Neutral Citation No. [2013] NIQB 145 | *Ref:* **TRE9088**

Judgment: approved by the Court for handing down | *Delivered:* **05/12/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

CM's Application [2013] NIQB 145

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

TREACY J

Introduction

[1] The applicant seeks leave to judicially review a decision of the Historical Institutional Abuse Inquiry ("the Inquiry") made on 7 June 2013 whereby it determined that it was unable to investigate abuse she alleges she suffered whilst in foster care. The Inquiry determined that it was unable to do so on the basis that it fell outside its terms of reference.

[2] Mr Gordon Anthony appeared on behalf of the applicant. Ms Christine Smith QC appeared with Mr Joseph Aiken on behalf of the Inquiry and Mr McGleenan QC appeared with Mr Paul McLaughlin on behalf of OFMDFM. I am grateful to all Counsel for their extensive and helpful oral and written submissions.

[3] Both proposed respondents object to leave being granted. First on the basis that the application is irredeemably out of time and that the challenge to the constitutionality of the time limit is misconceived and that no good reason has been advanced to explain the delay or justify an extension of time. Both also opposed the grant of leave on the basis that the applicant's substantive challenges are clearly unarguable.

Order 53 Statement

[4] By her amended Order 53 statement the applicant also seeks an order quashing the terms of reference which were set out in a statement to the Northern

Ireland Assembly by the First Minister and Deputy First Minister on 18 October 2012. She also seeks an order quashing Section 19 of the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013 ("the 2013 Act") which imposes a 14-day time limit for bringing judicial review challenges to decisions made by OFMDFM in relation to the inquiry or a decision made by a member of the inquiry panel. The grounds upon which relief is sought are set out in para3 of the Order 53 statement and are summarised as follows:

> (a) The decision of the inquiry of 7 June 2013 is contrary to common law principle and the applicant's rights under Articles 3, 8 and 14 of the European Convention on Human Rights.
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> (b) That the terms of references announced by the OFMDFM are contrary to common law principle and/or the applicant's rights under Articles 3, 8 and 14 of the European Convention.
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> (c) That the Northern Ireland Assembly has acted beyond its powers by enacting Section 1 of the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013.
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> (d) That the Northern Ireland Assembly has acted beyond its powers by enacting Section 19 of the 2013 Inquiry Act. In particular the two week time limit for commencing judicial review proceedings which the Order 53 statement goes on to say is contrary to fundamental constitutional rights at common law notably the right of access to a court. That it is contrary to common law constitutional principles namely the primacy of the rule of law doctrine and finally it said that it constitutes a disproportionate interference with the applicant's rights under Articles 3 and 8 of the European Convention insofar as it denies her access to a court for the purposes of vindicating that right.

Statutory Framework

[5] The Inquiry was set up under the 2013 Act. Section 19 of the 2013 Act imposes a statutory time limit on anyone wishing to challenge a decision by way of judicial review. Section 19(1) states:

> "19(1) An application for judicial review of a decision made—

> (a) by OFMDFM in relation to the inquiry; or
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> (b) by a member of the inquiry panel,
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> 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."

[6] It is clear that an application for judicial review must be brought within 14 days from when the applicant first becomes aware of the Inquiry's impugned decision. The aim of Section 19 of the 2013 Act, like the similar provision in Section 38 of the Inquiries Act 2005, reduce the time limit for judicial review of decisions that could delay an inquiry. There are a number of notable features about Section 19. The first is that time runs from the date on which an applicant became aware of the decision and the second is that the time limit can be extended by the court.

Relevant Background

[7] So far as the present challenges are concerned the relevant background is as follows. The statement from the First Minister and Deputy First Minister to the Northern Ireland Assembly announcing the Terms of Reference was on 18 October 2012. The institutions which fall within the inquiry remit are defined by the Terms of Reference as follows:

> "For the purposes of this inquiry institution means anybody, society or organisation with responsibility for the care health or welfare of children in Northern Ireland other than a school but including a training school or borstal which during the relevant period provided residential accommodation and took decisions about and made provision for the day to day care of children."

[8] The applicant's challenge in this case relates primarily to the Inquiry's interpretation of its Terms of Reference. The Inquiry does not consider that the abuse that is said to have taken place while an individual was in foster care is within its Terms of Reference. That is also the position of the Inquiry's sponsor department and for that reason the Inquiry has not been investigating foster care thus far. According to the proposed respondent, if foster care was to be included this would greatly widen the scope of the Inquiry and would necessarily involve delay and additional cost.

[9] The Inquiry's public hearings are due to begin in January 2014. The applicant met with the Acknowledgement Forum on 25 February 2013. Thereafter the statutory inquiry part of the Inquiry considered the transcript of the account given by the applicant to the Acknowledgement Forum and on 15 April the Chairman of

the Inquiry, through the Inquiry's solicitor, wrote to the applicant's solicitors explaining that the abuse which the applicant complained of had occurred in foster care and therefore was outside the Inquiry's Terms of Reference.

[10] The applicant was made aware of the Inquiry's decision via her solicitors by letter dated 17 April 2013. Following receipt of that letter there was an exchange of correspondence between the applicant's solicitors and the Inquiry which led ultimately to a further letter from the Inquiry dated 7 June 2013 in which the Inquiry solicitor, Mr Patrick Butler, referred to the earlier correspondence and explained that it had been fully considered and he informed the applicant's solicitors:

> "That the decision of the inquiry remains that your client falls outside the terms of reference."

[11] The 14 days to bring a judicial review application, the Inquiry submitted, ran from 17 April 2013. Therefore it was contended that in order to comply with the statutory time limit the applicant would have had to have issued her application by 1 May 2013. In fact the applicant did not issue the proceedings until 8 October 2013 which amounts to a delay of approximately 5 months.

[12] The applicant, on the other hand, maintains that the relevant date for the purposes of the time calculation is the letter of 7 June. However, whether the date of the relevant Inquiry decision was April 2013 or June 2013 is of little moment in this case since the proceedings were issued well outside the time limit imposed by Section 19 of the 2013 Act. No sufficient reason has been advanced to explain the delay and no good reason has been established that persuades me that it would be appropriate to extend time.

[13] I reject the applicant's challenge to the constitutionality of the statutory time limit. This argument was very skillfully presented in written and oral submissions by Mr Gordon Anthony. The challenge was, in large measure, founded on the decision of the Supreme Court in Axa General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland) [2011] UKSC 46. The applicant relied in particular on the passages from Lord Hope at para51 and Lord Reid at para153 as follows:

> "51. We do not need, in this case, to resolve the question how these conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament may be reconciled. The fact that we are dealing here with a legislature that is not sovereign relieves us of that responsibility. It also makes our task that much easier. In our case the rule of law does not have to compete with the principle of sovereignty. As I said in *Jackson*, para 107, the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. I would take that to be, for the purposes of this

> case, the guiding principle. Can it be said, then, that Lord Steyn's endorsement of Lord Hailsham's warning about the dominance over Parliament of a government elected with a large majority has no bearing because such a thing could never happen in the devolved legislatures? I am not prepared to make that assumption. We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.
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> ...
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> 153. The nature and purpose of the Scotland Act appear to me to be consistent with the application of that principle. As Lord Rodger of Earlsferry said in *R v HM Advocate* [2002] UKPC D 3, 2003 SC (PC) 21, para 16, the Scotland Act is a major constitutional measure which altered the government of the United Kingdom; and his Lordship observed that it would seem surprising if it failed to provide effective public law remedies, since that would mark it out from other constitutional documents. In *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390, para 11, Lord Bingham of Cornhill said of the Northern Ireland Act 1998 that its provisions should be interpreted "bearing in mind the values which the constitutional provisions are intended to embody". That is equally true of the Scotland Act. Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law."

[14] It is plain that the aim of Section 19 of the 2013 Act, like the similar provisions in Section 38 of the Inquiries Act 2005, is to reduce the time limit for judicial review of decisions that could delay an Inquiry. As previously observed there are two

salient features of the time limit, first that time runs from the date on which the applicant became aware of the decision and secondly, that the time limit can be extended by the court. The time limit does not deny the applicant access to the court and the court has the power to extend time. It is noteworthy that even if the ordinary time limit for judicial review had applied in this case that the applicant would have fallen foul of the promptitude requirement and the 3 month outer limit in Order 53 Rule 4. The time limit in respect of Inquiry decisions self evidentially does not abolish judicial review nor does it diminish the role of the court in protecting the interests of the individual.

[15] Accordingly, the challenge to the constitutionality of Section 19 fails and for the reasons already given I am not prepared to extend time.

[16] The Assembly passed the 2013 Act with the knowledge and intention that it did not include the investigation of abuse occurring to children in foster care. The documents to which the court was referred extensively demonstrate that the sponsoring Ministers, the First and Deputy First Ministers, the sponsor department OFMDFM, the Northern Ireland Executive and the Northern Ireland Assembly did not intend the Inquiry's remit to include the investigation of abuse that was said to have occurred in foster care. Similarly, the same documents disclosed that before the coming into force of the Act this position, that foster care was not included, was known to and accepted by Sir Anthony Hart who had agreed to act as the Chairman of the Inquiry. As to the consequences of extending the terms of reference the Inquiry's solicitor, Mr Butler, noted:

> "35. The exchanges contained in the Assembly and Committee papers also reveal the consequences if the remit of the Inquiry whether to include foster care or some other equally worthy area of abuse was extended.
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> 36. "The inquiry is clear that an extension of its remit would mean it could not complete its work within time or budget and that it would have to substantially change its method of operation and staffing. It would also mean a delay to the start of the inquiry's public hearings which are due to commence in January 2014.

[17] Further I do not consider that the terms of Reference are, as claimed by the applicant, repugnant to common law or Articles 3, 8 and 14 of the European Convention. The applicant's contention in this respect is based on the mistaken premise that the applicant has been denied an opportunity to vindicate her rights. The Inquiry's role however is to examine if there was systemic failings by the relevant institutions or the State. It does not determine issues of civil or criminal liability. Moreover, in so far as any Convention obligation to investigate could be said to arise, the primary means of discharging that obligation will ordinarily be a

police investigation. I note that in the present case the applicant and her brother made a statement to the PSNI in October 2009.

[18] The decision to construct the Inquiry around institutional abuse was the product of a very detailed examination. As was stated in the Scoping Paper of July 2011 at para2.4:

> "The Terms of Reference for the task force make it clear that its remit is to bring forward recommendations on the nature of an inquiry into ***historical institutional abuse***. The definition of institution for the purpose of an inquiry has formed an important aspect of discussions with victims and other key stakeholders more detail on the rationale for the definition of institution is outlined in Section B of this paper. Setting the parameters in this way does not in any way undermine the trauma that has undoubtedly been inflicted on many other individuals as a result of clerical abuse in domestic and other settings. However, it does bring a degree of focus to what could become an otherwise unmanageable and protracted process. The experience in other jurisdictions has also indicated that the profile of victims of institutional abuse is different from those who have suffered clerical abuse in other contexts. Consequently designing a process that aims to bring closure to both categories of victims would be extremely challenging and may result in a framework that falls short of meeting the needs of both groups."

[19] For all of the above reasons the application for leave must be rejected and the judicial review is dismissed.