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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* 13/09/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PETER KEELEY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Ronan Lavery KC & Richard Smyth (instructed by McAtamney Solicitors) for the applicant
Paul Greaney KC & John Rafferty (instructed by DWF Law) for the proposed respondent
Hugh Southey KC & Eamon Foster (instructed by Fox Law) for the notice party

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Humphreys J

Introduction

[1] On 15 August 1998 the Real Irish Republican Army detonated a car bomb on Market Street in Omagh, Co Tyrone, killing 29 people and two unborn children and injuring over 200 others. The atrocity, committed just months after the signing of the Belfast-Good Friday Agreement, marked out the single deadliest attack in the decades long conflict in Northern Ireland.

[2] In 2001 the Office of the Police Ombudsman for Northern Ireland ('PONI') published a report which was highly critical of the police handling of intelligence information and subsequent investigation into the attack. This was met by a robust response from the PSNI, rejecting many of the findings and asserting that nothing could have been done to prevent the bomb attack occurring.

[3] The PONI report references a newspaper article published in July 2001 which suggested that an agent, under the pseudonym Kevin Fulton, had provided information to his police handlers which, if acted upon, could have led to the bomb being prevented.

[4] PONI was satisfied that Fulton did pass information relating to dissident republican activities to the police between June and August 1998, albeit that this did not contain specific intelligence to the effect that a bomb was destined for Omagh. The

report also noted that Fulton was paid large rewards by the then RUC for his involvement and that, at the material time, his intelligence was graded as reliable.

[5] In its detailed response, the PSNI refuted a number of the points in the report as being flawed and inaccurate. In relation to Fulton, it was contended that he was an unreliable source of information and any intelligence he did supply was of no material significance in relation to the Omagh bomb.

[6] Michael Gallagher, the notice party to this application, lost his only son in the Omagh bomb. He has campaigned tirelessly for justice for the victims and survivors of the atrocity and in 2013 he launched judicial review proceedings in relation to the failure by the UK Government to instigate a public inquiry or other article 2 compliant investigation into whether the attack could have been prevented. This ultimately resulted in a judgment in his favour – see *Re Gallagher's Application* [2021] NIQB 85, and this proved to be the catalyst of the establishment of a public inquiry.

The Omagh bomb inquiry

[7] On 6 February 2023 the then Secretary of State for Northern Ireland announced the establishment of the Omagh Bomb Inquiry and subsequently appointed the distinguished retired Scottish judge, the Rt Hon Lord Turnbull, as its chair. Its Terms of Reference were published in February 2024 and they recite the purpose of the inquiry:

> "To investigate whether the car bomb detonated in Omagh, County Tyrone on 15th August 1998 in which 29 people and two unborn children were killed could have been prevented by UK state authorities, with particular attention to the matters considered by Horner J. in the application for judicial review, *Re Gallagher* [2021] NIQB 85."

[8] The terms also state that the scope of the inquiry will include consideration of:

> "Information relating to dissident republican terrorist activity said to have been passed to police between June and August 1998 by an alleged British security forces agent known by the name of Kevin Fulton and whether that might reasonably have enabled UK state authorities, whether on its own or in conjunction with other information, to disrupt dissident republican terrorists engaged in the planning and preparation of the Omagh Bombing." (paragraph 2E)

[9] This reflects the findings in the judgment of Horner J in *Gallagher* at para [243]:

> "I am satisfied that it is arguable that the intelligence supplied by Kevin Fulton either on its own, or more importantly in conjunction with other intelligence about the activities of

> those who planned and planted the Omagh bomb (and other bombs) had a real prospect of preventing this tragedy."

[10] The decision under challenge in this application for leave to apply for judicial review is the refusal by the chair of the inquiry to designate the applicant as a core participant.

[11] The applicant states that he is the individual otherwise known as Kevin Fulton and he provided the intelligence to the police referred to in the PONI report and the *Gallagher* judgment.

[12] The application proceeded by way of a rolled up hearing and the court had the benefit of detailed affidavit evidence from the applicant and his solicitor as well as Tim Suter, the solicitor to the inquiry.

The legislative provisions

[13] The inquiry was established under section 1 of the Inquiries Act 2005 ('the 2005 Act'). By section 2 of the 2005 Act**:**

> "(1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.
>
> (2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes."

[14] Section 17(3) of the 2005 Act imposes a duty on the inquiry chairman:

> "(3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

[15] Section 41 of the 2005 Act empowered the making of the Inquiry Rules 2006 ("the 2006 Rules"). Rule 5 addresses the designation of core participant status and provides:

> "(1) The chairman may designate a person as a core participant at any time during the course of the inquiry, provided that person consents to being so designated.
>
> (2) In deciding whether to designate a person as a core participant, the chairman must in particular consider whether—

(a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;

(b) the person has a significant interest in an important aspect of the matters to which the inquiry relates; or

(c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.

(3) A person ceases to be a core participant on—

(a) the date specified by the chairman in writing; or

(b) the end of the inquiry."

[16] Rule 6 states:

"(1) Where—

(a) a core participant, other than a core participant referred to in rule 7; or

(b) any other person required or permitted to give evidence or produce documents during the course of the inquiry,

has appointed a qualified lawyer to act on that person's behalf, the chairman must designate that lawyer as that person's recognised legal representative in respect of the inquiry proceedings"

[17] Rule 10 deals with oral evidence and provides:

"(1) Subject to paragraphs (2) to (5), where a witness is giving oral evidence at an inquiry hearing, only counsel to the inquiry (or, if counsel has not been appointed, the solicitor to the inquiry) and the inquiry panel may ask questions of that witness.

(2) Where a witness, whether a core participant or otherwise, has been questioned orally in the course of an inquiry hearing pursuant to paragraph (1), the chairman may direct that the recognised legal representative of that witness may ask the witness questions.

(3) Where—

(a) a witness other than a core participant has been questioned orally in the course of an inquiry hearing by counsel to the inquiry, or by the inquiry panel; and

(b) that witness's evidence directly relates to the evidence of another witness,

the recognised legal representative of the witness to whom the evidence relates may apply to the chairman for permission to question the witness who has given oral evidence.

(4) The recognised legal representative of a core participant may apply to the chairman for permission to ask questions of a witness giving oral evidence.

(5) When making an application under paragraphs (3) or (4), the recognised legal representative must state—

(a) the issues in respect of which a witness is to be questioned; and

(b) whether the questioning will raise new issues or, if not, why the questioning should be permitted."

The application for core participant status

[18] The inquiry developed a protocol for applications for core participant status which explained that the chair has a discretion to designate a person, organisation or entity as a core participant under Rule 5 and that, in doing so, he will take into account the Rule 5(2) factors as well as any other relevant factors.

[19] Such designation generates an entitlement to:

(i) Receive disclosure of evidence relevant to that core participant;

(ii) Make opening and closing statements to the inquiry;

(iii) Suggest lines of questioning to counsel to the inquiry; and

(iv) Apply to ask questions of a witness.

[20] Paragraph 6 of the protocol makes it clear that designation need not be for the whole of the matters in the terms of reference but may be limited to a specific part of the inquiry.

[21] 121 applications for core participant status were received by the inquiry, 111 of which were made on behalf of bereaved family members or survivors. Five retired police officers and the applicant were the only other individuals to apply for designation.

[22] On 3 April 2024 the applicant made his application through his solicitors who referenced paragraph 2E of the terms of reference and stated:

> "We would submit that he falls within Clauses 2(a) to (c). In relation to 2(c) the PSNI have been historically critical both of our client, and the intelligence he provided, in their response to the Police Ombudsman Report on the RUC investigation of the Omagh bomb."

[23] On 3 May 2024 the inquiry's solicitor replied, inviting further details relating to the application, including:

> "Why it is submitted, on Mr Keeley's behalf, that it is necessary for him to be granted Core Participant status as opposed to assisting the Inquiry through the provision of witness evidence."

[24] The applicant furnished detailed written submissions on 10 May 2024. It was submitted that the applicant satisfied each of the Rule 5(2) considerations and relied upon the express wording of paragraph 2E of the terms of reference and the judgment of Horner J in *Gallagher*.

[25] In terms of the need for core participant status as opposed to that of a witness, the applicant submitted:

(i) The applicant's evidence relates to terrorism and criminality and his relations with the police and republican groups;

(ii) Many serious allegations have been made against the applicant, and he is a defendant in over 25 civil actions which allege criminal and terrorist activity against him;

(iii) His character and reliability will be the subject of robust challenge;

(iv) He will be seeking immunity from any criminal prosecution in respect of the evidence he will give to the inquiry;

(v) If he is legally represented, the applicant's lawyers will be able to respond in a timely and efficient manner to criticisms of him, and to assist him in engaging with the inquiry;

(vi) The statutory duty of fairness in section 17 of the 2005 Act calls for legal representation for the applicant which core participant status would permit.

[26] The inquiry chair delivered his provisional determinations of the core participant applications on 24 May 2024. These were provisional in that the chair indicated he would consider any renewed application if lodged on or before 7 June 2024. 115 applications were granted and six were provisionally declined. All 111 bereaved family members and victims were granted core participant status along with the PSNI, PONI, the Secretary of State for Northern Ireland and Sir Ronnie Flanagan, the Chief Constable at the time of the Omagh bomb.

[27] The chair recognised that the applicant had important evidence to give to the inquiry and that he satisfied many of the Rule 5(2) factors but, in the exercise of his discretion, provisionally declined to designate him as a core participant. In doing so, the chair indicated that Rule 6(1)(b) of the 2006 Rules specifically provides for witnesses to have their lawyers designated as recognised legal representatives in respect of the inquiry proceedings.

[28] The chair stated:

> "I have a broad discretion. Fairness requires me to consider all the factors that I deem to be relevant to the application. The range of people or organisations who could legitimately claim to have a significant interest in an important aspect of the inquiry is very large. I am firmly of the view that the inquiry will not be assisted in fulfilling its terms of reference by designating as a core participant everyone with such an interest."

[29] The applicant renewed his application by correspondence dated 7 June 2024. In doing so, issue was taken with the potential for designation under Rule 6(1)(b). It was stressed that simply being a witness would deprive the applicant of the rights of a core participant including the making of opening and closing statements, suggesting lines of questioning, applying to ask questions and receiving disclosure of relevant material. It was asserted that the denial of these rights would be unfair on the applicant in light of the inevitable attacks on his credibility.

[30] The chair issued his final determination on 18 June 2024, maintaining his provisional decision not to grant core participant status to the applicant. The chair concluded that, in his view, the status of witness was the correct one for the applicant. Three mechanisms were identified whereby the applicant will be able to respond to any attacks on his credibility:

(i) The inquiry will disclose to the applicant all documents which, in the chair's opinion, he requires to see in advance of giving evidence;

(ii) Rule 10(3) gives a discretion to the chair to permit the recognised legal representative of a witness to directly question another whose evidence relates directly to that witness; and

(iii) Rules 13, 14 and 15 of the 2006 Rules provide for warning letters to be sent to any person who may be the subject of criticism in the inquiry and affording an opportunity to respond.

[31] By these means, and subject always to the statutory duty to act fairly, the chair determined that the applicant need not be, and should not be, a core participant.

[32] Whilst this determination was stated to be final, the chair indicated that it would be kept under review as the inquiry progressed.

The grounds of challenge

(i) Irrationality

[33] The applicant contends that the decision to refuse him core participant status was irrational in that immaterial considerations were taken into account, insufficient weight was given to the applicant's particular circumstances, it was arbitrary and leads to unfairness.

[34] In particular, the complaint is made that the only discernible reason given for the refusal relates to the potentially large number of people and organisations who could claim a significant interest in the subject matter of the inquiry, and the consequent need to limit the number of core participants.

[35] In considering the merits of this claim, it is first necessary to identify the relevant intensity of rationality-based review in the context of statutory public inquiries.

[36] In *R (Bates) v The Chairman of the Infected Blood Inquiry* [2019] EWHC 3238 (Admin), Cockerill J, in considering a challenge to a refusal to recognise the selected solicitors of a core participant as their recognised legal representatives, concluded:

> "Those authorities speak with one voice. They emphasise that this Court should be very slow indeed to conclude that a Tribunal of this sort has erred or that its decision is irrational."

[37] In *R (the Cabinet Office) v the Chair of the UK Covid-19 Inquiry* [2023] EWHC 1702 (Admin), the Divisional Court in England & Wales observed:

> "Public inquiries are convened to address matters of public concern. The matters of public concern are identified by the Terms of Reference and the powers of the inquiry can only be carried out within the Terms of Reference, see *R(EA) v The Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin); [2020] HRLR 23 at paragraph 46. It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation but conducting a thorough investigation. The inquiry has to follow leads and it is not bound by the rules of evidence…
>
> The powers of an inquiry are not without limits. This is because Chairs of public inquiries are subject to the supervisory role of the courts, although courts should be 'loath to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the tribunal ... 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.' It is, however, essential for courts to exercise their supervisory jurisdiction where necessary to uphold the rule of law, see *R v Lord Saville ex parte A* [1999] 1 WLR 1855 at 1865H." (paras [52] & [55])

[38] In *R (EA and BT) v The Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053, the Divisional Court in England & Wales considered the approach to the exercise of the court's supervisory jurisdiction in this context:

> "82. It is plain from the wording of the Rules that the Chairman has a broad discretion under the Rules. The only pre-condition to his designating a person a core participant is that they consent. The Chairman here proceeded on the basis that all the claimants met the Rule 5(2)(b) criteria. In other words, they each had an interest in an important matter to which the Inquiry relates. This was the foundational starting point of the Chairman's consideration of the representations put before him.
>
> 83. In reaching his decision, the Chairman was obliged to consider the matters set out in the Rules and everything else he considered relevant. It is the Chairman who is best placed to identify what is relevant in the circumstances of his Inquiry. The weight to be given to the matters the Chairman

considers relevant is also a matter for him (see *Da Silva* and *SSHD v KP(1)* [2011] 2 AC 1 at para 12).

84. His conclusions are neatly summarised in Mr Greaney's written submissions:

> 'In summary (the Chairman ruled against the application) because (having considered the wide range of submissions before him) he considered that the fact that the inquiry had commenced an inquest on the 22 deceased, had ToR on the deceased, the direct overlap of interests and perspective between the survivors and bereaved families (who are CPs and are legally represented), the fact that the survivors could be called as witnesses to assist with the inquiries investigation, the fact the survivors could participate in the inquiry by other means without being designated as CPs, the possible delay in the inquiry caused by a decision to designate survivors, and a statutory requirement to avoid unnecessary costs all weighted against granting the application.'

In our judgment, the Chairman's analysis was plainly one properly open to him. He had regard to all relevant factors and disregarded none. He did not focus on the benefits the claimants might derive from participating in the process as core participants but, in our judgment, he was not obliged to do so. His focus was, as is it had to be, on meeting his terms of reference.

The Chairman's decision does not exclude the claimants from the inquiry process, as he has made clear. On the contrary, as we have said, he was at pains to emphasise how they could be involved and how he would welcome their involvement. He was nonetheless plainly entitled to conclude that they should not have core participant status."

[39] These findings have clear parallels with the instant case. The chair of a public inquiry is vested with a broad discretion in relation to core participant status, with Rule 5(2) only prescribing matters to which the chair must have regard. The chair is, of course, much better informed on the detailed issues which will require exploration in order that an inquiry meets its terms of reference than a supervisory court could be. Questions of weight and the evaluation of the merits of a particular application are peculiarly for the inquiry chair and not the courts. Provided the chair adopts a fair procedure, instances of the courts intervening in such decisions will be rare.

[40] There can be no issue here in relation to the procedure adopted. The applicant was afforded every opportunity to make his case and, indeed, to renew his application.

[41] Properly analysed, the criticism of the chair's decision making is misplaced. He does make reference to the potentially large number of applicants for core participant status which did not, in the event, materialise. This will always be a practical issue for the chair of an inquiry to consider, particularly in light of the obligation imposed by section 17(3) of the 2005 Act in relation to unnecessary cost. However, this is not the reason that core participant status was refused to the applicant. The chair concluded that the proper status of the applicant was that of a witness and the array of powers available to him under the 2005 Act and 2006 Rules were sufficient to ensure that he could participate effectively and fairly in the process. This was the focus of the chair's analysis in both the provisional and final determinations. Furthermore, the chair had made it clear that, conscious of the section 17 obligation, he will keep this matter under review.

[42] Just as in the case of the aggrieved applicants in the *Manchester Arena Inquiry* case, the chair was entitled to reach a conclusion as to who should enjoy core participant status. He was fully informed as to the contentions of the applicant, the Rule 5(2) factors and the need to ensure both participation in the inquiry and fairness to all those who engage.

[43] As a result, it is not arguable that the decision to refuse core participant status to the applicant was irrational, either in the sense that immaterial considerations were taken into account or that the decision defied logic or was so unreasonable that no reasonable chair could have arrived at it.

(ii) Lack of reasons

[44] The applicant also asserts that the decision making process was vitiated by the failure on the part of the inquiry chair to give adequate or proper reasons for the decision. This is related to, and suffers from the same infirmity as, the rationality challenge. It is not the case that the applicant was refused core participant status simply on some arbitrary 'numbers' basis – it was because the chair determined that his proper status was that of a witness in light of all the issues and questions which the inquiry would have to address.

[45] This is spelt out clearly in both the provisional and final determinations. The applicant's concerns in relation to the protections which could be afforded to him are specifically addressed by the chair in terms of disclosure, questioning and warning letters in the final determination.

[46] The applicant's reasons challenge is therefore unarguable.

(iii) Illegality and legitimate expectation

[47] These grounds were not advanced with any vigour at hearing. In essence, it was argued that there was a failure to consider the application on its individual merits which would be a breach of the statutory obligation to do so and the legitimate expectation to that effect.

[48] However, the affidavit evidence filed on behalf of the proposed respondent made it clear that individual consideration was given to each application on its merits. Indeed, the position remains that the chair will keep the matter under review as the inquiry progresses.

[49] These grounds are also unarguable.

Conclusion

[50] For the reasons outlined, the application for leave to apply for judicial review is dismissed. I will hear the parties on the question of costs.