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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (CROWN SIDE)

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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 JUNIOR

_____

GILLEN J

The Proceedings

[1] In this matter the applicant is Lord MacLean who is the Chairman of the Tribunal known as the Billy Wright Inquiry ("the Inquiry"). The respondent, Ian Paisley Junior, is an elected member of the Northern Ireland Legislative Assembly. During 2007 and 2008 he was a Government Minister. The Chairman of the Inquiry has certified the failure of the respondent to comply with a notice dated 19 June 2008 served on him pursuant to Section 21 of the Inquiries Act 2005 ("the 2005 Act"). The applicant now applies to the court to make an order in the terms of the said notice pursuant to Section 36(2) of the 2005 Act so that effect may be given to it.

The Factual Background

[2] The Billy Wright Inquiry was announced by the Secretary of State for Northern Ireland ("SOS") on 16 November 2004. On 23 November 2005 the Inquiry was converted by the SOS to an Inquiry to be held under the 2005 Act.

[3] The power to establish an inquiry derives from Section 1 of the 2005 Act which provides as follows:

> "1. **Power to establish inquiry**
>
> (1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that –

(a) particular events have caused, or are capable of causing, public concern or

(b) there is public concern that particular events may have occurred."

[4] Section 8 of the 2005 Act provides that:

> "In appointing a member of the inquiry, the Minister must have regard –
>
> (a) to the need to ensure that the inquiry panel (considered as a whole) has the necessary expertise to undertake the inquiry;
>
> (b) in the case of an inquiry panel consisting of a Chairman and one or more other members, to the need for balance (considered against the background of the terms of reference) in the composition of the panel."

[5] Section 9 imposes on the Minister a requirement of impartiality in the appointment of members of the inquiry.

[6] The terms of reference of the Inquiry are:

> "To inquire 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."

[7] On 21 June 2007 the respondent 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 concerning the destruction of material which would have been relevant to the Inquiry. Inter alia, the letter declared:

> "According to the information I received two people were employed to destroy files and were paid £2.50 per file destroyed. This was carried out as an emergency and before the Data Protection Regulations came into effect. The idea that it was

> better to destroy this material before Data Protection Regulations presented problems for the authorities. The two people were paid a total of £7,000 each indicating that a total of 5,600 files were destroyed. The decision to carry out this action I am told was taken 'at the top' I hope this information is of value to you."

That letter came into the possession of the Inquiry.

[8] Mr Henry Palin, the solicitor to the Inquiry, in an affidavit of 18 December 2008 at paragraph 8 averred as follows:

> "This public Inquiry in its report will have to consider the actions of the NIPS ("the Northern Ireland Prison Service") and its personnel and decide whether any criticism of the organisation or individuals is appropriate. It is therefore essential for the Inquiry to establish, insofar as it possibly can, the truth about all matters that are subject to the Inquiry's investigation.
>
> (11) The name of the prison officer who approached Mr Paisley Jnr is considered essential in this regard as it seems apparent from Mr Paisley Jnr's letter to David Wright that this person has knowledge of payment for the file destruction which would appear to be at, or around, the relevant time."

[9] The Inquiry subsequently interviewed the respondent regarding the name of the prison officer who had allegedly approached him and provided the information. The respondent was unwilling to divulge the name of the prisoner officer.

[10] Accordingly the Chairman of the Inquiry served a notice on the respondent under Section 21 of the 2005 Act on 19 June 2008 requiring him to reveal the source of information received by him. No technical challenge has been raised before me as to the terms or legality of that notice. I am satisfied its terms complied with the requirements in the legislation.

[11] That notice informed the respondent that if he felt unable to comply with the terms of the notice or felt that it was unreasonable in all the circumstances to require him to comply with the notice, he must make an application in writing to the Inquiry Chairman setting out his reasons for this in full, before the expiration of the time limits for compliance. The notice also contained a warning that failure to obey the notice may result in prosecution and imprisonment or proceedings in the High Court.

[12] In a statement provided to the Inquiry by the respondent, he stated at paragraphs 3, 9 and 10 the following:

> "3. I cannot remember the precise date that I spoke to this man but it would have been around the time I wrote the letter, from memory I wrote the letter 2-3 days after I received the information. He was able to prove to me that he was a senior prison officer, and I was satisfied as to his identity. I do not wish to provide his name or details to the Inquiry because he came to me in confidence. I cannot provide his grade within NIPS, although he had over 20 years service. I know that he did not want his identity known because he said so and provided the information on that basis. He said he had has own employment to think about and his own personal and family security as he still works within the Prison Service.
>
> 9. The approach was made in the context of the Inquiry into the death of Billy Wright; however I do not know what specifically prompted him to come to me. He thought that what had happened was wrong and that this information should be made available to whoever might have an interest in it. He thought that it was in the public interest that the information was divulged. I felt that his impression was that there was more to the destruction of the files than just the forthcoming data protection legislation and that there was something sinister involved. I thought this because he had deliberately orchestrated our meeting so that we could speak in private. Although the impression given was that this information was relevant to the Inquiry into the circumstances of the murder of Billy Wright, he did not explain why.
>
> 10. 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 their 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

> this 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 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 a 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 interest would be better served in this Inquiry seeking to obtain this information by using other powers available to the Inquiry. Accordingly I believe I am unable to comply with the notice for the production of documents under Section 21 of the Inquiries Act 2005 and it is not reasonable for me to be expected to provide evidence in the form of a written statement providing the name and any other identifying information of the prison officer who contacted me around June 2007 regarding the destruction of files by the Northern Ireland Prison Service."

[13] The Inquiry Chairman considered the matter in accordance with Section 21(4) and (5) of the 2005 Act and decided that the notice should stand without variation. The respondent was informed by letter of 28 August 2008 that the matter would now be certified to the High Court if he continued to maintain his stance that he would not provide the information sought. That correspondence also outlined to the respondent that the identity of the prison officer was considered to be "of great importance to the Inquiry" and, given its need to satisfy its terms of reference that it would be in the public interest for the respondent to provide the Inquiry with the information.

[14] In the course of that correspondence of 28 August 2008 the solicitor to the Inquiry included the following paragraph to the solicitor acting on behalf of the respondent:

> "In considering this matter for the purpose of the Inquiries Act 2005, the Inquiry Chairman has taken account of all of the matters your client has raised. These are referred to in his witness statement, particularly the information in paragraph 3 where he says that he was approached in confidence by the prison officer, that he knows the person who

> contacted him did not want his identity known because he said so and that he provided the information on that basis, and further said that he had his employment to think about and his own personal and family security as he still worked within the prison service. The Chairman has also taken particular account of the information your client has provided in paragraph 10 of his statement where he refers to his position as an elected MLA, the reasons why he is not prepared to give any further details as to this person's identity, referring to his respect for this person's personal concerns, and his belief that his role as an elected public representative can only be properly performed if he can pass this type of information in a way that protects his integrity as a person who can be relied upon not to divulge the confidence people have in him. The Chairman has also considered the public interest in the information being obtained by the Inquiry (see Section 21(5))."

[15] The correspondence went on to state:

> "This information is of great importance to this Inquiry, particularly as a number of questions have been raised regarding the destruction of files by the Northern Ireland Prison Service, though it is noted that your client acknowledges that he does not know how this might relate to the information he has provided. Your client refers to the Inquiry seeking to obtain this information by using other powers available to it. This however is not possible and in view of the serious nature of the allegation and the clear obligation and duty of this statutory Public Inquiry to satisfy its Terms of Reference, the Chairman takes the view that it is in the public interest that your client provides the name of the prison officer to the Inquiry and that it is reasonable that your client should comply with the Notice. The Chairman has also considered the fact that disclosure of this person's name to the Inquiry does not mean the name will automatically enter the public domain and that other safeguards remain open to the prison officer. This was explained in my letter to you of 19 June which accompanied the notice."

[16] On 3 September 2008 the Chairman signed a certificate under Section 36 of the 2005 Act referring this matter to the High Court. On 18 September 2008 the Inquiry made an application for directions that the matter be dealt with in accordance with Section 36 of the 2005 Act so that effect could be given to the notice dated 19 June 2008 under Section 21 of the Act. On 30 October 2008 this court heard argument by way of preliminary issue as to the whether these proceedings were criminal or civil in character. I delivered a judgment on 27 November 2008 *(*unreported GIL7333) concluding that the proceedings at this stage were civil rather than criminal in nature.

[17] Thereafter the respondent sought discovery in these proceedings and I dealt with this by way of a judgment dated 18 February 2008 (unreported GIL7411)

The statutory background

[18] Section 21 of the 2005 Act deals with the powers of the Chairman to require production of evidence etc and 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 of this section a thing is under a person's control if it is in his possession or if he has a right to possession of it."

[19] Section 22 of the 2005 Act deals with the issue of privileged information in the following terms:

"**22. Privileged information etc.**

(1) A person may not under Section 21 be required to give, produce or provide any evidence or document if –

(a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or

(b) the requirement would be incompatible with a Community obligation.

(2) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom."

[20] The Explanatory Notes to the 2005 Act make the following reference to Section 22:

> "Section 22(1) ensures that witnesses before inquiries will have the same privileges, in relation to requests for information, as witnesses in civil proceedings. In particular, this means that a witness will be able to refuse to provide evidence:
>
> (i) because it is covered by legal professional privilege;
>
> (ii) because it might incriminate him or his spouse or civil partner (by virtue of Section 84 in the Civil Partnerships Act 2004); or
>
> (iii) because it relates to what has taken place in Parliament."

[21] I pause to observe that Mr Larkin QC, who appeared on behalf of the applicant with Mr Scoffield, drew attention to the fact that no such privilege attaches to the legislative Assembly in Northern Ireland. The closest approximation is found in Section 50 of the Northern Ireland Act 1998 which affords privilege to statements made on the floor of the Assembly as against the law of defamation only. It was his submission that as a devolved chamber and creature of statute, the Northern Ireland Assembly does not enjoy the wider protections that apply to Westminster.

[22] Section 19 of the 2005 Act provides for restrictions on public access etc. in the following terms:

> "(1) Restrictions may, in accordance with this section, be imposed on –
>
> (a) Attendance at an inquiry, or at any particular part of an inquiry;
>
> (b) Disclosure or publication of any evidence or documents given, produced or provided to an inquiry."

[23] Section 36 of the 2005 Act deals with enforcement by the High Court and provides:

> "**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 …."

[24] Section 36 which is remedial in nature and calculated to secure compliance, contrasts with Section 35 which is punitive in nature and provides for sanctions against a person who is guilty of an offence by failing without reasonable excuse to do what he is required to do under Section 21. (See my earlier judgment in this matter unreported GIL7333).

[25] Section 38 of the 2005 Act provides that an application for judicial review of a decision made by a member of the Inquiry Panel must be brought within 14 days after the day on which the applicant became aware of the decision unless that time limit is extended by the court.

The European Convention on Human Rights and Fundamental Freedoms ("the Convention ")

[26] Article 10 of the Convention, where relevant, provides:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevent of disorder or crime, for their protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Contempt of Court Act 1981("the 1981 Act")

[27] Section 10 of the 1981 Act provides:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, a source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

Evidence on behalf of the respondent

[28] The respondent in this matter called evidence from Mr Peter Robinson the First Minister. This witness recalled dealing with many thousands of people through his advice centre where, in many cases, information was being imparted to him by persons who wished to challenge Government departments because of the information they possessed. Mr Robinson indicated that his practice often was to give an assurance of confidentiality

when sought in light of the impact on employment etc. The witness declared that if an assurance of confidentiality was given, and subsequently breached, then this source of information would no longer be there in the future and society would be the loser. Two dangers would arise. First, this source of information would dry up and matters would not be properly investigated .Secondly, the role of public representatives would be diminished because they could not challenge Government on matters which thus might remain hidden.

[29] My attention was drawn in the course of his evidence to a resolution passed in the Northern Ireland Assembly on 3 March 2009 couched in the following terms:

> "That this Assembly recognises the need for elected representatives to be able to protect the confidentiality of information brought to them by constituents and sources; acknowledges the importance of being able to pass on to the appropriate authority information in the public interest without breaching that confidentiality; believes that an erosion of these expectations and rights would seriously undermine the ability of public representatives to perform their duty and, if unchecked, will emasculate the powers of the Assembly, and undermine the role and trust the public must have in its elected representatives to protect and represent them without fear of prosecution or interference."

Representations on behalf of the Applicant

[30] Mr Larkin in the course of a well structured skeleton argument augmented by cogent oral submissions before me, advanced the following arguments.

- the purpose and effect of Section 36 of the 2005 Act is to provide a mechanism for the obtaining of evidence which has been determined as necessary by the Chairman of the Inquiry. Having declined the opportunity to bring a judicial review under Section 38 of the 2005 Act, the respondent should now be limited to challenging the legality of the Chairman's decision and not its substance. Conventional public law grounds therefore are the parameters of the challenge.
- the Chairman is best placed to determine the importance and reasonableness of the information requested. This matter has been determined by the chairman of the Inquiry before reference to this Court.

- there is no basis in law for privilege against a requirement of disclosure in the case of a public representative such as an MLA. Section 22 of the Act deals with the issue of privileged information and this information does not come within its remit. Confidentiality is no bar to discovery. The explanatory notes to Section 22 further make clear that absolute protection against disclosure is provided to that which has taken place in Parliament. That protection affords no defence in this instance.
- the information provided to the respondent was expressly provided in contemplation of its being of assistance to the Inquiry and was duly passed on by the respondent. It is inappropriate to consider the information relevant to the Inquiry on the one hand but to consider the name of the person providing the information to be confidential on the other.
- Section 19 of the 2005 Act can be the foundation of protection for the informant in any event. The concerns he has about security job and family can all be accommodated within the ambit of this section of the Act
- the alleged destruction of files by the NIPS commands a position of centrality in any consideration of illegitimate State action in this inquiry. The respondent had himself discerned a sinister element in the destruction. It was crucial that the Inquiry speak to this informant in order to ascertain at first hand all the information he has on this matter
- the appropriate balancing act required under Article 10 of the Convention and Section 10 of the 1981 Act has been carried out by the Chairman. The focus of the court should be on the outcome of that balancing exercise and not the reasoning process.

Representations on behalf of the respondent

[31] In an equally compelling skeleton argument and oral submission, Mr Simpson QC, who appeared with Mr Aiken for the respondent, advanced the following submissions.

- the court should investigate the circumstances behind the decision made by the Inquiry to see if an order should be made in the first instance. That was the whole purpose behind section 36 of the 2005 Act making provision for evidence and representations before the High Court. Counsel contrasted the 2005 Act with the provisions of the Tribunal and Inquiries (Evidence)Act 1921 Act where the latter had made provision for the Tribunal to have the power of the High Court to make such an order. The 1921 Act was concerned with punishment for breach of such orders whereas the 2005 Order dealt with a much earlier stage where an order had not even been made. Hence the importance of the court assessing the facts de novo before acting.

- the Chairman of the Inquiry was obliged to carry out a balancing exercise under Article 10 of the Convention and Section 10 of the 1981 Act before certifying the notice, This court must carry out a different balancing exercise looking independently at sufficient material from the Inquiry to decide if the interests of justice outweighed the need to protect the confidentiality of public representatives as adumbrated by the First Minister in evidence before me. Hence he argued that Mr Larkin construed the effect of Section 36 too narrowly in confining the role of the court to conventional public law inquiries

- alternatively if this case is to be treated as a judicial review, the Wednesbury test is inappropriate. Citing Castells v Spain (1992) 14 EHRR 445 ("Castells"), Incal v Turkey (2000) 29 EHRR 449 ("Incal") and Leander v Sweden (1987) 98 EHRR 433 ("Leander") counsel submitted that the right of freedom of expression under Article 10 of the Convention and Section 10 of the 1981 Act calls for the closest scrutiny on the part of the court especially when dealing with an elected representative. In this instance the Inquiry had failed to afford the close scrutiny required in that balancing exercise and had in terms applied the wrong test before deciding to certify under Section 21 of the 2005 Act.

- addressing the factual evidence already before the Inquiry, and drawing attention to various references in the evidence already given before the it, Mr Simpson argued that the information now being sought from the informant is already in the Inquiry arena and has been investigated by it. He proffered a number of questions which the Inquiry has failed to address to the Northern Ireland Prison Service which, if answered, would make it even less likely that there is a requirement for Mr Paisley to reveal his source.

- there has been a difference in treatment of the respondent from others who had failed to assist the Inquiry e.g. journalists and prison officers. They had not been subjected to the certification process.

The approach of the Court to an application under Section 36 of the 2005 Act.

[32] I am satisfied that Parliament did not intend that this court should treat an application under Section 36 of the 2005 Act as a de novo hearing of an appeal against the decision of the Chairman. The concept of an appeal is well known to the Parliamentary draftsman. Had Parliament so intended, it would have been set out in clear terms. This interpretation is not warranted by the express terms or the discernible underlying intention of the statute.

The factors that should inform the exercise of the court's power under this Act are to be found within the Act itself.

[33] I also consider that provisions for judicial review have been deliberately made in Section 38 of the Act separately from the provisions of Section 36. Conceptually the two sections deal with quite different scenarios. Section 38 governs an application mounted by an applicant who wishes to challenge an Inquiry decision .Section 36 is an application mounted by the Inquiry for the court to refer a decision to the High Court for enforcement. Mr Larkin submitted that it would seem wholly incongruous if the respondent in this case could decline to challenge the decision of the Chairman by applying for judicial review under Section 38, which must be brought within 14 days after the day on which the applicant became aware of the decision, but could then avail of precisely the same means of remedy under Section 36. I do not believe the remedy being sought by the applicant falls into the same genre as a remedy sought under section 38.Judicial Review is not an arena where fresh or oral evidence is often helpful or even admitted whereas an application under section 36 clearly contemplates all of this . The two applications are wholly different in nature and function and do not inform each other in my view.

[34] It is instructive to contrast the tone and content of the language of Section 1 of the 1921 Act with the terms of Section 36 of the 2005 Order. Under the former a tribunal has all the powers, rights and privileges as are vested in the High Court. That is not the case under the 2005 Order and the task of enforcement is left entirely to this court. It is a serious and solemn matter for this court to exercise any of its powers particularly where it interferes with the rights of the individual. Hence I must consider the making of an order of enforcement of the contents of the certificate precisely in the same manner as if the matter had arisen in proceedings before this court. This application therefore will not be treated in the same manner as a court enforcing a judgment under Order 45 of the Rules of the Supreme Court (Northern Ireland) where a judgment or order has already been made and the court is taking steps to enforce it. When Order 45 is being invoked, the power to make the order which is to be enforced has already been exercised. In this instance, certification by the Chairman of the Tribunal is not invested with the powers, rights and privileges vested in the High Court. Far from being a rubber stamp to the decision of the Inquiry, the court must give earnest consideration to the matter after hearing any evidence or representations on the matter certified to it by the Chairman. I consider the fact that the court, before making any such order of enforcement or otherwise, must first hear any evidence or representations "on a matter certified to it" i.e. the failure to comply with an order made by the Inquiry, vests a wide discretion in the approach of the court to this matter but does not dilute the burden of careful analysis placed on the court in the process.

[35] The approach of the court may vary according to the circumstances. Just as in pure judicial review applications, there is a "sliding scale" of intensity of review, so in a hearing under Article 36 there may be a similar scale (see In the Matter of an Application by A and Others (Nelson witnesses) for Judicial Review (2009) NICA 8 paragraph 37). Thus the court will bring its own judgment to bear on the matters that have been canvassed by the applicant and the respondent, investing that process with the closest scrutiny where, as in this instance, issues arise under Article 10 of the Convention and Section 10 of the 1981 Act.

[36] If my task was simply confined to that of considering whether or not the decision of the Chairman was reasonable, I do not see what purpose is served by me hearing further evidence and representations in the matter so certified to me. I self-evidently must take into account material – evidence and representations – which may not have been before the Tribunal before deciding if I will make an appropriate order. Had Parliament merely wanted me to be satisfied that the Chairman had reasonable grounds for believing the production was necessary, it could have clearly so stated and would not have allowed further evidence or representation. Conceivably a wholly different scenario might emerge before me in light of the evidence and representations from that which had commanded the attention of the chairman. Hence I have a discretion to make the order by way of enforcement "or otherwise". In the particular circumstances of this case, the impact of Article 10 of the Convention and Section 10 of the 1981 Act must be considered by me.

[37] On the other hand, although the court must only act after hearing any evidence or representations on the matter certified by the Chairman, the court will bear in mind that where tribunals have been given the statutory task to perform and exercise their functions with a high degree of expertise so as to provide coherent and balanced judgment on the evidence and arguments heard by them, that does make those tribunals better placed to make a judgment than the court on the need for particular information to be brought before it. In this case the chairman has taken all the detailed steps and analysis outlined in Section 21 of the 2005 Order. Whilst it may well be that recognition of this does not go as far as the concept of "curial deference" to decisions of specialist administrative bodies in the context of judicial review proceedings adumbrated by the Supreme Court in Ireland in Henry Denny and Sons (Ireland) Ltd v Minister for Social Welfare (1998) 1 IR 34 and Sekou Camara (Applicant) v Minister for Justice Equality and Law Reform and Others Irish Times Reports 25 September 2000, nonetheless I consider Mr Larkin was entitled to invoke in aid of his case the widely cited words of Lord Woolf MR in R v Lord Saville of Newdigate ex parte A (2000) 1 WLR 1855 at 1865H paragraph 31 when he said of the Saville Inquiry :

> "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 loathe 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 …"

Thus the court in coming to a decision does not write on a blank page. It is this factor which distinguishes this hearing from a de novo appeal. The decision of the Chairman of the Inquiry, having followed the steps set out in Section 21 of the 2005 Act, must carry weight and I must be wary of interfering with or complicating the task of Lord MacLean.

[38] Thus section 1 of the 2005 Act highlights the public importance of the Inquiry, Section 8 the expertise and suitability of the Inquiry panel and Section 9 the impartiality of that panel. I bear all of these matters in mind in coming to my conclusion.

The European Jurisprudence

[39] The European jurisprudence yields some important insight into the correct approach which the court should adopt in exercising powers which clearly involve the invocation of Article 10 of the Convention and Section 10 of the 1981 Act in order to secure a fair balance between the right of freedom of expression and the interests of justice.

[40] The same approach can be applied equally to Section 10 now that Article 10 of the Convention is part of our domestic law (see Ashworth Security Hospital (Respondents) v MGN Limited (Appellants) (2002) UKHL 29("the MGN case") at paragraph 38.)

[41] Freedom of expression constitutes one of the essential foundations of a democratic society. See Goodwin v United Kingdom (1966) 22 EHRR 123 at paragraph 39. This principle was adumbrated in that case in the context of the protection of journalistic sources which was seen as one of the basic conditions for press freedom. In Goodwin's case the court, at paragraph 39, stated:

> "Without such protection sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and ability of the press to provide accurate and reliable information may be adversely affected. Having

> regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has in the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

[42] I consider that precisely the same kind of balancing exercise does apply in the case of elected public representatives. Conventionally confidentiality has been confined to the positions of journalist, doctors or priests who do owe a duty of confidentiality to their sources, patients or parishioners. The law must move and develop with the grain of the times. I believe there is much to be said in favour of the argument of Mr Simpson that for a democratic and elected representative of the people the public interest in the preservation of the duty of confidentiality on order to protect freedom of expression is in the modern era at least as great albeit there is no absolute privilege accorded to the matter. This is one of the clear channels within which active liberty can function.

[43] Whilst I recognise that Strasbourg authorities often have to be considered within the factual matrix of the particular case, nonetheless I consider that Mr Simpson was correct to invoke the concept of intense scrutiny that is called for in a case where the freedom of expression of elected representatives may be impaired as outlined in Castells case. At paragraph 42 of that decision, the ECtHR said:

> "42. The court recalls that the freedom of expression, enshrined in paragraph 1 of Article 10 (Art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10 (Art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is 'no democratic society' …. While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to the pre-occupations and defends their interests. Accordingly, interference with the freedom of expression of an opposition member of Parliament, like the applicant, called for the closest scrutiny on the part of the court."

I shall be sparing in further citation but Incal's case at paragraph 46 and Leander's case at paragraph 74 are in harmony with this exposition.

[44] Whilst Mr Larkin was correct to draw a sharp distinction between the factual situation that obtained in Castells case – where a Basque politician had sought to publish a pamphlet which the Government thought inflammatory – from the factual matrix in the instant case, nonetheless I consider that the principle therein set out applies to this case. It accords to elected representatives the protection of Article 10 and triggers the need for the closest scrutiny on the part of the court. The categories of confidentiality are in my view neither closed nor confined solely to journalists, priests or doctors in the wake of the developing jurisprudence in Strasbourg.

The Balancing Exercise

[45] In my view the approach to the balancing exercise to be carried out in the context of Section 10 of the 1981 Act or Article 10 of the Convention, is that set out by the Court of Appeal in Mersey Care NHS Trust v Robin Ackroyd ("Mersey Care case") (2007) EWCA Civ 101. That case involved the right of a freelance investigative journalist to protect sources at a hospital who had passed on to him certain medical records relating to Ian Brady who was notorious as one of the "Moors murderers".

[46] Sir Anthony Clarke at paragraph 13, citing the judgment of Lord Woolf in the MGN case and Lord Bridge in X Limited v Morgan-Grampian (Publishers) Ltd (1991) 1 AC 1 stated :

> "… The approach to be adopted in Section 10 of the 1981 Act involved very much the same balancing exercising as is involved in applying Article 10 of the Convention. The key extract from the speech of Lord Bridge (with whom Lord Oliver and Lord Lowry agreed) in Morgan-Grampian at pages 43-44 was in these terms:
>
> > 'It is in my opinion, in the interests of justice', in the sense in which this phrase is used in Section 10, that persons should be enabled to exercise important legal rights and protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Construing the phrase 'in the interests of justice' in this sense

> immediately emphasises the importance of the balancing exercise. It will not be sufficient per se for a party seeking disclosure of a source protected by Section 10 to show merely that he would be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he basis his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached'."

[47] In the MGN case, Lord Woolf added at paragraph 62 that he would adopt the contention that any restriction on the otherwise unqualified right to freedom of expression must meet two further requirements. First, the exercise of the jurisdiction because of Article 10(2) should meet a "pressing social need" and, secondly, the restriction should be proportionate to a legitimate aim which is being pursued.

[48] I pause to observe the similarity of approach adopted by the Supreme Court in Ireland in Howlin v The Honourable Mr Justice Frederick Morris, Sole Member of the Tribunal of Inquiry into Complaints concerning some Gardai of the Donegal Division (2005) IESC 85. In that matter Mr Howlin was a member of Dail Eireann who received confidential information by telephone in relation to alleged misfeasance on the part of certain members of the Garda which would have been relevant to the Inquiry conducted by the Sole Member. Mr Justice Morris was the Sole Member of a Tribunal set up in relation to alleged malfeasance on the part of certain members of the Garda Siochana. The Sole Member considered it essential that the identity of the informant be disclosed to the Tribunal. Mr Howlin had informed the Sole Member that he had not been given permission by his informant to disclose his identity and refused to give that information in the absence of such permission. The Tribunal made an order for discovery against him of all documentation connected with the information.

[49] In considering the approach to the matter, Mr Justice Geoghan said at page 6:

> "Finally, the Sole Member went on to endorse a view I had taken as a judge in the High Court in Goodman International v Hamilton No. 3 (1993) 3 IR 320. In that case I had adopted the view of the House of Lords in D v NSPCC (1978) AC 171 and in particular the views expressed in the speech of Lord Edmund-Davies that where there was a clash between the undoubted public interest in admissibility in court of all relevant and admissible evidence and the public interest in a particular instance in the non-disclosure of some particular piece of such evidence the court had to embark on a balancing exercise so as to consider whether the public interest was in the end best served by disclosure or non-disclosure."

[50] In the Howlin case the Supreme Court concluded that the Sole Member had carried out the appropriate balancing exercise and that the view he had taken to insist on disclosure was unassailable.

[51] I have concluded therefore that I must anxiously scrutinise the circumstances of the certification by the Chairman under Section 21 of the 2005 Act before I should make an order by way of enforcement or otherwise. Should I make such an order, it will result in the court interfering with the freedom of expression of an elected representative. In my view, Section 21(4) of the 2005 Act recognises the need for the Chairman, after he has considered a claim by the respondent that he was unable to comply with a notice or that it was not reasonable to require him comply with the notice, to "consider the public interest in the information questioned being obtained by the Inquiry having regard to the likely importance of the information." I must enquire whether he has carried out that balancing exercise bearing in mind the provisions of Article 10 of the Convention and Section 10 of the 1981 Act. Thereafter, as a public body, with the solemn power to enforce such a matter and after hearing further evidence and representations, I must independently ensure that that balancing exercise has been carried out albeit in doing so I can take into account the considerations of the expertise of the Chairman as outlined by me in paragraph 37 of this judgment.

Applying the principles to this case

[52] I am satisfied that the Chairman of the Inquiry has approached this matter in an impeccable manner. I am convinced that he has carried out both a quantitative and qualitative assessment of the benefits likely to accrue to the Inquiry of the identity of this informant being revealed.

[53] I am also certain that the Chairman has carried out the necessary balancing exercise to which I have earlier adverted. I regard the letter of 28 August 2008 from the solicitor to the Inquiry (and referred to by me at paragraph [14] of this judgment) to be crucial in this regard. Therein the Chairman has patently considered the position of the respondent as an elected MLA, his reasons for not being prepared to give any further details, the concerns of the informant and the respondent's belief that his role as an elected public representative could only be properly performed if he could pass this type of information in a way that protected his integrity as a person who could be relied upon not to divulge the confidence people have in him. In my view this is precisely the point raised by Mr Robinson in the course of his evidence and the core justification for the concept of freedom of expression in the context of an elected representative.

[54] The Chairman has gone on to balance that, as he was required to do, against the public interest of the information being obtained by the Inquiry. It is in this context that the court must bear in mind that the Inquiry does have a much greater understanding of the task to be carried out than this court. This Inquiry has been taking evidence now for some months from many witnesses and a great deal of documentary evidence has been accumulated. Whilst the precise issue of file destruction by the Northern Ireland Prison Service does not expressly feature in the Inquiry's terms of reference or its list of issues that it has set out to determine, it is self-evident that in any proposed determination as to whether or not a wrongful act or omission by the prison authorities facilitated Mr Wright's death, the destruction of files by the Prison Service – especially if it is on instructions somewhere "from the top" – will play a central part. Witnesses have been cross-examined at length on this matter including prison governors and a veritable mountain of documents accumulated. The Inquiry is therefore uniquely placed to decide what information it has already gathered on this issue and what information it still requires together with the value of that information. I am satisfied that the Inquiry Chairman has taken all of those matters into the balance and has determined that the information sought does meet a pressing social need and is proportionate to the legitimate aim which this Inquiry is pursuing.

[55] Mr Simpson, contending that the Inquiry had not applied the appropriate test with Article 10 of the Convention and Section 10 of the 1981 Act in mind, drew attention to the absence of any reference to these matters by the Chairman. In my view this ignores those authorities which establish that the focus is now on outcome rather than on the reasoning process itself. i.e. the focus is not "on whether a challenged decision or action is a product of a defective-making process, but on whether, in the case under consideration, the applicant's Convention rights, have been violated." See R (SB) v Head Teacher and Governors of Denbigh High School (2007) 1 AC 100 at

paragraphs 29 and 31. If the refusal did not interfere disproportionately with the right to freedom of expression, then it is lawful whether or not the Chairman had deliberated on that right before refusing. (See Belfast City Council v Miss Behavin' Ltd (2007) 1 WLR 1420). Whilst arguably the Chairman of the Inquiry and the solicitor acting on behalf of the Inquiry could have articulated the balancing exercise under Article 10 of the Convention and Section 10 of the 1981 Act in the context of public representatives more clearly employing references to how the interference required was proportionate to the ends sought, I am satisfied that he has properly concluded that the information being sought was so important that it justified interfering with the respondent's Article 10 and Section 10 rights. This was the conclusion which the Tribunal was entitled to reach (see Malik v Manchester Crown Court and Others (2008) EWHC 1362 per Dyson at paragraph 58.)

[56] Moreover even if I am wrong in concluding that the human rights issues were addressed by the Chairman of the Inquiry, this court can decide for itself whether those rights have been infringed. It is the court that is in a position to strike a balance for itself if the decision-maker has not balanced those rights and interests. See Miss Behavin' Ltd per Baroness Hale at paragraphs 31 and 37.

[57] In any event, I have discerned that the intention of Parliament in setting out Article 36 of the 2005 Order, is to place an onus on this court to revisit the issue after hearing evidence - in this case of Mr Robinson – and the representations on behalf of Mr Paisley made by Mr Simpson on the matter as certified in the Chairman's certificate. Thereafter I must exercise my discretion and determine my order or otherwise. I may have heard evidence that the Chairman did not hear and have had before me representations on legal issues which may not have been addressed to the Chairman. Parliament must have intended that I can make an independent assessment of the issues with the benefit of these matters now before me albeit, as I have indicated in paragraph 37 of this judgment, I must bear in mind the role and expertise of the Tribunal.

[58 Thus I have taken into account the evidence of Mr Robinson. I have also carefully considered the further factual representations by Mr Simpson which he set out in detail in his skeleton argument. Only then have I considered the application of the necessary balancing exercise

[59] Mr Simpson carefully analysed evidence that has already been given before the Inquiry which of course is before me in the plethora of documentation which has been discovered by the Tribunal to the respondent for the purpose of this hearing.

[60] Counsel instanced separate aspects of file destruction that were the subject of evidence to the Inquiry. First, files held on paramilitary prisoners from HMP Maze which were destroyed on the instructions of the main prison governor at Maghaberry, Martin Mogg. Secondly security files belonging to HMP Maghaberry prisoners as well as prison staff files and in addition prison security files. These files were destroyed by people working in pairs per day over a period of days. This destruction had to do with the coming into effect of the Freedom of Information and Data Protection Act. Accordingly Mr Simpson submitted that an explanation has been given as to the destruction of files and it is difficult to see how the information now sought can assist the Inquiry in relation to its terms of reference and list of issues.

[61] It is important to appreciate that any evaluation of this issue is fact dependent and value laden. This court is unaware whether the information contained in Mr Paisley's letter is one of these episodes or whether it is an additional category. Moreover, this court does not know if this informant could throw further light on the existing categories or any further category of destroyed documents. In the course of argument Mr Larkin helpfully drew attention to the evidence before the Inquiry of Governor Davis who was a security governor in Maghaberry Prison where the Maze files were housed. It is quite clear from this evidence that the whole ambit of file destruction is uncertain and lacking in precision on the basis of current information. In addition one simply does not know what further information this informant may be able to give in terms of those who were involved in the file destruction policy-- "at the top" or otherwise-- or whether further publicity arising out of his evidence might elicit more evidence of assistance to the Inquiry .Was there a sinister element to this destruction as opined by Mr Paisley? Does this informant know the identity of those "at the top" who allegedly authorised this exercise? These are but some of the more obvious questions that I can readily imagine this Inquiry must explore if the investigation is to command public confidence that no material stone had been left unturned in seeking the truth of this troubling event .The informant and Mr Paisley can be secure in the knowledge that provisions to protect this informant are available to be invoked under Section 19 of the 2005 Act.

[62] Mr Simpson went on to pose in his skeleton argument a number of questions which the Inquiry, in his submission, ought to have raised with the Northern Ireland Prison Service. The role of this court is not to direct or question the method that this Tribunal of experts has employed in order to fulfil its statutory role and its terms of reference in the absence of manifest error. That would be to trespass upon the area that has been delegated to the Inquiry by the Minister. The wealth of evidence accumulated and the expertise it has brought to bear upon the issues in any event would dilute the usefulness of any such comment by this court.

[63] There is no substance in the suggestion by Mr Simpson on the evidence before me that the respondent has been unfairly treated differently from others. Each person must be considered in his own context and in the particular circumstances obtaining in that instance. I find no analogy in the approach the Tribunal has adopted towards journalists or other prison officers when dealing with this information which is in the possession of a public representative. This material and its importance are unique to this informant and the steps taken to address such matters must be considered in their own context.

[64] I have attached considerable weight to the nature of the right to be interfered with – freedom of expression -- when this application was made. I have balanced that against the interests of justice in the order now sought being made. The matter certified by the Chairman is a proportionate response to the needs of the Inquiry and to the interests of justice. I consider that an order made by me to enforce the matter certified is measured and justified when set against the weight of the freedom of expression which must be accorded to public representatives. I am satisfied that the Inquiry has provided a clear and compelling case and justification for me to accede to the application now before me. The overriding requirement is the importance of the public interest in this Inquiry proceeding to pursue its task of investigation unhindered by this refusal on the part of the respondent. No remedy other than that now sought will achieve that end.

[65] Accordingly I have concluded that this court should make an order that within 17 days of the date of this order, evidence in the form of a written statement providing the name and other identifying information of the prison officer who contacted Mr Paisley in or around June 2007 regarding the destruction of files by the Northern Ireland Prison Service and which caused him to write the letter to Mr David Wright on 21 June 2007, should be furnished to the Inquiry Chairman by him.