THE INQUIRY INTO HISTORICAL INSTITUTUIONAL ABUSE 1922 - 1995

APPLICATIONS FOR LEGAL REPRESENTATION BY HIA 9, HIA 97 AND HIA 154

Rulings by Sir Anthony Hart

4 November 2014

INTRODUCTION

1. These applications relate to oral hearings following decisions by me to refuse legal representation at public expense. As provided by the Inquiry procedures, each applicant then exercised their right to apply to me for an oral hearing in relation to the application. In the case of HIA 154 the substantive hearing took place on 9 May 2014 and I reserved my ruling. In the interim an appeal from the decision of Tracey J *In the matter of an application by LP* was heard by the Court of Appeal on 20 June 2014. Although the issues in LP's case were different to those in these applications, I decided to await the outcome of that appeal (which related to the procedures adopted by the Acknowledgment Forum) in order to have the benefit of the views of the Court of Appeal. Judgment in that case was delivered on 10 October 2014, and I will refer to the judgment of Gillen LJ at [2014] NICA 67 later in this ruling. Whilst the judgment of the Court of Appeal was pending, applications for oral hearings were brought by HIA 9 and HIA 97, and the oral hearings in relation to both applications were heard on 10 October 2014. As these applications have a number of common features I propose to deal with the general issues raised by them together, and I will then consider the circumstances of each individual application.

BACKGROUND

2. The Inquiry into Historical Institutional Abuse 1922 - 1995 operates under the provisions of the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013 (the 2013 Act), its Terms of Reference, and The Inquiry into Historical Institutional Abuse Rules (Northern Ireland) 2013 (the Inquiry Rules). In addition, the Inquiry has issued a number of protocols setting out the procedures to be followed in relation to various aspects of the Inquiry's work. The relevant protocol to the present applications is the Costs Protocol applicable from 12 November,

2013 (the Costs Protocol). I will have occasion to refer to the provisions of the 2013 Act, the Terms of Reference, the Inquiry Rules and the Costs Protocol later in this ruling.

3. 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 the Inquiry, and for the purposes of the present application the relevant portion of the Terms of Reference is:

   "The NI Executive's Inquiry and investigation into historical institutional abuse will examine if there were systemic failings by institutions or the state in their duties towards those children in their care between the years of 1922 - 1995".

4. Section 14 (1) and (2) of the 2013 Act provide that I may award such amounts as I think reasonable where I consider it appropriate for legal representation at public expense to be granted. Section 14 (3) provides that

   "a person is eligible for an award under this section only if the person-
   (a) is giving evidence to the inquiry or attending to produce any document or other thing, or
   (b) in the opinion of the chairperson, has such a particular interest in the proceedings or outcome of the inquiry as to justify such an award."

5. Rule 23(2) of the Inquiry Rules provides that I must take into account the general criteria set out in paragraph (3) when determining whether an award should be made, and in the present case the relevant provision is Rule 23(3) (b), namely "whether making an award is in the public interest".

6. In the Costs Protocol I have set out the general principles which I consider it appropriate to apply when deciding whether or not to make an award for legal representation, and the relevant provisions of the Costs Protocol are paragraphs 6 to 10 which are set out below.

"6. Section 14 of the Act gives the Chairman power to award to a person such amounts as the Chairman thinks reasonable as compensation for loss of time, or for expenses properly incurred, in assisting the Inquiry.

7. The power to make such an award under section 14 of the Act includes power, where the Chairman considers it appropriate, to award amounts in respect of legal representation of persons assisting the Inquiry.
8. A person is eligible for an award in respect of compensation for loss of time or expenses only if the person:

    a. is giving evidence to the Inquiry or attending the Inquiry to produce any document or thing; or

    b. in the opinion of the Chairman has such a particular interest in the proceedings or outcome of the Inquiry as to justify such an award.

9. In making any decision about whether to award compensation for loss of time or expenses at public expense the Chairman will take the following into account:
    a. the financial resources of the applicant;
    b. whether making an award is in the public interest;

    c. his duty to act with fairness and with regard to the need to avoid any unnecessary cost;
    d. any conditions or qualification imposed by the sponsor department (OFMDFM) in respect of the making of awards and notified to the Chairman.
10. The factors which the Chairman may consider, when deciding whether making an award is in the public interest, include:
    a. whether the individual played, or may have played, a direct and significant role in relation to the matters set out in the Inquiry's Terms of Reference;
    b. whether the individual has a significant interest in an important aspect of the matters set out in those Terms of Reference;

c. whether the individual may be subject to significant criticism during the Inquiry's proceedings or in any report by it;
d. whether it is necessary that the individual should have legal representation before the Inquiry;
e. further to d above, if the Chairman considers legal representation is necessary, whether the individual would be prejudiced in seeking representation if there were to be any doubt about funds becoming available and there are no other means by which such representation can be funded;
f. whether it is fair, reasonable, and proportionate for the costs of the legal representation to be borne by the public purse.

7. Each applicant has given details of his or her financial resources, and as I am satisfied that they do not have the means to fund their own representation, should that be necessary, paragraphs 9(a) and 10(e) are not relevant to the present applications.
8. In considering these applications it is essential to bear in mind three fundamental matters. The first is that the Inquiry is required to consider whether or not there were "systemic failings". The second is that section 1(5) of the 2013 Act expressly prohibits the Inquiry panel from ruling upon, and determining, any person's civil or criminal liability. The third is that the Inquiry is not a trial, nor is it a series of trials, although to some the proceedings of the Inquiry may appear to resemble, or at least be an analogous in some way to, the proceedings of either a civil or criminal trial, but I must emphasise that such a perception is fundamentally misplaced. As will appear, many of the arguments put forward in support of the present applications are based either wholly or to a predominant extent upon this misplaced perception.
9. As is customary in inquiries of this sort the Inquiry obtained from the Director of Public Prosecutions for Northern Ireland an undertaking which ensures that neither the evidence given by witnesses to the Inquiry, nor documents produced to or given to the Inquiry, will be relied upon for the purposes of any future prosecution. This undertaking can be found on the Inquiry's website, and complements the express prohibition in the 2013 Act against the Inquiry making any finding in relation to criminal liability.

10. In order to determine whether there were systemic failings on the part of an institution or the State the Inquiry has to consider all of the evidence gathered by it that it considers relevant, and this inevitably involves considering the allegations made by or against individuals or institutions. Whilst the Inquiry has to consider individual allegations in order to come to factual conclusions which in turn will inform whether we determine that there were systemic failings or not, this process does not require us to decide in the great majority of instances whether a particular fact has been established or not. In other words, it is generally unnecessary for the Inquiry to decide whether A or B is telling the truth about a specific incident, because we are required to consider whether or not there were systemic failings. In the majority of instances these decisions will be made by the Inquiry on the basis of the findings we make in relation to the evidence of many individuals, as well as taking into account other matters such as the documents considered by the Inquiry, and what individuals other than applicants, and the institutions or governmental or public bodies may say, whether or not what they say amounts to a full, or a partial, acceptance of the existence of systemic failings, or of specific circumstances.
11. Nevertheless, the Inquiry accepts that there may be some, although we believe not many, instances where the acts or omissions alleged in respect of a single, or a very small number, of individuals or episodes may be of sufficient gravity to amount to a systemic failing if those allegations are accepted in whole or in part by the Inquiry.
12. Whilst it has been accepted on behalf of each of the applicants that the Inquiry is not engaged in an evidence gathering exercise for the purpose of civil proceedings, each applicant argues that he or she has an interest in ensuring that his or her version of events is accepted by the Inquiry, and it has been expressly or impliedly suggested that a failure to persuade the Inquiry of particular circumstances makes the applicant less likely to succeed in any civil claim he or she has brought. It is suggested that each core participant represented before the Inquiry also has an interest in ensuring that its version is accepted. However, these submissions confuse the inquisitorial function of the Inquiry with the adversarial process of a civil or criminal trial where the parties define the issues and the court decides the outcome by making a decision as to civil or criminal liability as appropriate. In accordance with its Terms of Reference the Inquiry

decides the matters to be investigated, the issues to be examined, the witnesses to be called, the questions to be asked, and then arrives at its findings as to systemic failings in order to make recommendations to the Northern Ireland Executive. It will then be for the Executive to consider the recommendations and take whatever action it considers appropriate.

13. Reliance has been placed upon the provisions of Articles 2 and 3 of the European Convention on Human Rights which have been incorporated into the domestic law of the United Kingdom by the provisions of the Human Rights Act 1998. Article 2 relates to the right to life, and Article 3 relates to the prohibition of torture and provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Neither has any relevance to the processes of this Inquiry.

14. Reliance has also been placed on the provisions of Article 6 of the Convention. Article 6(1) provides that

"in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Article 6(3)(c) and (d) provide that a person is entitled to legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require and to examine or have examined witnesses against him.

15. I am satisfied that the provisions of Article 6 have no application to the processes of this Inquiry because the Inquiry is not determining the civil rights and obligations of anyone, or of any criminal charge against anyone. If authority is required for this proposition, it can be found in the decision of the European Court of Human Rights in *Fayed v UK* [1994] 18 EHRR 393 at paragraphs 61 to 63. Although the Court was not considering a statutory inquiry with the powers of this Inquiry, nevertheless I consider the principle it laid down applies in the present circumstances. See also the discussion in Beer and others, *Public Inquiries*, at 5.08 and the authorities considered therein. Therefore, arguments that applicants should be granted their own legal representation before the Inquiry to achieve equality of arms with institutions which are core participants and have legal

representation before the Inquiry find no support from the provisions of Article 6 of the European Convention.

16. A further argument advanced in the present applications is that the grant of legal representation to each of the applicants would assist the Inquiry "to reach as informed an accurate view of the evidence as possible" (see paragraph 9 of the skeleton argument on behalf of HIA 9). However, the Inquiry has its own Counsel, supported by its own solicitor and legal team, as well as highly experienced and skilled panel members with extensive experience in the aspects of institutional child care being investigated by the Inquiry. The suggestion that additional assistance is necessary in the shape of separate legal teams being allocated at public expense to these applicants is merely another way of arguing that the proceedings represent a form of trial in which the witness is a party.

17. I have to consider whether it is fair, reasonable and proportionate for the costs of such representation to be borne by the public purse, and it is therefore appropriate to consider what the implications of the grant of legal representation to each of the present applicants would be. In the course of the oral hearing on 9 May 2014 in respect of HIA 154, Mr. McGowan on behalf of the applicant accepted that if legal representation were granted to HIA 154, then the legal team on behalf of HIA 154 would need to have documents disclosed to it which had a bearing on that witness's case, that they would seek to give him advice in relation to the legal implications of such matters, that they would assist him to be adequately prepared to give evidence to the Inquiry, that they would submit questions to the Inquiry that should be put to other witnesses, that they would seek permission from the Inquiry to question the applicant or other witnesses, and that they would ask the Inquiry to follow a particular line of inquiry.

18. This would mean that each applicant would have his or her own legal team acting in parallel with the Inquiry throughout those parts of the proceedings that have any possible bearing on that individual. The implications of these submissions are very substantial. In effect each witness who is an applicant and who is given legal representation at public expense would become the equivalent of a core participant in the Inquiry. The Inquiry would have to provide his or her legal representatives with all the documents in any module in which the applicant was directly or indirectly concerned in order to enable that legal team to consider documents which may have a bearing on their client. When it is realised that each

module involves the Inquiry preparing an evidence bundle that runs to tens thousands of pages in some cases, the implications for the Inquiry in terms of time and staff resources in providing such material to each applicant in addition to the existing core participants, and dealing with correspondence on behalf of each applicant suggesting lines of inquiry, or submitting questions to the Inquiry legal team, are very considerable indeed. This would put a further substantial burden upon Inquiry Counsel and the Inquiry team, and would require the Inquiry to seek the provision of very considerable additional resources in terms of staff and related costs.

19. However, those additional costs to the public purse are only part of the additional costs inherent in the present applications. Where, as in each of the three present applications, the application is for representation by senior counsel, junior counsel and a solicitor, at the appropriate rates prescribed by the Inquiry Rules, this would amount to £436 per hour or for a five hour sitting day, or £2,180, which with £327 for travel from Belfast to Banbridge comes to £2,407 per day per applicant. Module 4 of the Inquiry is presently estimated to take some forty days. If, as is contended on behalf of HIA 9 and 154, it is necessary for them to be represented on every day of that module then each would incur a total of £102,820 (plus VAT), made up of forty days at £2,470 (£96,280), and up to six hours would have to be allowed for reading the necessary legislation (£2,616) and perhaps another nine hours for making submissions at the conclusion of the Module (£3,924). Both these extra amounts would be incurred for each applicant. To that would have to be added whatever was necessary for preparation and reading of the documents disclosed by the Inquiry to the applicant as the applicant contends should be done. At present we estimate that there will be approximately 100 applicants who may be called to give evidence during that Module, and if each were to be granted legal representation as the present applicants contend, that would incur an additional expenditure of £10,282,000 (plus VAT) for this module alone. Of course there may be individual circumstances in which these amounts would not be incurred; some applicants may not wish to apply for them, whereas others may be able to claim larger amounts depending upon the volume of material relating to their client. Others may only require the services of junior counsel and solicitor. However, these figures illustrate the financial implications of the wide ranging representation that is sought on behalf of each of the present applicants.

20. I should record that Mr Stitt QC submitted somewhat tentatively in the course of his submissions on behalf of HIA 9 and HIA 97 that it might be possible to ensure that representation could be shared between applicants, but that would require each applicant to be designated as a core participant under Rule 7of the Inquiry Rules. In any event such an exercise would be complex, time-consuming and far from straightforward. He also suggested that counsel might decide that his client's interests did not require counsel's attendance on a particular day, but the scheme for pre-authorisation of costs by the Chairman requires me, and not the lawyers, to decide when attendance at public expense is necessary. For these reasons neither of his suggestions is acceptable.

21. A further argument has been that the applicant requires the assistance of his or her own legal representation to support him or her preparing for giving evidence, and to be present to give support to the applicant while he or she is giving evidence to the Inquiry. I do not accept that this is a necessary role for legal representatives to play. From the beginning of all its processes the Inquiry has been acutely aware that describing their experiences of abuse can be a very upsetting and stressful experience for applicants, and the Inquiry has gone to great length to ensure that stress and upset can be reduced as far as possible. All our staff, including counsel and the legal team, are very alert to the need to be sympathetic and understanding, and to accommodate witnesses as they describe such events, whether when they make their statements, or when they give evidence. Each applicant will have been interviewed by the Inquiry legal team who prepare a witness statement before the applicant comes to give evidence at the public hearings. When he or she comes to give evidence they have the benefit of the assistance of very experienced and sensitive staff employed by the Inquiry as witness support officers who have great experience of explaining to people what giving evidence will involve, and help them to cope with the stress involved in giving evidence. In addition, on each day that a public hearing takes place the Inquiry has arranged to have present in the Inquiry chamber a representative of a counselling organisation. That person is there to provide more detailed and specific advice and assistance to an individual who may be distressed as the result of giving evidence. Inquiry Counsel whose responsibility it is to elicit the evidence of all witnesses, irrespective of their status, are more than capable of, and devote a great deal of time to, giving to each individual the attention that he or

she requires insofar as their personal circumstances and background requires. I do not consider that it is necessary for an additional legal team to be present for that purpose irrespective of any other purpose that that legal team may fulfil.

22. It is submitted on behalf of HIA 97 that other inquiries such as the Hypnonatremia Inquiry in Northern Ireland, and other inquiries elsewhere in the United Kingdom, have granted legal representation to parties who it is asserted were in a similar position to the applicants to this Inquiry. However, each Inquiry is different, and the question of legal representation on behalf of individual witnesses depends entirely upon the nature and scope of each Inquiry, and inquiries vary greatly in this respect.

23. Applicants HIA 9 and 154 are prospective witnesses in Module 4 of the Inquiry which is presently scheduled to begin in January of next year and will examine matters relating to two homes run by the Sisters of Nazareth in Belfast, Nazareth House and Nazareth Lodge. It has been submitted on their behalf that it is necessary for them to have legal representation throughout the entirety of the module, and not just on the day or days upon which the applicant is called to give evidence. HIA 97 gave evidence on 7 October 2014 during Module 3 relating to the home at Rubane, County Down run by the De La Salle Order. A similar submission was made in his case. In the event, he was able to give his evidence without the support of his own legal team, and the same has been true of all those applicants who have given evidence to date without having their own legal representation.

24. In approaching applications of this sort I take into account all the material available to me in order to decide whether or not an applicant is liable to be criticised in the Inquiry Report. A number of applicants to the Inquiry have been granted legal representation at public expense by the Inquiry because it is apparent to me that they may possibly be the subject of criticism, either expressed or implied, because of allegations that they were guilty of abuse of others. None of the present applicants fall within that category, but as of 30 October 2014 I have approved twenty such awards amounting to £161,490. As the Inquiry progresses I anticipate that there will be a significant number of further awards as we reach each module, although at the present time it is very difficult to estimate with any great degree of accuracy how many awards may be made because we have not

done sufficient work on some of the institutions to be investigated that would allow us to make a more precise estimate of the costs in that respect.

25. When one stands back and looks at applications such as the present applications it is clear that the submissions made on behalf of the applicants envisage that they would conduct what are effectively parallel processes on behalf of the applicants resulting in a huge amount of unnecessary duplication of the work already carried out by the Inquiry at great cost to the public purse. It is extremely difficult to see what the real benefit to each individual applicant would be of having such individual representation unless he or she may possibly be criticized by the Inquiry in our Report. I now turn to consider the individual applications in the light of these general observations, and I take them in the order in which the applications were made.

HIA 154

26. HIA 154 was in care in Nazareth Lodge for some years from the age of three. He alleges various forms of physical, mental and sexual abuse suffered in the care of the Sisters of Nazareth, and it is clear from a psychiatric report submitted to the Inquiry that this can be said to have affected his psychiatric wellbeing. He is currently pursuing a civil claim in relation to these incidents against the Sisters of Nazareth.

27. I have considered all of the information available to the Inquiry, both that submitted on his behalf and that which the Inquiry itself has gathered. I am satisfied that there are no grounds for believing at the present time that he may be subjected to criticism by the Inquiry in its report. I am satisfied that it is not necessary for him to be legally represented, nor is it required in the interests of fairness. I am satisfied that it would not be reasonable, and would not be proportionate, to grant this application. I therefore affirm the decision which I made in the refusal letter in his case.

HIA 97

28. HIA 97 gave evidence in Module 3 relating to Rubane on 7 October 2014. Although the material available to the Inquiry suggested that he was a vulnerable individual, nonetheless he appeared to give his evidence without undue difficulty. After he gave his evidence, and subsequently when he was contacted by the witness support officers (as is the practice of the Inquiry to see whether he was alright) he thanked the witness support officers for their assistance throughout. I

have no grounds at the present time to believe that he may be subject to criticism by the Inquiry in its report.

29. I am satisfied that legal representation in his circumstances is not necessary, nor is it required in the interests of fairness. I am satisfied that it would not be reasonable, nor would it be proportionate, to grant his application. I therefore affirm the decision I made in the refusal letter in his case.

HIA 9

30. HIA 9 is an applicant in Module 4 of the Inquiry which is scheduled to take place from January 2015 onwards. I have considered all of the information available to the Inquiry, including the statement which she made, and the submissions on her behalf. I do not see any grounds at present for believing that she may be subject to criticism by the Inquiry in its report. I am satisfied that in her case that it is not necessary to grant her application for legal representation, nor is it required in the interests of fairness. I am satisfied that it would not be reasonable to do so, nor would it be proportionate to grant this application. I affirm the decision I made in the refusal letter in her case.

31. In each of these applications I am satisfied that legal representation will not add anything materially to the position of each applicant. In his judgment in *LP's application* Gillen LJ quoted remarks made by Woolf LJ in *R v Panel on Take-overs and Mergers, ex parte Guinness PLC* [1989] [2] WLR 863 in which Woolf LJ (as he then was) referred to "a real and not theoretical risk of injustice" and "real injustice". I am satisfied that the refusal of legal representation to each of these applicants cannot be said to create real, or indeed any, injustice for them, and that any disadvantage it is asserted that they will suffer as a result of being refused legal representation at public expense is purely theoretical.

A.R. Hart