Neutral Citation No. [2014] NICA 67 | *Ref:* **GIL9398**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **10/10/2014**

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)

LP's Application [2014] NICA 67

IN THE MATTER OF AN APPLICATION BY LP FOR JUDICIAL REVIEW

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

Before: HIGGINS LJ, COGHLIN LJ and GILLEN LJ

GILLEN LJ (delivering the judgment of the court)

Summary

[1] This is an appeal from the judgment of Treacy J dismissing the application for judicial review of the refusal of the Historical Institutional Abuse Inquiry ("the Inquiry" or "the HIA") to provide the appellant with a recording of a statement made by her to the Acknowledgement Forum (AF) as part of the Inquiry. The hearing before Treacy J was in the form of a rolled up hearing and hence this is an appeal on the substantive issue.

Background

[2] On 18 October 2012 the First Minister and Deputy First Minister made a joint statement to the Northern Ireland Assembly setting out the terms of reference of an Inquiry into historical institutional abuse examining if there were systemic failings by institutions or the State in their duties towards those children in their care between the years 1922-1995.

[3] Inter alia, the terms of reference included the following:

> "The Inquiry and Investigation under the guidance of the Panel will make as many preparations as practicable prior to the passing of the relevant legislation and this will include the commencement of the research element. Commencement of the work of the Acknowledgement Forum is not dependent upon the commencement of legislation and will begin its work as soon as practicable.
> ….
>
> The Inquiry and Investigation will take the form of:
>
> - An Acknowledgement Forum.
> - A Research and Investigative Team; and
> - An Inquiry and Investigation Panel with a statutory power which will submit a report to the First Minister and Deputy First Minister.
>
> The functions of each are as follows:
>
> **An Acknowledgement Forum**
>
> An Acknowledgement Forum will provide a place where victims and survivors can recount their experiences within institutions. A four person panel will be appointed by the First Minister and Deputy First Minister to lead this Forum. This Forum will provide an opportunity for victims and survivors to recount their experience on a confidential basis. A report will be brought forward by the panel outlining the experiences of the victims and survivors. All records will be destroyed after the Inquiry is concluded. The records will not be used for any other purpose than that for which they were intended. … The Acknowledgement Forum will operate as a separate body within the Inquiry and Investigation accountable to and under the chairmanship of the Inquiry and Investigation Panel Chair."

[4] On 18 January 2013 the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013 ("the 2013 Act") was passed.

[5] Where relevant to this application, the following extracts from the 2013 Act are as follows:

"**Evidence and Procedure**

6.-(1) Subject to any provision of this act or of rules under section 21, the procedure and conduct of the inquiry are to be such as the chairperson may direct.
……..

Public Access to Inquiry Proceedings and Information

7.(3) The proceedings of that part of the inquiry described in its terms of reference as the Acknowledgement Forum are to be held in private and references to the inquiry in sub-section (1) do not include that part of the inquiry.
…

Rules

21.-(1) OFM/DFM may make rules dealing with –

(a) Matters of evidence and procedure in relation to the inquiry.

(b) The return or keeping, after the end of the inquiry, of documents given to or created by the inquiry."

[6] Rules were enacted known as the Inquiry into Historical Institutional Abuse Rules (Northern Ireland) 2013 ("the 2013 Rules"). These came into effect on 25 July 2013.

[7] Where relevant to this application, the Rules provided as follows:

"**Evidence provided to the Acknowledgement Forum**

19.-(1) The evidence given to the acknowledgement forum by any witness is to be treated as subject to an obligation of confidence owed separately by each member of the inquiry team to that witness.

(2) The evidence given to the acknowledgement forum must not be disclosed –

(a) in the proceedings of any other part of the inquiry unless the chairperson so orders; or

(b) in any criminal or civil proceedings in Northern Ireland unless it is necessary to avoid a breach of convention rights (within the meaning of the Human Rights Act 1998).

(3) Where a witness gives evidence to the acknowledgement forum, the restrictions in paragraph (2) shall not prevent –

(a) the witness separately giving all or any part of that evidence to any other part of the inquiry; or

(b) the disclosure in any criminal or civil proceedings in Northern Ireland of the evidence referred to in sub-paragraph (a).

Records Management

20. Subject to the legal rights of any person –

(a) during the course of the inquiry, the chairperson must have regard to the need to ensure that the record of the inquiry is comprehensive and well-ordered; and

(b) at the end of the inquiry the chairperson must transfer custody of the inquiry record to the Public Record Office of Northern Ireland.

21.-(1) Any records of the inquiry which consist of evidence given in the acknowledgement forum, but not any evidence referred to in rule 19(2)(a) shall be destroyed in such manner and at such time as the chairperson may direct.

(2) In exercising his power under paragraph (1), the chairperson shall ensure that any records to which the paragraph relates are destroyed before the transfer mentioned in rule 20(b)".

The Acknowledgement Forum

[8] Since the AF is a key component of the matters at issue in this application, it may be helpful at this stage to outline a description of its work as given by Patrick Butler, solicitor to the inquiry, in the course of his affidavit of 6 September 2013:

> "19. I have discussed the procedure operated by the Acknowledgement Forum with its panel members and am informed by them and therefore believe the following.
>
> 20. When an individual comes before the Acknowledgement Forum they do so in private and in confidence.
>
> 21. Individuals tell of their experiences of abuse generally to two members of the Acknowledgement Forum Panel. That may take as long or as short as the individual requires.
> ……
>
> 23. At the start of the meeting with the panel members the individual coming forward is asked if they are prepared to allow the discussion that is about to happen to be recorded.
>
> 24. It is explained to the individual that the purpose of the recording is assist the acknowledgement forum with its work and, if the person does not intend to also speak to the Statutory Inquiry, the recording will be deleted once the panel members have finished with it. They are told the recording will not go beyond the Acknowledgment Forum.
>
> 25. It is also explained that if the person intends to also participate in the Statutory Inquiry then the recording will in due course be made available to the Inquiry's legal team to assist them in understanding the experiences the individual has had and to allow the Inquiry legal team to prepare for the Legal Team's interview with the individual who is then also a witness to the Inquiry.
>
> 26. I have discussed with the Inquiry Chairman the reasons why the recording of the interview is made available to the legal team. He informs me and I

therefore believe that the reasons he has exercised his power to allow the recording of the interview with the Acknowledgement Forum to be made available to the Inquiry legal team include:

(a) To give the legal team some idea in advance of the interview what it is the person has experienced.

(b) It allows the legal team to properly prepare for the interview by consulting what documents might be available around the issues disclosed to the Acknowledgement Forum.

(c) It shortens the length of the interview with the legal team as the Inquiry's legal team have had the benefit of the recording.

27. It is the Inquiry's position that the recording has not been and will not be made available to anyone else.

28. The panel members of the Acknowledgement Forum have confirmed to me that they explained to the individual meeting with them, that a copy of the recording will not be provided to the individual; that it is to assist the work of the Inquiry only and will not be made available beyond the Acknowledgement Forum unless the individual also wants to speak to the Statutory Inquiry, in which case it will also be made available to the Inquiry's legal team.

29. Having had those explanations if the person is not content for their interview to be recorded then it is not recorded.

…….

30. For those who are prepared to allow their interviews to be recorded then a recording is made of it with the individual having first been made aware of and agreed to the limited purposes for which the recording will be used by the Inquiry.

……

32. The panel members of the Acknowledgement Forum also normally make notes during the interview for their own use and which are subsequently destroyed.

> That is explained to the individual and if they are content then notes are made to assist with the work of the Acknowledgement Forum. These notes are never given to anyone and that is also explained to the individual at the outset of the interview".

[9] Mr Butler goes on to record that in so far as the appellant is concerned, there is a recording that the AF has and which it is not prepared to make available to anyone beyond the Inquiry legal team.

[10] Mr Butler also makes clear in his affidavit that the Inquiry team utilise the recording of an individual's account to the AF as a summary prepared for the individual prior to the individual meeting with the legal team for interview to facilitate the preparation of the individual's witness statement for use at the Statutory Inquiry. The individual is in fact given a copy of the summary so that they can read it before they attend for interview with the legal team. They receive it on a confidentiality undertaking as the Statutory Inquiry does not wish it to be disseminated further than the individual as it is not a completed witness statement.

The Appellant's Role

[11] The appellant has averred that she was subjected to physical and psychological abuse in Nazareth House during her time in care there between 1971-1976. She has commenced in 2011 civil proceedings seeking damages in respect of this alleged abuse.

[12] On 7 November 2012 she gave evidence confidentially and in private to the AF of the Inquiry.

[13] Over a number of months the appellant's solicitor has engaged in correspondence with the Inquiry with a view to obtaining a copy of the "statement" she made to the Acknowledgement Forum on 7 November 2012. In fact at best this would be a recording of what she said because there was no statement as such taken. These requests have been refused.

[14] The rationale for the refusal was set out in a letter from the solicitor to the Inquiry dated 25 March 2013 which included a statement that:

> "The Acknowledgement Forum provides a confidential service in which the victims and survivors of abuse can speak candidly about their experiences. It is important the Acknowledgement Forum protects the confidentiality of that process … I am sure you will appreciate the importance of protecting the integrity and confidentiality

of the Acknowledgement Forum process so that other victims and survivors can have confidence in it".

[15] Finally, by way of background, we observe that neither party in this matter has placed reliance on the Data Protection Act 1998 for reasons that it is unnecessary for us to pursue.

The Submissions of the Parties

The submissions of the appellant.

[16] Mr O'Donoghue QC, who appeared on behalf of the appellant with Mr Heraghty, in the course of a carefully structured skeleton argument well augmented by oral submissions contended as follows:

- The duty of confidentiality under Rule 19 of the 2013 Rules was imposed upon the members of the Inquiry to treat the appellant's personal evidence in a confidential manner. There is no corresponding obligation of confidence owed by the appellant to the Inquiry. To the extent that it was the appellant's evidence that was being sought, the provision could not breach any obligation of confidence. Neither the terms of the 2013 Act nor the 2013 Rules provided any legal impediment to her request. Merely because the Inquiry was self-evidently the owner of the recording did not in itself preclude the appellant from requesting or obtaining a copy of the recording.
- The Statutory Scheme of Rules 19(2) and (3) must be read within the context of Rule 19(1). There should be no restriction placed upon the appellant restraining her from requesting and obtaining this recording.
- The appellant had a legitimate expectation to have a copy of what she said made available to her in some form.
- There is no difference between the confined obligation of confidence set out in Rule 19 and the confidentiality of the process itself.

The submissions of the respondent.

[17] Mr Aiken, who appeared on behalf of the respondent, produced an equally skilful skeleton argument and oral submission in the course of which he contended:

- Section 6 of the 2013 Act vests a very wide discretion in the chairperson to determine the procedure and conditions of the HIA.
- The 2013 Act accords unique provisions of confidentiality, anonymity and protection for those coming forward with allegations of abuse.
- The appellant is free to disclose her information in any forum that she wishes. However the recording of the AF proceedings are the product of the AF, it belongs to that body and while she is entitled to request a copy, the

confidentiality of the process involving AF requires that the Chairman's decision to refuse release other than to the HIA legal team be respected.

- It cannot be argued that this causes any real injustice to the appellant. She is entitled to relate her evidence in any other forum and indeed she had already issued separate civil proceedings in 2011 before coming to the AF.
- Rule 19 regulates what the HIA Inquiry can do with the evidence it receives from the appellant. It does not interfere with the appellant's right to relate her experiences wherever she wishes. Rule 19 regulates what the HIA inquiry can do with the evidence that the AF received from the appellant i.e. permitting it to be made available to the Statutory Inquiry and in criminal or civil proceedings in Northern Ireland where it is necessary to avoid a breach of the European Convention of Human Rights and Fundamental Freedoms.
- The appellant can have had no legitimate expectation that this recording would be disclosed to her in circumstances where at the outset of the AF process she was expressly informed that no copy would be made available to her.

The Judgment of Treacy J

[18] In the course of his well-reasoned succinct judgment Treacy J made the following points:

- The appellant enjoyed no legitimate expectation of being provided with a copy of the record since she had been informed at the start of the meeting with the individuals in the AF that a copy of the recording would not be provided.
- There was no unfairness in the Inquiry Chairman determining in the exercise of his wide discretion under Section 6 that such evidence was not to be released other than to the Inquiry legal team with respect to those who wish to engage with the Statutory Inquiry.
- The Chairman's duty to act with fairness in terms of the procedures must be considered in light of the purpose of the Inquiry as set out in the 2013 Act and the terms of reference. Subject to the requirements of fair procedures and justice a wide margin of appreciation is to be afforded to the Inquiry in respect of the procedures they adopt influenced by factors such as speed, efficiency and costs.

Consideration

[19] At the outset we note that Treacy J found that the application was out of time since it had not been brought within 14 days after the date on which the applicant became aware of the decision as required by Section 19(1) of the Act. Whilst understandably Treacy J saw no good reason why the time limit should be extended, both parties recognised that to some extent this was a case which would carry a resonance with similar cases awaiting this determination. For that reason we

considered that the preferable course was to deal with this case on its merits notwithstanding the passage of time.

[20] We recognise that this is a time limited public inquiry set up to examine systemic failings. Doubtless with speed, costs and efficiency in mind Section 6(1) empowers the Chairman to determine the procedure and conduct of the Inquiry although of course, as Section 6(4) declares, he must act with fairness in making any decision as to the procedure or conduct.

[21] Tribunals in general, and this Inquiry in particular, almost invariably have a wide discretion in the area of procedures which will be influenced by factors such as the nature of the Inquiry, speed, efficiency and costs subject to requirements of fair procedures and justice (see Lord Woolf in R v Lord Saville of Newdigate (ex parte A) [2000] 1 WLR 1855) at 1868 ("Re A").

[22] In the instant case, whilst Rule 19 affords the appellant the right to give all or any part of that evidence which she has given to the AF to any part of the Inquiry or to disclose that evidence in any criminal or civil proceedings, it does regulate what the Inquiry itself can do with that evidence in so far as it permits only the *Chairperson* to order the disclosure of the evidence given to the AF in the proceedings of any other part of the Inquiry or permits the evidence to be given in any criminal or civil proceedings where it is necessary to avoid a breach of Convention rights.

[23] This duty of confidentiality and anonymity in the AF is consistent with a purposive construction of the concept of confidentiality which courses through the terms of reference and the 2013 Act e.g.:

- Section 7(3) declares the proceedings of the AF are to be held in private and expressly excludes references in 7(1) to steps to secure the attendance of members of the public (including reporters) to attend the inquiry, or to obtain or view a record of the evidence and documents given.
- The notes to the Act at note 7 record:

> "The inquiry will include a confidential 'acknowledgement forum' in which victims and survivors can recount their experiences in institutions to members of the inquiry panel who have been particularly chosen to progress this element of the inquiry's work. As well as hearing and acknowledging people's experiences, the acknowledgement forum will result in an anonymised report outlining the experiences of victims and survivors".

- The terms of reference, dealing with the Acknowledgement Forum, record:

> "This forum will provide an opportunity for victims and survivors to recount their experience on a confidential basis. A report will be brought forward by the panel outlining the experiences of the victims and survivors. All records will be destroyed after the Inquiry is concluded. The records will not be used for any other purpose than that for which they were intended. The Acknowledgment Forum will operate as a separate body within the Inquiry and Investigation accountable to and under the chairmanship of the inquiry and investigation panel chair."

[24] On foot of these express admonitions, the Chairman has determined pursuant to Rule 19(2)(a) that the evidence given to the AF will only be disclosed to the HIA Inquiry's legal team and then only if the individual is coming forward to the Statutory Inquiry stage. Mr Butler's affidavit at paragraph 26 expressly sets out the reasons why the Chairman has decided to exercise those powers to allow the recording of the interview to be made available to the legal team.

[25] The confidentiality of this entire process with regard to the AF is well underlined by the fact that witnesses attending with the AF, including the appellant, are expressly informed that a copy of the recording will not be provided to them, that it is to assist the work of the Inquiry only and will not be made available beyond the AF unless the individual also wishes to speak to the Statutory Inquiry in which case it would be made available to the Inquiry's legal team. If the witness is not content for the interview to be recorded then it is not recorded. Even notes made by members of the AF during the interview for their own use are subsequently destroyed. Computer records created by the AF to assist with its work will also be destroyed at the end of the Inquiry.

[26] It does not require a scholarly analysis of these provisions to recognise the fundamental confidentiality of the process involving the AF. We fail to see how the appellant, given her express acknowledgement to the AF at the outset that a copy of the recording would not be provided, could have entertained any legitimate expectation that such a recording would then be provided upon her request.

[27] Against this background, how then should this court approach the matter of the discretion which has been exercised by the Chairman in pursuit of his adjudicative objective?

[28] In Regina v Panel on Take-overs and Mergers, Ex parte Guinness Plc [1989] 2 WLR 863 (Ex parte Guinness) Woolf LJ dealt with a case where the panel had conducted an inquiry into whether Guinness Plc had contravened the city code on take-overs and mergers. Whilst that case, unlike the instant case, dealt with a panel which did not derive its authority from any statutory power, nonetheless his

comments about the circumstances in which the court would intervene to set aside the procedure adopted by the panel, are helpful in the current context:

> "Having set itself this adjudicative objective, the panel placed itself under an obligation not to carry out this function in a manner which was inconsistent with that objective. If it reached a result which was unjust, this would be in breach of this obligation. In the words of its then own Chief Executive … the object of the panel's procedures is to produce the right answer in code terms in the circumstances. If it goes about this role in a manner which manifestly creates a real and not theoretical risk of injustice, then it would be abusing its power and, because it is forming a public function, on an application for judicial review the courts could intervene on behalf of the public to protect those liable to be adversely affected by the exercise of the power".

[29] Lord Woolf returned to this role of the court in dealing with tribunals in Re A in the context of the Bloody Sunday inquiry which was set up to inquire into shootings by British soldiers in Londonderry in January 1972. The immediate issue before the court was the application for anonymity of soldiers coming before the inquiry. Dealing with the role of the court at 865[3] Lord Woolf said:

> "It is accepted on all sides that the tribunal is subject to the supervisory role of the courts. The courts have to perform that role even though they are naturally loath to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the tribunal. In exercising their role the courts have to bear in mind at all times that the members of the tribunal have a much greater understanding of their task than the courts. However, subject to the courts confining themselves to their well recognised role on applications for judicial review, it is essential that they should be prepared to exercise that role regardless of the distinction of the body concerned and the sensitivity of the issues involved. The court must also bear in mind that it exercises a discretionary jurisdiction and where this is consistent with the performance of its duty it should avoid interfering with the activities of a tribunal of this nature to any greater extent than upholding the rule of law requires."

[30] Fairness and the principles of natural justice must of course inform the process as section 6(4) of the 2013 Act expressly records. Lord Woolf in Ex Parte Guinness said at pp193-194:

> "On the application for judicial review it is appropriate for the court to focus on the activities of the panel as a whole and ask with regard to those activities … `whether something has gone wrong' in nature and degree which requires the intervention of the courts. Nowadays it is more common to test decisions of the sort reached by the panel in this case by a standard of what is called `fairness'. I venture to suggest that in the present circumstances in answering the question, …….. it is more appropriate to use the term which has fallen from favour of `natural justice'. In particular in considering whether something has gone wrong the court is concerned as to whether what has happened has resulted in real injustice. If it has, then the court has to intervene, since the panel is not entitled to confer on itself the power to inflict injustice on those who operate in the market which it supervises."

[31] Ultimately the question of fairness is one of law for the court. The court must be the arbiter of whether in any given circumstances there has been unfairness resulting in injustice and a need to intervene. Nonetheless the court will give great weight to the tribunal's own view of what is fair and will not lightly decide that a tribunal has adopted a procedure which is unfair albeit in the last resort "the court is the arbiter of what is fair". (See R(Brooks) v Parole Board [2003] EWHC 1458 (Admin) (34), R v Lord Saville of Newdigate, Ex Parte A [2000] 1 WLR 1855 at (41) and R(A) v Lord Saville of Newdigate [2002] 1 WLR 1249 at (7).

[32] The task facing this Inquiry is a daunting one. The issues upon which it has to deliberate are matters of great sensitivity and profound public concern. The perception of confidentiality is not only necessary to establish public confidence in the Inquiry but, equally importantly, to ensure that victims and survivors will feel confident enough to make themselves known and approach the AF stage at least with utter faith in the confidentiality of that part of the process.

[33] The tribunal has the advantage of both a very distinguished membership and Chairman who, with tireless commitment, have now been fully immersed in the task at hand for many months. It is they, and not the court, who have the greater understanding of what that task requires if it is to maintain the confidence of victims and survivors. The court must constantly bear in mind that it is to this decision-maker, not the court, that Parliament has entrusted the procedure to be adopted in this case. To that extent the chairman of the Inquiry is the master of its own procedure.

[34] The principle of fairness must inform their task but it does not follow that fairness requires the same level of public or personal disclosure at every point of the inquiry. What fairness requires may vary according to the particular task or stage that the inquiry has reached.

[35] The AF is a unique provision. It is intended to operate as a confidential and private service where victims and survivors can recount their experience of their time in institutional care with total confidence in the integrity and confidentiality of that stage of the process. We are satisfied that the Chairman has properly exercised his discretion in order to ensure that the purity of this principle is preserved. Nothing has gone wrong in his approach. It is vital to the integrity of the Inquiry to ensure that there is a public perception that this will remain the case. The grim truth is that if it were to become commonplace for such recordings to be provided, with all the attendant risks of such material innocently or otherwise getting into the public domain, we can readily see the deleterious effect this might have on the process as a whole.

[36] Not only does this reflect the purpose and spirit of the Act, the Rules and the terms of reference, but it has a compelling logic. The record of the AF process is not to be used for any purpose other than those for which it was intended. For example it was never intended that it was to be used as a vehicle for gathering evidence for civil proceedings.

[37] Regulation 19 affords adequate protection for the appellant and ensures there is no injustice. It permits her to discuss her evidence in any other legal forum. Indeed it is not without significance that before seeing the AF she had already instructed a solicitor and civil proceedings had been issued. In fact she will be given a copy of the summary of her meeting with the AF if she proceeds to the next stage on a confidentiality undertaking that it will not be disseminated further than the individual as it is not a completed witness statement.

Conclusion

[38] We have concluded that there is no basis for declaring that the decision of the Inquiry to refuse disclosure of the recording in this instance was unreasonable, unfair or unjust. In all the circumstances therefore we affirm the decision of Treacy J. We will hear the parties on costs.