which, while incidental to the main thrust of the Inquiry into systemic failings, if the Inquiry concludes that it is necessary and appropriate for those particular allegations to be examined insofar as they are relevant on the issue of systemic failings, procedural fairness will call for procedural safeguards in relation to those individuals.

[31] Rule 5 of the Inquiry Rules makes provision for the designation of persons or bodies as core participants. In exercising this power of designation the chairman must consider in particular whether the person or body played a direct and significant role in relation to the matters in question; or have a significant interest in an important aspect of the matter

or the persons may be subject to *explicit or significant* criticisms. Core participants may appoint legal representation, who may be designated as the person's recognised legal representatives.

[32] It is clear that the procedural rules applicable to core participants, combined with Rule 14 (to which reference is made below) are intended to and do cater for the need to ensure procedural fairness for those who played a direct and significant role in the running and oversight of institutions which may be the subject of criticism or which or who face the possibility of explicit or significant criticism of their conduct and procedures.

[33] Individual witnesses who give evidence relating to their recollection of events which occurred during their residence as children in institutions subject to the investigations of the inquiry are normally unlikely to qualify as core participants in the Inquiry. Their individual testimony will form part of the overall picture forming the context from which potential findings of systemic failure may be made. These individuals are unlikely to have played a significant role in relation to the running management or oversight of the institutions. They have no significant interest in important aspects of systemic failings. The applicant argues that if her evidence is discounted, rejected or subjected to criticism there is the possibility that she will be subject to explicit or significant criticism during the inquiry proceedings or in the report or interim reports. It is thus argued that she falls within the designations of persons falling within Rule 5(2)(c). Rule 5, however, must be read as a whole and in the context of the terms of reference of the Inquiry. A resident child whose testimony relates solely to their experience at the hands of an institution of which he or she is critical could not be considered answerable for any of the conduct which is the subject matter of the inquiry unless while a resident he or she did acts which played into the overall systemic failings.

[34] On occasion a former resident may face an allegation that he or she physically or sexually abused another resident or person during a relevant period. The tribunal recognises that procedural fairness entitles that person to legal representation to answer the allegation. It is not in dispute that in the present case an allegation has been made against the applicant and this has entitled the applicant to legal representation to meet that allegation. Nor is it in dispute that X against whom the applicant has made an allegation will be entitled to legal representation to answer the allegation. Furthermore, it appears to be accepted that the applicant will be

entitled to legal representation at public expense to deal with the issue whether the allegation she has made against X is one which falls or should fall within the inquiry's terms of reference.

[35] Mr Stitt argued, however, that the dictates of procedural fairness call for more than that. He stated that in fact what the applicant sought (and was entitled to) would be neither as costly or as time consuming as the Chairman of the Inquiry considered would be the case if legal representation and public funding therefore was provided to the applicant. Counsel indicated that what the applicant sought was legal representation to allow the applicant to finalise her statement for onward transmission to the tribunal. He stated that the applicant had not had sight of any of the material to which the police had access when they considered whether in the light of her allegations against X criminal charges should be brought against X. Counsel submitted that the applicant should be allowed to attend the inquiry with her legal team and have access to a designated room for consultation and discussion. The legal team should be present when she is giving evidence and when X is giving evidence. The legal team should be entitled to sight of relevant documents and be able to make appropriate submissions at the appropriate point. Without those protections he submitted that there would be a real risk of an injustice being done to the applicant, who could be the subject of criticism by the Inquiry at the end of the day if it rejected her evidence against X.

[36] In relation to Mr Stitt's proposition that fairness demanded publicly funded legal assistance to the applicant in formulating her statement, it should be borne in mind that the applicant has had the advantage of legal assistance in relation to the institution of her civil claim for damages. It is a reasonable assumption that before the institution of a civil claim (which may be covered by legal aid) her solicitor in those proceedings would, or at least certainly should have, taken a properly detailed statement of what the applicant asserts happened to her during the period in respect of her claim. If such a statement has not already been taken it can still be taken within the ambit of her civil claim. Furthermore, the applicant is in receipt of legal assistance in respect of the allegation against her and appears to be going to receive legal assistance on the question of whether her allegation against X falls within the remit of the inquiry. It would be a surprising omission if her solicitor has failed to take a full and detailed statement from the applicant in relation to her experiences during institutional care in order for them to properly deal with those issues covered by legal assistance. Furthermore, it is common case that the applicant's solicitor

was present while the applicant was interviewed by Inquiry counsel and had she wished to do so she could have contributed to the formulation of the statement. The applicant has not laid any real basis for justifying the need for legal representation and the public funding thereof in relation to the preparation of a witness statement. The question is whether procedural fairness calls for legal representation and public funding thereof in relation to the other matters relied on by Mr Stitt as calling for legal representation.

[37] Sir Anthony Hart in his ruling on the application posed three questions. The first was whether there were any grounds for believing that the applicant may be subject to criticism in the Inquiry report. The second was whether legal representation was required in the interests of justice. The third was whether it would be proportionate to grant the application. The Chairman correctly stated that the Inquiry determines within its terms of reference the issues which have to be examined, the matters which have to be investigated, who is to be called as a witness, the questions appropriate to be asked and then at the conclusion to determine whether there were systemic failings in relation to the matters investigated. The Chairman, again correctly in our view, stated that the fact that an Inquiry does not accept every allegation made by a witness does not convert the process into something equivalent to an adversarial process. He stated:

> "I have said before, and I repeat, that the inquiry in general will not determine specific allegations in its report because it is not necessary in the great majority of cases to do that. There is nothing in the material presently before me that leads me to conclude that this applicant is likely to be subject to criticism in the inquiry report."

[38] The Chairman in his ruling recorded that:

> "The application is essentially based on a false premise that these proceedings before the inquiry are sufficiently related to either in form or in substance the legal proceedings in which she has an interest and therefore she should be entitled to have legal representation."

[39] It appears that before the Chairman junior counsel did argue in favour of the application for legal representation of public funding that the legal representatives would have the advantage of observing the demeanour of the witnesses insofar as they would have a bearing on the outcome of the civil proceedings. If the motivation behind the application was essentially to protect or enhance or advance the respondent's civil action then as the Chairman indicated that would not provide a sound basis for the argument that legal representation should be provided to the applicant and provided at public expense. The Inquiry is expressly precluded from determining civil and criminal liability. Mr Stitt in his oral argument did not seek to press the argument that she needed representation to protect her civil claim apparently which junior counsel pressed before the Chairman as a reason why representation should be granted.

[40] The Chairman correctly identified that the first question which needed to be addressed was whether the applicant might be subject to criticism in the inquiry report. It is the real risk of a person or body being subjected to adverse findings affecting the person's reputation or other personal interests that triggers, in the interest of fairness and justice, the need for legal representation. In this inquiry core participants facing potential criticism in relation to findings of systemic failings have been designated and ascertained. Witnesses who were children resident in and subject to the institutions, such as the applicant, provide evidential material from which the inquiry must draw conclusions that play into the central question of whether there were systemic failings. Such witnesses are in a wholly different situation from core participants. The inquiry is not called on to make definitive findings on every individual specific complaint or allegation made by the witnesses who were relevant residents. Indeed, the inquiry's procedure and the framework of the inquiry are not designed to make definitive findings in respect of each allegation. What must be determined is whether the totality of the evidence leads the Inquiry to conclude that there were systemic failings. Indeed, to descend into precise findings in relation to each and every contested allegation would require a different focus and procedure likely to considerably lengthen the Inquiry, increase it costs and would be liable to divert attention away from the wider question of systemic failings.

[41] The Chairman concluded there was nothing in the material 'presently' before him to lead him to conclude that the applicant was likely to be the subject of criticism in the inquiry report. Mr Stitt criticised the use

of the word 'likely' as introducing a higher and more onerous test as compared to the use of the words 'may be subject to explicit or significant criticisms' in Rule 6(2)(c). The Chairman in the formulation of his question did pose the question whether the applicant 'may be subject to criticism'. Reading his ruling *in bonam partem* and as a whole we find no error of approach by the Chairman. In effect having correctly posed the question he found that there was no real likelihood of criticism.

[42] Against the background of a conclusion that the applicant did not face a likelihood of criticism the dictates of fairness did not call for legal representation or representation at public expense. The decision not to provide such legal representation does not work an injustice to the applicant or cause her procedural unfairness. She can give her evidence if she so wishes and she may decide, on the basis of her own legal advice, not to give evidence. The Inquiry has indicated that it is unlikely to compel any resident to give evidence if he or she is not willing to do so. If the tribunal were to use its power of compulsion and require the applicant to attend to give evidence different questions of procedural fairness would be likely to arise.

[43] If the Inquiry, notwithstanding the Chairman's current view that there is no real likelihood of criticism, were subsequently minded to subject the applicant to criticism in its report, two issues would arise for consideration. Firstly, the question would arise whether it would be fair to do so when the Inquiry had decided not to provide legal representation against the background of an expressed view of the criticism was unlikely. The rejection or non-acceptance of an allegation would not in itself constitute explicit or significant criticism of an individual for the purposes of Rule 5, particularly where, as here, the applicant would remain anonymised as would the alleged perpetrator X. If, as seems likely, the tribunal were to decide that it would not be fair in such circumstances to subject the applicant to the criticism then no criticism would be made.

[44] If, notwithstanding its earlier view that criticism was unlikely, the Inquiry considered that notwithstanding its earlier view, it was now minded to move the stage of considering express criticism of the witness then Rule 14 of the Rules would come into play. If the Inquiry were minded to make adverse critical comments in relation to a non-core participant witness who was unrepresented before the Inquiry then the inquiry would be bound to fashion a procedure that was procedurally fair before any explicit criticism was made. Such a fair procedure would

require a reconsideration of the question whether fairness required that the witness should be provided with legal representation.

[45] That situation has not arisen, may well never arise and, indeed, is unlikely to arise because of the approach taken to date by the Inquiry and because of the way in which it has approached the evidence of witnesses such as the applicant. However, the inquiry has not precluded itself and cannot preclude itself from reconsidering the issue of legal representation as matters develop. As noted the Chairman in his ruling concluded that on the material presently before him it led to the conclusion that the applicant was unlikely to be criticised. The Inquiry clearly did not, and of course may not legally, take an inflexible approach to the question. The Inquiry has already granted legal representation to the applicant when facing allegations and is minded to grant legal representation in respect to the issue of whether the allegation against X is within the remit of the tribunal. That latter issue has itself moved on since the matter was before the Chairman because when the Chairman was giving his ruling the applicant appeared to be contending that she had informed a sister in the relevant Order that she was being abused by X. In a somewhat opaque fourth affidavit sworn in the present proceedings, the applicant's solicitor states that the applicant had not actually informed any sister but she was making the case that the 'sister should have known something was wrong and if they had been taking care of her properly then they would have discovered this'.

[46] We conclude that the Chairman did not err in his decision to refuse the respondent her application for legal representation and public funding therefore.

[47] Mr Stitt argued that having regard to Article 3 of the Convention the applicant was entitled to legal representation, although the point was not substantively argued before the trial judge and was not the subject of any analysis in the judgment of the court below. We can dispose of this point briefly. The inquiry does not purport to be an inquiry into breaches of individuals' Article 3 rights not to be subject to degrading or inhuman treatment. It is a public inquiry into the question whether there were systemic failings by institutions and the state in duties owed towards children between 1922 and 1995 in relevant institutions. Under domestic law aggrieved individuals asserting a breach of Article 3 may, and in many cases are, pursuing civil proceedings (as is the applicant). The criminal law of the state makes provision for criminal sanctions for conduct which, in

addition to infringing the criminal law, involves breaches of the Article 3 rights of individuals. As a result we must reject the respondent's Article 3 argument.

[48] We must accordingly allow the appeal and dismiss the respondent's application for judicial review of the Inquiry's decision and must reject the applicant's counter notice.