**Neutral Citation No.: [2008] NIQB 145** | *Ref:* **GIR7325**

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*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Chief Constable's Application [Stephen Walker] [2008] NIQB 145**

**AN APPLICATION FOR JUDICIAL REVIEW BY THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND**
**AND**
**STEPHEN WALKER**

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**GIRVAN LJ**

[1] In this application Stephen Walker, a police officer, and the Police Service of Northern Ireland, whose alleged actions form part of the subject matter of the Rosemary Nelson Inquiry ("the Inquiry") seek to challenge a ruling of the Inquiry in June 2008. Two aspects of the ruling are under challenge, firstly, the decision of the Inquiry to refuse permission to counsel for the PSNI to question directly certain witnesses giving evidence to the Inquiry and, secondly, the refusal of the Inquiry to obtain and have regard to alleged bad character evidence including evidence of previous convictions and criminal associations of certain witnesses its refusal to permit the applicant to cross examine those witnesses in relation thereto. Those witnesses are witnesses giving evidence that police officers issued threats and/or made abusive remarks concerning Rosemary Nelson in the course of their interviews in relation to suspected involvement in scheduled offences. The PSNI represent two of the 18 officers who are the subject of complaints from those witnesses. Of those two witnesses only the applicant Stephen Walker has challenged the ruling. The remaining 16 police officers who are separately represented have not sought to challenge it.

**The Inquiry**

[2] The Inquiry was established under section 44 of the Police (Northern Ireland) Order 1998 which applies Schedule 8 of the Health and Personal Social Services (Northern Ireland) Order 1972 to such an Inquiry. While the Schedule confers power on the Inquiry to require the attendance of and

provision of information by any persons under oath it does not spell out procedural duties nor does it constrain the discretion available to the Inquiry to regulate its own procedures as it sees fit.

**The Witness Protocol**

[3] The Inquiry panel decided that the Inquiry should be conducted along inquisitorial as opposed to adversarial lines taking the view that such an approach would encourage co-operation and assist the Inquiry in the discovery of the truth. The evidence shows that the Inquiry has made a conscious effort to avoid the process becoming adversarial. It has taken the view that the kind of adversarial elements contended for in this application would be likely to damage the prospect of getting at the truth rather than enhancing it.

[4] The Inquiry established a witness protocol on 31 January 2008. The effect of the protocol is to ensure that counsel to the Inquiry carries out the role of questioning each witness. The full participants at the Inquiry are given the opportunity to provide suggestions for questions and lines of Inquiry in advance by writing to counsel for the Inquiry no later than 48 hours before the relevant witness is called. Counsel for the Inquiry will thus endeavour to address those questions in pursuing the evidence when that is considered appropriate. When any counsel considers that a relevant matter has not been put to a witness then before the conclusion of the evidence he or she can raise it with the Inquiry counsel and if the Inquiry counsel declines to put the point then it is open to the other counsel to apply to the panel for permission to raise the issue with the witness. The protocol made clear, however, that such cases would be the exception rather than the rule and the panel made clear that it did not intend to let the full hearings be lengthened by adversarial unnecessary or repetitive questioning. No party sought to challenge the witness protocol when the Inquiry enunciated its approach to the question of how witness questioning should be conducted.

**Relevant Evidence**

[5] The oral hearings commenced on 15 April 2008. These were preceded by a process of obtaining evidence and statements from potential witnesses and the release of relevant material to full participants suitably redacted.

[6] Colin Stafford, the solicitor acting for the PSNI in the Inquiry, in his affidavit of 11 June 2008 in support of the application states in paragraph 15:

> "The PSNI has conducted its representation of the Inquiry within the confines of the witness protocol on the formulation of which no representations were invited. But it has also taken the view that its

> counsel should be permitted to question directly those witnesses who have made strongly critical remarks about the police or about individual officers. We are concerned that the role of counsel to the Inquiry while ostensibly fashioned to assist the Inquiry in its pursuit of the truth is not necessarily equipped to protect the interests of a full participant, particularly where that participant is the subject of serious allegations. Put simply there are occasions when cross-examination is necessary."

In his third affidavit he further stated:

> "Even if all questions suggested by counsel for the PSNI had been put to the witnesses (which was not the case), that would not answer the charge of unfairness raised in this challenge by way of judicial review. It is conceivable that direct questioning by counsel for the PSNI would have opened up new avenues of inquiry and/or undermined the credibility of the witnesses concerned as frequently occurs in the course of cross-examination. Fairness cannot be engaged simply through the mechanical exercise of ticking off the suggested questions that have been put to witnesses; where such serious allegations have been made against a party, fairness demands that the party affected should be permitted to subject those allegations to a direct challenge."

[7] On 4 June 2008 the Inquiry indicated that two individuals, Barry Toman and Brian Loughran, who were individuals making allegations of misconduct by police officers in relation to statements and actions relating to Rosemary Nelson would be called to give evidence on 11 June 2008. Mr Toman's allegations included a serious allegation that officers interviewing him stated that they were either going to get Rosemary killed or "have her killed anyway". Two other witnesses Shane McCrory and an anonymous witness C150 would also be required to give evidence that week within the category of witnesses making allegations of police misconduct were to be called.

[8] Counsel for the PSNI furnished lists of questions to be put to Barry Toman and Brian Loughran accompanying the lists with the rider that the lists of question and lines of Inquiry did not purport to be exhaustive. Further questions and lines of inquiry were also likely to present themselves as a

witness gave evidence. Counsel for the PSNI did not accept that the protocol was adequate to protect the interests of the PSNI in respect of witnesses falling within the category in question. He pointed out that the Inquiry would be failing to discharge its overriding duty of fairness to the PSNI if permission were not granted to the PSNI to engage in direct questioning of the witnesses. It was argued that the specific protection of the interests of the PSNI was not compatible with the role of counsel for the Inquiry.

[9] Having heard submissions the Inquiry on 10 June 2008 refused to defer the calling of the witnesses and refused the application that counsel for the PSNI should cross-examine the witnesses. Although the PSNI sought interim relief in these proceedings to require the Inquiry to defer calling relevant witnesses pending the outcome of the judicial review the court declined to grant interim relief and the Inquiry has proceeded to hear the witnesses with counsel for PSNI having the opportunity in accordance with the protocol to raise issues and questions with counsel for the Inquiry with a view to those being raised with the witness.

**The Role of the Inquiry**

[10] Tribunals of Inquiry have a wide discretion in the area of procedures which will be influenced by factors such as the nature of the Inquiry, speed, efficiency and costs subject to requirements of fair procedures and justice. Lord Woolf in R v Lord Saville of Newdigate (ex parte A) [2000] 1 WLR 1855 ("Re A") stated:

> "It is accepted on all sides that the tribunal is subject to the supervisory role of the courts. The courts have to perform that role even though they are naturally loath to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the tribunal. In exercising their role the courts have to bear in mind at all times that the members of the tribunal have a much greater understanding of their task than the courts. However, subject to the courts confining themselves to their well recognised role on applications for judicial review it is essential that they should be prepared to exercise that role regardless of the distinction of the body concerned and the sensitivity of the issues involved. The court must also bear in mind that it exercises a discretionary jurisdiction and where this is consistent with the performance of its duties it should avoid interfering with the activities of the

> tribunal of this nature to any greater extent than upholding the rule of law."

In a similar vein in the context of the approach of the Irish courts to such inquiries the Supreme Court in Flood v Lawlor (Supreme Court 24 November 2000) stated:

> "It is not necessary to stress, because it has been repeatedly said in this court, that the courts in interpreting the relevant legislation must afford a significant discretion to the tribunal as to the way in which it conducts these proceedings. It must, of course, observe the constitutional rights of the persons who appear before it or upon whom the decisions of the tribunal may impinge but making every allowance for that important qualification the principle remains as indicated."

[11] In the context of a challenge to the fairness of the procedures adopted by an Inquiry the approach of the court is to determine whether what has happened has resulted in real injustice. If it has the court has to intervene, since the panel is not entitled to confer on itself the power to inflict injustice (see Woolf LJ in R v Panel on Takeovers and Mergers ex parte Guinness plc [1900] 1 QB 146 at 193-194 and Lord Woolf in Re A [2000] 1 WLR 1855.

**Parties' Contentions**

[12] Mr Larkin QC argued that the prohibition on questioning of an adversarial nature was not justified where individuals are making serious allegations that are entirely disputed. The role of Inquiry counsel is not suited to conducting the kind of questioning necessary to ensure that the evidence is tested in the interests of those affected by the allegations. Probing and challenging questions can only be effectively carried out on the instructions of the person against whom the allegations are made. The Inquiry's assertions that partisan questioning is antithetical to an inquisitorial procedure is misplaced. Other inquiries permitted and even inquisitorial civil law systems provide for a role for cross-examination where individual reputations and good names are at stake. Article 8 requires proper procedural safeguards which will include a right to cross-examine.

[13] Mr Eadie QC on behalf of the Inquiry argued that the applicants are in essence making a root and branch attack on the witness protocol. They are, he contends, claiming to be entitled to directly question witnesses once they give evidence addressing a relevant issue in the Inquiry and which contains a serious allegation affecting the reputation of other witnesses. Such an approach will open the door to claims to a right to cross-examine by, for

example, the claimant witnesses themselves. The challenge goes to the heart of the inquisitorial nature of the Inquiry. He submitted that common law fairness does not entitle participants at a Public Inquiry to a right to cross-examine witnesses if the evidence relates to an issue in the Inquiry and might cause damage to reputation. Mr Eadie referred to the common practice of modern inquiries following a similar procedure to that adopted in this Inquiry. It is consistent he says with the statutory procedures now set out the Inquiries Act 2005. The 2005 Act confers a broad discretion on the Inquiry chairman as to whether to permit cross-examination. The presumption in Rule 10(1) of the Inquiries Rules is that only counsel to the Inquiry will be permitted to ask questions it is difficult, he argued, to identify any residual fairness in the present instance to the applicants in all the circumstances.

[14] Counsel referred in particular to R (D) v Secretary of State for the Home Department [2006] All ER 946. In that case the claimant D attempted to take his life whilst detained in prison and as a result he sustained permanent and irreversible brain damage. At first instance the court concluded that in order to discharge the State's investigative obligation under Article 2 of the Convention there needed to be a public investigation into the circumstances leading to D sustaining life-threatening injuries and that as part of a full and effective investigation D's representatives had to be able to put questions to witnesses directly.

[15] Sir Anthony Clarke MR delivering the judgment of the court at paragraph 40-42 of the judgment of the court stated:

> "[40] We note that the 2005 Act does not give parties represented at an Inquiry rights to cross-examine witnesses … By section 17(1) the procedure and conduct of the inquiry are to be as the chairman may direct and, by section 17(3) he must act with fairness and with regard to the need to avoid unnecessary cost. Thus while by section 17(2) he may take evidence on oath there is no provision entitling interested parties to cross-examine witnesses. It is a matter for the chairman of the particular Inquiry to decide whether and to what extent to permit interested parties or their representatives to ask questions of witnesses.
>
> [41] We see no reason why an inquiry conducted in such a way should not be compatible with Article 2 of the Convention. The underlying obligation of the chairman is to act fairly. In discharging that obligation the chairman may or may not allow others to question witnesses

> depending upon the circumstances of the particular case. In some cases it may be appropriate to do so and in others it may not. For example where there is counsel to the Inquiry it may not be appropriate, whereas where there is no such counsel it may, but all will depend upon the circumstances.
>
> [42] We have reached the conclusion that the judge went too far insofar as he concluded that these representatives must be entitled to cross-examine witnesses they must in general be entitled to see the written evidence, to be present during oral evidence and to make appropriate submissions, including submissions as to what lines of Inquiry should be adopted, what questions asked and indeed who should be permitted to ask witnesses questions about what. As just stated it will be a matter for the chairman to decide what procedure to adopt. Such an approach which is as specified in the 2005 Act will in our judgment discharge the United Kingdoms obligations under Article 2 of the Convention on the facts of this case and be consistent with both the Strasbourg jurisprudence and the reasoning of the House of Lords in R (Amin) v Secretary of State for the Home Department [2003] 4 All ER 1264 … It will for example meet the requirement identified in Jordan v UK 2001 11 BHRC 1 at 31 and Edwards v United Kingdom [2002] 12 BHRC 190 at 211 that there must be involvement of D's representatives `to the extent necessary to safeguard his or her legitimate interests'."

**The Irish Authorities**

[16] Although Mr Larkin did not refer to the Irish authorities in his argument there is relevant Irish jurisprudence which must of course be read in the constitutional context in which those cases were decided. In view of the potential relevance of the Irish cases I drew them to the attention of the parties and relisted the matter for further argument. The authorities were usefully reviewed by the Irish Law Reform Commission in its Report on Public Inquiries including Tribunals of Inquiry (2005). In Haughey v Moriarty [1999] 3 IR 1 in the context of an inquiry into allegedly unethical and improper payments made to the former Taoiseach the Supreme Court stated

that at an Inquiry of such a nature there are five stages in the tribunal of inquiry process:

(i) the preliminary investigation of the available evidence;

(ii) the determination by the tribunal of what it considers to be evidence relevant to the subject matter of the Inquiry;

(iii) the service of such evidence on the persons likely to be affected thereby;

(iv) the public hearing of the evidence of witnesses together with cross-examination by the persons likely to be affected by the evidence; and

(v) the preparation of the report setting out the findings of the tribunal and any recommendations based on those facts.

[17] The approach taken by the Supreme Court in Haughey v Moriarty followed that adopted in an earlier case Re Haughey [1971] IR 217 involving a different individual, Padraic Haughey. The Committee of Public Accounts received hearsay evidence containing serious allegations against Padraic Haughey who appeared as a witness before the Committee. Having unsuccessfully sought leave to cross-examine witnesses appearing before the Committee and have counsel appear on his behalf he refused to answer questions and the Committee certified to the High Court that he had committed an offence. He was sentenced to 6 months imprisonment. The Supreme Court held that Mr Haughey was not a mere witness but a party accused of a serious offence. He should have been afforded a reasonable means of defending himself. The Supreme Court stated that the minimum protection which the State should afford such an individual was as follows:

> "(a) That he should be furnished with a copy of the evidence which reflected on his good name.
>
> (b) That he should be allowed to cross-examine by counsel his accusers or accuser.
>
> (c) That he should be allowed to give rebutting evidence.
>
> (d) That he should be permitted to address, again by counsel, the committee in his defence."

The Supreme Court concluded that as Mr Haughey had been deprived of his right to cross-examine by counsel his accusers and to address the Committee in his defence he had not received a reasonable means of defending himself and his rights as guaranteed by Article 40.3 of the constitution had been infringed. Article 40.3.1˚ and 2˚ provide:

> "1˚: The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2˚: The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

O'Dalaigh CJ sought to state the guiding principles thus:

> "In proceedings before any tribunal where a party to the proceedings is at risk of having his good name or his person or property or any of his personal rights jeopardised the proceedings may be correctly classed as proceedings which may affect his rights and in compliance with the constitution the State either by its enactments or through the courts must now outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights."

[18] Recent case law from the Irish Supreme Court stresses that inquiries should take a tailored approach to the issues of constitutional justice. The constitutional rights and entitlements of a particular individual will vary according to the position in which he is placed, a position that is acknowledged might evolve during the course of the proceedings. Geoghegan J in O'Callaghan v Mahon (Supreme Court 9 March 2005) left open the question whether all the rules relating to evidence and cross-examination etc fashioned by the courts or devised under the Common Law Procedure Act are necessarily under all circumstances equally applicable to a tribunal of Inquiry. In Boylan v Beef Tribunal [1993] 1 IR 210 in a matter in which the United Farmers Association was a witness and was given limited but not full representation rights Denham J pointed out that:

> "Its conduct is not being investigated by the tribunal. There are no allegations against the UFA and its members. It is a witness which has proffered itself. As such while its constitutional

> rights must at all times be protected it does not appear that its rights – a good name for example are in jeopardy in any way at all. This position as a witness is fully protected by the limited legal representation awarded by the tribunal."

[19] In its report the Irish Law Reform Commission at paragraph 5.48 to 5.54 deals the with the right of cross-examination at a tribunal pointing out that in relation to the right to cross-examine witness this should not be taken to be an automatic right. Implicit in the inquisitorial nature of tribunals is a recognition that the examination and cross-examination of every witness by every represented party in addition to counsel for the tribunal is not appropriate. In some cases the examination of witnesses by counsel for the Inquiry may be sufficient. It acknowledged that a right to cross-examine in appropriate situations is particularly important where a person's rights are in issue whether that person is in the position of a potential accused or their good name and reputation is at issue. In Maguire v Ardagh [2002] 1 IR 385 Hardiman J stated:

> "Cross-examination adds considerably to the length of time which proceedings will take but it is an essential constitutionally guaranteed right has been the means of the vindication of innocent people. It must be firmly understood that when a body decides to deal with matters as serious as those in question here it cannot (apart from anything else) deny the persons whose reputations and livelihoods are brought into issue the full power to cross-examine fully as a matter of right and without unreasonable hindrance. This is not to deny to any tribunal the right to control prolixity and incompetence if that is manifested."

The Commission at paragraph 5.51 of its report recommended that tribunals must make sure that appropriate cross-examination is provided for where the rights of an individual including his good name and reputation are in issue. This should not in any way restrict the tribunal's power to control prolixity if it arose. Although the paragraph is framed as a recommendation it appears to be based on an analysis of the case law principles.

**Discussion**

[20] The Irish case law must be read in the specific context of the express provisions of Article 40.3(1) and (2) (which do not apply in Northern Ireland). It can be argued that the spirit and intent of the Irish constitution is little different from and drew inspiration from the concerns of the common law to

protect the rights of the individual and to provide fair procedures that enable the individual to vindicate his life, good name and property rights. That being so the approach adopted by the Irish courts is at first sight persuasive authority for the proposition that the common law rules of fairness should require that a right to cross-examine at a public inquiry should be available to individuals or organisations whose reputation and good name are seriously at issue.

[21] Furthermore on close analysis R (D) v the Secretary of State for the Home Department is not authority for the wider propositions which Mr Eadie contends that it decided. In that case what was in question was whether D had a right to cross-examine. It was not in issue that D was detained in prison and that he had sustained permanent and irreversible brain damage in controversial circumstances. His interests could be protected by the Inquiry counsel. The question whether it would not be unfair for his representatives not to have a right to cross-examine raised different issues from those which would have been raised if a named individual had been accused of serious wrongdoing leading to D's injuries. What might be fair in relation to D might very well not be fair in relation to such a named individual. Paragraph [41] of the judgment makes clear that it all depends on the circumstances what fairness requires in individual cases.

[22] The difference between the Irish constitutional law approach and the common law approach lies in the fact that under Irish law a party in certain circumstances has a *right* to cross-examine whereas under the common law approach the question of whether a person should be permitted to cross-examine falls to be determined, not by reference to the language of rights, but by consideration of the dictates of procedural fairness in given situations. As Mr Eadie pointed out in his argument Convention case law does not support the view that there is a right to cross-examine in the case of investigative procedures in the nature of an inquiry which is not dispositive of rights and in which there is no legal determination of civil or criminal liability and no determination of any right to reputation. Fayed v United Kingdom (Application No 17101-09) concerned allegations of the most serious kind affecting the reputation and good name of the Fayed brothers. During the investigation under the Companies Act 1985 into the circumstances of a company takeover there was no opportunity for the applicants to confront or cross-examine witnesses. The Fayed brothers alleged a breach of article 6 of the Convention. The Court held that in the circumstances Article 6 had no application since there was no determination of their civil right to reputation. The procedural protections under Article 6 including a right to cross-examine did not arise.

[23] Even in the context of the Irish constitutional law right to cross-examine in certain circumstances there is a need to exercise caution. Murphy J in Lawlor v Flood [1999] 3 IR 107 pointed out:

> "The report of the tribunal whilst it may be critical or highly critical of the conduct of a person or person who gave evidence before it is not determinative of their rights … The conclusions of the tribunal will not be evidence conclusive or prima facie of the facts found by the tribunal."

He ventured to suggest that it may be necessary to examine afresh the manner in which the constitutional rights of a witness required to attend such a public Inquiry must be protected. In paragraph [116] of his judgment he stated:

> "I am persuaded at this stage that a witness is entitled to cross-examine or have cross-examined any other witness who gave evidence critical of him. To impose such a requirement would involve the assumption that cross-examination is the only means or the only appropriate means of eliciting the truth. Such an assumption would place an excessive value on the adversarial system and implicitly reject alternative systems which find favour in other jurisdictions and appear to achieve an equally high standard of truth and justice. The examination and cross-examination of witnesses by the tribunal or its counsel might meet the requirements of natural justice having regard to functions which such a body performs. Whether a tribunal so confirms the proceedings would be a matter for the judgment of the tribunal itself. In certain cases it might be persuaded that cross-examination of witnesses critical of a particular person should be open to cross-examination by counsel on behalf of that person. … I would have thought that the appointment of a judge of the superior courts to act as a sole member would in itself go a long way to ensuring the protection of the constitutional and civil rights of all witnesses."

[24] The real question in this application cannot be answered by recourse to the question whether there is an abstract right to cross-examine where allegations are made that impugn the integrity or reputation of individuals. Rather the true question is whether the tribunal has in all the circumstances acted unfairly to the applicants by refusing to accede to their application to cross-examine at large. As Mr Harvey pithily put it fairness is the objective and procedures are the means or, as Murphy J put it in Lawlor v Flood (1999)

3 IR 107 "the attainment of justice does not demand a ritual or formula requiring slavish adherence."

[25] In considering whether the Inquiry has followed an unfair procedure Mr Harvey listed a number of relevant factors which he argued had to be taken into account.

(a) Many of the allegations made by individual complainant witnesses related to unidentified police officers nearly all of whom have in any event been granted anonymity.

(b) The allegations related largely to offensive remarks amounting to incivility.

(c) The applicant Mr Walker was identified by one individual Colin Duffy who has not yet given evidence. Any question of whether Colin Duffy should be open to cross-examination would have to be determined in the light of the circumstances prevailing at the end of the examination by counsel for the Inquiry.

(d) The Inquiry has informed the parties that it will not be making individual findings against any officer. Thus there will not be individual findings that will damage their reputation. It will focus on questions relating to the systems in place in the Police Service and processes and procedures followed.

(e) The central evidence of a threat alleged to have been made by a police officer was of a threat by an alleged unidentified Special Branch officer. One witness alleges that Officer 121 and others solicited murder through him. This witness has not yet given evidence. If he does the tribunal would have to consider whether it would be unfair to disallow cross-examination of him. That witness has indicated that he will not give evidence.

(f) The evidence to date does indicate widespread attitudes of prejudice held against Mrs Nelson within the Police Service. No application was made to cross-examination in relation to the evidence about those attitudes.

[26] The role of the counsel to the Inquiry is to assist the Inquiry in its function of establishing the truth. The modern practice in tribunals of inquiry favours the enhancement of the role of counsel to the inquiry and to follow procedures to ensure the gathering of evidence in as full a manner as possible. The traditional role of cross-examination has been altered in that no party to the proceedings is in a position to exploit instructions entirely within its knowledge alone. If counsel to the inquiry failed to pursue proper lines of inquiry brought to his attention by a relevant party the Inquiry panel would have to determine whether they should be pursued by counsel for the Inquiry

and failing that by the relevant party. As it is the applicants have identified only one line of inquiry which they contend should have been pursued. Apart from that one line of Inquiry counsel for the applicants was not able to point to any particular questions or lines of inquiry which it was suggested should have been put to witnesses but had not been adequately pursued by counsel to the Inquiry.

[27] The line of inquiry which the applicants sought to pursue was dealt with in the ruling of 10 June 2008 thereby the Inquiry chairman stated that the panel did not accept in general that criminal convictions are of assistance one way or the other in the assessment of witness's credibility or his or her motivation. In addition however the raising of criminal convictions would have an adverse impact on the Inquiry's general approach as outlined above. He said "To take just one example it would seem to us inevitable that the criminal convictions of other witnesses and the disciplinary history of police officers, soldiers and civil servants would be fair game."

[28] Mr Larkin contended that it is an established tenet of the law of evidence that previous convictions subject to certain controls are relevant to the matter of a witness's credit. The previous conduct of the complainant witnesses would be relevant but not exclusively to credit but the issue of whether the remarks were made. Counsel referred to the fact that in the Saville Inquiry the Inquiry did require production of records of criminal convictions and army disciplinary proceedings. It was argued that the decision to close out this line of evidence was irrational.

[29] Mr Eadie contended that it was pre-eminently a matter for the Inquiry panel to make a judgment as to what materials should be admitted. Any questioning along the lines suggested by Mr Larkin would introduce a confrontational and hostile atmosphere particularly if questioning expanded beyond criminal convictions to assert a suggested involvement in paramilitary training activity. It would damage the effectiveness of the Inquiry. Reference to them and public hearings could deter witnesses co-operating with the Inquiry, would lead to unwelcome consequences which could be difficult to avoid on grounds of inconsistency. Counsel pointed out that having worked on the Inquiry for over three years and having read a huge amount of documented material which included records of criminal convictions relating to some witnesses reference to such material would be of little assistance to the panel.

[30] Notwithstanding the persuasive attractiveness of Mr Larkin's argument and contrary to the initial view which I formed on the question I conclude, not without hesitation, that this court should not interfere with the Inquiry's decision on this aspect of its ruling. The Inquiry has to make a balanced judgment on the question whether opening up these lines of Inquiry would be more prejudicial to the Inquiry than probative of relevant issues.

The question of the impact on the overall effectiveness of the Inquiry and the co-operativeness of other witnesses does enter into the equation. The Inquiry panel, steeped as it is in the evidence and material gathered, is best placed to make that judgment. Mr Harvey on behalf of the Nelson family referred to the considerable problems of time wasting and additional time necessitated by such lines which occurred in other inquiries such as the Saville Inquiry as a result of protracted examination and cross-examination of records and allegations of misconduct by witnesses. The Inquiry in the present instance is fully alive to the fact that the complainant witnesses were familiar with the criminal process, had spent time in police stations and had an incentive if they wished, to exaggerate and distort evidence in a particular way. It is aware of their political viewpoints and background. It was entitled to conclude in the circumstances that opening the issue of the previous convictions and associations would potentially do more damage than good to the effectiveness of the Inquiry and that is a decision which lay within its margin of appreciation.

[31] Accordingly the application must be dismissed.