Neutral Citation No. [2015] NIQB 3 | *Ref:* **TRE9504**

Judgment: approved by the Court for handing down | *Delivered:* **13/01/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

BP's Application [2015] NIQB 3

IN THE MATTER OF AN APPLICATION BY BP FOR JUDICIAL REVIEW

AND

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

_____

TREACY J

Introduction

[1] The applicant challenges a decision of the Chairman of the Historical Institutional Abuse Inquiry ("the Inquiry") refusing the applicant's application for legal representation at public expense.

[2] The grounds upon which relief is sought are that:

(a) The decision is in breach of the duty of the Inquiry to act with fairness and in particular:

(i) will result in an inequality of arms between the applicant and the individuals and Orders against whom she will make allegations of abuse in her evidence;

(ii) will permit those against whom allegations of abuse are made an unfair advantage in seeking to persuade the Inquiry to accept their version of events; and

(iii) will result in the applicant facing questioning of her evidence and background in the absence of independent legal advice.

(b) The decision was unlawful as the Chairman failed to place any or adequate weight on the following manifestly relevant considerations:

(i) The applicant has a significant interest in the findings of the Inquiry.

(ii) The applicant is at risk of significant criticism in the ruling of the Inquiry insofar as a finding that fails to accept the applicant's account as true would at the very least by implication amount to significant criticism of the applicant.

(iii) If the applicant intends to give evidence to the Inquiry without the representation sought this will provide the Sisters of Nazareth with a significant advantage in the civil proceedings she has lodged against them.

(iv) The applicant is making allegations of abuse against a high profile public figure and the level of scrutiny her evidence will attract will consequently be of a greater order than that afforded to other witnesses who have so far given evidence to the Inquiry.

(v) The Inquiry processes amount to a significant investigative step into the abuse the applicant suffered throughout childhood, and therefore engages procedural obligations pursuant to Article 3 of the European Convention on Human Rights.

(vi) The Inquiry will necessarily have to determine whether they believe the allegations made by the applicant are true.

(vii) The decision is otherwise irrational or unlawful.

(c) The decision relied on materially irrelevant considerations, namely:

(i) The fact that other witnesses to the Inquiry against whom no allegations of abuse were made had already given evidence to the Inquiry and had not benefitted from legal representation at public expense.

(ii) The cost to the Inquiry if every witness to that Module was granted legal representation at public expense for the entirety of the Module;

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

(e) The decision was based on a mistake of material fact, namely that no one had been deterred from giving evidence to the Inquiry as a result of the fact that the Orders and Institutions benefitted from permanent representation at the Inquiry.

(f) The Chairman unlawfully fettered his discretion, insofar as he has determined that no legal representation at public expense will be provided for her on the basis that to grant one application would open the doors for other similar applications and thereby giving more weight to financial implications rather that the individual merits of the applicant's request.

(g) The decision will result in the defendants to her civil claim being provided with an unfair advantage in defending that claim and the applicant suffering an equal disadvantage in prosecuting her said claim in breach of Art 6 and Art 3 ECHR.

(h) The decision amounts to an infringement of the procedural obligations under Art 3 on the basis that the legal representation at public expense sought is necessary to ensure that the applicant can participate in the Inquiry to the extent necessary to safeguard her interests.

(i) The decision is irrational, arbitrary and oppressive as the applicant is expected to participate in the Inquiry without the benefit of legal advice to the extent necessary to protect her interests.

(j) The decision is otherwise irrational or unlawful."

Background

[3] The background to the Inquiry is very helpfully set out in the affidavit of Patrick Butler, solicitor to the Inquiry. The Inquiry was set up under the Inquiry into Historical Institutional Abuse Act (NI) 2013 ("the Act"). As appears from its terms of reference the Inquiry has been set up to examine if there were systemic failings by the institutions or the State in their duties towards those children in their care between the years 1922 to 1995. It is therefore examining systems failures that caused or failed to prevent abuse of children in residential care across a number of homes spanning many years. The Inquiry is chaired by the retired High Court Judge Sir Anthony Hart assisted by 2 specialist panel members.

[4] The Inquiry has two distinct parts (1) the Acknowledgement Forum process which is private and confidential. Aspects of its workings were considered by this court and the Court of Appeal in *Re LP* [2014] NICA 67. (2) The "Statutory Inquiry" (as Mr Butler called it) which he describes as that of a typical public inquiry which will investigate allegations of abuse within its terms of reference, take evidence from witnesses, have public hearings where evidence will be given, and provide its

findings by way of a report. The present case is concerned with a decision of the Chairman taken during the course of the Statutory Inquiry.

[5] The Statutory Inquiry is an inquisitorial process. It is investigating systemic failings that may have caused abuse to occur or which failed to prevent abuse. Within that context the Inquiry "will investigate allegations of abuse" within its Terms of Reference. Section 1(5) of the Act prohibits the Inquiry from ruling on and makes clear that the Inquiry has no power to determine any person's civil or criminal liability. In passing I note that this provision is not unusual and is a feature of most Inquiry's including Coroners inquests.

[6] Witnesses before the Inquiry are Inquiry witnesses. The Inquiry decides what witnesses it wishes to hear oral evidence from. Examination of witnesses in practice has only been through Inquiry Counsel but core participants can submit questions to Counsel to the Inquiry to be asked of witnesses.

[7] The Inquiry is examining events over a wide time frame, 1922–1995, and in multiple children's homes across Northern Ireland. There are therefore many alleged victims and perpetrators (Institutions and individuals) who will have a "particular interest" in the processes and outcome of the Inquiry. The task of the Inquiry is an onerous one in light of the subject matter, the time limit, the volume of material it has to deal with and the personal circumstances of many of the individuals with whom it comes into contact. (When I use the terms victims and perpetrators later in this judgment it is to be understood as "alleged" victims and perpetrators).

[8] To deal with the breadth of its task the Inquiry has divided its hearings into Modules with each Module relating to a particular home or homes. Three Modules have now been completed involving some 78 days of public hearings and evidence from over 158 witnesses of whom 98 gave evidence of what happened to them in care. In total the Inquiry anticipates hearing evidence from over 360 such witnesses.

[9] The Inquiry has a dedicated team of witness support officers to assist witnesses whose role is described in some detail at paras 40-56 of Mr Butler's affidavit. Trained counsellors are available during the public hearings.

Preparation of victim statements of evidence

[10] The process of engagement with the Inquiry legal team and the preparation of witness statements from alleged victims is set out at paras 62 -82. Victims are sent written summaries of their account to the Acknowledgement Forum to assist them for their forthcoming consultation with the Inquiry legal team to prepare a witness statement. Other documents gathered by the Inquiry concerning that individual from other sources are **not** provided to the victim either in advance of the consultation or for the oral hearings. A consultation is arranged to discuss the written summary and to assist in the preparation of the witness statement. The

witness can have a companion. It seems given this applicants experience when she met with the Inquiry at Hydebank that the companion could be a solicitor – albeit not one paid out of public funds. "At that consultation, where relevant and appropriate, the legal team leading the consultation will *discuss* the summary of account and any other documents that the Inquiry has available about the individual". After the consultation the Inquiry legal team prepare a draft witness statement which is then sent to the witness (but not accompanied by any other documents). The witness is asked to reflect on the draft and to identify anything inaccurate or which is missing. If no concerns of that nature are raised the witness is asked to sign and return the witness statement. Those who have concerns address them in a variety of ways. Some annotate and send back for the Inquiry to make the necessary changes. Others wish to come back to the Inquiry to discuss the issues with the legal team. By whatever means best suit the witness any issues are resolved until the witness feels the statement accurately reflects what the witness wants to say to the Inquiry. When this process has been completed the witness statement is "executed" (Butler, para 77). Because of the "vast quantity" of documents received by the Inquiry on an ongoing basis this means that on occasion relevant material is received about an individual after the witness signed his statement. These documents are not furnished to the witness. Only occasionally is that material sufficiently important to justify asking the witness to return for a further consultation or so an addendum statement can be prepared. Even on those occasions the witnesses are not furnished with copies. Inquiry counsel will in due course determine whether and if so what of that information it is necessary to *communicate* to the individual. Communication does not involve provision of copies of the material to the witness in advance of the consultation or thereafter.

Evidence bundles

[11] An evidence bundle is created for each Module. The Inquiry bundle is *not* provided to the victims but it is provided to the perpetrators, as "core participants", "so they are aware of the evidence the Inquiry has gathered about the home in question" (Butler, para 85). The witness statements from the victims who lived in a particular home form part of the evidence bundle, together with material the Inquiry has gathered from core participants, social services, the police, or from its own work in the Public Records Office in NI. The concept of a "core participant" appears in the 2013 Rules made under section 21 of the Act. Rule 2 provides that a core participant means a person designated under Rule 5. In deciding whether to designate the chairperson must in particular consider whether the person, body etc "played or may have played a direct and significant role in relation to the matters to which the Inquiry relates" [Rule 5(2)(a)], "has a significant interest in an important aspect of the matters to which the Inquiry relates" [Rule 5(2)(b)] <u>or</u> "*may* be subject to explicit or significant criticism during the Inquiry proceedings or in the report or any interim report"[Rule 5(2)(c). Victims have not been designated core participants.

[12] Although the evidence bundle is provided to perpetrators it is not provided to victims. All that they physically receive is their draft statement. Mr Butler has

averred that the evidence bundle will always contain a great volume of material the "vast bulk" of which will not relate to an individual witness. The Inquiry considers that it is wasteful and unnecessary to provide victim witnesses with documentary material that does not directly relate to that individual (Butler, para 88). In fact documentary material (apart from the witness statement) that does relate to the witness is not provided either. Documents relevant to a witness that needs to be displayed publicly are not furnished to the witness but they are discussed with the witness during consultation normally on the day they are scheduled to give evidence.

[13] In preparation for giving evidence Inquiry counsel are provided with a folder of material on each witness coming to give evidence. Physically the only material the victim witness will have is their witness statement. Inquiry counsel may, where they have considered it relevant and appropriate, discuss other documents about the witness during consultation in statement preparation. If further documents have come into the Inquiry's possession between then and the giving of evidence Inquiry counsel will determine whether and if so what information it is necessary to communicate and when. Copies of such documents are not provided.

[14] Inquiry counsel consider the folder to determine whether a consultation with the witness is necessary in advance of the day they will give evidence. This only happens where Inquiry counsel consider it "absolutely essential". The Chairman and Inquiry counsel have taken the view that consulting on the morning the witness is to give evidence is in the best interests of the witness unless aware that material could not be reasonably discussed on the day witness is to give evidence (Butler, para 93).

[15] Mr Butler has averred that the legal team operate a "do no further harm" principle since the Inquiry receives material the contents of which would be very difficult or hurtful for an individual to deal with. Material is only discussed with the witness and thereafter raised publicly if its relevance is sufficiently important that it is necessary for the fulfilment of the Terms of Reference. The Inquiry's purpose is "not to impart information to individuals, though where it can assist individuals with questions they have about their childhood then the Inquiry will try to assist." However, the Inquiry is particularly sensitive to try to avoid causing further harm to the often vulnerable individuals with whom it comes into account.

[16] At para 97 Mr Butler explains that witnesses will often ask for copies of documents relating to them. The legal team explain to the (unrepresented) witness "*why that will not be possible* but also the mechanisms available … if they wish to obtain material relating to them (subject access requests to government bodies etc.)"

[17] Mr Butler has averred that, generally speaking, the Inquiry does not consider that witnesses (ie victims or alleged victims) giving evidence about what happened to them whilst in care require to have legal representation or that the cost of such representation should be met at public expense. At para 110 of Mr Butler's affidavit

three reasons are advanced for this position. First, that it is an inquisitorial process. Secondly, that each witness is an Inquiry witness, there to assist the Inquiry fulfil its terms of reference. Thirdly, that the Inquiry has an experienced legal team and that it would be a duplication of work to have other lawyers "executing the functions of the Inquiry legal team carrying on some form of parallel investigation". The Inquiry's position was first set out in the Chairman's public address on 21 February 2013 quoted extensively by Mr Butler at para 112. That address noted that "if there was a possibility that a person *might* be subject to criticism *in the Inquiry report* then the Inquiry will consider granting them legal representation, and allowing them to participate in the Inquiry process. Of course anyone is free to approach their own solicitor for other purposes, but the Inquiry will not pay for that, nor will their lawyer play *any* part in the Inquiry". This quotation appears to recognise the limitations on participation in the Inquiry process that flows from denial of legal representation.

[18] The Chairman returned to this theme in the Inquiry's public session of 4 September 2013 in advance of the first module of hearings that commenced in January 2014. The relevant extract is set out at para 114 of Mr Butler's affidavit. Having referenced his earlier public statement the Chairman stated that "it is *only* if the individual is likely to be the subject of criticism that it may be necessary for that person to have their own legal representation. He said that it will therefore be "completely unnecessary, and will only cause needless duplication of work, if extra teams of lawyers are to be paid at public expense to attend the public hearings on behalf of each individual applicant, or indeed to any of the other functions of the Inquiry, such as when the applicant is being interviewed by the legal team in order to prepare a statement".

[19] At para 119 it is stated that "it remains entirely unclear to the Inquiry what in reality the role would be for the proposed legal representatives … . It appears that it may be for some entirely collateral purpose connected to civil proceedings or as some form of support, neither of which is necessary nor could be justified at public expense".

[20] These passages and the affidavit of Mr Butler make the position of the Chairman in respect of legal representation for victims out of public funds unambiguously clear. It is also clear that at all times the Chairman has been understandably vexed by the potential cost implications of acceding to *any* request for legal representation. Paras 120 – 135 of Mr Butler's affidavit purport to address that very point. Indeed at para 122 it is explicitly acknowledged that if the Chairman had considered that legal representation for the applicant was justified that it would have serious implications for the running of the Inquiry.

Discussion and commentary

[21] Although by section 6(1) of the Act the procedure and conduct of the Inquiry are to be such as the Chairman may direct he plainly does not have a discretion to

act unfairly or unjustly. The key provision is section 6(4) which provides that "in making any decision as to the procedure or conduct of the Inquiry, the chairperson must act with fairness and with regard also to the need to avoid any *unnecessary* cost (whether to public funds or to witnesses or others)". However, if fairness requires legal representation the cost thereby incurred in providing it could not be regarded as "unnecessary". What fairness requires is an objective test. Ultimately the question of fairness is one of law for the court [see Re Reilly [2013] UKSC 61; NI [2014] 154 at para 65]. It is not about the subjective view of a judge or judges. Of course what public law fairness requires depends crucially on the context within which it arises.

[22] The present climate of austerity, the fact that Inquiries are not always greeted with unalloyed joy, the understandable demand to avoid inessential costs, and the inevitability of public expenditure which legal representation entails must not affect the anterior consideration by the court of whether public law fairness in context requires any level of legal representation for *this* victim of alleged abuse. That will require the court to look in some detail at the basis of the application and the reasons given for its refusal.

[23] The key to section 6(4) is the use of the word "unnecessary". Thus if fairness requires some measure of legal representation then the fact that it inevitably comes with a cost does not remove the public law obligation to provide it. Of course matters such as the level of representation and for what work legal representation is required out of public funds are all matters which will require to be scrutinised to avoid unnecessary cost. There are very detailed protocols and procedures by way of a system of pre-authorisation of awards custom built to achieve this very purpose. The time and administrative inconvenience of processing such claims does not speak to the issue of whether fairness requires some measure of legal representation.

[24] The respondent sought to rely on the margin of appreciation to be afforded to the Inquiry relying on Re LP [2014] [67] and cases cited therein. However, if fairness requires a measure of legal representation to this applicant I consider that no margin of appreciation arises because it is then a matter of enforceable public law obligation.

[25] The applicant's application for legal representation at public expense was an application made pursuant to section 14 of the Act and under rule 22 of the 2013 Rules. The Chairman accepted that the applicant met the eligibility criteria under section 14(3)(a) of the Act for an award of expenses in that she was a person giving evidence to the Inquiry. In his initial decision of 31 October 2014 the Chairman noted that the applicant is in prison, has no assets or financial resources and that this was not therefore an impediment to making an award. He then considered whether, pursuant to Rule 23(3)(b) of the Rules, it was in the public interest that the applicant should be represented before the Inquiry by her own legal representative at public expense. The Chairman concluded that it was not in the public interest to make an award for the various reasons set out in his decision letter including the following:

(i) that the Inquiry is unaware of any basis upon which the applicant is likely to be subject to significant criticism either during the Inquiry or in any report by the Inquiry;

(ii) that the applicant is not a core participant;

(iii) while the Sisters of Nazareth Congregation may take issue with many of the details made by the applicant, "even if these criticisms are accepted at their height, they fall far short of amounting to criticism of her of the type that would justify an award of legal representation";

(iv) the cost to public funds.

[26] The Inquiry Costs Protocol provides general information and guidance as to how the Inquiry will deal with matters relating to costs and expenses. It sets out at para 9 the matters to be considered when deciding whether to make an award. In the present case the sole ground on which the award was refused was that the Chairman concluded that it was not in the public interest. Para 9 lists four matters:

(a) applicant's financial resources;

(b) public interest;

(c) duty to act with fairness and with regard to the need to avoid unnecessary cost; and

(d) any conditions or qualification imposed by the sponsor department (OFMDM) in respect of the making of awards and notified to the Chairman.

It is not clear what, if any, distinction there is in the present context between the public interest and the duty to act with fairness. If fairness requires a measure of legal representation it must be in the public interest to provide it since a refusal would as a matter of public law be otherwise unlawful. Para 10 then sets out the factors the Chairman may consider whether making an award is in the public interest which include:

(a) whether the individual played, or may have played, a direct and significant role in relation to the matters set out in the Inquiry's Terms of Reference;

(b) whether the individual has a significant interest in an important part of the matters set out in those Terms of Reference;

(c) whether the individual may be subject to significant criticism during the Inquiry's proceedings or in any report by it;

(d) whether it is necessary that the individual should have legal representation before the Inquiry; and

(e) if legal representation is considered necessary whether there are other means of funding. The factors are not weighted.

[27] The Costs Protocol makes it clear at para 15 that any award for expenses in connection with legal representation will only be for work that is:

(a) within the terms of reference;

(b) which is necessary, fair, reasonable, and proportionate in all the circumstances; and

(c) which is conducted in a cost effective and efficient manner, and without duplication.

[28] Para 16 provides that when the Chairman decides to make an award that it will normally be limited to a recognised legal representative having a role in relation to some or all of the following matters:

(a) considering initial instructions;

(b) advising the client in relation to the making of a witness statement, and/or otherwise providing evidence to the Inquiry;

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

(d) advising the client in relation to any warning letter; and

(e) representing the client on those occasions:

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

(ii) when their client is giving evidence; or

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

So far as this applicant's application for legal representation (a)-(c) and (d) are particularly relevant.

[29] As previously pointed out victims are not physically provided with any documentation other than the limited material earlier described – essentially their statement in draft or completed form without any accompanying documents even

those relating directly to that witness. This is in contrast to the perpetrators (Institutions or individuals against whom allegations are made) who have access to the materials I have set out earlier. This arises from their designation as core participants. Victims have not been designated core participants. The rationale appears to be that only those against whom allegations are made have in practice been so designated and in consequence thereby attracting a right to legal representation and, if not otherwise indemnified or without sufficient financial resources, to have their legal representation paid out of public funds. Aside from greater access to documentation and more extensive rights to legal representation and participation in the Inquiry process core participants by dint of being so designated enjoy a panoply of further participative rights. This is made clear by para 16(f)(i)-(iv) of the Costs Protocol which refers to core participants: making an opening statement, where permitted by the Chairman;

- submitting questions to Counsel to the Inquiry to be asked of witnesses;

- providing final submissions, where permitted by the Chairman;

- making a closing statement, where permitted by the Chairman.

[30] Only perpetrators (Institutions and individuals) have been permitted legal representation. Victims have (unless themselves the subject of allegations of abuse) never had a successful application for legal representation to be met out of public funds. Given the refusal in this case the applicant argues with some force that it is difficult to see in what circumstances the Inquiry might ever exercise its power to allow legal representation out of public funds to a victim. In substance the applicant submits that victims have a systemically inferior status in terms of their ability to participate as compared with the perpetrators. The perpetrators have legal representation over and above all the other participative advantages I have set out. The Institutions have a permanent legal presence which includes solicitor and senior and junior counsel. The victims have neither legal representation, provision of documents nor the raft of participative rights afforded to the perpetrators. It is against that background that I now turn to look in a little more detail at the nature of this applicant's application and the basis upon which it was refused.

[31] Following the refusal of the applicant's request she asked for an oral hearing before the Chairman. This took place on 13 November 2014 and there is a transcript of the hearing. The applicant was represented on this occasion by Mr McGowan BL and KRW LAW who were appearing pro bono on her behalf. It is apparent from the transcript that counsel made very skilful and focussed submissions. No counsel or solicitor for the Inquiry were present in opposition. Following the detailed submissions the Chairman immediately promulgated his decision rejecting the application.

[32] At the oral hearing counsel emphasised the nature of the allegations made by the applicant and in particular the allegation of sexual assault against an individual

over a number of months. This was counsel submitted a very serious allegation against a very high profile figure. Given that it was envisaged the allegations would be robustly rejected and challenged in public counsel submitted that it would be appropriate, given the seriousness of the allegations, that she receive advice on the consequences of giving evidence to the Inquiry at the outset. She would be questioned in detail about it and would also open up questioning about her background and character. She suffered from severe mental health issues and is currently serving a prison sentence and being questioned in public on her background in those circumstances could amount to a significant detriment being cast on her character. This submission prompted the Chairman to observe that it would seem that the matters to which counsel referred did not happen in Nazareth Lodge. The Chairman understandably then raised the point that there may well be an issue therefore as to whether this was within the inquiry's Terms of reference. In response counsel pointed out that in her draft statement the applicant had said that one of the sisters had been informed of it and in those circumstances there would be a question as to whether appropriate steps had been taken by those who had care of her at the time. In my view this exchange highlights an additional reason why the applicant requires some legal representation. It would be grossly unfair if a debate were to take place about whether these serious allegations were outside the terms of reference and the applicant did not have the benefit of legal representation out of public funds to make submissions.

[33] These allegations will as a matter of fairness to the alleged perpetrator have to be properly tested to see if they are credible or truthful counsel submitted. If the Inquiry found that her allegations were not credible or truthful or that it otherwise became clear that her allegations did not stand up to scrutiny and were not being relied upon counsel submitted to the Chairman that this would expose her to significant criticism.

[34] The Chairman in refusing the application indicated without elaboration that there was nothing in the material before him that would lead him to conclude that the applicant is "likely" to be the subject of criticism in the Inquiry's *report.* It is unclear why he so concluded. Her account is likely to be challenged by the alleged perpetrator who will be entitled to legal representation and afforded full participative rights. Why should the perpetrator be placed in a materially more advantageous position in terms of legal representation especially in circumstances where he already enjoys significantly more participative rights to safeguard his interests? Can this objectively and as a matter of public law be regarded as fair? Furthermore, the test of likelihood seems inappropriately high. If she is exposed to a *genuine risk* of significant criticism that should be sufficient and I consider the Chairman set the bar too high especially bearing in mind the high stakes for all concerned. In any event whether serious criticisms will be made and if so against whom can only readily and properly be assessed at the conclusion of the Module. The Chairman also concentrated on whether she was likely to be the subject of criticism in the report. He should also have considered per Rule 5(2)(c) whether she

"*may*" be subject to explicit or significant criticism during the Inquiry proceedings and not have confined it to the report.

[35] I have previously adverted to the disparity in terms of disclosure of documents to victims and perpetrators. I also understand that the Inquiry does not take statements from perpetrators in the manner applied to victims and that a quite different procedure applies to them. This is not commented upon in the affidavit of Mr Butler. In any event the Inquiry submitted that the procedure regarding the non-provision of documentary material to victims (apart from their statement) was uninfluenced and unaffected by the absence of legal representation. However, in his decision at the conclusion of the oral hearing the Chairman appears to indicate that as a result of the grant of legal representation "it would be necessary to provide [this applicant] legal representative with much if not all of the written material probably amounting to thousands of pages to enable them to consider what they consider to be appropriate or necessary insofar as attendance was concerned and to make submissions … This would involve a very considerable extra burden on the Inquiry". If this means that unrepresented victims get less disclosure than if they were represented it underscores the value of legal representation.

[36] I find it difficult to escape the conclusion, in light of the Chairman's various statements on the issue set out earlier, that for all practical purposes a bar has been erected against determining that victims before this Inquiry ever require any form of legal representation or alternatively that an unduly high hurdle has been erected amounting to an impermissible fetter. Given the facts of this case it is not unreasonable to ask "if not this case, what case?"

[37] The Chairman has a statutory obligation to avoid *unnecessary* cost and it was submitted he must therefore consider the consequences of making any decision including the decision theapplicant seeks. If providing unnecessary legal representation at public expense before the Inquiry would have the cost implications identified by the Chairman, which it clearly would, then the Chairman has a statutory obligation to take that into account in the exercise of his discretion. This is also dealt with at para 33 of Mr Butler's affidavit. This approach is misconceived. The consequences in terms of costs do not remove the public law necessity for legal representation out of public funds if that is what fairness requires. As previously pointed out if some measure of legal representation is as a matter of public law fairness required the costs in providing it cannot be regarded as unnecessary. In any event the Costs Protocol has a robust custom built pre-authorisation scheme designed to ensure that expenses for legal representation will only be permitted for work which is necessary, fair, reasonable, proportionate, conducted in a cost effective and efficient manner and without duplication.

[38] I have therefore concluded that the decision of the Inquiry has fallen into public law error in rejecting the application for legal representation at public expense for the reasons given above. At the conclusion of his oral submissions to the Chairman the transcript records that counsel said "Mr Chairman, can I make an

application for costs" to which the Chairman responded "you may, and it is refused". The Chairman reasoned that the applicant's legal representatives had been aware of the Inquiry's position regarding legal representation and had been unsuccessful therefore no costs should be allowed. In light of the ruling of this court that matter should be revisited as well. I will hear the parties as to the appropriate relief.

Postscript 15 January 2015

[39] Following the judgment of the court delivered on Tuesday 13 November 2014 the parties were in agreement that the court should quash the decision of the Inquiry Chairman of 13 November 2013 with costs to the applicant.

[40] The applicant initially also sought additional relief in the following terms:

> "An Order of Mandamus (or a Declaration) that the applicant be granted further legal representation at public expense, the level and amount of which to be remitted for determination by the Chairman forthwith."

[41] In its written submissions on relief the respondent contended that such additional relief is neither necessary nor appropriate. Mr Aiken submitted that *subject to any appeal,* the Chairman is clear as to the view of the Court and, given his statutory obligation to act with fairness would deal with the matter accordingly. In addition the point was made that, if such an Order were made, and in the event of an appeal by the Inquiry, it would have the "unfortunate" consequence of requiring the Inquiry to ask for a stay of that part of the Order so that the Chairman would not be in contravention of the Order pending the Appeal.

[42] The applicant on the other hand contends such an Order is necessary on two grounds. First, it is submitted all delay at this point is prejudicial to the ability of the applicant to benefit from the entirety of the relief sought. She intends to give evidence of sexual abuse suffered at the hands of another child at the Institution as well as the high profile individual referred to in the judgment, the latter abuse lasting over a period of months. The Inquiry is examining systems failures and must, it is argued, therefore consider the extent of knowledge that the individuals with authority in this institution had in relation to the applicant's visits to this person and her treatment. It is said these are issues which may have to be addressed by a variety of individuals. It is submitted that the applicant and her legal team would require sight of documents relevant to these issues and adequate time to consider them in order to determine which witnesses would be relevant to the applicant and the questions which should be put to them. The applicant and her legal team currently have no knowledge of when relevant witnesses are scheduled to give evidence to the Inquiry, nor has the applicant or her legal team been provided with documents of relevance to these issues. All further delay in providing these documents it is argued reduces the time within which the applicant and her legal

team must consider this evidence, and raises the real possibility that the applicant will not be represented during the testimony of individuals when fairness would require that she is represented.

[43] Secondly, Mr McGowan submitted it is not clear in the event of an appeal how soon it will be possible for the Court of Appeal to sit. Whilst the applicant does not dispute that the Inquiry Chairman would act with fairness and expedition subject to any appeal, the applicant contends that the applicant should not be prejudiced if a date for an appeal is not immediately available. In those circumstances the applicant contends the appropriate relief would be to grant relief in the terms sought by the applicant, with the Court of Appeal to determine when an appeal can be heard and whether the relief ordered should be stayed pending a hearing of that appeal.

[44] At the oral hearing the position of the parties as to the appropriate form of relief had altered somewhat. First, the respondent has indicated that the suggested declaration, were it without the word "forthwith", would not cause any material difficulty (though the Inquiry has already set out why it considers such a Declaration unnecessary. Secondly, the applicant was no longer seeking an order of Mandamus.

[45] The terms of the substantive judgment of the Court do not justify the intrusive relief originally sought by the applicant. Whether legal representation is required, the level of representation (eg solicitor only, or with counsel (junior only or with senior), and the work to be covered remain matters for the Chairman and the Inquiry. Assuming legal representation is allowed there is nothing in the judgment that was intended to speak to the level of representation or any work to be covered. As to the whether legal representation is mandated that remains a matter for the Chairman to be determined in light of the terms of the judgment and any fresh material or representations that may bear on that issue. The Inquiry may wish to invite and the applicant may in any event wish to make further submissions in support of legal representation in light of the judgment of this court. It does however strike me that the applicant's present submissions are based on the premise that the allegations against the high profile figure fall within the terms of reference and will feature in this Module. That may well ultimately turn out to be so but until that determination is made the central foundation on which the request for legal representation is based is as yet undetermined. If on the other hand the Inquiry don't propose to deal with that issue as a preliminary question of jurisdiction but to determine it at the conclusion of all the evidence the Chairman and affected parties may wish to advance submissions as to what flows from such an approach. Nothing that I have said should be taken as an endorsement of any such approach or its lawfulness were it to be adopted.

[46] It would however be extraordinarily difficult for an unrepresented lay person with mental health issues to deal with issues of jurisdiction, procedure and related issues which surround this issue. Mr Aiken confirmed that the Inquiry have not yet decided on jurisdiction or the procedure to be followed. I now gather that on this

aspect there is a recognition on the part of the Inquiry that legal representation may well be required. This is an additional matter that the applicant and the Chairman may wish to consider.

[47] I was concerned by the applicant's submission that she and her legal team have no knowledge of when relevant witnesses are scheduled to give evidence (nor access relevant documents). Accordingly, I requested and received a note setting out the position with regard to this issue. The respondent has confirmed that individual victims are informed of **their** date to give evidence. Victims are unrepresented. They are not informed of when those against whom they have made allegations will be giving evidence nor are they informed of when other witnesses are giving evidence which might be relevant to their allegations. This is to be contrasted with the position in relation to alleged perpetrators, who are legally represented, are informed by the Inquiry of the date when those who have made allegations or others who will give relevant evidence are scheduled to do so. They also have in documentary form the statement(s) or material parts thereof of the relevant witnesses. The core participants (for the present Module the religious congregation who ran the Home, the Roman Catholic Diocese who invited them to do so, the HSCB and the DHSS&PS) also receive the published timetable of the scheduled hearings.

[48] As appears from the same note in obtaining statements from core participants and alleged perpetrators the process employed by the Inquiry is materially different from that employed in respect of victims. Evidence is gathered "by request" also utilising section 9 of the Act or rule 9 of the Rules as required. Witness statements are sought from core participants and individuals against whom allegations are made. Alleged perpetrators respond to the allegations by way of statement. The Inquiry is not involved in the taking of the statement. It is furnished to the Inquiry by their legal representatives. A victim is not furnished with the statements of the alleged perpetrator or from the relevant Institution or authority. The court was informed that if the alleged perpetrator has not furnished a statement in response by the time the victim is giving evidence the Inquiry would seek "instructions" from the legal representative of the alleged perpetrator. [I note in passing that in these circumstances the problem identified by the Inquiry in the transcript of the oral hearing, exhibit 12 to Mr Butler's affidavit at pp 211-212, is in practice unlikely to arise].

[49] The respondent at the hearing did not oppose a quashing Order and, provided the word "Forthwith" was excluded, was content with the proposed Declaration. Section 21 of the Judicature Act 1978 however provides that the Court may, instead of quashing the decision, remit the matter with a direction to reconsider it and reach a decision in accordance with the ruling of the Court. I consider in the circumstances described that that is the appropriate Order and I so indicated at the conclusion of the hearing on appropriate relief.