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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GARY HOY FOR JUDICIAL REVIEW

Before: Morgan LCJ, Weir LJ and McBride J

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from a decision of Treacy J who dismissed as premature the appellant's application for Orders of Mandamus compelling the Secretary of State to order an Article 3 ECHR compliant enquiry into allegations of sexual abuse suffered by him at Kincora Boys' Home (Kincora) and alternatively an Order directed to the Historical Institutional Abuse Inquiry (HIA) to adopt procedures to ensure compliance with Article 3. Mr Underwood QC and Mr McGowan appeared for the appellant, Mr McGleenan QC and Mr McLaughlin for the Secretary of State and Mr Aiken for the HIA. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The background to this appeal is helpfully set out by the learned trial judge at paragraphs [4]-[12] of his judgement:

> "[4] The Applicant is a former resident of the Kincora Boys Home in Belfast and has sworn an affidavit stating that he suffered abuse during his time at the home. Pursuant to the Inquiry into Historical Institutional Abuse Act (Northern Ireland)

2013 ("the HIA Act"), the NI Assembly established the HIA Inquiry to which Sir Anthony Hart has been appointed as Chairman. The terms of reference were determined by the First Minister and Deputy First Minister on 18 October 2012 and require it to:

> `... examine if there were systemic failings by institutions or the state in their duties towards those children in their care between the years 1922 – 1995.'

[5] On 4 September 2013, the Chairman of the HIA Inquiry ("the Chairman") announced that one of the homes it would be investigating was Kincora. Evidence filed on behalf of the HIA Inquiry makes clear that it has already commenced investigative work into events at Kincora and that the public hearings on this module of the investigation are likely to take place in the near future.

[6] The Applicant filed evidence of reports from two former soldiers which, if substantiated, suggest that members of the army and/or security services may have been complicit in the abuse or they may have failed to take steps to prevent it from occurring or being investigated.

[7] Following these reports, the Chairman advised the First Minister and deputy First Minister that the inquiry, in its current form, did not have the powers to investigate the army or security services. Consideration was then given to whether these allegations should be investigated by the Panel of Inquiry which had been established by the Secretary of State for the Home Office to investigate allegations of child abuse in state and non-state institutions in England & Wales ("The Goddard Inquiry"). At that time, it was proposed that this inquiry would be non-statutory.

[8] On 21 October 2014, the Secretary of State for Northern Ireland laid a written statement before Parliament, announcing that the HIA Inquiry was the better forum for investigation of allegations about

Kincora. She said that not only had the HIA Inquiry already commenced work on this issue, but the protection of children was a devolved matter and it was less appropriate for a UK inquiry to make recommendations about the system of child protection in Northern Ireland. The Secretary of State also addressed the issue of the inquiry's powers to compel the production of witnesses and documents relating to the allegations against the MOD and Security Services. She said:

> 'I have discussed these issues with ministerial colleagues and can confirm that there will be the fullest possible degree of co-operation by all of HM Government and its agencies to determine the facts. All Government Departments and agencies, who receive a request for information or documents from the Inquiry will co-operate to the utmost of their ability in determining what material they hold that might be relevant to it, on matters for which they have responsibility in accordance with the terms of reference of the Inquiry.....
>
> With my Rt Hon Friend the Home Secretary, I am determined that no stone should be left unturned to investigate such serious allegations of institutional failure. We currently believe that the Historical Institutional Abuse Inquiry is the best place to do that in respect of Kincora and I, and my officials, will work closely with Sir Anthony to help to achieve that.
>
> We will monitor carefully the extent to which the Inquiry is able to make progress in respect of material relevant to Kincora. We will look at the situation again if the Inquiry tells us it is unable to determine the facts. In the event that this were to occur there remains the possibility of seeking agreement to

> bring the Kincora allegations within the terms of reference of the inquiry panel, along with the option of converting it into a statutory inquiry.'

[9] On 21 October 2014, the Chairman announced that he was satisfied with the assurances of co-operation from the SoS and that he would continue to investigate the Kincora allegations. On the issue of compellability, he said:

> 'However, should it become apparent during our work that it is necessary to have powers under the Inquiries Act 2005 then we will ask OFMDFM and HM Government to confer such powers on our inquiry.'

Statutory Framework

[10] The HIA Inquiry was set up under the HIA Act which came into force on 18 January 2013. Its present Terms of Reference are set out in a ministerial statement made to the Northern Ireland Assembly by the First Minister and deputy First Minister on 18 October, 2012, together with the amendment to its time limit effected by the Inquiry into Historical Institutional Abuse (Amendment of Terms of Reference) Order (Northern Ireland) 2015.

[11] The specific purpose of the HIA Inquiry is to examine systemic failings by institutions or the State that caused, facilitated, or failed to prevent the abuse of children in children's homes in Northern Ireland. It is prohibited from determining civil or criminal liability.

[12] The HIA Inquiry is time limited and must complete its public hearings by July, 2016 and report by January, 2017. S21 of the Act provided a power to the sponsor government department, the Office of First Minister and deputy First Minister (OFMDFM), to make Rules. The Inquiry into Historical Institutional Abuse Rules (Northern Ireland) 2013 (the HIA Inquiry Rules) came into effect on 25 July, 2013.

> The HIA Act and HIA Rules are materially similar to the Inquiries Act 2005 and Inquiry Rules 2006. ”

[3] The extent of the co-operation offered by the Secretary of State to the Inquiry was set out at paragraphs [14-[17] of the judgment:

> “[14] In an affidavit filed by the SoS at para14 Mr Jackson identified four specific measures in relation to the extent of cooperation by the state with the HIA namely:
>
> a public statement by the Government that all government departments who receive a request for information or documents from the HIA will co-operate to the utmost of their ability;
>
> if necessary the Advocate General for Northern Ireland will give an assurance that persons subject to the Official Secrets Act may not be subject to prosecution or other prejudice for disclosing any matter that would otherwise be covered by the Official Secrets Act;
>
> a responsible officer of the relevant government departments will make a statement to the HIA confirming that all relevant documents have been disclosed; and
>
> additional funding will be made available to the HIA to assist in the investigation of matters relating to non-devolved institutions.
>
> [15] In paras 16 -19 of his affidavit Mr Jackson describes the disclosure process noting that it will be for government departments to request redaction of materials from the Chairman who is empowered under the 2013 Act to restrict publication of documents and it is anticipated that redaction will only be requested where the Convention rights of third parties may be engaged or where a PII claim might otherwise be asserted.
>
> [16] Mr Jackson does not anticipate that there will be a conflict of view between the Chairman and government departments since the HIA is a public

> authority in its own right and would also be required to ensure that in ordering or permitting disclosure this did not compromise the Convention rights of third parties.
>
> [17] Mr Jackson asserted as follows:
>
> The prospect of a conflict of view in relation to a claim asserted on grounds of PII would be remote.
>
> As in any form of litigation it is possible for the state to assert and certify a PII claim even if the relevant judicial authority does not agree that such a course should be adopted. In this respect, the fact that full disclosure to the HIA Inquiry may not be possible mirrors the circumstances that apply routinely in some categories of civil litigation, coronial inquests and public inquiries. Such restrictions have not been held to render coronial inquests non-compliant with Art2 procedural obligations. It follows that the mere possibility of such restrictions would not compromise the ability of an inquiry process to be Art 3 compliant. Moreover, it is clear that issues in relation to public interest immunity redactions can also arise in an inquiry constituted under the Inquiries Act 2005. The position articulated by the SoS reflects orthodox practice in civil litigation, inquests and statutory inquiries.
>
> Mr Jackson submitted that there will be no inhibition upon the Inquiry in accessing unredacted sensitive documents. The Inquiry will see the relevant material in unredacted form. The extent to which that material will be disseminated in public will involve – as commonly occurs – nuanced judgments about the balance of Convention rights and/or the public interest. The position will be no different in relation to the CSA inquiry conducted by Justice Goddard in England and Wales."

[4] The appellant advanced five broad propositions in the court below:

(i) He, together with others, is entitled to an Article 3 compliant investigation in relation to his treatment at Kincora Boys Home.

(ii) The information in relation to this abuse and the complicity of state agents has come to light since the coming into force of the Human Rights Act 1998, and any inquiry must satisfy the investigative obligation despite the events occurring before the Act came into force.

(iii) The Secretary of State wrongly denied the entitlement to an Article 3 compliant investigation, but also wrongly contended that the HIA would in any event meet it.

(iv) The HIA, through a combination of limited power and its own attitude, demonstrates that it will not meet the entitlement.

(v) There should be mandatory relief ensuring that there is an effective inquiry and declaratory relief about what is required for that.

[5] The learned trial judge noted the appellant's submission that the material described at [6] above was new information which triggered a fresh requirement for a further Article 3 ECHR compliant investigation. The HIA stated that it intended to examine issues around whether the police, army or intelligence agencies were responsible for systems failures that caused, facilitated or failed to prevent abuse at Kincora. He took into account the jurisprudence of the ECHR indicating that where new information imposed a triggering of the Article 3 procedural obligation the steps that it would be reasonable to take would vary considerably with the facts of the situation.

[6] He acknowledged the extent to which the procedural obligation had already been met by a combination of the RUC police investigation in 1980, the subsequent criminal trials resulting in the convictions of Mains, Semple and McGrath, the wider RUC investigation in 1982, the independent Sussex Police investigation in 1985 and the Committee of Inquiry into Children's Homes and Hostels conducted by Judge Hughes in 1985. He concluded that the HIA was one of a number of mechanisms that may discharge that procedural obligation.

[7] He noted the commitment of the HIA to make public all of the material which was necessary for it to fulfil its Terms of Reference and the statement that it would not hesitate to disclose publicly any attempt to frustrate its work. The Chairman had a wide discretion on the conduct of evidence and hearings and was committed to publishing its findings in accordance with its Terms of Reference.

[8] The learned trial judge concluded that after the publication by the Inquiry of its report the authorities and the court would be in a position to determine whether the UK Government bore any further obligation to satisfy any Article 3 rights of the appellant. In those circumstances he considered the application premature and misconceived.

The submissions of the parties

The appellant

[9] There was no dispute about the fact that the appellant had been subject to prolonged and debasing abuse during the 1970s when he was being cared for at Kincora. Evidence of similar abuse both within the Home and at venues to which the children were taken was provided by Mr Massey and Mr Kerr. These children were in the custody or control of the state at all material times and the authorities had a responsibility to take reasonable steps to prevent any ill-treatment of the children of which they had or ought to have had knowledge.

[10] On 24 January 1980 the Irish Independent newspaper carried an article entitled "Sex Racket at Children's Home" in which it was alleged that there had been an official cover-up of the recruiting of boys at Kincora for homosexual prostitution. That led to the steps set out at paragraph [6] above. During the early 1980s it was alleged by Colin Wallace that he had been involved in intelligence operations in Northern Ireland and was aware that children at Kincora had been abused in connection with intelligence gathering operations. Mr Wallace was invited to give evidence to the Hughes Inquiry but declined that opportunity despite the fact that he was given immunity from prosecution in relation to any breach of the Official Secrets Act. He was subsequently convicted of murder.

[11] On 1 August 2014 BBC News carried an article stating that a former intelligence officer, Brian Gemmell, said that he was ordered by a senior MI5 officer to stop investigating allegations of child sexual abuse at Kincora in the 1970s. He said that he had previously spoken anonymously about his investigations into Kincora but had decided to go public because he felt the allegations need to be investigated again. In 2015 the Home Affairs Select Committee recommended that the scope of the Goddard Inquiry into child sexual abuse should be extended to include allegations of the possible involvement of UK Government agencies in the abuse of children at Kincora. The Committee was concerned that the powers of compulsion available to the HIA would be inadequate to investigate non devolved institutions.

[12] The appellant noted that there was evidence in the Da Silva Report that an individual's criminality was not a bar to that person being recruited as a state agent during the 1970s. In light of all of the available material it was submitted that it was arguable that there was credible evidence that there had been a breach by the state of its substantive duty under Article 3 ECHR and that an investigative duty arose.

[13] The passage of time did not affect the obligation to carry out an Article 3 investigation. The appellant relied upon a passage in the judgement of Lord Phillips in Re McCaughey and another [2011] UKSC 20 where he stated that the procedural

requirements, in that case of Article 2, applied where a significant proportion of the procedural steps required by that article in fact take place after the Convention has come into force. There was no temporal restriction in such circumstances. The HIA was instituted as a result of the existence of credible evidence that a number of children in care had been subjected to severe physical, sexual and mental abuse over a long period. The inquiry into these allegations which is due to commence on 31 May 2016 will amount to a significant portion of the investigative steps required to determine responsibility for serious and systemic breaches of Article 3. Alternatively the more recent credible allegations made by Mr Gemmell amounted to new and relevant information which triggered the need for an Article 3 compliant investigation. Either ground was sufficient to engage the Article 3 investigative duty.

[14] The appellant contended that an Article 3 compliant investigation should make sure that the full facts were brought to light, that culpable and discreditable conduct be exposed, that dangerous practices and procedures be rectified and the victims made the satisfaction of knowing that lessons had been learnt from their experience. There was a requirement of promptness. If an Article 3 compliant inquiry was not held now it would have to be held at some later date causing further distress to the appellant.

[15] The appellant complained that the HIA had no power to compel witnesses in relation to security issues because of the provisions of section 9(7) and 22(2) of the Inquiry into Historical Institutional Abuse Act (NI) 2013. Since the allegation of cover-up involved the security services and MI5 the investigation would be significantly hampered. Mr Underwood considered that the assurance provided by the Secretary of State about the provision of government documentation was no more than wishful thinking. It was inconceivable that the Secretary of State would provide evidence of the identity of those who ran agents as well as that of the agents themselves. Without full powers of compulsion there was no realistic prospect of an effective and independent inquiry.

[16] In respect of documents the Secretary of State said that she will make the documents available to the Inquiry but will suggest redactions. The Inquiry has no power to override those suggestions. The Secretary of State will be able to impose her will over the extent to which documents are disclosed. The appellant contrasted this with powers under the Inquiries Act 2005 where there were powers of compulsion to obtain documents.

[17] Finally, there was no provision for representation of the appellant so as to ensure that he could participate to the extent necessary in the Inquiry although it was disclosed by Mr Underwood that he had been retained to represent Mr Kerr who had achieved core participant status. The total cost of such representation was £17,200 per week over an eight week period. That was considerably less than the cost involved in establishing a subsequent investigative inquiry. The appellant submitted that if the Inquiry itself recognised that it was obliged to act in a manner compliant

with Article 3 and provided the necessary representation and access to documents many of the other issues might be overcome.

The respondent

[18] The respondent noted that the HIA had announced on 4 September 2013 that Kincora was within its remit. The statement by the Secretary of State on 21 October 2014 was a response to the requirement for additional powers in order to make the investigation effective. There was no reason to anticipate that there would be a conflict of view between the HIA and the Secretary of State on redaction or disclosure of documents. Both are public authorities and both would apply the same principles. The same issues would arise in relation to an inquiry constituted under the Inquiries Act 2005.

[19] The respondent questioned whether Article 3 was engaged in this case. In Re McKerr [2004] UKHL 12 the House of Lords refused to apply section 6 of the Human Rights Act 1998 to cases where the death in question had occurred before the commencement of the 1998 Act. In McCaughey [2011] UKSC 20 the Supreme Court did not reverse the ruling in McKerr. The court accepted, however, that the procedural obligation in Article 2 may in certain circumstances be detachable from the substantive obligation. In particular where the state had commenced an inquest after October 2000 into a death occurring prior to that date such an inquest should comply with the requirements of Article 2.

[20] The impact of this line of reasoning in relation to Article 3 was confirmed by the Grand Chamber in Mocanu v Romania (2015) 60 EHRR 19. That case repeated the approach which had been taken in Janowiec v Russia (2014) 58 EHRR 30 making it clear that the detachable procedural obligation arose in respect of procedural acts and omissions in the post-entry into force period where there was a genuine connection between the death and incorporation of the Convention. Applying that reasoning to domestic law it was submitted that the HIA was not part of the framework of criminal, civil, administrative or disciplinary proceedings capable of leading to the identification and punishment of wrongdoers. It had a specific remit in respect of the identification of systemic failures in child care institutions.

[21] Even if Article 3 is engaged the respondent contended that the HIA may discharge the relevant obligation of investigation when taken in conjunction with the earlier matters set out at paragraph [6] and in any event was perfectly capable of contributing to the discharge of any investigative obligation. The respondent relied on Brecknell v UK (2008) 46 EHRR 42 to support the proposition that setting up the HIA did not have the effect of imposing Article 3 standards on the proceedings.

[22] In any event it did not follow that because Article 3 was engaged it was necessary to hold a public enquiry. That was supported by Banks v UK (2007) 45 EHRR SE2 and R(JL) v Secretary of State for the Home Department [2009] 1 AC 588.

In terms of the HIA's powers it was submitted that section 9 of the Act empowered the Chairman to require the attendance of anyone within the United Kingdom. It was accepted, however, that those powers were exercisable only in respect of evidence, documents or other things concerned with a transferred matter. If that created a problem the powers of the HIA could be amended or the terms of reference of the Goddard inquiry could be altered to include any further necessary investigation.

The HIA

[23] The HIA was established by the HIA Act. Its terms of reference were to examine if there were systemic failings by institutions of the state in their duties towards those children in their care between the years 1922 – 1995. On 4 September 2013 the Chairman announced that Kincora was one of the institutions that would be investigated. When it became clear that the powers of the HIA were insufficient to carry out the required investigation further powers were sought as a result of which the Secretary of State made her statement on 21 October 2014. There was no indication in the papers that there had been any failure on the part of the Secretary of State to honour the commitments made in that statement. The submission that the Secretary of State would not or could not do so is unfounded.

[24] The HIA has carried out substantial investigative work in relation to Kincora and intends to commence that module on 31 May 2016. The HIA Act requires it to complete its oral hearings by 15 July 2016. Substantial investigatory work has been completed. A great deal of this will be disclosed when the Kincora module opens. The HIA was not, however, established as the sole mechanism by which the state would satisfy any Article 3 obligation in relation to any of those who were involved in the inquiry. Its findings may, however, be of considerable assistance in achieving that objective where Article 3 is engaged (see Re BP's Application [2015] NICA 20).

[25] Mr Gemmell has been offered core participant status but has refused to accept it and has not engaged with the Inquiry. It is not intended to make any application to require him to attend. Core participant status has, however, been given to Mr Kerr who is a deponent in these proceedings and for whom Mr Underwood acts in the inquiry. The PSNI, NIO, MOD, Security Service and Secret Intelligence Services will all be represented at the Inquiry on the same basis.

[26] The HIA has established that Mr Gemmell made statements similar to those reported in August 2014 in 1982 and 1990. That may be relevant to the issue of whether any Article 3 rights are engaged in this case. In any event as a result of the hearings before the HIA and the subsequent report which must be published by January 2017 it will be possible to determine whether the appellant's Article 3 rights are engaged at that point and what if any further steps are required in order to vindicate them.

Consideration

[27] The appellant's application proceeds on the basis that the issue of state involvement in the infliction of abuse and its cover-up requires investigation by virtue of Article 3 ECHR. It is apparent that the abuse and cover-up of which complaint is made occurred many years before the coming into operation of the Human Rights Act 1998 in October 2000 and since the 1998 Act does not operate retrospectively any claim based on the substantive obligation in Article 3 is not maintainable in domestic law.

[28] The appellant submitted, however, that in McCaughey the Supreme Court accepted that the procedural obligation under Article 2 existed as a separate and autonomous duty. Accordingly where the inquest in respect of a death which occurred before October 2000 was outstanding the Convention applied to the conduct of the inquest which accordingly had to comply with the procedural obligation in Article 2. Lord Phillips emphasised at paragraph [50] that there was no temporal restriction on the obligation other than that the procedural steps took place after the coming into force of the Convention. Mr Underwood sought to build on this jurisprudence to submit that the setting up of the HIA and the inclusion of Kincora within its terms of reference imposed upon the HIA an obligation to conduct the inquiry in an Article 3 compliant manner.

[29] We do not accept that submission. The procedural obligation in respect of the investigation of a suspicious death includes the operation of the civil and criminal law. Where such a death has occurred a criminal trial will often satisfy any procedural obligations arising. In the absence of such a trial, however, domestic law provides for the conduct of a separate investigation by a coroner at an inquest. That has been the established vehicle through which the state ensures that the full facts about suspicious death are publicly investigated in the absence of another forum. Where, therefore, such an inquest is held after the Convention rights have become enforceable in domestic law, the decision in McCaughey requires that the procedural investigation complies with Article 2 ECHR even where the death occurred before the coming into operation of the 1998 Act.

[30] It is common case that there is a similar procedural obligation under Article 3 of the Convention in relation to state involvement in the abuse of children. That procedural obligation is generally satisfied by the operation of the criminal and civil law. There is no equivalent to the inquest. That does not mean, however, that in appropriate cases there may not be an obligation to conduct an appropriate form of enquiry. It is, however, clear that the HIA was not established for that purpose. Its terms of reference require it to look at issues of systemic failure and its work may contribute to the satisfaction of any Article 3 obligation in this case. If there is an Article 3 procedural requirement in this case the state has the responsibility of satisfying it. It has not purported to do so by establishing the HIA and if a further investigative mechanism is necessary it is the responsibility of the state rather than

the HIA to provide it. The decision in McCaughey does not require the Secretary of State to utilise the HIA as the vehicle for the satisfaction of any Article 3 procedural obligation nor does it require the HIA to take on that role.

[31] The second route by which Mr Underwood submitted that the procedural obligation under Article 3 now arose in domestic law was because of the disclosure by Mr Gemmell in the newspaper report on 1 August 2014. Brecknell was an Article 2 case in which the applicant relied upon information in relation to police involvement in the death which came many years after the earlier investigations. The issue arose as to the basis upon which there was any further duty to investigate. The Court concluded at paragraph [71] that where there was a plausible or credible allegation, piece of evidence or item of information relevant to the identification and eventual prosecution and punishment of the perpetrator of an unlawful killing the authorities were under an obligation to take further investigative measures.

[32] There was no dispute that in principle the same approach should be taken to Article 3. The issue between the parties was whether the publication of the material in relation to Mr Gemmell was a plausible or credible allegation and whether it was new. Similar claims had been made by Mr Wallace in the early 1980s. It is not clear to what extent, however, those claims in relation to the intelligence services were pursued by way of independent investigation. Brecknell suggested that where a plausible or credible allegation was made the starting point may be to verify the credibility of the source. We considered that there was some substance in this submission on the basis of the papers before us.

[33] On the basis that it was arguable that Article 3 was engaged in this case we then turned to examine what the procedural obligation might require in this instance. In Brecknell the court said that the positive obligation in Article 2 must be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the case and may well be influenced by the passage of time.

[34] More recently the ECHR looked at the procedural obligation in P v United Kingdom (2014) 58 EHRR SE9. That was a case involving a prisoner who required medical treatment as a result of self-harming. The court held that the procedural obligation required a thorough and effective investigation capable of establishing facts and attributing responsibility as regards allegations of serious ill-treatment falling within the scope of the article. Importantly, once the ordinary mechanisms of civil, criminal or administrative remedies provided adequate scrutiny of the impugned ill-treatment there was no requirement in Article 3 to provide in addition an enquiry into the wider public policy issues which constituted the background to the alleged ill-treatment.

[35] We considered that one should be cautious about importing the extent of investigation that was considered suitable in one case into another but this line of authority is consistent with the view that the requirements of the procedural obligation are fact sensitive, that they may be satisfied compendiously and that there may be a number of different ways of so doing. We do not consider it necessary to set out all of the cases referred to in argument where those propositions were established.

[36] It is against that background that it is now necessary to examine the decision of the Secretary of State not to extend the terms of reference of the Goddard Inquiry so as to incorporate Kincora but to provide a range of assurances in relation to the provision of information to the HIA. Mr Underwood was highly critical of the ability of the HIA to exercise jurisdiction over the provided materials in face of objection from the Secretary of State. There is, however, no evidence that there has been any difficulty in relation to the provision of relevant information to the HIA. If there were any such difficulty the Chairman has indicated that he would not fail to make that fact public. In those circumstances there is little material at this time to support the submission that the HIA will be impeded in its search for documents from government. That further deals with any concerns arising from the provisions of section 22 of the HIA Act.

[37] Mr Underwood drew attention to the provisions of section 9 of the HIA Act:

> "9.—(1) The chairperson 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 the custody or under the control of that person which relate to a matter in question at the inquiry;
>
> (c) to produce any other thing in the custody or under the control of that person for inspection, examination or testing by or on behalf of the inquiry.
>
> (2) The chairperson may by notice require a person within a period stated in the notice—
>
> (a) to provide evidence to the inquiry in the form of a written statement;

(b) to provide any documents in the custody or under the control of that person which relate to a matter in question at the inquiry;

(c) to produce any other thing in the custody or under the control of that person for inspection, examination or testing by or on behalf of the inquiry.

…

(7) The powers conferred by this section are exercisable only in respect of evidence, documents or other things which are wholly or primarily concerned with a transferred matter.

(8) In subsection (7) "transferred matter", in relation to a power conferred by this section, means a matter which, when the power is exercised, is a transferred matter within the meaning of the Northern Ireland Act 1998."

[38] We accept that section 9(7) limits the entitlement to use these powers to evidence, documents or things concerned with a transferred matter. We also accept that issues of national security or matters concerning the intelligence services are not transferred matters. Although this provision may have given rise to difficulty there is no evidence that the work of the HIA has been impeded as a result of this provision. If it had given rise to difficulty we would have expected that to be raised by the HIA. If such problems arise the Secretary of State has undertaken to examine the provision of enhanced powers to address the issue.

[39] The Secretary of State does not maintain that the HIA will necessarily satisfy the entirety of the Article 3 procedural obligation if it is engaged. She considers that it may do so taking into account the earlier investigations and the Hughes public enquiry. We have previously indicated that the procedural obligation can be satisfied compendiously and we cannot exclude the possibility that the HIA will go some way towards satisfying that obligation. If it does not do so and the Article 3 procedural obligation is engaged it is accepted that further steps may be required. These include the possibility of joining the Goddard Inquiry although there is no commitment to that course. We accept that there may have been other methods of dealing with this matter but we cannot criticise as unlawful the approach taken by the Secretary of State.

[40] At the end of the hearing we invited Mr Underwood to apply to amend the Order 53 Statement to include a declaration that Article 3 was engaged in this case. He submitted a draft which linked that declaration with an investigative obligation.

We did not consider that this added materially to the Order 53 as drafted so we have decided not to allow the amendment.

Conclusion

[41] This society has been rocked to its core by the shocking disclosure of the abuse of children in this community over many years. Just as shocking has been the manner in which the institutions to which some of the abusers belonged sought to protect the institution rather than the children. There is a suggestion in this case that children in Kincora were abused and prostituted in order to satisfy the interests of national security. If that is true it must be exposed. As a society we must not repeat the errors of the institutions and should remember our obligations to the children. If the suggestion is not true the rumour and suspicion surrounding this should be allayed. We have decided that the HIA is entitled to proceed along the route mapped out by it. That does not in any way detract from the need to ensure that our obligations to these children are satisfied.

[42] For the reasons given we dismiss the appeal.