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Judgment: approved by the Court for handing down | *Delivered:* **27/11/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION UNDER SECTION 36 OF THE INQUIRIES ACT 2005

AND

IN THE MATTER OF IAN PAISLEY

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GILLEN J

[1] Lord MacLean is the Chairman of the Tribunal known as the Billy Wright Inquiry. The Terms of Reference of the Inquiry are:-

> "To inquiry into the death of Billy Wright with a view to determining whether any wrongful act or omission by or within the prison authorities or other state agencies facilitated his death, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; and to make recommendations."

That Inquiry was announced by the Secretary of State for Northern Ireland on 16 November 2004. On 23 November 2005 the Inquiry was converted by the Secretary of State for Northern Ireland to an Inquiry to be held under the Inquiries Act 2005.

[2] On 21 June 2007 Ian Paisley Jnr a member of the Northern Ireland Legislative Assembly (MLA) wrote to the father of Billy Wright providing him with information relevant to the Inquiry. In particular he referred to a prison officer who allegedly had divulged information relevant to the destruction of material which would have been relevant to the Inquiry.

[3] The Inquiry interviewed Mr Paisley regarding the name of the prison officer who had allegedly approached him and provided the information. When the information was not forthcoming, on 19 June 2008 the Inquiry

wrote to the solicitors of Mr Paisley serving a notice under Section 21 of the Inquiries Act 2005("the 2005 Act") requiring a witness statement containing the name of the prison officer who was known to Mr Paisley. That notice stated that if he was unable to comply or if it was not reasonable to require him to comply, he was obliged to make an application in writing to the Inquiry Chairman before the time for compliance with that notice setting out the full reason why the notice could not or should not be complied with. The notice contained a note in the following terms:

> "Take note: you must obey this notice. Failure to do so may result in your prosecution and imprisonment or may result in proceedings against you in the High Court which could also result in your imprisonment."

[4] A further letter of 19 June 2008 enclosed a draft of a statement to be signed by Mr Paisley following an earlier interview with the Inquiry team.

[5] Thereafter some correspondence passed between the solicitors on behalf of Mr Paisley and the Inquiry. However following the failure of Mr Paisley to comply with the notice, on 25 July 2008 the Inquiry wrote to his solicitors indicating that continued failure to comply would result in enforcement proceedings.

[6] On 13 August 2008 the solicitors on behalf of Mr Paisley sent to the Inquiry signed statements by him which included a section setting out his position in relation to the evidence/information sought. At paragraph 10 of that statement Mr Paisley stated as follows:

> "I am a well known politician in Northern Ireland and an M.L.A. at Stormont. Many constituents over the years have given me information to pass on to various Inquiries and Tribunals and have requested that I do not provide their names or details to that Inquiry or Tribunal as the information has been passed on to me in strict confidence as a public representative. I am not prepared to give any further details so as to identify the senior prison officer because I respect his personal concerns in relation to his employment and his personal and family security. Moreover I believe that my role as an elected public representative can only be properly performed if I can pass on this type of information of public interest to the Inquiry in a way that protects my integrity as a person who can be relied upon not to divulge the confidence people have in me for protecting them. I sincerely believe that it would not be reasonable in all

> the circumstances for me to identify by name or to provide details that may lead to the identification of the senior prisoner officer and that the public interests would be better served in the Inquiry seeking to obtain this information by using other powers available to the Inquiry. Accordingly I believe that I am unable to comply with a notice for the production of documents under Section 21 of the Inquiries Act 2005 …."

[7] On 28 August 2008 the Inquiry wrote to the solicitors on behalf of Mr Paisley indicating that the Inquiry Chairman Lord MacLean had concluded that his decision in the notice dated 19 June 2008 should stand without variation. The solicitor to the Inquiry in that letter indicated that it was the opinion of the Chairman that the information in the possession of Mr Paisley was of great importance to this Inquiry particularly as a number of questions had been raised regarding the destruction of files by the Northern Ireland Prison Service.

[8] On 28 August 2008 the solicitor to the Inquiry on behalf of the Chairman wrote to Mr Paisley's solicitors indicating that in view of the serious nature of the allegation and the clear obligation and duty of the Inquiry to satisfy its Terms of Reference, the Chairman took the view that it was in the public interest that he provide the name of the prison officer to the Inquiry and that it was reasonable that he should comply with the notice.

[9] Accordingly on 3 September 2008 the Chairman signed a certificate under Section 36 of the 2005 Act referring the matter to this court.

[10] On 18 September 2008, the Inquiry made an application before this court for directions for the matter to be dealt with in accordance with Section 36 of the 2005 Act in order that effect might be given to the notice dated 19 June 2008 under Section 21 of the 2005 Act served on Mr Paisley.

[11] When the matter was listed before me, counsel on behalf of Mr Paisley, Mr Simpson QC, asked the court to consider as a preliminary issue whether or not these proceedings are criminal or civil in character, counsel contending that they were criminal in nature. Mr Larkin QC, who appeared on behalf of the Inquiry with Mr Scoffield, contends that they are civil in character.

Statutory Framework

[12] Section 21 of the Inquiries Act 2005 provides:

> **"21 Powers of chairman to require production of evidence etc**

(1) The chairman of an inquiry may by notice require a person to attend at a time and place stated in the notice –

(a) to give evidence;
(b) to produce any documents in his custody or under his control that relate to a matter in question at the inquiry;
(c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

(2) The chairman may by notice require a person, within such period as appears to the inquiry panel to be reasonable -

(a) to provide evidence to the inquiry panel in the form of a written statement;
(b) to provide any documents in his custody or under his control that relate to a matter in question at the inquiry;
(c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

(3) A notice under subsection (1) or (2) must—

(a) explain the possible consequences of not complying with the notice;
(b) indicate what the recipient of the notice should do if he wishes to make a claim within subsection (4).

(4) A claim by a person that -

(a) he is unable to comply with a notice under this section, or
(b) it is not reasonable in all the circumstances to require him to comply with such a notice,
is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground.

(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection (4)(b), the chairman must consider the public interest in the information in question being obtained by the

inquiry, having regard to the likely importance of the information.

(6) For the purposes at this section a thing is under a person's control if it is in his possession or it he has a right to possession of it."

[13] Sections 35 and 36 of the 2005 Act provides as follows

"**35. Offences**

(1) A person is guilty of an offence if he fails without reasonable excuse to do anything that he is required to do by a notice under section 21.

(2) A person is guilty of an offence if during the course of an inquiry he does anything that is intended to have the effect of -

(a) distorting or otherwise altering any evidence, document or other thing that is given, produced or provided to the inquiry panel, or
(b) preventing any evidence, document or other thing from being given, produced or provided to the inquiry panel,
or anything that he knows or believes is likely to have that effect.

(3) A person is guilty of an offence if during the course of an inquiry -

(a) he intentionally suppresses or conceals a document that is, and that he knows or believes to be, a relevant document, or
(b) he intentionally alters or destroys any such document. For the purposes of this subsection a document is a 'relevant document' if it is likely that the inquiry panel would (if aware of its existence) wish to be provided with it.

(4) A person does not commit on offence under subsection (2) or (3) by doing anything that he is authorised or required to do -

(a) by the inquiry panel, or

(b) by virtue of section 22 or any privilege that applies.
(5) Proceedings in England and Wales or in Northern Ireland for an offence under subsection (1) may be instituted only by the chairman.

(6) Proceedings for an offence under subsection (2) or (3) may be instituted -

(a) in England and Wales, only by or with the consent of the Director of Public Prosecutions;
(b) in Northern Ireland, only by or with the consent of the Director of Public Prosecutions for Northern Ireland,

(7) A person who is guilty of an offence under this section is liable on summary conviction to a fine not exceeding level three on the standard scale or to imprisonment for a term not exceeding the relevant maximum, or to both.

(8) 'The relevant maximum" is -

(a) in England and Wales, 51 weeks:
(b) in Scotland and Northern Ireland, six months.

36. Enforcement by High Court or Court of Session

(1) Where a person—
(a) fails to comply with, or acts in breach of, a notice under section 19 or 21 or an order made by an inquiry, or
(b) threatens to do so,

the chairman of the inquiry, or after the end of the inquiry the Minister, may certify the matter to the appropriate court.

(2) The court, after hearing any evidence or representations on a matter certified to it under subsection (1), may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the court.

> (3) In this section 'the appropriate court' means the High Court or, in the case of an inquiry in relation to which the relevant part of the United Kingdom is Scotland, the Court of Session."

[14] Mr Simpson drew my attention to the "Explanatory Note to the Inquiries Act" published by the Government through the medium of the Office of Public Sector Information. These provide, dealing with Section 36 of the 2005 Act, in paragraphs 87 and 88:

> **"Section 36: Enforcement by High Court or Court of Session**
>
> 87. This section provides for an appropriate court (the High Court or Court of Session) to enforce notices issued under powers of compulsion, restriction notices and any orders of the inquiry, including restriction orders. Where a person breaches a notice or order, or threatens to do so, the chairman of the inquiry (or the Minister, after the end of the inquiry) can certify the matter to the court, which can then take steps to enforce the order. This is similar to the mechanism that would have been used to enforce orders issued under the Tribunals of Inquiry (Evidence) Act 1921 Act 1921.
>
> 88. In the case of notices issued under powers of compulsion in section 21, enforcement by the appropriate court is an alternative mechanism to prosecution, and could be used in cases where a prosecution might not be the best method of obtaining the relevant evidence. However, the court could also be asked to enforce a wider range of orders, for example someone revealing the name of a witness whose identity was covered by a restriction order. This example could occur after the end of an inquiry, when the chairman is no longer in a position to certify the matter to the court, so section 36 provides for the Minister to certify matters to the court after the end of the inquiry."

[15]For comparison purposes and since it was raised in this matter it is apposite that I set out that Section 1 of the Tribunals of Inquiry (Evidence) Act 1921 ("the 1921 Act") provided as follows:

"**Section 1: Powers with respect to the taking of evidence, &c., before certain tribunals of inquiry –**

(1) Where it has been resolved by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose either by His Majesty or a Secretary of State, the instrument by which the tribunal is appointed or any instrument supplemental thereto may provide that this Act shall apply, and in such case the tribunal shall have all such powers, rights, and privileges as are vested in the High Court, or in Scotland the Court of Session, or a judge of either such court, on the occasion of an action in respect of the following matters:-

(a) The enforcing the attendance of witnesses and examining them on oath, affirmation, otherwise;
(b) The compelling the production of documents;
(c) Subject to rules of court, the issuing of a commission or request to examine witnesses abroad; and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.

(2) If any person—

(a) on being duly summoned as a witness before a tribunal makes default in attending; or
(b) being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer; or
(c) does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court;

> the chairman of the tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session, and the court may thereupon inquire into the alleged offence and after hearing witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.
>
> (3) A witness before any such tribunal shall be entitled to the same immunities and privileges as if he were a witness [in civil proceedings] before the High Court or the Court of Session."

Leading authorities

[16] Mr Simpson primarily relied on the judgment of the Court of Appeal in Northern Ireland in Lord Saville of Newdigate v Harnden (2003) NI 239("Harnden's case"). In that case, the chairman of a tribunal established to inquire into events which took place when 13 civilians were shot dead by members of the armed forces under the Tribunal of Inquiry (Evidence) Act 1921, sought to have a journalist who declined to give evidence despite being summoned by the Tribunal punished by the High Court for contempt.

[17] Carswell LCJ determined in that case that the contempt proceedings were essentially punitive and that the proceedings were therefore criminal in nature. Drawing on, inter alia, R (on the application of McCann) v Crown Court at Manchester (2001) 1 WLR 1084(McCann's case) and Han v Comrs of Customs and Excise and others (2001) 1 WLR 2253 in the course of a review of relevant case law, Lord Carswell concluded as follows at paragraph 18:

> "The availability of contempt proceedings, by holding a threat over the heads of witnesses summoned to give evidence, is designed to compel them to obey the command of the court and give the evidence within their knowledge and not to withhold it. If a witness persists in his refusal to answer questions on relevant matters, and proceedings are commenced to commit him for contempt, then he becomes liable to be punished by the court, as s. 1(2) of the 1921 Act provides. In our judgment that takes on the colouring of a criminal rather than a merely coercive matter. Taking into account also the nature and amount of the penalty which may be involved, we conclude, in

> agreement with the judgment, that those proceedings are essentially punitive."

[18] In Engel v Netherlands (No. 1) (1976) 1 EHRR 647 at para. 82, the European Court of Human Rights laid down three criteria for determining whether a matter is to be classified as criminal. They were the domestic classification, the nature of the offence and the severity of the potential penalty which the person concerned risk incurring. Dealing with these criteria Lord Carswell said at paragraph 16 in Harnden's case:

> "These factors are considered cumulatively in determining the issue. The domestic classification is relevant, but only a starting point; the second and third factors carry greater weight and the third factor has been described as the most important (*per Lord Steyn in McCann's case at paragraph 30*)."

Conclusions

[19] It is tempting in a case such as the instant one to invoke the authority in Harnden's case and apply it. Mr Simpson cogently argued that the present matter should similarly be classified as criminal in nature in domestic law, that the nature of the offence was a wilful refusal to comply with the notice of Chairman under Section 21 of the 2005 Act, and the nature and degree of severity of the penalty which Mr Paisley risks incurring -namely committal for contempt – all cumulatively result in Section 36 being treated as criminal in concept. Moreover the note appended to the notice has punitive overtones (see paragraph 3 of this judgment) and proceedings under s36 of the 2005 Act are described as "Enforcement "Proceedings

[20] However after careful reflection, I have come to the conclusion that the wording and format of the 2005 Act, together with the mechanisms for enforcement, are significantly different from those set out in the 1921 legislation. Hence Harnden's case, which dealt with the 1921 Act is not necessarily a prescriptive guide for interpretation of the 2005 Act albeit there may be similarities in the mechanisms employed as outlined in the explanatory notes to the 2005 Inquiries Act.

[21] Looking at the differences between the two pieces of legislation, I have borne in mind the traditional distinction in domestic law between contempt being classified as either being criminal or civil. The general approach has been that a criminal contempt is an act which so threatens the administration of justice that it requires punishment from the public point of view; whereas, by contrast, a civil contempt involves disobedience of a court order or undertaking by a person involved in litigation. In these cases, the purpose of the imposition of the contempt sanction has been seen as primarily coercive

or "remedial". It is not the fact of punishment, but rather its character and purpose, that often served to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court; see Arlidge, Eady and Smith on Contempt 3rd Edition at paragraphs 3.1-3.2 and Gumpers v Bucks's Stove and Range Co. 221 U.S. 418 (1911) at 441.

[22] For my own part I consider that Section 35 of the 2005 Act is clearly a punitive route if adopted by the Chairman. This section provides sanctions for non-compliance. The Chairman himself may institute proceedings under subsection (1). The wording of this section is regularly punctuated by references to "an offence", "a person is guilty of an offence", "proceedings for an offence … may be instituted", and "who is guilty of an offence under this section is liable in summary conviction to a fine … or to imprisonment …".

[23] This is similar in tone and content to the language of Section 1 of the 1921 Act. Under that Act, a Tribunal has all the powers, rights and privileges as are vested in the High Court (in stark contrast to the tribunal under the 2005 Act). It employs the language of offence and punishment with the Chairman certifying "the offence of that person" and the High Court "may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence … punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court."

[24] I consider that the route employed under Section 36 of the 2005 Act is in sharp contrast. The language of "offence" or "punishment" is never mentioned or suggested. I consider this is deliberate.

[25] In Crest Home Plc v Mack (1987) 1 AC 829 at 856E, Lord Oliver observed that:

> "Offence hardly seems an appropriate word to describe a civil contempt."

In my view it cannot be without significance that whilst Parliament has deemed fit to invoke the use of the term "offence" in Section 1 of the 1921 Act and Section 35 of the 2005 Act, such language is absent in Section 36 of the 2005 Act. I can only consider this is because the purpose is not primarily punitive.

[26] No prosecution is instituted once Section 36 is invoked. Rather the Chairman, who does not have the powers of the High Court, certifies "the matter" to the appropriate court and it may make "such order by way of enforcement or otherwise as it could make if the matter had arisen in

proceedings before that court". Consequently the person concerned has not been charged with any offence and in my view has not been referred to the High court for punishment at this stage.

[27]It is worth reciting again that the explanatory notes to the 2005 Inquiries Act state:

> "In the case of notices issued under powers of compulsion in Section 21, enforcement by the appropriate court is an alternative mechanism to prosecution and could be used in cases where a prosecution might not be the best method of obtaining the relevant evidence."

[28] I believe that this captures the character and purpose of the Section 36 route. It is for the benefit of the Tribunal as a step towards securing compliance. I agree with the suggestion of Mr Larkin that the focus is on obtaining the information rather than on the punishment. It is neither punitive in nature nor bent on vindicating the authority of the tribunal or court at this stage. Rather it is coercive or remedial in concept, calculated towards taking a further step to secure compliance notwithstanding the use of the word enforcement. To adopt the phraseology of Carswell LCJ in Harnden's case the focus of Section 36 causes it to take on "the colouring" of a coercive rather than a criminal matter.

[29]I make it clear that I have an entirely open mind as to what will happen when this mater is determined by the High Court .However if the Court does decide to take enforcement steps and if compliance is not achieved in the face of such an Order made under Section 36 by the High Court, the dual nature of civil contempt will come into play and the court may wish to address the impact from the public interest's point of view of a failure to comply. At that stage the High Court will have a very substantial interest in seeing that any order it makes must be upheld – if necessary by committal to prison for contempt. But that stage is far from being reached at this point and in my view is not the primary purpose of Section 36. The fact of the matter is that the High Court must hear any evidence or representation on the matter certified and only then make such order by way of enforcement *or otherwise(*my emphasis). It seems to me that if an order requiring compliance is made by the High Court it may well carry sufficient status to secure adherence by a publicly elected official who is, it may be assumed, committed to upholding the rule of law even if he disagrees with it in a particular instance. Mr Simpson asserted on behalf of his client at this stage that he is not prepared to accede to the Chairman's direction in any circumstances .I am not persuaded that this stance converts the current proceedings into a punitive exercise. If an order of the High Court is made under s36 this may

well create a new context. It is the purpose of Section 36 to move this issue to a new level in order to secure compliance rather than to punish.

[30] I have concluded therefore that the classification of the current proceedings in domestic law is civil in nature, that the nature of the "offence" is not criminal - the very absence of the word "offence" in the context of Section 36 is indicative of this- and the nature and degree of the severity of the penalty which a person risks incurring in circumstances such as these is secondary to the primary aim of bringing about a remedy to the current failure to comply with the Chairman's requirements. Cumulatively I do not consider Section 36 of the Inquiries Act 2005 is criminal in nature.