Neutral Citation No: [2016] NIQB 66 | *Ref:* **TRE9940**

Judgment: approved by the Court for handing down | *Delivered:* **8/4/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

Hoy's (Gary) Application [2016] NIQB 66

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

AND

AND IN THE MATTER OF DECISIONS OF BY THE SECRETARY OF STATE FOR NORTHERN IRELAND AND THE HISTORICAL INSTITUTIONAL ABUSE INQUIRY

_____

TREACY J

Introduction

[1] By this application the applicant challenges decisions of the Secretary of State for Northern Ireland ("SoS") and the Historical Institutional Abuse Inquiry ("the HIA Inquiry").

[2] Mr Ashley Underwood QC and Mr Malachy McGowan appeared for the applicant. Mr Tony McGleenan QC appeared with Mr Paul McLaughlin for the Secretary of State and Mr Joseph Aiken for the HIA Inquiry. The court is indebted to all counsel for their excellent written and oral submissions.

[3] The applicant sought Orders of Mandamus from the Court compelling the Secretary of State to order an Article 3 compliant inquiry into allegations of sexual abuse suffered by him at Kincora Boy's Home. The applicant also sought an alternative form of relief wherein the HIA Inquiry is directed to adopt procedures to ensure Article 3 compliance. After oral submissions had been received from the parties the court acceded to a request that the conclusion of the hearing should be postponed until the judgement of the UKSC had been given in the case of Keyu. The parties were given leave to file further written submissions in light of that judgement. The applicant did not file any further submission. The respondent filed a

further short written submission but agreed with the applicant and the HIA inquiry that no further oral argument was necessary.

Background

[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. Section 21 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.

[13] The HIA Inquiry has two separate limbs. This Court ([2014] NIQB 40) and the Northern Ireland Court of Appeal ([2014] NICA 67) reviewed the first limb, the private and confidential Acknowledgement Forum, in LP's Application. This Court ([2015] NIQB 3) and the Northern Ireland Court of Appeal ([2015] NICA 20) reviewed the operation of the statutory inquiry in BP's Application. The UK Supreme Court on 5 May 2015 refused permission to appeal the decision in BP.

Co-operation by the Secretary of State with the HIA Inquiry

[14] In an affidavit filed by the SoS, at paragraph 14 Mr Jackson identified four specific measures in relation to the extent of cooperation by the state with the HIA namely:

> (i) 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;
>
> (ii) 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;
>
> (iii) a responsible officer of the relevant government departments will make a statement to the HIA confirming that all relevant documents have been disclosed; and

(iv) additional funding will be made available to the HIA to assist in the investigation of matters relating to non-devolved institutions.

[15] In paragraphs 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 Public Interest Immunity ("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:

(i) The prospect of a conflict of view in relation to a claim asserted on grounds of PII would be remote.

(ii) 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 Article 2 procedural obligations. It follows that the mere possibility of such restrictions would not compromise the ability of an inquiry process to be Article 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.

(iii) 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.

Applicant's Submissions

[18] The applicant advanced five broad propositions namely that:

(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.

Proposition 1: entitlement to an Article 3 compliant investigation

The Law

[19] Article 3 ECHR requires authorities to take reasonable steps to prevent ill treatment of children, of which they have or ought to have knowledge - see E v UK (2003) 36 EHRR 31. Where the victims are in the custody or control of the State, the authorities bear some responsibility under that substantive obligation even if the abuse is perpetrated by private individuals: DSD v MPS Commissioner [2014] EWHC 436. Where it is arguable, or there is credible evidence, that there has been a breach of that substantive duty, the investigative duty arises: R (AM) v SSHD [2009] EWCA Civ 219**.**

[20] The Applicant argued that the purposes of an Article 3 compliant investigation were to ensure so far as possible that the full facts were brought to light; that culpable and discreditable conduct was exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) was allayed; that dangerous practices and procedures were rectified; and that victims may at least have the satisfaction of knowing that lessons learned from their experience may benefit others - see R (Amin) v SSHD [2004] 1 AC 653 at paragraph 31.

[21] Further the applicant submitted that an Article 3 compliant investigation requires the following:

> (a) effectiveness and independence - see paragraph 25 of Amin**.** This necessitated powers over witnesses: Edwards v UK (2002) 35 EHRR 19**,** paragraphs 71; 78-79; 87. In examining whether the inquiry satisfied the Convention obligations, the ECtHR concluded:
>
> > "that the lack of power to compel witnesses and the private character of the proceedings from which the applicants were excluded, save when they were giving evidence, failed to comply with the requirements of Article 2 of the Convention to hold an effective investigation into Christopher Edwards's death. There has accordingly been a violation of the procedural obligation of Article 2 of the Convention in those respects." (at paragraph 87)
>
> (b) power over documents and the degree to which they are made public: Hugh Jordan's Application [2014] NICA 76 at [124]:
>
> "It is not the function of this court to determine how the United Kingdom should honour its Article 2 investigatory obligations in the legacy cases but it seems inevitable that the requirement of reasonable expedition will continue to be breached unless there is a new approach. There are models within this jurisdiction, such as the Historical Institutional Abuse Inquiry, which might provide the basis for an effective solution. It would be possible to have all the legacy cases taken out of the inquest system and all of them considered in a time bound inquiry. Past experience suggests the need for a chair with senior judicial experience. The inquiry would need facilities for independent investigation and powers of compulsion in respect of witnesses and documents. PII would have to be addressed by redaction and gisting so that the families would have a proper opportunity to comment on the evidence and be involved to the appropriate extent. The procedures for any oral evidence would need careful consideration. Common themes might be identified.

> It seems to us that all of this could be achieved in a Convention compliant manner."
>
> (c) the involvement of the victim to the extent necessary to protect his legitimate interests, which entails legal representation and access to documents: Amin at para 26; R (Humberstone) v Legal Services Commission [2011] 1 WLR 1460 at paragraph 75.
>
> (d) reasonable promptness: Amin paragraph 25(3)

[22] A significant feature of an Article 3 compliant investigation is that emphasis is placed on the process rather than the outcome. The ECtHR noted that it is an obligation of means, not result. The House of Lords has required the State to conduct such an investigation even when there appeared to be nothing left to learn: see Amin at paragraphs 20 and 52; DSD at paragraph 217.

The Facts

[23] The applicant has sworn a very detailed affidavit in relation to the prolonged abuse he states he suffered at Kincora. The systematic nature of the abuse is corroborated by Messrs Massey and Kerr in their affidavits. The applicant submitted that the abuse described amounted to inhuman and degrading treatment. He submitted that this was a closed society operated by the State in which those responsible for it perpetrated abuse, that the authorities knew or ought to have known of the abuse because they employed the perpetrators and they are fixed with responsibility because of the closed nature of the society they established and their oversight function.

[24] The Applicant submitted that there is credible evidence the abuse was perpetrated with the connivance of the State, as can be seen from the affidavits of Claire McKeegan and Mr Kerr and submitted that it was well established that the State ran agents during "The Troubles" and that involvement in criminality was not seen as a bar to maintaining a person as a state agent.

Proposition 2: it is immaterial that the abuse occurred before the HRA

[25] The applicant submitted that the obligation to hold a compliant investigation would arise with regard to fresh evidence of a breach of Article 3, or where the state takes a significant proportion of the investigative steps required, after the HRA. The Applicant referred the Court to In Re McCaughey and Anor [2011] UKSC 20 in which the Supreme Court addressed the relevant obligations in the context of Article 2 investigations which in turn addressed the development in Convention law by the Grand Chamber in Šilih v Slovenia [2009] EHRR 37. Lord Phillips MR quoted the key conclusion from Šilih in paragraph 44 of his judgment, and went on to discuss the

consequences of this in the context of inquests where the death had pre-dated the coming into force of the HRA 1998:

> "50 … The obligation to comply with the procedural requirements of article 2 is to apply where "a significant proportion of the procedural steps" that article 2 requires (assuming that it applies) in fact take place after the Convention has come into force. This appears to be a free standing obligation. There is no temporal restriction on the obligation other than that the procedural steps take place after the Convention has come into force. Thus if a state decides to carry out those procedural steps long after the date of the death, they must have the attributes that article 2 requires.
>
> 51 It is this obligation that is of potential relevance in the current case. The United Kingdom is not under a continuing obligation under article 2 to carry out an investigation into the deaths over 20 years ago of Martin McCaughey or Dessie Grew. But an inquest is going to be held into those deaths. As a matter of international obligation it is now apparent that the United Kingdom has come under a free standing obligation under article 2 to ensure that the inquest complies with the procedural requirements of that article, at least in so far as this is possible under domestic law. In Šilih v Slovenia the Grand Chamber was satisfied that the two sets of proceedings that had been initiated were "theoretically capable of leading to the establishment of the exact circumstances which had led to the death and potential responsibility for it at all levels": see para125 …."

[26] The HIA Inquiry 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 whilst in state care, and allegations that this occurred with the knowledge and connivance of agents of the State. Any inquiry into these allegations will amount to a significant portion of the investigative steps required to determine responsibility for serious and systemic breaches of Article 3, and in any event the recent credible allegations made by former army officers amounts to new and relevant information that has come to light since the coming into force of the HRA 1998. Consequently the processes of any inquiry into these allegations should comply with the Article 3 procedural obligations.

Proposition 3: the Secretary of State wrongly denies the need for compliance with Article 3 and the deficiencies of the HIA Inquiry

[27] The SoS submitted that her position in relation to documents was that she will ensure that they are made available, and will suggest redactions. If those suggestions are not accepted she is open to the prospect of granting more powers to the HIA Inquiry. The applicant submitted that this is a complete abdication of the responsibility to establish an Article 3 compliant investigation for a number of reasons including that it fails to address the lack of power over witnesses; that it does not credibly provide for necessary powers over documents; and that it is incompatible with the obligation of promptness.

[28] The HIA Inquiry has no power to compel witnesses in relation to security issues or who are in the control of the UK Government: Sections9(7) and 22(2) of the 2013 Act. The allegations of state connivance in the abuse in Kincora centres on the involvement of the security services and MI5, so plainly both of those subsections will apply. The events took place over 40 years ago and the relevant officials may now have retired. The applicant argued that even if the UK Government wanted to produce them it could not in fact do so because it itself has no enforceable control mechanism over the actions of individuals who are no longer in its employ therefore the expressions of willingness and co-operation are meaningless in this regard. For this reason the "guarantees" of co-operation offered by the SoS are meaningless and patently unbelievable.

[29] The applicant submitted the SoS has failed to address the inability of the HIA Inquiry to compel witnesses.

[30] The HIA Inquiry asserts that it has sufficient powers over witnesses, but that if it needs more it will say so. The allegations of State collusion are well documented. It is obvious that the HIA Inquiry will have to call their makers, and that it will need to investigate the allegations properly. That will require it to identify individuals said to have run agents as well as the agents themselves, and to secure evidence from those people. It is inconceivable that they would attend voluntarily or that they would be permitted by the SoS to give evidence of security matters without PII and NCND ("neither confirm nor deny") being used to inhibit their evidence. The applicant submitted that unless there is a full power of compulsion there is no realistic prospect of an effective and independent inquiry.

[31] The applicant submitted the SoS's position on the issue of documents is fanciful arguing that the starting point is that the allegations to be investigated are that Army and MI5 personnel ran agents connected with the Kincora abuse. The key issue will be whether that was true and, if so, what was the purpose of doing so and to what degree was the sexual abuse known, tolerated and encouraged so as to facilitate the espionage. In this respect the applicant submitted that all the relevant documents will be subject to PII claims, and in particular that the mantra "neither confirm nor deny" or "NCND" will be adduced in relation to every request for a

document relevant to the question of whether someone was an agent or an agent-handler.

[32] There is no statutory power in the HIA Inquiry to hold a closed material procedure. The applicant argued that if such a power were to be given to the HIA Inquiry it could in principle decide against the SoS in relation to PII claims. The fact that this inquiry does not even possess notional power to decide any PII claim against the interest of the state is evidence of the embedded ineffectiveness of this inquiry at the structural level and of its designed-in incompatibility with Article 3.

[33] The applicant submitted if the SoS intends to propose redactions but to impose her will if they are rejected, then that means that she has complete power over the extent to which documents are shown to Core Participants and made public. The SoS submitted that if the HIA Inquiry rejects her proposed redactions, she will also consider giving it the power to override her. The applicant submitted that this assertion of future intent is not credible in a situation where she would have discharged her duty claiming PII and asserting NCND, when the ineluctable result will be that her will would then be overborne.

[34] In this respect the applicant submitted why use a statute which explicitly denies the Inquiry the relevant powers of compulsion, and why not give it the powers now? The SoS is eliding the principles of the HIA Inquiry having access to documents, which she promises to achieve by volunteering them (albeit coupled with "suggested redactions") and the Inquiry having power over documents so as to weigh the competing public interest arguments, to gist them, to make them available to victims such as the applicant, and to make proper public use of them, against her will. She has no mechanism for achieving that save for the risible suggestion that she may give up her powers when she needs them most.

[35] The existence of a power to overcome the possibility that the State will suppress documents, and to *be seen* to be available to overcome it, is vital to the independence and effectiveness of an inquiry, to the proper participation of victims and to the public scrutiny necessary for allaying public concern. The current perception is demonstrated by the First Minister, by the Assembly, and by the Home Affairs Select Committee: that only compulsion will do.

[36] The applicant submitted there have already been a number of investigations and inquiries into the abuse suffered by the children in Kincora, and three individuals have been convicted in relation to it. This, he says, makes it all the more vital that the proposed inquiry should be adequate to complete the task and discharge the Article 3 investigative obligation. If an inquiry is held that does not satisfy the Article 3 obligation the State will remain under a requirement to discharge it, which would amount to a significant waste of time and resources. This would be particularly difficult for the victims in general and the applicant in particular, who has averred to the fact that he is keen to see that this be adequately

investigated, but has also described the distress he suffers from the fact that these allegations are once again being investigated.

Proposition 4: the HIA Inquiry will not meet the entitlement to compliance with Article 3

[37] The applicant submitted that the HIA Inquiry does not accept that Article 3 has any application to the Applicant's abuse at Kincora but will nonetheless comply with it and referred the Court to the press release dated 21 October 2014 and its letter dated 5 December 2014 in which the HIA Inquiry refuses to confirm that Article 3 is relevant, but claims that it will comply with it and that it will investigate State collusion; Sir Anthony Hart said in terms in BP that Article 3 has no relevance to his inquiry.

[38] Even if the HIA Inquiry was capable of conducting an Article 3 compliant investigation, the applicant submitted that it does not intend to do so. Its process has sophisticated provisions for alleged perpetrators. The Protocol for Core Participants does not sufficiently involve the victims such as the applicant, as shown in BP**:**

> (a) no documents nor other witness statements are made available to them: paragrpahs 11, 12, 13, 15, 16;
> (b) they have no facility to call witnesses: paragraph 7;
> (c) they have no notice of when other relevant witnesses are giving evidence: paragraph 48;
> (d) they have no funding for legal representation: paragraphs 18-21; 36-37;
> (e) note the disparity with "perpetrators" who volunteer their witnesses, get full documents; may submit questions, and may make submissions: paragraphs 12, 30-31; 49

[39] The applicant submitted that the HIA Inquiry will treat him solely as a witness and not a victim. The applicant is a vulnerable individual who endured a difficult life growing up in care, has limited educational ability, a history of drug and alcohol abuse, a history of criminality, and a very difficult personal life characterised by difficulties communicating with other people. He will give evidence on matters that have had a marked effect on his life, and intends to detail systematic physical, mental and sexual abuse which he suffered variously throughout his childhood. He is determined to see that all those in authority who knew of or colluded in the abuse perpetrated at the home are identified and held accountable.

[40] The applicant submitted that the HIA Inquiry believes, and seems to regard as relevant, that he only alleges abuse by staff members already convicted of abuse and argued that the HIA Inquiry deposed to that to show that the applicant has no Article 3 rights. Manifestly, that is wrong. Even if it were true that he complained solely about abuse by men who have been convicted, that would not negate the

requirement of the State to investigate its own responsibility for that abuse. Further, he has drawn evidence of systemic abuse of others to the Court's attention in a judicial review, and the Court will obviously consider all that evidence in order to decide what investigation is necessary: R (AM) v SSHD paras 34-35

[41] The applicant submitted that the HIA Inquiry has nowhere acknowledged the features of an Article 3 investigation, the applicant's role in it, or the particular difficulties presented by conducting such an investigation into the Security Services. It has not produced evidence that it is even seeking intelligence documents which will shed light on agent-running connected with Kincora, nor made any efforts to identify witnesses, let alone that it is taking steps to ensure that that its powers are sufficient in relation to that evidence.

Proposition 5: mandatory and declaratory relief is needed

[42] In summary the applicant submitted:

> (a) As matters stand, the HIA Inquiry will investigate the abuse at Kincora. It will not satisfy the Article 3 requirements. Even if it managed to get to the truth, despite the manifest hurdles in its way, it will not be independent if it does not have full powers of compulsion, it will not be effective in terms of means, and it will not involve the applicant sufficiently to protect his interests;
>
> (b) the Secretary of State has failed in her duty to establish an Article 3 compliant inquiry;
>
> (c) alternatively, if it is found that she has discharged that duty by leaving matters to the HIA Inquiry, the HIA Inquiry wrongfully refuses to recognise that it is the vehicle by which the continuing Article 3 obligation will be fulfilled, and so will not be independent and effective, and will not involve the applicant sufficiently to protect his interests;
>
> (d) accordingly, one of the respondents will require compulsion and declaratory guidance. Unless the Court provides that, there will be no (prompt) effective investigation capable of allaying public concern about events in Kincora.

Submissions of the Secretary of State

[43] In relation to the applicant's five specific propositions the SoS argued first that the applicant is entitled to an Article 3 compliant investigation into his treatment at Kincora Boys Home. The applicant participated in the 1980 police investigation into these matters and gave a statement to the police at that time. The police investigation resulted in the prosecution and conviction of three individuals. It is not possible to say whether the applicant's statement of evidence was material to those convictions as he has not placed it before the Court. However, it is apparent that there was a public investigative process proximate in time to the index incidents that appropriately involved the applicant. The key constituent elements of an Article 3 investigation were, therefore, in place in the 1980s.

[44] The applicant contended that he is entitled to an Article 3 compliant investigation grounded on the premise that the Article 3 procedural obligation is in play. The SoS argued that both the domestic jurisprudence and the Strasbourg jurisprudence were against him on this point indicating that the Section 6 obligation would only bring the Article 3 obligation into play if the Janowiec "genuine connection" test was met. A case where all material investigative steps have been taken at least 15 years prior to October 2000 will not satisfy the Janowiec criteria.

[45] Secondly, the SoS argued that new information had come to light since October 2000. This information is the material that is said to come from Army sources. However, the mere fact that new information comes to light does not, of itself, trigger the revival of an Article 3 procedural obligation. This issue was closely considered, in the Article 2 context, by the Strasbourg Court in Brecknell [Application NO. 32457/04] – 27 November 2007. At paragraph 66 of the judgment the Court noted that when new information came to light after the conclusion of criminal proceedings "the issue then arises as to whether, and in what form, the procedural obligation to investigate is revived." It is clear, therefore, that revival does not automatically follow upon the presentation of new information.

[46] At paragraph 68 the Court noted that, in a revival case, the nature and extent of any subsequent investigation required by the procedural obligation would inevitably depend on the circumstances of each individual case. At paragraph 70 the Court sounded a cautionary note:

> "It cannot be the case that any assertion or allegation can trigger a fresh investigation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further. ……. If Article 2 does not impose the obligation to pursue an investigation into an

> incident, the fact that the State chooses to pursue some form of inquiry does not thereby have the effect of imposing Article 2 standards on the proceedings.

[47] At paragraph 71 the Court outlined the pragmatic and nuanced approach that should be adopted in a "new information" case:

> "…the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. **The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence"**

[48] The SoS submitted it was clear that the HIA will provide an entirely appropriate forum for determining, in the first instance, the credibility of the new evidence relied upon by the Applicant. The steps proposed by the State in this instance chime with the requirements of a reasonable response to "new information" in an historic case as outlined by the Strasbourg Court in Brecknell.

[49] In relation to the applicant's third proposition that the SoS is wrong to deny the entitlement to an Article 3 investigation and also wrong to contend that the HIA would in any event meet it the question of whether there is an entitlement of an Article 3 investigation raises the "revival" question which has been addressed in Silih, Janowiec, Mocanu and Keyu. The applicant did not engage with, or cite, any of the relevant jurisprudence in the section of his skeleton argument which seeks to develop his third proposition. Rather the applicant directs his written submissions to a critique of the HIA processes.

[50] The applicant's suggestion that the HIA Inquiry cannot discharge the Article 3 obligations, if applicable, is also rejected by the SoS. Contrary to the applicant's submissions relevant witnesses both within this jurisdiction and elsewhere in the United Kingdom will be subject to compulsion. The Inquiry will have access to all relevant documents. Issues about redaction of sensitive material will be addressed collaboratively in the first instance. In the unlikely situation of a disagreement arising in respect of proposed redactions the assertion of a PII claim may have to be

considered. However, such a scenario could equally arise in an inquiry convened under the Inquiries Act 2003.

[51] The SoS argued that even if it were established there were deficiencies in the HIA process these can be remedied by the addition of alternative powers. Furthermore, the question of compliance with procedural obligations falls to be considered compendiously. The HIA Inquiry is one of a composite set of state processes (investigations, inquiries, prosecutions, civil claims) which taken in the round can be held to discharge an investigative obligation. The applicant's submissions make no reference to the fact that the HIA is only one component of the State's mechanism for investigating these matters. Nor is there any recognition of the fact that the State (and the Secretary of State) retains a significant discretion as to how a Convention procedural obligations is to be discharged (per Longmore LJ in AM v SSHD). Such a discretion is applicable in the present case and ought to be afforded a significant margin of appreciation.

[52] The applicant's fourth proposition is that the HIA Inquiry will not meet the entitlement to compliance with Article 3. The SoS submitted that this argument fails to recognise the import of the decision of the Court of Appeal in BP. In that case the applicant introduced an Article 3 argument by way of Respondent's Notice that had not formed part of the first instance case.

[53] The Court of Appeal addressed the Article 3 point at paragraph 47 of the judgment:

> [47] Mr Stitt argued that having regard to Article 3 of the Convention the applicant was entitled to legal representation, although the point was not substantively argued before the trial judge and was not the subject of any analysis in the judgment of the court below. We can dispose of this point briefly. The inquiry does not purport to be an inquiry into breaches of individuals' Article 3 rights not to be subject to degrading or inhuman treatment. It is a public inquiry into the question whether there were systemic failings by institutions and the state in duties owed towards children between 1922 and 1995 in relevant institutions. Under domestic law aggrieved individuals asserting a breach of Article 3 may, and in many cases are, pursuing civil proceedings (as is the applicant). The criminal law of the state makes provision for criminal sanctions for conduct which, in addition to infringing the criminal law, involves breaches of the Article 3 rights of individuals. As a result we must reject the respondent's Article 3 argument."

[54] Implicit in the Court's reasoning is an acceptance of the argument advanced here by the SoS that the HIA is one of a number of state mechanisms which can, in combination, discharge any procedural obligation arising under Article 3. In the present case it is clear that the Applicant contributed to the original police investigation. That investigation resulted in appropriate criminal sanctions. The Applicant has not averred as to whether he obtained any civil remedy in relation to his experiences at Kincora but that option was certainly open to him. The procedures which the Court of Appeal considered appropriate to discharge the Article 3 obligation in BP are equally applicable to this applicant. The petition for permission to appeal the decision in BP to the Supreme Court has been rejected.

[55] The Court was referred to Mousa in which the Divisional Court, having rejected the challenge to the SoS' refusal to hold a public inquiry, considered whether a modified coronial investigation would be sufficient to discharge the Art2 procedural obligations. The Court found that an inquisitorial process would work effectively with "no need for examination or cross-examination by separate counsel to the inquiry or by parties who might be interested."

[56] At paragraph 219 the Divisional Court addressed the need for legal representation. It stated that:

> "As such an inquiry would only be held once it was determined that there was no realistic possibility of a prosecution, the legal assistance to those being asked to give evidence could be calibrated accordingly. For example, there would be no reason for the families of those whose deaths were being investigated to have extensive legal representation. The examination of witnesses would be conducted entirely by the person conducting the inquiry. The families would simply require some legal help in understanding the procedure and when giving their evidence ..."

[57] It is clear that the HIA will not adopt any such attenuated procedure. However, the decision in Mousa illustrates the force of Lord Rodger's point in *JL* that a Convention compliant procedural investigation does not require "all the bells and whistles" of a D-type inquiry. Against that background, in our submission, the procedures envisaged for the HIA examination of Kincora would readily satisfy the Convention standards.

[58] The applicant's fifth proposition is that the Court should grant Mandamus compelling the SoS to establish an Article 3 compliant inquiry into the abuse that is alleged to have occurred at Kincora Boys Home. Alternatively, it argued that the Court must direct the HIA Inquiry to adopt procedures that are Article 3 compliant.

[59] The SoS submitted that this proposition involves absolutely no recognition that the State enjoys a significant margin of appreciation as to how it discharges an Article 2 or Article 3 obligation in the event that such an obligation is engaged. As we have noted above the Strasbourg has stated that these are obligations of means and not result. It follows that there are discretionary judgments to be made about which means should be deployed. The Court in Mousa refused to interfere with the Secretary of State's decision for that very reason.

[60] Moreover, the SoS stated, that issues relating to the management of children's care homes are devolved matters. The question of whether an inquiry should be established and, if so, what form it should take is one to be addressed by the devolved institutions in Northern Ireland. If significant resource is to be directed to such an inquiry then it will fall to the Northern Ireland Assembly and Departments to allocate the necessary funding. In those circumstances, it would be inappropriate for the Court to direct the Secretary of State for Northern Ireland to take a course of action with repercussive fiscal consequences for the Northern Ireland Executive who are not a party to these proceedings.

[61] In summary the SoS submitted that the question of what, if any, remedial order the Court should make in this case should await a determination of the substantive issues raised by the applicant. If the Court finds that the applicant succeeds in his application then a separate remedies hearing should be convened to consider if any mandatory relief is either necessary or appropriate.

Submissions of the HIA Inquiry

[62] The HIA Inquiry submitted that since this judicial review does not purport to challenge a decision of the Chairman of the HIA Inquiry there is therefore no basis for relief to be given against the HIA Inquiry. The HIA Inquiry submitted that this judicial review is premature.

[63] The HIA Inquiry submitted that after it has conducted its investigations, and held its oral hearings, and made and published its findings in relation to systems failures of institutions or the State in respect of Kincora, the Court will then be in a position to know:

> (a) Whether and to what extent the Applicant's allegations engage Article 3 ECHR;
>
> (b) If there was an Article 3 investigative obligation owed to the Applicant for a historical breach of Article 3 from 1978/9, whether the investigative obligation owed to him had already been met by one, or a combination of, the following:
>
> (i) The first RUC police investigation of 1980 (in which he took part);

(ii) The criminal trials and convictions of Joseph Mains, Raymond Semple, and William McGrath;

(iii) The second wider RUC police investigation of 1982;

(iv) The independent Sussex police investigation of 1982;

(v) The 1985 Committee of Inquiry into Children's Homes and Hostels (the Hughes Inquiry);

(vi) Any civil claims brought against government departments or agencies relevant to Kincora.

(c) If there was an Article 3 investigative obligation owed to the Applicant for a historical breach of Article 3 from 1978/9, and it had not been fully met from one or a combination of those matters set out above, together with any work done by the HIA Inquiry, whether any remaining aspect of an Article 3 investigative obligation could still be met by any criminal or civil process that the applicant could still engage in, rather than an Article 3 public inquiry.

[64] It is the HIA Inquiry's intention, as part of its work, to collate and make publicly available as much information as possible about what occurred at Kincora. When it does so the Court will be in the best position to determine whether a United Kingdom Minister bears any obligation, or any further obligation, that needs to be met in some form (given the applicant's focus on the activities of non-devolved government departments and agencies it is unlikely to involve an obligation on a Northern Ireland Minister).

[65] The HIA Inquiry submitted that the applicant did not refer the Court to the decision of the Court of Appeal in BP's Application [2015] NICA 20, and the subsequent order of the United Kingdom Supreme Court (the Supreme Court) of 5 May, 2015 in the same case. In that appeal the applicant served a Respondent's Notice (to the HIA Inquiry's Appeal) relying on an alleged breach of Article 3 by the HIA Inquiry in denying BP legal representation before the inquiry.

[66] Lord Justice Girvan, giving the judgment of the Court of Appeal, dealt with BP's argument about Article 3 stating:

"[47] Mr Stitt argued that having regard to Article 3 of the Convention the applicant was

> entitled to legal representation, although the point was not substantively argued before the trial judge and was not the subject of any analysis in the judgment of the court below. We can dispose of this point briefly. The inquiry does not purport to be an inquiry into breaches of individuals' Article 3 rights not to be subject to degrading or inhuman treatment. It is a public inquiry into the question whether there were systemic failings by institutions and the state in duties owed towards children between 1922 and 1995 in relevant institutions. Under domestic law aggrieved individuals asserting a breach of Article 3 may, and in many cases are, pursuing civil proceedings (as is the applicant). The criminal law of the state makes provision for criminal sanctions for conduct which, in addition to infringing the criminal law, involves breaches of the Article 3 rights of individuals. As a result we must reject the respondent's Article 3 argument."

[67] BP renewed her Article 3 challenge before the United Kingdom Supreme Court when seeking permission to appeal the Court of Appeal's judgment. The Supreme Court refused permission and their Lordships concluded their order by stating of the Court of Appeal's decision: *"The Court of Appeal was plainly correct"*

[68] The HIA Inquiry was not set up by a United Kingdom Minister, or as an Article 3 human rights investigation into Kincora. It was set up by Northern Ireland's devolved administration to look at systems failures that caused or failed to prevent abuse in children's homes in Northern Ireland between 1922 and 1995. Kincora was one such home where children were abused and the HIA Inquiry, in keeping with its Terms of Reference, will examine what systems failures may have caused, facilitated, or failed to prevent that abuse. As there are issues over whether the police, army or intelligence agencies were responsible for systems failures that caused, facilitated, or failed to prevent abuse at Kincora, the HIA Inquiry will examine those issues and endeavour to get to the truth of the allegations. In order to assist the HIA Inquiry in achieving that aim, Her Majesty's Government has promised the fullest possible co-operation in terms of relevant material the HIA Inquiry may consider it holds. If that co-operation is insufficient to allow the HIA Inquiry to properly complete its work then it will seek the powers necessary to do so.

[69] While the HIA Inquiry was not set up as an Article 3 human rights inquiry, it does not follow that what it does could not be part or all of the discharge of any Article 3 investigative obligation placed on the state in respect of the matters the HIA Inquiry is investigating. It also does not follow that the procedures being operated by the HIA Inquiry, given its Terms of Reference, are not compliant with Article 3 requirements. It also does not follow that because the applicant is not given

the level of participation he seeks the HIA Inquiry is consequently other than compliant with Article 3 requirements.

[70] The HIA Inquiry submitted that the requirements of a state's investigative obligation under Article 3 is not as straightforward as has been characterised by the applicant, and that it is necessary to ensure that the differences between Article 2 and Article 3 recognised in the authorities, and their effects on the nature of the relevant investigative obligation, are not ignored.

[71] The HIA Inquiry referred the court to a number of Article 2 cases in which it submitted that cases involving Article 2 have generally revolved around killings by state agents or deaths (or near deaths) in custody. The HIA Inquiry referred also to what it said were the 10 core principles, derived from a consideration of the authorities, of what is required to satisfy the Article 2 investigative obligation and in particular Lord Bingham at paragraph 20 of R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653.

[72] In respect of Article 3 cases the HIA Inquiry purported to summarise the principles that it submitted could be discerned from the authorities. In light of the approach of the Court summarised in the discussion section below the Court, for reasons of economy, does not intend to repeat these submissions which are contained in the extensive skeleton argument.

[73] The HIA Inquiry further submitted the following points in relation to the approach and propositions of the applicant as disclosed in his skeleton argument:

(i) The SoS did not set up the HIA Inquiry, and the Northern Ireland Office is not its sponsor department.

(ii) The Northern Ireland Assembly, and the Office of First Minister and deputy First Minister (that did set up the HIA Inquiry), did not set up the HIA Inquiry as an Article 3 human rights inquiry, nor as compliance with some Article 3 investigative obligation it considered it had.

(iii) The applicant has not contended that the HIA Inquiry's sponsor department was under such an obligation, and it is not a party to the judicial review challenge which is brought against the Secretary of State for Northern Ireland.

(iv) The co-operation provided to the HIA Inquiry by Her Majesty's Government is designed to allow the HIA Inquiry to fulfil its Terms of Reference given that the HIA Inquiry regards non-devolved departments and agencies as having evidence and documents relevant to one of the children's homes it is investigating (Kincora).

(v) The applicant's understanding of how the HIA will deal with documentation from non-devolved departments and agencies is

flawed. The HIA Inquiry has unrestricted access to view documents from non-devolved departments and agencies, without any redactions. The HIA Inquiry will then consider what of that material, or the information the material contains, needs to be made public in some form in order for the HIA Inquiry to fulfil its Terms of Reference. That would be the position whether or not the HIA Inquiry had powers under the Inquiries Act 2005.

(vi) The HIA Inquiry has made plain that if there is any attempt to frustrate the work of the HIA Inquiry it will not hesitate to say so, it will then endeavour to obtain whatever powers it considers necessary to resolve the matter, and if those powers cannot be obtained it will make clear that it cannot satisfactorily complete its work into whatever home is affected by that problem. That regrettable position, should it arise (and the HIA Inquiry has no present reason to believe that it will) will thereafter be a matter for United Kingdom Ministers to resolve. Any decision then taken could be challenged and ultimately reviewed by the Courts.

(vii) Issues of PII and "NCND" (neither confirm nor deny) have, would, and will affect any inquiry dealing with classified material, including the CSA Inquiry. The HIA Inquiry will deal with those issues should the need arise.

(viii) Section 6 of the HIA Act makes clear that the procedure and conduct of the HIA Inquiry are to be such as the Chairman may direct. The Chairman of the HIA Inquiry also can, and has, made enforceable Restrictions Orders that regulate the conduct of evidence and hearings before the HIA Inquiry. The HIA Inquiry has the power to provide for closed hearings, has done so, and will do so where it considers it necessary to fulfil its Terms of Reference or the HIA Inquiry considers that it is otherwise necessary in the public interest to do so.

(ix) The reason why section 9(7) and section 22(2) are found in the HIA Act is because they reflect the United Kingdom's devolution settlement. Devolved administrations do not have legislative competence in respect of excepted matters (non-devolved departments or agencies) and no inquiries set up by devolved administrations in the United Kingdom can be given (by the devolved legislatures) powers of compulsion over non-devolved departments or agencies; see sections 27 to 31 of the Inquiries Act 2005 and the Northern Ireland Act.

(x) Cases about the Article 2 investigative obligation have been given an interpretation that they may not necessarily be able to bear.

(xi) They have then been read across and applied to Article 3 in a manner that cannot be sustained when detailed consideration is given to the authorities.

(xii) The HIA Inquiry is an inquiry into systems failures that caused, facilitated, or failed to prevent abuse. Paragraph 37 of the applicant's skeleton argument makes no reference to the decisions of the Northern Ireland Court of Appeal or the United Kingdom Supreme Court in relation to *BP*. It also ignores:

(a) The services the HIA Inquiry has in place for those who come forward voluntarily to the HIA Inquiry to make allegations of abuse.

(b) Their engagement with the HIA Inquiry legal team.

(c) That relevant documents are shown to and discussed with them by Counsel to the HIA Inquiry before they give evidence.

(d) They engage in an entirely inquisitorial process.

(e) They do so with anonymity.

(f) They can attend any public hearings of the HIA Inquiry (save for the very limited occasions when the HIA Inquiry is holding a closed hearing).

(g) The timetable of witnesses is published on the HIA Inquiry website and disseminated to interested groups including various victims groups.

(h) Only the HIA Inquiry can call witnesses, and all witnesses are HIA Inquiry witnesses, as all documents gathered by the HIA Inquiry are inquiry documents.

(i) Individuals are entitled to apply for public funding in respect of legal representation which will be dealt with in accordance with the HIA Inquiry's statutory obligations and procedures.

(j) Further participative rights are provided to those individuals or organizations that the HIA Inquiry considers it may well criticise in its report.

(xiii) The logical conclusion of the applicant's contentions is that all individuals who come forward to make allegations to the HIA Inquiry would have to be core participants, and have greater powers that core participants have. That is not necessary.

(xiv) The obligation to investigate matters within its Terms of Reference is given to the HIA Inquiry. It determines what it wishes to say publicly about its work in furtherance of its aims and objectives. While it is apparent from paragraph 42 of the applicant's skeleton argument that there is much information his legal representatives would wish to know, the HIA Inquiry will decide what, and, if so, when, it wishes to set out who it is investigating.

[74] The HIA Inquiry noted the assertions contained in paragraph 1 of the applicant's skeleton argument that there is "substantial evidence" of the following:

(a) The Security Services knew of systemic abuse at Kincora;

(b) The Security Services made use of that abuse to blackmail individuals *(presumably the abusers);*

(c) That those individuals *(presumably the abusers)* were blackmailed to inform on paramilitary activity;

(d) That the "principal abusers" *(whatever that phrase is said to mean)* were "prominent loyalists".

(e) That those "principal abusers" were protected *(presumably by the Security Services)* against the "legal consequences of their *(presumably abusive)* behaviour".

[75] The HIA Inquiry submitted that it was unclear from the skeleton argument what the "substantial evidence" is that is being referred to. In the absence of the identification of what is relied upon as "substantial evidence" the HIA Inquiry submitted that the applicant makes as yet unproven assertions as "evidence" in order to provide a basis upon which to erect a completely flawed and unnecessary application. If it is as described, then the HIA Inquiry will wish to investigate it as part of its work.

Discussion

[76] The Terms of Reference require the HIA Inquiry to examine if there were systemic failings by institutions or the state towards those children in their care between the years 1922-1995. One of the homes being investigated is Kincora. Investigative work into events at Kincora has already commenced and public hearings on this module of the investigation will take place in the near future.

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

[78] Following these reports the Chairman advised OFMDFM that the Inquiry, in its present form, did not have the power to investigate the army or security services.

[79] In October 2014, following consideration of whether the Kincora allegations should be investigated by the Goddard Inquiry, the SoS laid a written statement before Parliament announcing that the HIA Inquiry was the better forum for the investigation. The Secretary of State said that not only had the HIA Inquiry already commenced work on the issue but the protection of children was a devolved matter and it was therefore less appropriate for the Goddard Inquiry to make recommendations about the system of child protection in Northern Ireland.

[80] Her statement also specifically addressed the issue of the HIA Inquiry's powers to compel witnesses and the production of documents. Her statement gave an assurance, following discussion with ministerial colleagues, that "there will be the fullest possible degree of co-operation by all of HM Government and its agencies to determine the facts". The statement gave the related assurance that "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".

[81] The statement also indicated that they would look again at the situation "if the Inquiry tells us that it is unable to determine the facts". In the event that that was to occur their remains the "possibility" of bringing the Kincora allegations into the Terms of Reference of the Goddard Inquiry along with the option of converting the HIA Inquiry into a statutory inquiry.

[82] The Chairman announced that he was satisfied with the assurances of co-operation from the SoS and that he would continue to investigate Kincora. Significantly he also said that should it become apparent that it is necessary to have powers under the Inquiries Act 2005 then the HIA Inquiry would request the conferment of such powers on it. As set out above, Mr Jackson has sworn an affidavit on behalf of the SoS setting out four specific measures regarding the extent of co-operation by the State with the HIA Inquiry.

[83] In his affidavit at paras [16]–[19] Mr Jackson describes the disclosure and redaction process. He avers that there will be no restriction on the HIA Inquiry in accessing unredacted sensitive documents and that the HIA Inquiry will see all relevant material in unredacted form. The Chairman is empowered under the 2013 Act to restrict publication of documents. The fact that full disclosure, in the public interest, may not be available to others (excluding the Inquiry itself) is a feature of civil litigation, inquests and inquiries. There is, as I understand it, no question of any material document being withheld from the HIA Inquiry itself.

[84] The applicant argues that he is entitled to an Article 3 compliant investigation; that the information in relation to this abuse and the complicity of state agents has come to light since the coming into force of the HRA 1998 and that any inquiry must satisfy the investigative obligation despite the events occurring before the Act came into force; that the SoS wrongly denied the entitlement to an Article 3 compliant

investigation and wrongly contended that the HIA Inquiry would in any event meet it.

[85] The applicant submitted that the HIA Inquiry through a combination of its limited powers over witnesses and the production of documents, and its own attitude, demonstrated that it will not meet this entitlement.

[86] Even if, as the applicant argues, he is entitled to an Article 3 compliant investigation this application is in my view misconceived and premature for the reasons which follow. The Applicant says that this is a new information case triggering a requirement for a fresh Article 3 compliant investigation in accordance with the well-known jurisprudence from the ECHR and domestic courts as exemplified, for example, in McCaughey [2011] UKSC 20 and Keyu [2015] UKSC 69]

[87] However, as the ECHR recognised in Brecknell at paragraph 71 even where the new information imposes an Article 2 obligation to take further investigative measures:

> "…The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence"

[88] There are a number of points arising from this. First; the investigative steps that are referred to relate to the investigation of information "relevant to the identification and eventual prosecution or punishment of the perpetrator of an unlawful killing". However, it must also be borne in mind that as Lord Justice Sedley observed in R (AM &Ors) v SOS for the Home Dept & Ors [2009] EWCA Civ 219 at paragraph 60 the investigative obligation of the state (under both articles 2 & 3) may, depending on what facts are in issue, go well beyond the ascertainment of individual fault and reach questions of system, management and institutional culture. He also said if his observation goes beyond the jurisprudence of the Strasbourg court, and he was not persuaded that it did, it is domestic authority the court was bound to follow.

[89] Leaving aside for one moment the fact that this is an Article 3 and not an Article 2 case the purpose of this Inquiry is that identified by Girvan LJ in BP at para[47]. It is useful at this juncture to set that paragraph out again.

> "[47] Mr Stitt argued that having regard to Article 3 of the Convention the applicant was entitled to legal representation, although the point was not substantively argued before the trial judge and was not the subject of any analysis in the judgment of the

> court below. We can dispose of this point briefly. The inquiry does not purport to be an inquiry into breaches of individuals' Article 3 rights not to be subject to degrading or inhuman treatment. It is a public inquiry into the question whether there were systemic failings by institutions and the state in duties owed towards children between 1922 and 1995 in relevant institutions. Under domestic law aggrieved individuals asserting a breach of Article 3 may, and in many cases are, pursuing civil proceedings (as is the applicant). The criminal law of the state makes provision for criminal sanctions for conduct which, in addition to infringing the criminal law, involves breaches of the Article 3 rights of individuals. As a result we must reject the respondent's Article 3 argument."

[90] Secondly, it may well be that in the course of investigating the Kincora allegations within the HIA Inquiry's Terms of Reference – whether there were systemic failings by institutions of the state – that information will emerge suggesting that state agents e.g. army/security services have, as some reports suggest, been complicit in abuse and/or failed to take steps to prevent it from occurring or being investigated.

[91] In the event that the credibility of the material suggestive of such an occurrence is established that may well trigger consideration of whether any further more focused and intensive inquiry beyond the already extensive ambit of the present inquiry is required.

[92] If, as the Applicant argues, the new information triggered or revived the procedural obligation to investigate that begs the question in what form the procedural obligation to investigate is revived. Brecknell at paragraph [71] makes clear that the steps that it will be reasonable to take will vary considerably with the facts of the situation and that "such an investigation may, in some cases, be restricted to verifying the credibility of the source, or of the purported new evidence".

[93] If in the present case the HIA Inquiry were to conclude that the state, in the form of the army/security services may have been complicit in the abuse or failed to take steps to prevent it from occurring or being investigated afterwards then that conclusion will require the state to evaluate the HIA Inquiry's report with a view to establishing whether any Convention compliant investigative steps should then be taken on foot of the report's conclusions.

[94] The applicant's submissions also overlook the important consideration that the question of compliance with procedural obligations falls to be considered

compendiously and usually at the conclusion of the various processes which cumulatively contribute to the discharge of Convention procedural obligations. The HIA Inquiry is one of a composite set of state processes which include investigations, inquiries, prosecutions and civil claims. The present inquiry is but one component of the state's mechanism for investigating these matters.

[95] Implicit in the Court's reasoning in BP and in particular paragraph [47] set out above is an acceptance by the Court of Appeal that the HIA Inquiry is one of a number of mechanisms which can, in combination, discharge any procedural obligation under Article 3. In the present case the applicant contributed to the original police investigation. That investigation resulted in a criminal trial, convictions and criminal sanctions for those convicted of the abuse. The applicant has not addressed whether the issue of any civil remedy was or is being pursued by him. Plainly however this is an option. It has to be recognised that the purpose of civil proceedings in the context of a case such as Kincora may not be a suitable vehicle to address the wider issues that would arise on foot of a HIA Inquiry conclusion that the state had been complicit in the manner alleged by the applicant and others.

[96] The co-operation provided to the HIA Inquiry by the UK Government is designed to allow the HIA Inquiry to fulfil its Terms of Reference given that the HIA Inquiry regards non-devolved departments and agencies as having evidence and documents relevant to one of the children's homes it is investigating (Kincora).

[97] The applicant's understanding of how the HIA Inquiry will deal with documentation from non-devolved departments and agencies is flawed. The HIA Inquiry has stated in unequivocal terms that it has unrestricted access to view documents from non-devolved departments and agencies, without any redactions. The HIA Inquiry will then consider what parts of that material, or of the information the material contains, need to be made public in order for the HIA Inquiry to fulfil its Terms of Reference. That would be the position whether or not the HIA Inquiry had powers under the Inquiries Act 2005.

[98] The HIA Inquiry has made plain that if there is any attempt to frustrate its work it will not hesitate to say so, it will then endeavour to obtain whatever powers it considers necessary to resolve the matter, and if those powers cannot be obtained it will make clear that it cannot complete its work satisfactorily into whatever home is affected by that problem. That regrettable position, should it arise (and the HIA Inquiry has no present reason to believe that it will) will thereafter be a matter for UK Ministers to resolve. Any decision then taken could be challenged and ultimately reviewed by the Courts.

[99] Issues of PII and "NCND" (neither confirm nor deny) have, would, and will affect any inquiry dealing with classified material, including the Goddard Inquiry. The HIA Inquiry will deal with those issues should the need arise.

[100] Section 6 of the HIA Act makes clear that the procedure and conduct of the HIA Inquiry are to be such as the Chairman may direct. He can also make enforceable Restrictions Orders that regulate the conduct of evidence and hearings before the HIA Inquiry and indeed has done so. The HIA Inquiry has the power to provide for closed hearings, it has done so already, and may do so again where it considers it necessary to fulfil its Terms of Reference or it considers that it is otherwise necessary in the public interest to do so.

[101] The question of prematurity is allied with the issue of the composite nature of the investigation which must be taken into account when assessing Article 3 compliance. I do not understand the SoS to have ruled out any further investigation whether in compliance or otherwise with Article 3 should an assessment of the HIA report into Kincora require such an investigation.

[102] After the HIA Inquiry has completed its investigations, examined all the relevant documents and witnesses, following the full co-operation that the UK Government has publicly pledged to make, it will then publish its findings in accordance with its Terms of Reference, that is to say, it will publish its conclusions as to whether there were systemic failings by institutions or the state towards those children in Kincora.

[103] At that point the Court and others will be able to properly assess whether and to what extent Article 3 is engaged and, if so, whether the procedural investigative obligation has been met by a combination of the following:

> (a) The first RUC police investigation of 1980 (in which he took part);
> (b) The criminal trials and convictions of Joseph Mains, Raymond Semple, and William McGrath;
> (c) The second wider RUC police investigation of 1982;
> (d) The independent Sussex police investigation of 1982;
> (e) The 1985 Committee of Inquiry into Children's Homes and Hostels (the Hughes Inquiry);
> (f) Any civil claims brought against government departments or agencies relevant to Kincora;
> (g) The HIA Inquiry itself;
> (h) Any further criminal or civil process.

[104] As there are issues over whether the police, army or intelligence agencies were responsible for systems failures that caused, facilitated, or failed to prevent abuse at Kincora the HIA Inquiry has said it will examine those issues and endeavour to get to the truth of the allegations. In order to assist the HIA Inquiry in achieving that aim the UK Government has promised to provide the fullest possible co-operation in terms of giving access to relevant material which the HIA Inquiry may seek. The HIA Inquiry relies upon this promise and has also emphasised that if

co-operation is insufficient to allow it to properly complete its work then it will seek whatever additional powers it may need.

[105] It is the HIA Inquiry's intention to collate and make publicly available as much information as possible about what occurred at Kincora. I agree that when it does so the authorities including the Court will be in the best position to determine whether the UK Government bears any further obligation that needs to be met in some form.

[106] If at that point it is concluded that Article 3 is engaged it will be a matter for the UK Government in the first instance to determine what further steps are required to ensure compliance with Article 3. If a challenge to any renewed decision is taken at that point the Court will be in a much better position to decide on Article 3 compliance.

[107] Accordingly, for the above reasons the Court considers that the present application is premature and misconceived. Therefore the application for judicial review must be dismissed.