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Judgment: approved by the Court for handing down | *Delivered:* **08/01/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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DR's Application (Judicial Review) [2016] NIQB 37

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

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MAGUIRE J

Introduction

[1] The applicant in this case is known in these proceedings as DR and I confirm the conferral of anonymity upon him, which I ordered yesterday when I first learnt about the case.

[2] On 29 December 2015 the applicant issued these proceedings. The intended respondent is the Historical Institutional Abuse Inquiry, which I will simply refer to as the Inquiry. The applicant seeks an order from the court quashing a decision of the Inquiry Chairman. The background is found in DR's affidavit sworn in support of these proceedings. In his affidavit he indicates he was a resident in Millisle Borstal between 1977 and 1978. He says that in 2013 he had telephoned the Inquiry to say that he could give evidence in respect of his time in Millisle. The precise date of this contact seems to have been 27 August 2013. This date is derived from files held by the Inquiry. The response to his call was that he was told that he would be sent a registration pack. However, according to the applicant, but not the Inquiry, no such pack was sent to him. He avers that he thought this was because Millisle would not be under investigation. But, however that may be, he appears to have let the matter go until November 2015.

[3] In November 2015 the applicant says that he learnt from what he saw on the news that the Inquiry was proposing to consider events at Millisle. This caused him to telephone the Inquiry again on 5 November 2015 and he explained his position to whoever he talked to. By reason of this contact he received a letter from the Inquiry dated 18 November 2015. This indicated to him that as he had not requested an application pack before November 2013, his request to appear and give evidence at the Inquiry could only be granted in exceptional circumstances. Moreover, in the Chairman's view, his case did not fall into the exceptional circumstances category. Consequently his request was refused.

[4] The applicant did not, however, leave matters there. A pre-action protocol letter was written to the Inquiry by his solicitors on 4 December 2015. This elicited a response from the Inquiry on 11 December 2015. It was at this stage that the Inquiry indicated that his earlier telephone contact had been on 27 August 2013. The Inquiry maintained that he was in fact sent a registration pack on 29 August 2013 but this had not been returned. The response to the pre-action protocol letter involved the Chairman reconsidering his earlier decision. The decision which is impugned in these proceedings is that which is contained in the pre-action protocol response. In other words the response contains a fresh decision. However, this decision was negative to the applicant and the Chairman declined to exercise discretion in his favour to allow him to make a late application to be a witness at the Inquiry. The Chairman clearly expressed the view that there were no exceptional circumstances in the applicant's case. In particular, the Chairman had indicated that he had considered the timetable of past events but had concluded that there had been no failure by the Inquiry to have sent the applicant in August 2013 the necessary documentation. The applicant either had simply failed to return it or, alternatively, for some reason, he had not received it. He had failed to contact the Inquiry to ask why he had not received the documentation.

[5] The allegations made by the applicant as the basis for him wishing to give evidence can reasonably be described as severe. Without going into every detail, the applicant indicated that he had been punched, kicked, hit and burned while he was at Millisle Borstal. He was also frequently, he said, sexually assaulted by an individual he could identify. As a result of the abuse the applicant indicated that he had suffered physical injuries including an anal fissure. This latter injury resulted, he said, in having his colon and part of his intestine removed. The bleeding, which led to the removal, the applicant said, started with the sexual assaults upon him as described. The applicant also outlined to the Inquiry, in his solicitor's pre-action protocol letter, that unfortunately presently he suffers from a variety of health difficulties, such as degenerative bone disease, and is currently on strong medication.

[6] The Chairman in his response indicated that he had regard to the fact that the applicant could identify his principal abuser, but he noted that others had come forward who could give similar evidence. In the Chairman's view the applicant's evidence would not add materially to the evidence the Tribunal already had. The

Chairman also indicated that he was not applying an inflexible approach, but had carefully considered the application of the applicant in the light of its own facts. The letter also contained the information that the Chairman had publicly announced that the original closing date for applications to become involved as a witness was 29 November 2013. By that stage no application had been made by the applicant. The closing date, he indicated, was the subject of media publicity and also appeared on the Inquiry website. The Chairman also indicated that if the applicant's application had been received shortly after that closing date he would probably had exercised his discretion in the applicant's favour.

[7] I now turn to shortly describe the applicant's case. In a notably well composed submission on behalf of the applicant, Mr McGowan BL, has submitted that there was insufficient evidence for the Chairman's negative conclusion; that the Chairman had not taken into account the importance of the evidence the applicant could give, especially to the issue of systemic abuse of children at Millisle; that the Chairman had not taken into account the gravity of the abuse in the applicant's case, resulting ultimately in serious medical intervention; that he had not taken into account the applicant's current medical condition; that it was unfair on the part of the Chairman not to enable the applicant to give evidence; and that by not enabling the applicant to give evidence the Chairman had failed to take into account the effect of this on him. It was, he argued, an unreasonable decision in the circumstances, which was in conflict with the Inquiry's mission and it was a decision that was unfathomable in terms of the fulfilment of the Inquiry's Terms of Reference. Mr McGowan argued that if the evidence was received it would enable the Tribunal to ask searching questions about the failings which existed in the way the institution at Millisle had been operating. In short Counsel submitted that real injustice had been caused by the decision and that the court should intervene by granting leave to apply for judicial review.

[7] I then turn to the case for the intended respondent. Mr Aiken BL, whose submissions were made with moderation and focus, made it clear that the approach of the Inquiry has been and is to act compassionately to victims. He emphasised that the Chairman was aware of and had acknowledged the disappointment that his decision would bring to the applicant. The Inquiry did not, he said, wish to be seen in an adversarial position *vis-à-vis* victims. In particular Mr Aiken indicated that the Inquiry is ready to receive any written submissions, medical reports or other materials that the applicant may wish to provide to it. In Mr Aiken's submission it was elemental that it was the Inquiry and in particular the Chairman who should determine what witnesses appear before it. The Chairman, he argued, was equipped with a detailed knowledge of the evidence available to the Tribunal and how it planned to perform its functions, including how to ensure that it completed its task in the time available to it. In Mr Aiken's submission, while he accepted that public law supervision was well established and appropriate in particular areas, it was difficult, he contended, to think of an area more appropriate to a wide discretionary area of judgement than the Chairman's assessment of what witnesses should be called. He submitted that, in effect, the Court was being asked to compel the

Chairman to call a witness and that such intervention would rarely be appropriate. Mr Aiken accepted that the judgment of the Chairman, in the case of an application to give evidence long after the deadline for such applications had passed, involved a balancing exercise. On the one hand, regard had to be had to the established timetable set by the Inquiry and the need to bring home the Inquiry's report on time, but, on the other hand, the Chairman must be prepared to set off against the former factor the importance of the evidence proposed to be given and the stage at which the application was received. Understandably Mr Aiken laid some emphasis on the logistical difficulties which late applications bring with them and the need for the Chairman to be robust in his approach so that the Inquiry did not overrun or fail to reach its deadline for completion of the proceedings.

[8] In the present case the applicant had come late in the day, and of importance, Mr Aiken submitted, was the Chairman's knowledge that there were already in the region of six witnesses who were being called to give evidence in the Millisle module of a similar nature as the applicant's involving the same alleged abuser. In Mr Aiken's submission there was therefore no basis for the grant of leave in this case.

[9] I now briefly make mention of authorities. In his helpful and skilled argument Mr Aiken has drawn the court's attention to relevant authorities on the approach to be taken by the Judicial Review Court to the work of Inquiries. The court wants to make it clear that it has carefully considered all of these authorities and that the following points seem to the court, without wishing to express the relevant factors exhaustively, to be of importance:

(i) In exercising its role the court must bear in mind that the members of the Inquiry, particularly the Chairman, have a much greater understanding of their task than the court.

(ii) In relation to the conduct of proceedings before the Inquiry, significant discretion must be afforded to the Inquiry.

(iii) Such discretion might properly be influenced by such factors as the nature of the Inquiry, speed, efficiency and costs, subject of course to the requirements of fairness and justice.

[10] I turn to the court's assessment. At the leave stage the court must consider whether there is an arguable case in the light of the factors just mentioned, justifying intervention by way of Judicial Review. Applying this test the court is clear in its mind that in this case taking account of all of what each side has said in its totality, not just the short summary I have given, it should not grant leave. Its principal reasons for doing so are as follows:

(a) The court is satisfied that the Chairman conscientiously considered all of the points put to him in the applicant's correspondence to the Inquiry.

(b) In reaching his conclusions it seems to the court that he did carry out a careful balancing exercise. The conclusion he arrived at does not appear to the court even at the level of arguability to have been irrational or unreasonable. In simple terms the Chairman was best equipped to make the judgement call in question and the applicant has not been able to satisfy the court that in any significant way he neglected to take account of relevant factors or took into account irrelevant ones. The Chairman necessarily had to balance the demands placed on the Inquiry in the way described by Mr Aiken and the court has no basis for believing that the balance he arrived at was flawed.

(c) While it has been suggested that he neglected a variety of factors, it seems to the court that this submission is based on the absence of specific mention of certain aspects of the case in correspondence. In the court's view it is plain that in correspondence the applicant's request was carefully addressed and the court is not prepared to infer that the failure to mention particular factors in the Inquiry's response means that these factors were not considered. This is especially so as the factors alleged not to have been considered were, as a generality, obvious ones, which a conscientious decision maker would not be likely to overlook.

[11] My conclusion therefore is that I dismiss the application to apply for Judicial Review. However, I mention finally that it may be some solace for the applicant that he may, as Mr Aiken indicated, feel free to put before the Inquiry any further information that he wishes.